14 March 2013

Dear Sir / Madam

Consultation paper on Voluntary Assisted Dying

Thank you for the opportunity to make this submission. We do so in our capacity as members of the Gilbert + Tobin Centre of Public Law at the Faculty of Law, University of New South Wales. We are solely responsible for its contents.

In this submission, we address the potential inconsistency of the proposal to allow voluntary assisted dying in Tasmania with s 117 of the Australian Constitution.

1. The model and its residency requirement

The consultation paper proposes a model that would allow a terminally ill patient to make a voluntary request for assisted dying. After a process of consultation and the satisfaction of other criteria, the patient would be able to access an assisted death, administered either by the patient or by the patient’s doctor.

One of the requirements that a patient must satisfy is a residency requirement. The proposed model states that ‘only Tasmanian residents [would] be eligible for assistance’, and that such residency would be proven through such means as ‘proof of enrolment to vote in Tasmania, proof of a Tasmanian drivers licence, or proof that the patient owns or leases property in Tasmania’.

The consultation paper does not outline a policy justification for the imposition of the residency requirement, other than describing it as being an ‘important provision’. While it is noted that other similar legislative schemes – such as those in Oregon, Washington, the Netherlands and Belgium – do restrict eligibility for an assisted death in this way, no such requirement exists in Switzerland.

The consultation paper acknowledges the capacity of people from other States to move to Tasmania for the purpose of seeking an assisted death, and although the Dying with Dignity Bill 2009 (Tas) (the most recent euthanasia Bill introduced in the Tasmanian Parliament) sought a 12 month residency requirement, no such limitation is proposed by the present paper. In practice, however, s 99 of the Commonwealth Electoral Act 1918 (Cth) requires that an individual have resided at their address for at least one month before changing their enrolment details on either the State or Commonwealth electoral rolls. Nevertheless, even this requirement could be circumvented if residency were proven by the ownership or leasing of property in Tasmania.
2. **Potential inconsistency with s 117 of the Australian Constitution**

The consequence of the residency requirement outlined in the consultation paper is that Australians who are residents of States other than Tasmania would not be eligible to access an assisted death under the proposed legislation. This consequence may be regarded as disadvantaging non-residents of Tasmania, in the sense that they would be disqualified from accessing the only legislatively enshrined assisted death in Australia for the sole reason of their lack of Tasmanian residency.

For this reason, the proposed legislation risks breaching s 117 of the Constitution, which provides for a limited form of equal treatment to residents of all States.

3. **The operation of s 117**

The text of s 117 is as follows:

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.

In other words, State A cannot impose any disability or discrimination on residents of State B that is not equally applicable to residents of State A. With respect to the Bill proposed by the consultation paper, it is likely that the consequence of the residency requirement – that is, that residents of States other than Tasmania would not be eligible to access an assisted death – would constitute a ‘disability or discrimination’ for the purposes of s 117.

The High Court’s current interpretation of s 117 has existed for little more than twenty years. Having read the section restrictively for over eighty years, the court broadened its view in *Street v Queensland Bar Association* (1989) 168 CLR 461. The court’s judgment in that case clarified a number of issues relating to the operation of s 117; in particular:

- It is the actual effect of the impugned law on the out-of-state resident that is relevant – so, for example, a restriction that appears to apply to all persons without distinction (i.e. one that is ‘universal’ in its application) may nevertheless operate in practice to discriminate against residents of other States;
- The section is applied by comparing the actual situation of the out-of-state resident with his or her hypothetical situation if s/he were a resident of the legislative State;
- There exist a number of exceptions to the section’s application (though the judges differed significantly on the scope of such exceptions); and
- The consequence of breach of s 117 is that the impugned law is not invalidated.

In that case, Mason CJ described the test to be applied as follows:

[F]or s 117 to apply, it must appear that, were the person a resident of the legislative State, that different circumstance would of itself either effectively remove the disability or discrimination or, for practical purposes in all the circumstances, mitigate its effect to the point where it would be rendered illusory.

4. **Does the residency requirement breach s 117?**

Our view is that there is real prospect that the residency requirement proposed in the consultation paper would breach s 117. The two reasons for this conclusion are, first, that the disadvantage to out-of-state residents established by the consultation paper is such as to meet the definition of ‘discrimination or disability’ under s 117, and, second, that the present case does not fall within any of the stated exceptions.

As to the first issue, the High Court’s interpretation of the words ‘discrimination or disability’ is broad enough that the inability of a resident from a state other than Tasmania to access a voluntary assisted
death in Tasmania, for the sole reason that the person is not a resident of Tasmania, would be sufficient to constitute a breach of s 117.

Such was the case in *Street v Queensland Bar Association*, in which the right denied was admission as a barrister in Queensland. Such admission would only be granted to persons who practised ‘principally’ in that State, with the practical effect that admission was limited to residents of Queensland. When a barrister residing in New South Wales challenged this limitation, it was found to breach s 117. Similarly, in *Goryl v Greyhound Australia Pty Ltd* (1994) 179 CLR 463, the quantum of damages available under a Queensland law to persons injured in car accidents was higher for Queensland residents than it was for residents of other States. The relevant provision under this law was also held to breach s 117.

In the present situation, the consequence of the residency requirement is that the right to access an assisted death is restricted only to residents of Tasmania, and thus is likely to constitute a ‘discrimination or disability’ on out-of-state residents for the purposes of s 117. This is despite the fact that an out-of-state resident would only have to reside in Tasmania for one month in order to change his or her details on the Tasmanian electoral roll, and that even this could be circumvented if residency is proven by the ownership or leasing of property in Tasmania. In the former case, the residency requirement is explicit (i.e. *only* persons residing in Tasmania would be able to show proof of enrolment to vote in Tasmania); in the latter case, the residency requirement is implicit (i.e. although the ownership or leasing of property in Tasmania may be seen as a rule of ‘universal’ application, its practical effect would be to preference Tasmanians over residents of other States).

As to the second issue, the residency requirement proposed in the consultation paper appears not to fall within one of the exceptions to the application of s 117 stated by the High Court. All the judges in *Street v Queensland Bar Association* agreed that s 117 does not apply at least to the prohibition on out-of-state residents from participating in a State’s elections. Beyond that, however, there was little commonality among the judges as to which other exceptions might exist.

Some judges, such as Brennan J, took a restrictive approach, reasoning that ‘nothing less than the need to preserve the institutions of government and their ability to function’ would suffice in providing an exception. Similarly, McHugh J suggested that available exceptions might include ‘the franchise, the qualifications and conditions for holding public office in the State, and conduct which threatens the safety of the State or its people.’

On the other hand, other judges, such as Mason CJ, took a broader approach, stating that ‘the exclusion of out-of-state residents from the right to enjoy welfare benefits provided by a State under a scheme to assist the indigent, the aged or the ill’ would not amount to a ‘disability or discrimination’, nor would an exclusion that could be ‘justified as a proper and necessary discharge of the State’s responsibility to the people of that State, which includes its responsibility to protect the interests of the public.’ To a similar effect, though employing a different method of reasoning, Gaudron J held that ‘the absence of a right or entitlement does not constitute a disability if the right or entitlement is appropriate to a relevant difference’.

It is difficult to see that even the broader view of the exceptions to s 117 stated by Mason CJ in *Street v Queensland Bar Association* would be sufficient to exonerate the discriminatory operation of the proposed residency requirement in the consultation paper. The rationale behind the argument that State measures such as welfare benefits should be excluded from the application of s 117 is that the residents of a State pay taxes, and so should be the only persons to benefit from that State’s spending. To this end, Gaudron J stated that ‘a law conferring a special benefit by virtue of membership of the body politic constituting the State, especially if that benefit is funded by taxes levied against its members’ would not be constrained by s 117.

In addition, the proposed legislative model does not purport to be an exercise of the Tasmanian government’s protective responsibility to the residents of its State in particular, even though the proposed model does describe itself as having been ‘designed to suit the Tasmanian situation’. (It may conceivably be argued, however, that Tasmania views the provision of voluntary euthanasia as being part of a responsibility to protect its residents from unnecessary suffering.)

On balance, we believe that the residency requirement proposed by the consultation paper does not clearly fall under the exceptions to s 117 as they currently stand. There is, however, a lack of clarity on
this issue, and it is possible that a majority of the High Court would find that other exceptions exist which may be applicable to the present situation.

5. **Consequences of a breach of s 117**

Unlike most other sections of the Constitution, a State law’s breach of s 117 does not render that law invalid. Rather, the consequence is that a person affected by the breach – that is, an out-of-state resident who suffers ‘discrimination or disability’ by operation of the State law – is exempt from that law’s application. As Mason CJ explained in Street v Queensland Bar Association:

> [A] person who would, but for s 117, be so affected by the law is immune from its operation in so far as it subjects him to impermissible disability or discrimination, though the law itself remains valid in its application to persons who would not be so affected. Perhaps an enactment might be rendered wholly invalid by s 117 if it depended for its operation upon the imposition of a prohibited form of disability or discrimination, but that is not a question which I need to examine.

Thus, the High Court would not ‘strike down’ Tasmanian legislation on the basis that its residency requirement is inconsistent with s 117. It would simply order that the out-of-state resident who had brought a case before it is not be subject to the residency requirement. Though this immediate effect would only apply to the particular plaintiff or plaintiffs, other out-of-state residents seeking to access an assisted death in Tasmania would be entitled to require that Tasmania act consistently towards them.

6. **Advice on the retention of the residency requirement**

There is a real prospect that the High Court would find that the residency requirement proposed by the consultation paper breaches s 117 of the Constitution. This conclusion is by no means certain, however, given the incomplete way in which the Court has outlined the available exceptions to that section.

If such a breach were to be found, the residency requirement would be rendered inapplicable to an affected out-of-state resident who challenged the law. Neither that requirement nor the legislation generally would be struck down by the Court.

Whether or not the residency requirement should be retained depends on the strength of the policy reasons that warranted its initial inclusion in the proposed model. If there are strong policy reasons to support the residency qualification, then it would seem sensible to retain it in order for the matter to be tested in court, especially since that testing could not lead to the striking down of the law. If there are not strong policy reasons to support the residency qualification, then the potential breach of section 117 would suggest it should not be included in any Bill.

Yours sincerely

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