



Report of the

ATTORNEY-GENERAL

under the New Zealand Bill of Rights Act
1990 on the End of Life Choice Bill

Presented to the House of Representatives pursuant to
Section 7 of the New Zealand Bill of Rights Act 1990
and Standing Order 265 of the Standing Orders of the
House of Representatives

1. I have considered whether the End of Life Choice Bill ('the Bill'), a member's Bill in the name of David Seymour MP, is consistent with the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990 ('the Bill of Rights Act').
2. I have concluded that the Bill appears to be inconsistent with s 19 (freedom from discrimination) in respect of age and cannot be justified under s 5 of the Bill of Rights Act. As required by s 7 and Standing Order 265, I draw this to the attention of the House of Representatives.
3. I have also considered the consistency of the Bill with ss 8 (right not to be deprived to life), 13 (freedom of conscience), and 14 (freedom of expression) and have concluded that the Bill is consistent with those rights and freedoms.

Introduction

4. Assisted dying is an issue on which philosophical, moral, religious, ethical and clinical views are divided. My report relates to the legal question of the Bill's consistency with the Bill of Rights Act. Social and moral considerations raised by the Bill are matters for Parliament.
5. There have been two previous private members' bills on the subject of assisted dying drawn from the ballot. The first was the Death with Dignity Bill 1995, introduced by Michael Laws MP on 2 April 1995. The second was the Death with Dignity Bill 2003 ('the 2003 Bill'), introduced by Peter Brown MP on 6 March 2003.
6. The then Attorney-General, Hon Margaret Wilson, concluded that the 2003 Bill contained provisions that appeared to be inconsistent with ss 8 and 14 of the Bill of Rights Act.¹ As required by s 7 and the Standing Orders, she drew this to the attention of the House of Representatives.²
7. The 2003 Bill was, in many respects, similar to the current Bill. Like the current Bill, it contained comprehensive procedural safeguards. However, one significant difference was that it provided for an "advance directive", whereby a person could outline the medical or surgical procedures he or she wished to be followed should he or she become incompetent to make, or incapable of communicating, a treatment decision. This process did not have the same procedural safeguards as a request for contemporary assistance in dying. For this reason, the Attorney-General considered that the advance directive regime was inconsistent with the right not to be deprived of life in s 8 of the Bill of Rights Act.

The Bill

8. The objective of the Bill is set out in the explanatory note under the heading 'Purpose':³

This Bill gives people with a terminal illness or a grievous or irremediable medical condition the option of requesting assisted dying.

¹ The finding of inconsistency in respect of s 14 is irrelevant for present purposes, and is not discussed further.

² The report is available at www.justice.govt.nz/justice-sector-policy/constitutional-issues-and-human-rights/bill-of-rights-compliance-reports/section-7-reports/

³ Explanatory note, p1.

The motivation for this Bill is compassion. It allows people who so choose, and are eligible under this Bill, to end their lives in peace and dignity, surrounded by loved ones.

The Bill carefully defines those eligible for assisted dying, details a comprehensive set of provisions to ensure this is a free choice, made without coercion, and outlines a stringent series of steps to ensure the person is mentally capable of understanding the nature and consequences of assisted dying.

9. Put another way, the objective of the Bill is to allow people suffering intolerably with a terminal illness, or grievous or irremediable medical condition, to make a free and informed decision to end their suffering and maintain their dignity through assisted dying.
10. Given the importance of the subject matter, I set out the process in the Bill in some detail. To be eligible for assisted dying, a person must:⁴
 - 10.1 be aged 18 years or over
 - 10.2 be a New Zealand citizen or permanent resident
 - 10.3 suffer from a terminal illness likely to end their life within six months or have a grievous and irremediable medical condition
 - 10.4 be in an advanced state of irreversible decline in capability
 - 10.5 experience unbearable suffering that cannot be relieved in a manner that he or she considers tolerable, and
 - 10.6 have the ability to understand the nature and consequences of assisted dying.
11. If a person tells a medical practitioner ('the attending medical practitioner') that he or she wishes to have the option of assisted dying, the medical practitioner must:⁵
 - 11.1 inform the person of the prognosis for the terminal illness or grievous and irremediable medical condition, and the irreversible nature and anticipated impacts of assisted dying
 - 11.2 talk to the person about his or her wish at intervals determined by the progress of his or her condition
 - 11.3 ensure that the person understands his or her options for end of life care
 - 11.4 ensure that the person knows that he or she can change his or her mind at any time
 - 11.5 encourage the person to talk about his or her wish with others, such as family, friends, and counsellors, and ensure that the person has had the opportunity to do so

⁴ Clause 4.

⁵ Clause 8.

- 11.6 ensure that person knows that he or she is not obliged to talk to anyone, and
- 11.7 do his or her best to ensure that the person expresses his or her wish free from pressure from any other person by talking to other health practitioners who are in regular contact with the person and members of the person's family approved by the person.
12. If the person still wishes to proceed, the medical practitioner must then decide whether the person is or is not eligible for assisted dying, or would be eligible for assisted dying if his or her competence was established by a psychiatrist or psychologist ("a specialist").⁶
13. If the medical practitioner reaches the opinion that the person is eligible, or would be eligible if his or her competence was established by a specialist, the practitioner must get a second opinion from an independent medical practitioner identified by the Support and Consultation for End of Life in New Zealand ('SCENZ') Group.
14. The independent medical practitioner must read the person's file and examine them to decide whether the person is or is not eligible, or would be eligible if his or her competence was established by a specialist.⁷
15. If one or both medical practitioners consider that the person would be eligible for assisted dying if his or her competence was established by a specialist, the practitioners must jointly get an opinion from a specialist identified by the SCENZ Group. The specialist must read the person's file and examine them to decide whether or not the person is competent.⁸
16. If either of the medical practitioners decides that the person is not eligible for assisted dying, or if the specialist decides that the person is not competent, the practitioner or specialist (whichever is applicable) must explain the reasons for that decision to the person.⁹
17. At each stage, the actions taken and decisions reached must be recorded using a prescribed form and sent to the Registrar (assisted dying) and any prior decision makers.
18. If both medical practitioners decide that the person is eligible for assisted dying (and a specialist decides that the person is competent, if applicable), the attending medical practitioner must:¹⁰
- 18.1 tell the person that he or she is eligible for assisted dying
- 18.2 discuss the progress of the person's terminal illness or grievous or irremediable medical condition with the person
- 18.3 discuss the likely timing of the assisted dying with the person, and

⁶ Clause 10.

⁷ Clause 11.

⁸ Clause 12.

⁹ Clause 13.

¹⁰ Clause 14.

- 18.4 make provisional arrangements to be available to administer the medication at that time.
19. Once found eligible, if the person tells the attending medical practitioner that he or she wishes to exercise the option of receiving assisted dying, the practitioner must ask the person to choose from several methods of administering a lethal dose of medication, choose a time at which it is to be administered, and ensure that the person understands that he or she can change his or her mind at any time.¹¹
20. At least 48 hours before the time chosen for administering the medication, the attending medical practitioner must write the prescription and provide it to the Registrar (assisted dying) and advise the Registrar of the method and time chosen for administration. The Registrar must check that the preceding steps have been complied with and, if they have, co-sign the prescription.¹²
21. At the chosen time, the attending medical practitioner must ask the person if he or she chooses to receive the medication. If the person does, the medication is administered by the chosen method.¹³

Inconsistency with s 19 (freedom from discrimination)

22. Section 19(1) of the Bill of Rights Act affirms that everyone has the right to freedom from discrimination on the basis of age, commencing at the age of 16 years.¹⁴ While age limits of any kind are likely to involve a degree of arbitrariness, Parliament has chosen 16 as the starting point for discrimination on this basis.
23. The key questions in assessing whether there is a limit on (breach of) the right to freedom from discrimination are:¹⁵
- 23.1 does the legislation draw a distinction on one of the prohibited grounds of discrimination under s 21 of the Human Rights Act and, if so,
- 23.2 does the distinction involve disadvantage to one or more classes of individuals?
24. The eligibility criteria in the Bill include the requirement that the person be aged 18 years or over. This *prima facie* limits the right to freedom from discrimination on the basis of age in respect of 16 and 17 year-olds. Put another way, 16 and 17 year-olds are disadvantaged vis-à-vis those aged 18 and over because they are ineligible for assisted dying.¹⁶
25. A provision limiting a particular right or freedom may nevertheless be consistent with the Bill of Rights Act if it can be considered reasonable and justified in terms

¹¹ Clause 15(1) – (3).

¹² Clause 15(4) – (6).

¹³ Clause 16.

¹⁴ Section 19(1) Bill of Rights Act and s 21(1)(i) Human Rights Act 1993.

¹⁵ See, for example, *Atkinson v Minister of Health and others* [2010] NZHRRT 1; *McAlister v Air New Zealand* [2009] NZSC 78; and *Child Poverty Action Group v Attorney-General* [2008] NZHRRT 31.

¹⁶ This issue did not arise with the 2003 Bill, which had no age criterion.

of s 5 of that Act. The s 5 inquiry was summarised by the Supreme Court in *R v Hansen* as follows:¹⁷

- a) does the provision serve an objective sufficiently important to justify some limitation of the right or freedom?
- b) if so, then:
 - i. is the limit rationally connected with the objective?
 - ii. does the limit impair the right or freedom no more than is reasonably necessary for sufficient achievement of the objective?
 - iii. is the limit in due proportion to the importance of the objective?

Is the objective sufficiently important?

26. The objective of the requirement that the person be aged 18 or over appears to be to ensure that the person is mature enough to understand their prognosis and the nature and consequences of assisted dying. This objective is sufficiently important to justify some limitation on the right to freedom from discrimination on the basis of age.

Is there a rational connection between the limit and the objective?

27. For the reasons that follow, I do not think there is a rational connection between the objective (ensuring that the person is sufficiently mature to understand their prognosis and the nature and consequences of assisted dying) and the limit (restricting eligibility to those aged 18 or over).
28. I acknowledge there is a wide range of minimum ages in legislation. For example:
 - 28.1 the age of majority for all purposes of the law is reached at 20 (s 4 Age of Majority Act 1970)
 - 28.2 the age at which a person can consent to sexual intercourse is 16 (s 134 Crimes Act 1961 (which makes it an offence to have sexual conduct with a person under the age of 16))
 - 28.3 the age at which a person can be registered to vote is 18 (ss 3 (definition of adult) and 74 Electoral Act 1993), and
 - 28.4 the age at which a person can purchase alcohol or tobacco is 18 (s 5 (definition of purchase age) Sale and Supply of Alcohol Act 2012 and s 30 Smoke-free Environments Act 1990).
29. I think the closest analogy to assisted dying is the age of full consent to medical treatment and other decisions that concern bodily integrity. Under the Care of Children Act 2004, a child of or over the age of 16 can consent, or refuse to

¹⁷ *Hansen v R* [2007] NZSC 7 at [121].

consent, to medical treatment as if they were of full age.¹⁸ There is also a common law principle, set out in *Gillick v West Norfolk and Wisbech Area Health Authority*,¹⁹ that a child under 16 years is able to consent to medical treatment if he or she is mature enough to fully understand what is proposed.

30. I am not aware of any evidence that the age of 18 is a suitable proxy for maturity and competency to consent to assisted dying.²⁰ Indeed, it seems unnecessary to use age (or anything else) as a proxy given the Bill's other safeguards to ensure that the person is in fact competent to make the decision. Age tends to be used as a proxy for maturity in situations where it would be impracticable to assess maturity on an individual basis (usually because of volume), which is not the case here. For this reason, I do not consider that there is a rational connection between the limit and the objective.
31. The lack of rational connection may reasonably be considered a threshold issue which itself results in a conclusion of inconsistency with the Bill of Rights Act.²¹ However, I consider it beneficial for this analysis to also address the tests of minimal impairment and due proportionality.

Does the limit impair the right no more than reasonably necessary to achieve the objective?

32. The minimal impairment inquiry concerns whether the objective might sufficiently be achieved by another method involving less cost to the right in question.²² In my view, setting the age of eligibility at 18 is not the least restrictive means necessary to achieve the objective. People mature at different rates and the least restrictive means to achieve the objective of ensuring competence is to assess each person individually (it not being impracticable to do so in the circumstances).
33. In my view, the primary purpose of the Bill could be sufficiently achieved with less cost to the right to be free from discrimination by reducing the age of eligibility to 16 (because s 19 is only engaged after the age of 16), or by removing the age criterion altogether and relying on the other criteria and safeguards to ensure competence.

Is the limit in due proportion to the importance of the objective?

34. Because I have concluded that the age criterion is not the least restrictive means necessary to achieve the objective, I cannot conclude that it is in due proportion to the importance of the objective.

Conclusion on the right to be free from discrimination on the grounds of age

35. The requirement that a person be 18 or over to be eligible for assisted dying limits the right to freedom from discrimination on the basis of age. I do not think this

¹⁸ Section 36 Care of Children Act 2004.

¹⁹ *Gillick v West Norfolk and Wisbech Area Health Authority* [1985] 3 All ER 402.

²⁰ The same conclusion was reached by the Attorney-General, Hon Dr Michael Cullen, in respect of the Human Tissue (Organ Donation) Amendment Bill 2006. In that Bill it was proposed to limit registration to donate organs to those aged 18 years or over. The s 7 report on the Bill is available from the website in n 2 above.

²¹ *Hansen*, above n 17, at [121].

²² *Hansen*, above n 17, at [126].

limitation can be justified under s 5 because it is not rationally connected to the objective of ensuring that the person is competent to make the decision to end their life (there being no evidence that 18 is a suitable or necessary proxy for competence). The Bill could be made compliant with s 19 by reducing the age of eligibility to 16, or by removing the age criterion altogether and relying on the other criteria and safeguards to ensure competence.

36. As drafted, however, I think the Bill appears to be inconsistent with the right to be free from discrimination on the grounds of age affirmed in s 19(1) of the Bill of Rights Act.

Consideration of consistency with other sections of the Bill of Rights Act

Section 8 – Right not to be deprived of life

37. Section 8 of the Bill of Rights Act affirms the right not to be deprived of life. The section provides:

No one shall be deprived of life except on such grounds as are established by law and are consistent with the principles of fundamental justice.

38. Section 8 was recently considered in the context of assisted dying in *Seales v Attorney-General*.²³ That judgment drew extensively on decisions of the Canadian Supreme Court, particularly *Carter v Canada (Attorney-General)*,²⁴ on the equivalent provision of the Canadian Charter of Rights and Freedoms (s 7). However, care must be taken in applying those decisions in the current context. The issue in *Seales* and the Canadian cases was whether the statutory provisions that *prohibited* assisted dying were consistent with the right not to be deprived of life. The issue I am considering is whether the Bill's provisions *allowing* assisted dying are consistent with that right.
39. There are three aspects to consider in determining whether the Bill engages the right not to be deprived of life and, if it does, whether it *prima facie* limits that right:²⁵
- 39.1 the right to life
 - 39.2 exceptions to that right established by law, and
 - 39.3 consistency with the principles of fundamental justice.

Right to life

40. In *Seales*, Collins J said that assisted dying engages four principles: the sanctity of life, respect for human dignity, respect for individual autonomy, and protection of the vulnerable.²⁶ He observed that the sanctity of life is not an absolute principle

²³ *Seales v Attorney-General* [2015] 3 NZLR 556.

²⁴ *Carter v Canada (Attorney-General)* [2015] SCC 5.

²⁵ *Seales*, above n 23, at [152].

²⁶ *Seales*, above, n 23, at [62] – [81].

and must, on occasion, “yield to other principles, such as accepted standards of medical practice which recognise individual autonomy and human dignity”.²⁷

41. At first glance, it may seem counterintuitive that the right not to be deprived of life could be engaged by a Bill that allows a person to consent to assisted dying.²⁸ In her report to the House of Representatives on the 2003 Bill, the Attorney-General considered whether a person could be said to be “deprived of life” if he or she consented to the termination of his or her life. She observed that, by adopting one possible meaning of ‘deprived’ – to take without permission – it could be argued that protections provided by s 8 could be waived by a person who consented to ending his or her life. However, referring to cases to the contrary,²⁹ she considered the Courts were unlikely to adopt this interpretation.³⁰ I agree.
42. In the context of assisted dying the right not to be deprived of life protects against the risk that a vulnerable person³¹ will make a decision that is not truly voluntary or otherwise the product of rational choice, or is motivated by reasons other than to relieve suffering and maintain dignity (such as relieving the financial and emotional burden on family members). The existence of such risks means that the Bill engages the right not to be deprived of life. The question is then whether the Bill is lawful and fundamentally just in the way it addresses those risks.

Exceptions established by law

43. As outlined above, the right to life is not absolute. However, s 8 requires that the state may only deprive a person of life on the basis of grounds established by law.³²
44. The Bill creates a regime for determining when a person is eligible for assisted dying and how assisted dying will occur. It also provides that a person is immune from civil or criminal liability “for acts or omissions in good faith and without negligence in providing or intending to provide assisted dying.”³³ The Bill, if enacted, therefore provides a ground, established by law, by which a person may be deprived of their life.

²⁷ At [64]. For example, in *Shortland v Northland Health Ltd* [1998] 1 NZLR 433 the Court of Appeal held that the Northland Health Board could not be compelled to continue renal dialysis treatment, without which Mr Shortland would die, because the decision to discontinue dialysis was consistent with prevailing medical practices.

²⁸ See similarly *Seales*, above n 23, at [162].

²⁹ The Attorney-General cited *Shortland v Northland Health*, above n 27, and *Pretty v the United Kingdom* App. No 2346/02, 29 April 2002 (ECtHR). In *Shortland*, the Court of Appeal held (at 445) that, in the circumstances, Northland Health’s actions in refusing to provide Mr Shortland with dialysis treatment would not ‘deprive’ him of life in terms of s 8 of the Bill of Rights Act. In *Pretty*, the European Court of Human Rights held (at [39]) that art 2 (right to life) of the Convention for the Protection of Human Rights and Fundamental Freedoms “cannot, without a distortion of language, be interpreted as conferring the diametrically opposite right, namely a right to die; nor can it create a right to self-determination in the sense of conferring on an individual the entitlement to choose death rather than life.” It should be noted that art 2 does not contain the s 8 exception for “such grounds as are established by law and are consistent with the principles of fundamental justice”.

³⁰ This particular issue did not arise in *Seales* and *Carter* as the Courts in those cases accepted that the right not to be deprived of life was engaged because “the prohibition on physician-assisted dying had the effect of forcing some individuals to take their own lives prematurely, for fear that they would be incapable of doing so when they reached the point when the suffering was intolerable.”; *Carter*, above n 24, at [57], cited in *Seales*, above n 23, at [165].

³¹ As noted in *Seales* and *Carter*, the fact that a person is suffering from a terminal illness or grievous or irremediable medical condition does not necessarily mean they are vulnerable.

³² *Seales*, above n 23, at [167].

³³ Clause 26.

Principles of fundamental justice

45. Any exception to the right to life established by law must also be consistent with “the principles of fundamental justice”. This is the crux of the s 8 analysis. It imports an element of justification into the right itself and, unsurprisingly, has been interpreted as engaging considerations similar to some of those identified in *R v Hansen* as relevant in determining whether a particular breach of a right is justified under 5 of the Bill of Rights Act (see paragraph 25 above).³⁴
46. In *Seales*, Collins J observed that the scope of the phrase “consistent with the principles of fundamental justice” had not previously been determined in New Zealand. He found it useful to refer to Canadian case law, which identified three components to be considered: arbitrariness, overbreadth, and gross disproportionality.³⁵ Each is discussed separately below.
47. Collins J also adopted the Canadian approach whereby competing social interests or public benefits of a law were not relevant to assessing whether the law was consistent with the principles of fundamental justice (at least in respect of individual claims). Rather, those factors were relevant to the subsequent question of whether a particular breach was justified in a free and democratic society under s 5 of the Bill of Rights Act.³⁶ In *Carter*, the Canadian Supreme Court explained the reason for this approach:³⁷
- In *Bedford*, the Court noted that requiring s. 7 claimants “to establish the efficacy of the law versus its deleterious consequences on members of society as a whole, would impose the government’s s. 1 burden [equivalent to s 5 of the Bill of Rights Act] on claimants under s. 7”. A claimant under s. 7 must show that the state has deprived them of their life, liberty or security of the person and that the deprivation is not in accordance with the principles of fundamental justice. They should not be tasked with also showing that these principles are “not overridden by a valid state or communal interest in these circumstances”.
48. One matter that the Courts in *Seales* and *Carter* did not specifically address was whether, to be consistent with the principles of fundamental justice, the objective of the law has to be one that is legitimate in the sense that it could reasonably justify some limit on the right not to be deprived of life. Those cases concerned the laws prohibiting assisted dying. Few would dispute that the objective of such laws could reasonably justify some limit on the right, and it is therefore possible that it was not specifically addressed because it was not at issue.
49. My preliminary view is that it is inherent in the concept of fundamental justice that the legislative objective must be one that can reasonably justify some limit on the right not to be deprived of life. However, I have not found it necessary to resolve this issue because, as discussed below, I consider that the Bill does serve a legitimate objective.

³⁴ The authors of Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (2nd ed, LexisNexis, Wellington, 2015) consider (at 9.6.1) that “[t]here is unlikely to be much need for resort to s 5 of BORA in cases where a prima facie breach of s 8 has been established. That is because if legislation provides for deprivation of life that is not “consistent with the principles of fundamental justice” it is unlikely to be capable of being justified as a reasonable limit on the s 8 right.” A similar point was made by the Court in *Carter*, above n 23, at [95], although the Court did not rule out the possibility that a breach could be justified in the right circumstances (see also [82]). However, see footnote 47 below about whether s 5 applies to s 8 at all.

³⁵ At [169] – [170].

³⁶ At [175]; See also *Carter*, above n 24, at [79].

³⁷ At [80] (references omitted).

Objective of the Bill

50. Arbitrariness, overbreadth, and gross disproportionality are all assessed by reference to the objective of the relevant law. As outlined above, the objective of the Bill is to allow people suffering intolerably with a terminal illness, or grievous or irremediable medical condition, to make a free and informed decision to end their suffering and maintain their dignity.
51. For the purposes of assessing the legal question of compliance with the Bill of Rights Act, I think a Bill promoting the liberty of persons to decide to end their life in certain limited circumstances can be a legitimate objective, such that it can justify some limit on the right not to be deprived of life.

Arbitrariness

52. A law is arbitrary where there is no rational connection between the objective being pursued and the law that purports to achieve it.³⁸ In *Chaoulli v Canada (Attorney-General)* the Supreme Court of Canada outlined the test for arbitrariness as follows:³⁹

A law is arbitrary where “it bears no relation to, or is inconsistent with, the objective that lies behind [it]”. To determine whether this is the case, it is necessary to consider the state interest and societal concerns that the provision is meant to reflect...

In order not to be arbitrary, the limit on life, liberty and security requires not only a theoretical connection between the limit and the legislative goal, but a real connection on the facts ... The question in every case is whether the measure is arbitrary in the sense of bearing no real relation to the goal and hence being manifestly unfair ...

53. The Bill contains a comprehensive regime for determining if, and how, a person with a terminal illness or a grievous or irremediable medical condition may access the option of assisted dying. The provisions of the Bill are directly related to the objective and so not arbitrary.

Overbreadth

54. A law is overbroad where it goes further than necessary to achieve the objective being pursued.⁴⁰ In *Carter*, the Canadian Supreme Court said:⁴¹

The overbreadth inquiry asks whether a law that takes away rights in a way that generally supports the object of the law, goes too far by denying the rights of some individuals in a way that bears no relation to the object. Like other principles of fundamental justice under s. 7 [of the Canadian Charter], overbreadth is not concerned with competing social interests or ancillary benefits to the general population. A law that is drawn broadly to target conduct that bears no relation to its purpose “in order to make enforcement more practical” may therefore be overbroad. The question is not whether Parliament has chosen the least restrictive means, but whether the chosen means infringe life, liberty or security of the person in a way that has no connection with the mischief contemplated by the legislature.

³⁸ *Seales*, above n 23, at [171]; *Carter*, above n 24, at [83].

³⁹ *Chaoulli v Canada (Attorney-General)*[2005] 1 SCR 791 at [130] – [131], cited in *Seales*, above n 23, at [176].

⁴⁰ *Seales*, above n 23, at [172].

⁴¹ At [85] (references omitted).

55. In *Carter*, the Supreme Court held that the objective of the provisions prohibiting assisted dying was to protect vulnerable persons from being induced to commit suicide in a moment of weakness. However, the Court concluded that a total ban was overbroad because it caught people outside this class.⁴² In *Seales*, Collins J concluded that the objective of the equivalent New Zealand provisions was wider, protecting not only the vulnerable but “so far as is reasonably possible, the lives of those who are not vulnerable.”⁴³ In light of the wider objective, Collins J held that the New Zealand provisions were not overbroad.
56. The Bill is tightly circumscribed in its application. Amongst other things, the person must be in an advanced state of irreversible decline in capability and be experiencing unbearable suffering that cannot be relieved in a manner that he or she considers tolerable. This must be assessed by two medical practitioners. In addition, the person must be assessed as competent and the medical practitioners must do their best to ensure that the person’s decision is free of coercion. The Bill cannot therefore be said to be overbroad.

Gross disproportionality

57. A law is grossly disproportionate where the impact of the law is out of all proportion to the objective being pursued.⁴⁴ In *Carter*, the Supreme Court of Canada said:⁴⁵

The enquiry into gross disproportionality compares the law’s purpose “taken at face value”, with its negative effects on the rights of the claimant, and asks if this impact is completely out of sync with the object of the law. The standard is high: the law’s object and its impact may be incommensurate without reaching the standard for *gross* disproportionality.

58. In *Canada (Attorney-General) v Bedford*, the Supreme Court of Canada gave the following example of gross disproportionality:⁴⁶

This idea is captured by the hypothetical of a law with the purpose of keeping the streets clean that imposes a sentence of life imprisonment for spitting on the sidewalk. The connection between the draconian impact of the law and its objective must be entirely outside the norms accepted in our free and democratic society.

59. The objective of the Bill is to allow people suffering intolerably with a terminal illness, or grievous or irremediable medical condition, to make an informed decision to end their suffering and maintain their dignity. The method by which the Bill achieves that objective does not result in impacts that are grossly disproportionate to the objective. There are multiple safeguards built into the process, including the stringent criteria for eligibility (see paragraph 10 above), the requirement for an independent second opinion and referral to a specialist (if necessary), and the ability for the person to change their mind at any time.

⁴² At [86].

⁴³ At [132] and [184] – [186].

⁴⁴ *Seales*, above n 23, at [173]; *Carter*, above n 24, at [89].

⁴⁵ At [89] (references omitted); See also *Seales*, above n 23, at [188] and [189].

⁴⁶ *Canada (Attorney-General) v Bedford* 3 SCR 1101 at [120], cited in *Seales*, above n 23, at [189].

Conclusion on the right not to be deprived of life

60. I have concluded that the Bill engages the right not to be deprived of life, but does not *prima facie* limit that right. The Bill creates a statutory exemption to the right to life that is consistent with the principles of fundamental justice (the Bill's objective being one that can reasonably justify some limitation on the right, and the method by which it seeks to achieve the objective not being arbitrary, overbroad, or grossly disproportionate). As I have concluded that the Bill does not limit the right protected by s 8, there is no need to consider s 5 (justified limitations).⁴⁷
61. For the reasons above, I think the Bill appears to be consistent with the right not to be deprived of life affirmed in s 8 of the Bill of Rights Act.

Section 13 – Freedom of conscience

62. Section 13 of the Bill of Rights Act affirms the right to freedom of conscience, including the right to adopt and hold opinions without interference.
63. Clause 7 of the Bill requires a medical practitioner, who has a conscientious objection to doing anything authorised or required by the Bill, to tell a person seeking assisted dying that the medical practitioner has a conscientious objection and that the person may ask the SCENZ Group for the name and contact details of another medical practitioner. This provision *prima facie* engages the right to freedom of conscience because it requires the medical practitioner to assist the person to do something the practitioner conscientiously objects to (by referring the person to another medical practitioner)).
64. To the extent that cl 7 limits the right to freedom of conscience, I consider that the limit is justified for the effective functioning of the regime for assisted dying created by the Bill. In particular, I consider that the requirement to identify another medical practitioner is necessary to meet the objective of the Bill and is the most minimal impairment of the right possible. I also consider it important that a medical practitioner is not obliged to raise assisted dying with a potentially eligible patient; they are only required to respond if the patient raises it.
65. I think the Bill appears to be consistent with the right to freedom of conscience affirmed in s 13 of the Bill of Rights Act.

Section 14 – Freedom of expression

66. Section 14 of the Bill of Rights Act affirms the right to freedom of expression. This includes the freedom to seek, receive, and impart information and opinions of any kind and in any form. The right has been interpreted as including the right not to be compelled to say certain things or to provide certain information.⁴⁸

⁴⁷ I note that it is unclear whether the question of justification is built into the right itself such that a subsequent analysis under s 5 is unnecessary, as the Supreme Court held in *Hamed v R* [2012] 2 NZLR 305 (at [162]) in respect of s 21 of the Bill of Rights Act (unreasonable search and seizure) (see also the general discussion of this issue in *The New Zealand Bill of Rights Act: A Commentary*, above n 35 at 6.6.11 to 6.6.18). The reasoning of Collins J in *Seales* (see paragraph 47 above), suggests that there is still a role for s 5, at least in respect of individual complaints.

⁴⁸ *RJR MacDonald v Attorney-General of Canada* (1995) 127 DLR (4th).

67. The Bill contains various provisions (including cl 7 discussed in the preceding section) requiring the medical professionals involved to provide certain information, record actions taken and decisions made and, in some cases, to provide reasons. These provisions *prima facie* engage the right to freedom of expression.
68. To the extent that any of the provisions of the Bill limit the right to freedom of expression, I consider that the limit is justified for the effective functioning of the regime for assisted dying created by the Bill.
69. I think the Bill appears to be consistent with the right to freedom of expression affirmed in s 14 of the Bill of Rights Act.

Conclusion

70. I therefore conclude:
- (a) the Bill engages the right not to be deprived of life (s 8 of the Bill of Rights Act), but does not *prima facie* limit that right; and
 - (b) to the extent the Bill limits the right to freedom of conscience and expression (ss 13 and 14 of the Bill of Rights Act respectively), the limits are justified; but
 - (c) the Bill appears to be inconsistent with s 19(1) (freedom from discrimination) of the Bill of Rights Act in respect of age and the limit cannot be justified under s 5 of the Act.

Hon Christopher Finlayson

Attorney-General

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