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Report of the

# ATTORNEY-GENERAL

under the New Zealand Bill of Rights Act  
1990 on the Death with Dignity Bill 2003

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*Presented to the House of Representatives pursuant  
to Section 7 of the New Zealand Bill of Rights Act  
1990 and Standing Order 260 (as varied by the House  
of Representatives on 5 September 2002) of the  
Standing Orders of the House of Representatives*

I have considered the Death with Dignity Bill 2003 (the “Bill”) for consistency with the New Zealand Bill of Rights Act 1990 (the “Bill of Rights Act”). I have concluded that the Bill contains provisions that appear to be inconsistent with the right not to be deprived of life and the right to freedom of expression contained in sections 8 and 14 of the Bill of Rights Act respectively. As required by section 7 of the Bill of Rights Act and Standing Order 260 (as varied by the House on 5 September 2002) I draw this to the attention of the House of Representatives.

### **The Bill**

The Bill seeks to allow persons who are terminally or incurably ill and are experiencing pain, suffering or distress the opportunity of requesting assistance from a medically qualified person to end their lives. The ability to seek assistance to terminate life will also be accorded to persons who have made an advance directive to this effect and have duly appointed another person to represent their interests in the event that they later become mentally incompetent to communicate their wishes regarding their medical treatment.

The Bill contains comprehensive procedural safeguards where a terminally or incurably ill patient requests assistance from a medical practitioner to terminate their life. These safeguards provide that such requests may only be carried out after medical confirmation, a psychiatric assessment, counselling and personal reflection. In contrast, the safeguards in place for persons making an advance directive do not provide the same degree of protection against potential abuse.

### **Breach of Section 8 of the Bill of Rights Act**

The Bill seeks to legitimise assisted suicide: for example, by allowing a medical practitioner to administer a lethal injection to an incurably or terminally ill patient. I have considered whether this is inconsistent with section 8 of the Bill of Rights Act, which 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.”

The first matter that needs to be considered in order to determine whether the Bill raises a *prima facie* issue under this section is whether the proposed procedures “deprive” a person of their life. By adopting one possible meaning of this word – namely, to take without permission – an element of consent may be read into section 8. Accordingly, an argument can be made that the protections provided by this right are discretionary and thus can be waived by an individual who consents to the termination of his or her life. There is, however, jurisprudence to the contrary (see, for example, *Shortland v Northland Health Ltd* [1998] 1 NZLR 433; *Pretty v the United Kingdom*, App. No 2346/02, 29 April 2002 (ECtHR)). I, therefore, consider that it is extremely unlikely that the courts would adopt this meaning of the word and take the view that consent would by-pass the protections conferred by this section.

Having determined that the Bill’s provisions deprive a person of their life, the next issue to consider is whether such deprivation is “on such grounds as are established by law and are consistent with the principles of fundamental justice”. This means that the law must be substantively just and applied in a procedurally fair manner (see, for

instance, *B.C. Motor Vehicle Reference* [1985] 2 SCR 486). Consequently, whenever a law permits an individual to be deprived of life, we must, from the substantive point of view, determine whether “the right balance” has been struck between the competing values that need to be reconciled. From the procedural perspective, we must ascertain whether the law affords sufficient legal protections against potential abuse.

Although the New Zealand courts have not yet been called upon to examine the issue of assisted suicide, they have considered the competing values that arise when withdrawing life-support from a patient that is in an irreversible vegetative state. In these cases, the courts acknowledged the distinction between desisting with life prolonging treatment and taking action lacking therapeutic or palliative value for the purpose of terminating life. However, they also demonstrated a willingness to consider quality of life issues (ie. unacceptable levels of pain, suffering and distress) as part of the balancing exercise associated with the substantive aspect of fundamental justice. This raises the possibility that the proposal to allow medical practitioners to assist an incurably and terminally ill patient terminate his or her life – following strict procedural safeguards regarding competency and consent – may be considered substantively just.

Nonetheless, any procedure to this effect must contain robust safeguards to ensure the authenticity and reliability of the patient’s decision. The procedural safeguards contained in the Bill with respect to patients other than those who have made an advance directive appear to be adequate. The advance directive process, however, does not provide the same degree of protection to ensure that a person who previously made an advance directive has understood the nature of the document he or she signed and the consequences of his or her decision. There is no mandatory requirement for the person to consult with a psychiatrist – to ensure that the person is not suffering from a mental disorder or clinical depression that may have impaired his or her judgement – or undergo counselling. Moreover, it will be extremely difficult for the medical practitioners to verify that the patient made the request voluntarily and was competent to do so, especially as the patient will lack the required mental capacity by the time the medical practitioners become involved. In light of this, I consider that the Bill, in its current form, is *prima facie* inconsistent with section 8 of the Bill of Rights Act.

The question is, therefore, whether this can be said to be a “reasonable and justified” limit on the right not to be deprived of life in terms of section 5 of the Bill of Rights Act. In this regard, I consider that an argument can be made that the purpose of the Bill, namely to extend terminally or incurably ill patients’ personal autonomy to allow them to make an informed decision to end their life with medical assistance if they find it intolerable due to pain, suffering or distress, serves a significant and important objective.

Arguably, the inclusion of provisions allowing persons to make advance directives on whether they wish to have assistance to end their life should they later develop a terminal or incurable illness that deprives them of the necessary mental capacity is rationally related to the objective underlying the Bill. However, in order to be considered a justified limitation in terms of section 5 of the Bill of Rights Act, a provision must be proportionally as well as rationally related to the objective underlying the provision. In my view, the Bill, as currently drafted, fails to meet this requirement.

If the purpose of the Bill is to respect a patient’s right to control the circumstances and nature of his or her death, it is vital that rigorous statutory safeguards are in place to ensure the authenticity and reliability of all requests for assistance to terminate life. The

procedural safeguards surrounding advance directives are inadequate and therefore not proportionally related to the objective because they do not ensure that the person making the directive understood the nature of the document he or she has signed or the consequences of making (and not revoking) a directive. It can also be argued that the wide scope of the term "incurably ill" contributes to the lack of proportionality. The justification for including such a wide definition is not entirely clear: especially as there may be other avenues to reduce the pain, suffering and distress of an incurable ill person that are equally effective, but less intrusive on the right not to be deprived of life.

Consequently, the Bill cannot, in terms of section 5 of the Bill of Rights Act, be considered a reasonable and justified limit on the right not to be deprived of life.

### **Breach of Section 14 of the Bill of Rights Act**

I consider that clause 7(1) of the Bill appears to be inconsistent with section 14 of the Bill of Rights Act (the right to freedom of expression). This provision provides that "no person other than those specifically and personally authorised by the patient or the attending or consulting medical practitioners or the appointed psychiatrist or the appointed counsellor may discuss the patient's request with any other individual not immediately associated with the patient." I consider that this provision seeks to limit the degree of pressure or influence that is placed on a patient who has made a request to terminate his or her life. By allowing the patient to control who has knowledge of his or her decision, this provision seeks to ensure that the patient is not exposed to pressure or influence from unwanted sources. This objective is a significant and important one.

I note, however, that, because the scope and effect of the provision are ambiguous, it is possible to interpret the provision in a number of ways, some of which would not satisfy the second limb of the section 5 inquiry. For instance, the provision, on its face, would prohibit a patient's family members from accessing counselling services and spiritual support to deal with the emotional consequences that flow from the patient's decision to terminate his or her life. Moreover, there is uncertainty regarding whether the restriction remains in place after the request has been carried out or withdrawn. Because of these possibilities, it can be argued that the provision is not rationally or proportionally connected to the objective of limiting the amount of pressure or influence placed upon a patient. I, therefore, consider that clause 7(1) cannot be considered a reasonable and justified limit on the right to freedom of expression.

### **Conclusion**

I have concluded that the Bill contains provisions that appear to be inconsistent with the right not to be deprived of life as affirmed by section 8 of the Bill of Rights Act. Furthermore, I do not consider that the offending provisions can be considered a justified limitation on this right in terms of section 5 of the Bill of Rights Act. I also consider that clause 7(1) of the Bill is inconsistent with the right to freedom of expression and that this provision also cannot be justified in terms of section 5.



Hon Margaret Wilson  
Attorney-General