



NEW ZEALAND  
LAW SOCIETY

NZLS EST 1869

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# End of Life Choice Bill

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*06/03/2018*

## **Submission on the End of Life Choice Bill**

1. The New Zealand Law Society (Law Society) appreciates the opportunity to comment on the End of Life Choice Bill (Bill).
2. In this submission the Law Society identifies:
  - (a) issues that affect the workability of the scheme set out in the Bill; and
  - (b) aspects of the intended scope or operation of the Bill or the interplay of the Bill with other statutes that may benefit from clarification.
3. The Law Society makes no comment on the policy of the Bill, on which there is a wide divergence of views within the Law Society's membership. The suggestions and comments set out below are intended to be neutral and constructive, with a view to improving the operation of the Bill should it proceed. In light of the subject-matter of the Bill and the range of views on that subject-matter within the legal profession, it is important that the Law Society's silence on any aspect of the Bill not be interpreted as either endorsing or not endorsing it.

### **Eligibility criteria**

4. It is not clear whether the Bill would extend eligibility to persons with a number of more minor conditions that in combination would mean that the other criteria are established. For example, in the Netherlands euthanasia is allowed for elderly people with 'multiple geriatric syndromes': it is not clear whether the intention is to include or exclude this and similar groups. The use of the singular 'a' in clause 4(c)(ii) may be read as excluding them.

### **Competence**

5. Under clause 4(f)(i) and (ii) of the Bill, a person is eligible for assisted dying if they have the ability to understand the nature of assisted dying and the consequences of assisted dying. The Code of Health and Disability Services Consumers' Rights (which doctors have a statutory obligation to abide by) provides that a consumer must be presumed to be competent when giving informed consent, unless there are 'reasonable grounds' for believing otherwise (right 7(2)).
6. The Law Society recommends that consideration be given to clarifying the definition of competence in the Bill by reference to the following examples of different approaches:
  - (a) Section 9 of the Substance Addiction (Compulsory Assessment and Treatment) Act 2017, which provides that a person's capacity to make informed decisions about treatment for a severe substance addiction is severely impaired if the person is unable to—
    - (a) understand the information relevant to the decisions; or
    - (b) retain that information; or
    - (c) use or weigh that information as part of the process of making the decisions; or

- (d) communicate the decisions.<sup>1</sup>

This approach sets out a comprehensive list of attributes that a person must demonstrate to be considered competent.

- (b) Section 241.2(1)(b) and (e) of the Canadian Code, which provides that a person must be capable of making decisions with respect to their health and be able to give informed consent to receive medical assistance in dying after having been informed of the means that are available to relieve suffering. This approach involves a less detailed definition of competence, but explicitly links competence to the concept of informed consent.

### **Implications of interval between request and administration**

7. An issue arises as to how far in advance of administration of the medication a person can request assisted dying and what happens if competence is lost in the interval before the medication is administered:
  - (a) Can the request still be acted on?
  - (b) Must the request still be acted on?
  - (c) Can the request be overridden by a person appointed under an enduring power of attorney whose powers have become exercisable during that interval or a welfare guardian appointed under the Protection of Personal and Property Rights Act 1988?
8. It would be desirable to clarify these matters.

### **Conscientious objection**

9. The Bill provides that any person may decline to do any act connected to assisted dying if they have a conscientious objection (except for the obligation on a medical practitioner to, in effect, refer the patient to the SCENZ Group for the name and contact details of a replacement medical practitioner) (clause 7(2) of the Bill). Similar clauses can be found in the Contraception, Sterilisation and Abortion Act 1977 and the Marriage Act 1955.
10. In light of the broad definition of medical practitioner (which would include practitioners in fields as diverse as paediatrics, plastic surgery, dermatology and ophthalmology), there are likely to be medical practitioners who would not be qualified to provide assisted dying. The position of medical practitioners in this situation can be addressed by providing that medical practitioners may decline to provide assisted dying in circumstances where they do not believe themselves to be professionally qualified to provide assisted dying.
11. If a provision along these lines were to be included in the Bill, then the medical practitioner should be required to tell the requestor that they do not consider themselves professionally qualified to provide assisted dying and to inform the requestor that that person may ask the SCENZ Group for the name and contact details of a replacement medical practitioner (as is provided for in the case of a conscientious objection in clause 7(2) of the Bill).
12. A number of conscientious objection clauses explicitly provide that a person who raises a conscientious objection should not be discriminated against as a result of that objection (e.g.

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<sup>1</sup> Section 4 of the Voluntary Assisted Dying Act 2017 (Victoria) provides a similar definition for 'decision-making capacity' in relation to assisted dying.

section 46(2) of the Contraception, Sterilisation and Abortion Act 1977). The Law Society recommends that consideration be given to providing a similar protection in the Bill.

### **Free choice**

13. The attending medical practitioner has a duty to do his or her best to ensure that a person expresses his or her wish free from pressure from any other person (clause 8(2)(h)).
14. It is implicit in this task that where the attending medical practitioner forms a view that the request has not been made free from pressure that the attending medical practitioner can decide that a person is not eligible for assisted dying. However, the requirement that a patient's choice be free from pressure from any other person is not an explicit requirement of the definition of "person who is eligible for assisted dying" (clause 4), nor is it explicitly stated as being a ground upon which an attending medical practitioner (or an independent medical practitioner) can make a negative decision upon a request for assisted dying (see clauses 10(2) and 11(3)(c)).
15. The Law Society recommends that the Bill be amended to make clear that the attending medical practitioner, the independent medical practitioner or the third specialist practitioner may decide a person is not eligible if they are not satisfied that the person is free from pressure from any other person.

### **SCENZ Group and the End of Life Review Committee**

16. The SCENZ (Support and Consultation for End of Life in New Zealand) Group consists of "the number of medical practitioners that the Director-General considers appropriate" (clause 19(1) of the Bill).
17. The Law Society notes that in light of the definition of "medical practitioner" in clause 3 of the Bill, only health practitioners who are registered with the Medical Council of New Zealand as a practitioner of the profession of medicine can be appointed to the SCENZ Group. This definition would exclude, for example, pharmacists, psychologists or nurse practitioners from being members of the SCENZ Group, as they are not registered with the Medical Council, but rather with the Pharmacy Council, the Psychologists Board and the Nursing Council respectively. There does not appear to be any reason for excluding pharmacists, psychologists and nurse practitioners from membership of the SCENZ Group bearing in mind the roles envisaged for those health practitioners under the Bill. Subject to any policy reasons to the contrary, the Law Society recommends that membership of the SCENZ Group be extended to include all health practitioners. The members who are actually appointed (and the backgrounds that they will have) will still be a matter for the Director-General.
18. Similarly, eligibility for membership of the End of Life Review Committee is not open to health practitioners, who are not also medical practitioners (see clause 20(1)(b) and (c)). Again, there does not appear to be any reason for confining eligibility for the Review Committee to practitioners who are registered with the Medical Council. Unless there is a policy reason to the contrary, the Law Society recommends that eligibility for membership of the Review Committee be extended to all health practitioners.

## **“Cause of death”**

19. Clause 25 and clause 28(2) appear to be inconsistent.
20. Clause 25 provides that “[a] person who dies as a result of the provision of assisted dying is taken for all purposes to have died as if assisted dying had not been provided.”
21. Clause 28(2) inserts proposed regulation (xiiib) into regulation 7(1)(a) of the Births, Deaths, Marriages, and Relationships Registration (Prescribed Information) Regulations 1995. Proposed regulation (xiiib) would require death certificates to record, in respect of a person who died as a result of the provision of assisted dying under the End of Life Choice Act, the fact that the person died as a result of the provision of assisted dying under the End of Life Choice Act.
22. The apparent inconsistency between these two provisions could be removed by amending clause 25 to read “[s]ubject to clause 28(2), a person who dies as a result of the provision of assisted dying is taken for all purposes to have died as if assisted dying had not been provided.”

## **Immunity provisions**

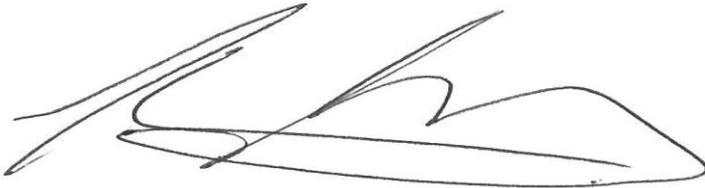
23. The Bill does not propose decriminalising assisted dying through repealing or amending the relevant provisions in the Crimes Act 1961. Rather, it provides in clause 26 for an immunity “from liability in civil or criminal proceedings for acts or omissions in good faith and without negligence in providing or intending to provide assisted dying”.
24. This “immunity approach” to carving out an exception to the general provisions of the Crimes Act 1961 is an available approach. The Law Society makes the following observations:
  - (a) On its face, it suggests that the conduct permitted by the Bill is still criminal in nature. The Law Society notes that, in contrast, when the Contraception, Sterilisation and Abortion Act 1977 was enacted, it was accompanied by changes to the Crimes Act that in effect decriminalised conduct in accordance with the 1977 Act: see Crimes Amendment Act 1977.
  - (b) On its face, the immunity is available to any person who falls within its terms. A key concept, however, is that the person be providing or intending to provide assisted dying. It may be possible to clarify the scope of the immunity by reference to the more detailed set of provisions tailored to individual actors within the assisted dying scheme provided in sections 241(2) – (6) of the Canadian Code.
  - (c) The Bill does not address the application of the defence provisions in the Crimes Act for those who interfere to prevent offences being committed against another person. Section 41 of the Crimes Act currently provides a defence for any person to use such force as may be reasonably necessary to prevent such offending, which on current drafting would apply to those acting to prevent assisted dying under the Bill. Similarly, section 48 (self-defence or defence of another person) is also likely to apply.
  - (d) Similarly, the Bill does not amend the offence of inciting, counselling or procuring suicide under the Crimes Act,<sup>2</sup> nor the Harmful Digital Communications Act 2015

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<sup>2</sup> Section 179.

(Communication Principle 9 prohibits inciting or encouraging an individual to commit suicide). It is not clear whether the immunity provisions in the Bill would be sufficient to exempt practitioners, families or carers who more generally encourage or support a person through the assisted dying process from these offence provisions, given that their conduct is not directly authorised or prescribed by the Bill.

25. Given the technical nature of this submission, the Law Society does not seek to be heard. However, it would be happy to meet with officials to discuss the submission if that would be of assistance.

A handwritten signature in black ink, appearing to be 'K. Beck', written in a cursive style.

Kathryn Beck  
**President**

6 March 2018