A FAILURE OF ACCOUNTABILITY: LACK OF ANY EFFECTIVE OVERSIGHT, INVESTIGATORY OR PROSECUTORIAL MECHANISM IN THE BILL

The Ministry of Health Registrar (Assisted Dying)

1. The Director General of Health must nominate an employee of the Ministry of Health to be the "Registrar (Assisted Dying)". The Registrar must establish and maintain a register of reports and prescribed forms that they have received from doctors, set up and oversee a complaints procedure, and report to the Minister of Health annually.[1]

2. The only "safeguard" provided by the Registrar (Assisted Dying) is that he or she checks the prescribed forms have been completed and filed by the doctors during the opinion and decision making process in clauses 8–14, and then co-signs the prescription and returns it to the relevant doctor.[2]

3. The Registrar has no powers, except (as above) an apparent ability to decline to co-sign the prescription of lethal medication if the mandatory, prescriptive process set out in clauses 8–14 described above has not been complied with.[3]

The "End of Life Review Committee"

4. Appointed by the Minister of Health, the only functions of the Review Committee (and thus the only "safeguards" the Committee provides) are:[4]

    4.1 to check and consider the prescribed form reports that have been completed by the doctor(s) who administered the lethal medication in a EAS process, and

    4.2 to report back to the Registrar (Assisted Dying) about its "*satisfaction or otherwise with the* cases *reported*", and

    4.3 to "recommend actions" the Registrar may take on cases the Review Committee is "not satisfied" with.

5. There is no provision for information to be provided to the Review Committee other than the prescribed report that is completed by the doctor(s) who administered the lethal medication. The prescribed report requires the doctor's details, the fact that a person died including name, place, date and time, the steps that were taken once a positive decision on that person's request to die had been made, and the administration of the EAS process (including whether any problem arose in the administration of the medication and, if so, how it was dealt with).

6. The Review Committee (and, consequently, the New Zealand public) is deprived, in the case of any person who has been euthanized or assisted in suicide under the Bill, from knowing:[5]

    6.1 the person's clinical information;

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1 Clause 21.
2 Clause 15(5)–(6).
3 See clause 15(6).
4 Clause 20.
5 Clause 17(2) – "Death Reported", listing the information which doctors must provide the Registrar who then provides it to the Review Committee. See also Clause 20(2)(a).

6.2 their ethnicity;

6.3 their personal or socio-economic circumstances such as family situation, income status,

6.4 the reasons why doctors assessed them eligible for euthanasia or assisted suicide;

6.5 what steps a doctor took in "doing their best" to detect coercion or pressure;

6.6 the nature of the "unbearable suffering" that led the person to request euthanasia or assisted suicide.

7. Neither the Registrar nor the Review Committee have any power to investigate a specific case. Both are limited to reviewing the information on the prescribed form. The Registrar and the Review Committee have restricted functions which do not expressly include referring a matter to the police or a professional regulator. The medical information of the patient who has been euthanised or medically assisted in suicide is confidential from the Registrar and the Review Committee. No one outside the Review Committee has access to the information on the forms. Reporting of that information is limited to the data specified in the Bill and takes the form of a report to the Minister. Under the 5 year review of the Act, those who review the legislation will not be able to access records of individual cases.

8. The Review Committee has no powers. In particular, it will have no power to review the exercise of clinical judgment and the exercise of good faith in individual cases of euthanasia and assisted suicide under the Bill. In *Wall v Livingstone* Woodhouse P stated in obiter (in the context of certifying consultants authorising abortion under s 187A of the Crimes Act 1961):[6]

> "The subject of the review would be the exercise of medical judgment by professional men in discharge of a professional responsibility under a statutory authority. To put the matter in another way, the legislation provides for the formulation of a medical judgment by medical practitioners as to whether the performance of an abortion is authorised by s 187A of the Crimes Act which with two exceptions is entirely concerned with medical considerations. **And most significantly, as we have earlier mentioned, the exercise of that medical judgment in individual cases is not subject to review by the supervisory committee, the specialist body established under the Act to exercise oversight of the legislation. Against that statutory background we do not think it can possibly have been Parliament's intention that upon such a delicate matter as this the Courts could freely take under review the conclusions reached by the professional men so exclusively entrusted with the statutory responsibilities**."

9. This position was affirmed by the New Zealand Supreme Court in 2012 in *Right to Life New Zealand Inc v The Abortion Supervisory Committee*,[7] in which Blanchard J held [40]:

> "We endorse the position taken in *Wall v Livingstone* that the Committee cannot, even after the event, make any inquiry or investigation into the decision-making in an individual case where that would tend to question a decision made in a particular case".
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> "Individual decisions are a matter of medical judgment and expertise in the particular case and not to be questioned, whether before or after the decision has been acted on. Moreover as counsel for the Committee submitted, it would usually not be possible to reach a properly informed judgment on an individual decision without full access to the medical records (that not

6 [1982] 1 NZLR 734 at 740.

7 [2012] NZSC 68.

being within the power of the Committee as explained in the next para) and also full access to the patient whose identity and confidentiality the Act sets out to protect".

10. The Review Committee will possess none of the statutory functions New Zealand courts say a statutory authority needs in order to investigate individuals for statutory compliance. Its powers and functions will be similar to those of the Abortion Supervisory Committee, in respect of which the Supreme Court in *Right to Life New Zealand Inc* has found:[8]

> "The Committee's statutory functions were silent on issues of establishing professional and ethical obligations, investigating alleged breaches of such obligations, enforcing standards, and the administrative and procedure framework to deal with these matters."

No appeal or proper review process

11. There are no appeal or proper review processes built into the statutory regime. The EOLC Bill provides for the attending medical practitioner to lodge the relevant documents with the Registrar, but the Registrar has no apparent powers to act in response. There is no provision in the EOLC Bill for a person or their family or other carers or medical practitioners to raise issues during the process or pursue concerns about a person's eligibility, competence or consent.

A lame Registrar

12. There is no review process prior to the person's death, other than the Registrar's role of receiving relevant forms from the first and second doctor and confirming that the procedures in the EOLC Bill have been followed before authorising the prescription of the lethal medication. As above, the Registrar appears to have no powers except to decline to co-sign the prescription of the medication. Other legislation such as the Mental Health (Compulsory Assessment and Treatment) Act 1992 provides for an independent person to review decisions made under the relevant legislation.[9] The EOLC Bill contains no similar provision. There is no provision for an independent person to oversee the euthanasia or assisted suicide process as it occurs, or to monitor the quality and safety of the services, or investigate complaints or conduct enquiries.

13. While the EOLC Bill appears to contemplate that the Registrar (Assisted Dying) will deal with complaints, it does not make clear whether that process comes into play before or after the person has died.[10] This creates obvious concerns in situations where a person has already died and there is a question over whether all the eligibility grounds were met, or whether there was proper consent, or whether there was coercion. Similarly, for a person who has their eligibility declined, the lack of an appeal process appears to be anomalous.

A lame Review Committee

14. As above, after a person has died the End of Life Review Committee has no powers of inquiry or response beyond reporting back to the registrar "*about its satisfaction or otherwise with the cases reported*" and recommending "*actions that the Registrar may take to follow up cases with which the [committee] was not satisfied*".[11] It has no power to investigate a specific case

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8 [2012] NZCA 246; [2012] 1 NZLR 176, para 28.
9 Mental Health (Compulsory Assessment and Treatment) Act 1992, ss 94–98A.
10 Clause 21.
11 Clause 20.

and no power to review the exercise of clinical judgment or the exercise of good faith in individual cases of euthanasia and assisted suicide under the Bill.

Little likelihood of judicial intervention

15. A person who is not party to an act of assisted dying under the EOLC Bill may lack legal standing to request judicial review of any of the decisions or processes involved in the Bill. In *Wall v Livingstone* (under different legislation) Woodhouse P held that "…*no individual who is not one of the statutory participants could ever be regarded as having a sufficient interest to institute proceedings for judicial review*".[12]

16. Under the EOLC Bill, this is likely to mean that the only entities with standing to request a judicial review after euthanasia had been carried out would be:

    16.1 the personal representatives of the person requesting euthanasia or assisted suicide;

    16.2 the doctors who authorised the request for euthanasia or assisted suicide;

    16.3 the administering doctor who ended the life of the person or helped them to die;

    16.4 the various bodies named in the Bill.

17. Judicial review is thus highly unlikely for that reason alone.

18. In any event, New Zealand courts have stated that any such review even if conceptually possible would be extremely limited in scope.[13] Judges are very reluctant to review medical judgments made under statutory criteria. In *Wall v Livingstone* Woodhouse P stated in obiter:[14]

> "The Courts are ordinarily entitled in terms of the responsibilities under the Judicature Amendment Act to determine whether the statutory criteria under any legislation have been or will be met in particular cases. But if that principle is to be applied to this statutory scheme what will always be difficult will be to isolate underlying and strictly legal questions from what will be the heavy overlay of straight-out medical judgement; and then (if a case actually does arise) to discern an adequate evidentiary basis for an argument that the statutory criteria have not been honestly applied by the professional people involved".

19. The lack of any appeal or review process is particularly concerning given the immunity provisions in the draft EOLC Bill which are discussed further below that appear to have the general effect of removing *any* professional disciplinary oversight, effectively exempting medical professionals from the obligations set out in the Code of Health and Disability Consumers' Rights and the general obligations of competent practice.[15]

20. As such, based on previous cases there is very little likelihood of any form of judicial intervention whether by way of judicial review, injunction or otherwise. This is because the decision to declare a patient eligible for euthanasia or assisted suicide or to administer a lethal injection will always be based on some form of medical judgment and in many previous cases

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12 [1982] 1 NZLR 734 at 740, 54-55.

13 Ibid at 741. Cited in *Right to Life New Zealand Inc v The Abortion Supervisory Committee* [2012] NZSC 68, at 36.

14 Ibid at 741, 22-29.

15 Clause 26.

the courts have shown an extreme reluctance to second-guess the judgments of medical professionals.

A lame Health and Disability Commissioner

21. The EOLC Bill makes no reference to the role and powers of the Health and Disability Commissioner under the EAS regime. Effectively though, the Commissioner's role will be eliminated by the Bill because medical decision-making under the Bill is immunised (if it was not, it would be difficult to see how any doctor would want to be involved), and with that immunisation there is no accountability. The Health and Disability's role, if it is ever called upon by a complainant, will unlikely be availed of during the course of a euthanasia process and would more likely be engaged in an inquiry carried out long after the event. Any such inquiry would be severely hamstrung by the fact that it will centre on medical decision-making. Systemically, the question is raised as to how, during the course of any such inquiry, evidence of alleged wrongdoing would be obtained vis-à-vis actions and events between a person who is now dead and a doctor who undoubtedly will have a very heightened interest in consistently saying he/she acted diligently and professionally at every step.

22. Nor does the Bill address the proper role (if any) of the Coronial system as an oversight mechanism for conducting full and independent inquiries into any concerns that may be raised by the Review Committee.

A lame Police force – impact on police investigative and prosecutorial functions

23. The decriminalising impact of the clause 26 immunity on numerous acts that presently are criminal offences raises the question of how the New Zealand Police might practically investigate or prosecute a potential abuse of the legislation. By way of example, were the Police to receive a credible complaint that coercive pressure had been applied to a vulnerable person by a family member to request euthanasia or assisted suicide under the End of Life Choice Act, how could the Police intervene prior to death taking place to prevent what ordinarily would be an offence under s 179 Crimes Act? How could the Police investigate or prosecute after death had occurred? With the medicalisation of euthanasia and assisted suicide, how willing might the Police be to investigate doctors, family members or caregivers of patients to ascertain whether they had coerced them into requesting EAS? The Bill does not explicitly make it an offence for any person to coerce another into requesting euthanasia or assisted suicide. If coercing a person to undergo EAS is not a crime, how could it be investigated?

24. To have a complaint considered by the police, friends or family members would need significant evidence of serious misconduct on the part of someone involved in the process. Because of the restrictions outlined above (including the nature of record-keeping and the confidentiality of medical information), obtaining evidence of that kind would be very difficult and, in most cases, nearly impossible. To prosecute for any criminal charge, including murder or manslaughter, the police would need to have evidence of serious wrong-doing such as gross negligence, bad faith or murderous intent. In a situation in which the police had evidence of serious misconduct, it might be possible to obtain a search warrant to access the medical records of the deceased but this is unclear at present.

25. From a practical point of view, the Police may be very reluctant to intervene given the likely uncertainties there will be around the legal parameters of "assisted dying". Recently the Police were publicly criticised (and censured by the Independent Police Conduct Authority) for stopping attendees at a checkpoint outside a pro-euthanasia meeting. As a law enforcement

agency, the Police tend to be reluctant to involve themselves in "politically sensitive" issues, and that reluctance will likely be heightened in situations where once-criminal acts have been decriminalised and become standard medical practice. The passing of the End of Life Choice Bill into law could therefore lead to a chilling effect in terms of how the Police approach the issue.

Conclusion: Light-handed regulation

26. As outlined above, the procedures proposed in the End of Life Choice Bill represent a form of light-handed regulation in which only the most minimal forms of control and accountability are intended to operate. If enacted, this would create a bizarre anomaly in the law of New Zealand. If, for example, the police wish to search a property for evidence of a crime, they must apply for a search warrant unless there are exceptional circumstances. The search procedure requires the warrant to be authorised by a judicial officer and is subject to stringent legal requirements. If the correct process is not followed, serious consequences can ensue. By contrast, for a New Zealand citizen or resident to be deprived of their life under the EOLC Bill, no meaningful authorisation or approval would be required and no significant consequences could ensue in the event of error or wrongdoing. For a community to impose a very high level of protection for privacy and property rights, without providing adequate safeguards for the lives of those who are intended to enjoy those rights, would be a social absurdity. It would also represent a travesty of elementary New Zealand values.