IMPACT OF THE BILL ON MEDICAL PRACTITIONERS

1. The End of Life Choice Bill's sponsor, David Seymour, frequently cites polls to the effect that the majority of New Zealanders support the introduction of an "assisted dying" law. However, there are other polls which Mr Seymour neglects to mention, showing that the majority of New Zealand doctors - in particular those very doctors whose job it is to care for people in their dying on a daily basis - totally oppose the idea of intentionally ending their patient's lives. Over the past three-and-a-half years, polls of general practitioners have revealed that between 52 - 58% of New Zealand's general practitioners "totally" or "strongly" oppose euthanasia or assisted suicide.[1] In addition, a 2016 Australasian poll found that the overwhelming number (80.1%) of palliative care specialists and palliative general practitioners in Australia and New Zealand are totally opposed to euthanasia or assisted suicide and that only 2% of palliative care specialists would be willing to participate in these practices.[2]

2. In a submission to the Justice Select Committee, the Royal New Zealand College of General Practitioners (RNZCGP), the very regulatory body whose doctors will be on the front line of the Bill's proposed euthanasia and assisted suicide processes, stated that it does not endorse euthanasia or physician-assisted suicide, that general practitioners will not be able to detect coercion or pressure in all cases, and that wrongful deaths will result from the Bill.[3] The RNZCGP has also expressed concern over the impact of the Bill's conscientious objection clause on doctors.

3. In response, David Seymour has stated that doctors' personal opinions "carry no more weight than a plumber's".[4] As will be seen below, his End of Life Choice Bill effectively signals to New Zealand doctors that:

---

1 In **April 2018** a *New Zealand Doctor* magazine commissioned survey by Horizon Research reported its findings from a survey of 1,540 General Practitioners and registrars, for which 545 responded, and found that 52% of doctors totally opposed assisted dying if death was imminent, while 32% supported it. 56% opposed and 31% were in favour if the patient's condition was irreversible but death was not imminent. In **2017** the NZMJ published the findings of a survey of 969 New Zealand-registered doctors and nurses taken in October to November 2015. The survey found that 58% of doctors "strongly" or "mostly" disagreed (on a 5-point scale from 'strongly agree' to 'strongly disagree' or 'not sure') that assisted dying should be legalised in New Zealand, assuming provision of appropriate guidelines and protocols. In contrast 37% of doctors "strongly" or "mostly" agreed with legalising AD.
See https://www.parliament.nz/media/5372/assisted-dying-new-zealand-december-2018.pdf

2 A **2016 study** found very low support for legalising euthanasia (7.1%) and assisted dying (8.9%) among Australasian palliative care specialists and GPs with palliative care practice interests: 80.1% were opposed and 15.9% were undecided about euthanasia; 75.2% were opposed and 15.9% were undecided about assisted dying. The study also found that very few palliative care specialists were willing to participate in euthanasia (2%) or assisted dying (4.5%); see Sheahan L. 2016, "Exploring the interface between 'physician-assisted death' and palliative care: cross-sectional data from Australasian palliative care specialists", Internal Medicine Journal.

3 "The College also considers clause (h) where the medical practitioner is required to 'do his or her best to ensure that the person expresses his or her wish free from pressure' is problematic. **As one member wrote: "It will prove impossible to determine if a patient is 'free from coercion'. What criteria will doctors use to determine whether or not coercion exists? If patients request assisted death, there is no provision in the Bill as to what a doctor should do if she or he thinks that coercion is actually present. Coercion of patients will be impossible to discern in every request for assisted death. Doctors will not be 100% correct in their assessments of coercion. Wrongful deaths will be the result of this proposed new law."** Again, we question the practicalities of medical practitioners being able to consult with other health practitioners. In cases where some medical professionals and health professionals have a conscientious objection to euthanasia, in sharing their medical opinion they may feel complicit in the process of enabling euthanasia." Royal New Zealand College of General Practitioners, Submission to Justice Select Committee on End of Life Choice Bill, 6 March 2018, https://oldgp16.rnzcgp.org.nz/assets/2018-03-06-RNZCGP-submission-to-Justice-Committee-End-of-Life-Choice-Bill.pdf

4 Laura Walters "David Seymour open to change his euthanasia bill to stop objecting doctors being punished" *Stuff* (online ed, New Zealand, 19 June 2018).

3.1 they will all be forced to participate in the euthanasia and assisted suicide process, regardless of their conscientious or other objections (Clause 7 of the Bill);

3.2 those who refuse to participate will be prosecuted and imprisoned or fined up to $10,000 (Clause 27(1) of the Bill);

3.3 those who agree to participate will be given full civil and criminal immunity for their participation (Clause 26 of the Bill);

3.4 those who agree to participate will likely not be held accountable for any wrongdoing on their part (Clauses 20, 21 and 26 of the Bill).

Impact of Bill on the autonomy of the medical profession: the mandatory, prescriptive nature of the EAS process

4. Critical to the End of Life Choice Bill is the notion of personal "choice", reflected in its title and in its Explanatory Note which argues that it "allows people who so choose" to be euthanised or be assisted to commit suicide. The Act Party's “My Life, My Choice” campaign for the Bill principally focuses on this notion of self-autonomy, reflecting various arguments that were advanced over the "the principle of respect for individual autonomy" by the plaintiff in *Seales v Attorney General*.[5]

5. Little if any recognition is shown in the End of Life Choice Bill, however, to the individual autonomous choices of doctors in the exercise of their professional and ethical obligations. Any conscientious, ethical or clinical objections they may have are overridden by the Bill, as will be discussed below. The word “must” appears 70 times in the Bill, mostly in relation to doctors, in contrast to the word “may” which appears only 4 times (never in relation to doctors). Clauses 8–16 of the End of Life Choice Bill set out a mandatory, rigid process which “must” be followed by the first and second doctors in every case for every patient who asks for euthanasia or assisted suicide, once that patient has been found “eligible”. See for example clauses 10(2)(a)–(c) and 11(3)(c)(i)–(iii). Each step is carefully prescribed and the medical practitioner is obliged to move the person to the next step once the requirements set out in the EOLC Bill are met.

6. During the EAS process there is no flexibility for either the first, second or third doctor, or for the scheduling or administering doctors, to exercise their independent clinical judgement as to what they consider the patient’s best care might be, or to take appropriate interim steps, such as *instead* referring the patient to other specialists or support services (including mental health services), for undertaking more tests or assessment, or for seeking advice or input from a different specialist. In fact, doing so may constitute an offence under cl 27 of the End of Life Choice Bill by amounting to a "wilful failure" to comply with the mandatory steps that each doctor “must” take under cls 8–16.

---

[5] *Seales v Attorney General* [2015] NZHC 1239, [2015] 3 NZLR 556. The campaign launched in February 2018; <www.scoop.co.nz/stories/PA1802/S00159/mylifemychoice-campaign-goes-live.htm>

Impact of Bill on conscientious objectors

7. According to a 2017 study, some 58% of New Zealand doctors "strongly" or "mostly" disagree with legalising euthanasia or assisted suicide.[6] A considerable number of these may be opposed because of a conscientious objection.

8. The Bill defines a conscientious objection as: "an objection to doing anything authorised or required by this Act".[7] The Explanatory Note to the End of Life Choice Bill claims that conscientious objectors will be protected:[8]

> There will be those who remain opposed to assisted dying, including those who are opposed because of their personal views and religious or cultural beliefs. The Bill ensures that medical practitioners who are opposed to the practice are under no obligation to advise on or provide assisted dying.

9. This claim is false. In fact, **all** medical practitioners with a conscientious objection will be required to facilitate EAS regardless of their conscientious objection.[9] The requirement is initiated on two occasions:

   9.1 Initially it is triggered in the requirement that doctors holding a conscientious objection must refer a requesting patient to the SCENZ Group ("the referral requirement"). The referral requirement is engaged when the patient tells their attending medical practitioner that they wish "*to have the option of receiving [EAS]*".[10] Following that triggering event, any medical practitioner with conscientious objection *must* tell the patient that they have a conscientious objection *and* that the patient "*may ask the SCENZ Group for the name and contact details of a replacement medical practitioner*".[11]

   9.2 It will likely arise again when the "replacement practitioner"[12] appointed by the SCENZ Group to substitute the doctor holding a conscientious objection is required by cl 8(2)(h) to contact that doctor for assistance in determining whether their patient has expressed their wish free from coercion. The doctor holding a conscientious objection may very well be the requesting patient's own GP and could be the only person known to that patient who is permitted to share information with the replacement practitioner. Having just refused to assist the patient because of their conscientious objection, however, that doctor is hardly likely to become a willing assistant to the SCENZ replacement practitioner's determination of their patient's eligibility for EAS. Once again, that assistance would entail them becoming a part of the process of facilitating euthanasia or assisted suicide.

10. Any medical practitioner who, owing to a conscientious objection, wilfully fails to comply with the requirement to refer a person who requests euthanasia or assisted suicide to the SCENZ Group for assistance, could face a term of imprisonment of up to 3 months or a fine of up to $10,000.[13] In terms of its impact on conscientious objection, the Clause 27 offence provision

---

6 Pam Oliver, Michael Wilson, Phillipa Malpas: New Zealand doctors' and nurses' views on legalising assisted dying in New Zealand NZ Medical Journal, Volume 130 Number 1456 (2 June 2017)

7 EOLC Bill, cl 3.

8 EOLC Bill (explanatory note) at 2.

9 Clause 7.

10 Clause 7(1)(a).

11 Clause 7(2).

12 Clause 7(2)(b)

13 Clause 27.

(and any prosecution that could arise out of an objector doctor's refusal to refer a person who requests EAS) arguably is inconsistent with s 21 of the Human Rights Act 1993, which prohibits discrimination on the grounds of religious belief or ethical belief.

11. The referral requirement in the Bill goes further than analogous obligations on medical practitioners under s 32 of the Contraception, Sterilisation, and Abortion Act 1977 ("CSA Act"). In *Hallaghan and Anor v Medical Council of New Zealand*, the High Court found that requiring a medical practitioner with a conscientious objection to refer a patient requesting an abortion to a medical practitioner who would actually provide the service compromised that practitioner's conscience. Medical practitioners who have a conscientious objection under the CSA Act may refuse to refer a patient for assessment although they must advise the patient that they can obtain the service from another health practitioner or a family planning clinic.[14]

12. Nevertheless, the former Attorney General Chris Finlayson has opined that the End of Life Choice Bill appears to be "consistent" with the right to freedom of conscience in s 13 of the Bill of Rights Act. Although noting that cl 7 prima facie engages the right to freedom of conscience in s 13 of the Bill of Rights Act "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)", he concluded that this limitation on the right to freedom of conscience "is justified for the effective functioning of the regime for assisted dying" and in particular "is necessary to meet the objective of the Bill and is the most minimal impairment of the right possible".[15]

13. Former Prime Minister Bill English has remarked that the End of Life Choice Bill's conscientious objection clause is "repugnant and must be changed".[16] The President of the Royal New Zealand College of General Practitioners has also publicly stated that the Bill needs to be amended to remove any obligation on medical practitioners to participate in euthanasia or assisted suicide if they have conscientious objections. In response David Seymour has stated that doctors' personal opinions "carry no more weight than a plumber's".[17]

Clinical or other objections

14. While the definition of 'conscientious objection' in the End of Life Choice Bill is apparently broad, the concept of conscientious objection is usually linked to a general objection based on principled views held by the objector, that do not vary from case to case. The description in the Explanatory Note would also support this narrower interpretation.

15. Accordingly, the right of objection may not extend to excuse:

    15.1 medical practitioners who have clinical objections to taking a step under the Act, either generally or because of their judgment of the clinical needs of the patient in front of them;

---

14 *Hallaghan v Medical Council of New Zealand* HC Wellington CIV-2010-485-222, 2 December 2010 at [20].

15 Christopher Finlayson *Report of the Attorney-General under the New Zealand Bill of Rights Act 1990 on the End of Life Choice Bill* (4 August 2017) at [62]–[64].

16 Anna Whyte "'In this bill there are no consequences' – Sir Bill English speaks out against proposed euthanasia legislation, supporter Matt Vickers wants restrictions" *1 News Now* (online ed, New Zealand, 18 August 2018).

17 Laura Walters "David Seymour open to change his euthanasia bill to stop objecting doctors being punished" *Stuff* (online ed, New Zealand, 19 June 2018).

15.2 medical practitioners who have no conscientious objection to assisted suicide generally, but find themselves unwilling to assist, for example, a person who is depressed or intellectually disabled;

15.3 medical practitioners who step aside because of concerns about their own competency or experience to provide this service (either generally, or in relation to the particular patient);

15.4 medical practitioners who assess a person as competent and eligible under limited requirements of the Act, but have broader concerns over the person's capacity or the freedom of their decision.

16. If the rights of objection do not clearly extend to cover these and similar situations, the End of Life Choice Bill threatens to put many medical practitioners in an untenable position in terms of their professional obligations. As it presently reads the Bill provides no clarity around these issues, and so practitioners who find themselves engaged in what will be a highly contentious area will lack any certainty over the boundaries of their lawful rights of action.

17. Medical practitioners are also likely to find themselves in a compromised position when faced with the decision of whether to refer a patient with a terminal illness or a serious, irremediable medical condition who requests euthanasia or assisted suicide (or who merely expresses a desire to end their lives):

17.1 to secondary care mental health services (for treatment and alleviation of their suicidal ideation and risk), or

17.2 to the SCENZ Group (for assistance in accessing assisted suicide or euthanasia).

Conscientious objection and employment

18. The End of Life Choice Bill as drafted does not expressly address potential discrimination and employment issues arising from conscientious objection. As currently drafted, the interaction of the Bill with the regime under the Human Rights Act appears to create an anomalous situation where if a medical practitioner's objection is based on religious belief, it is likely they will be protected from adverse treatment in employment under the Human Rights Act 1993 (although not necessarily from prosecution under cl 27 of the End of Life Choice Bill).

19. However, if a medical practitioner's objection is based on other grounds – for example, clinical concerns, a lack of expertise in the area or ethical concern – it is unlikely that they will be similarly protected.

Impact of Bill on Medical Ethics

20. The End of Life Choice Bill's provision for euthanasia and assisted suicide engages the ethical obligations of New Zealand medical practitioners (and other health practitioners) in a way that is unique to these professions. Many of the relevant leading professional organisations of medical practitioners have expressed clear ethical and other objections to practitioner involvement in EAS, even if lawful.[18] This ethical position is different from, and more general,

[18] New Zealand Medical Association "End of Life Choice Bill: New Zealand Medical Association: Submission to the Justice Select Committee" at [4]; The Australian & New Zealand Society of Palliative Medicine *Position Statement: The Practice of Euthanasia and Physician Assisted Suicide* (31 March 2017) at [3]; Australian & New Zealand Society for Geriatric

than a practitioner's individual conscientious objection. These are statements by professional bodies that this practice is unethical and not part of proper professional practice. The validity of those concerns, particularly regarding the impact of a law change on medical practice, has recently been endorsed by the High Court of England and Wales.[19]

21. The End of Life Choice Bill in its current form authorises and requires medical practitioners to act contrary to this ethical position. While the Code of Health and Disability Consumer's Rights requires medical practitioners to comply with relevant ethical and professional standards, the Bill appears to grant them full immunity from any professional response.[20] Normally ethical and professional obligations are standards enforceable by a Professional Conduct Committee investigation or Tribunal disciplinary process.

22. The End of Life Choice Bill would thus effectively undermine the rights of these professional bodies to set and maintain their own professional standards.

Medicine *Euthanasia, Physician-Assisted Suicide and End of Life Care: Position Statement* (August 2014) at [18]; Palliative Care Nurses New Zealand Society Inc *Position statement on euthanasia and assisted dying* (September 2012) at 1; World Medical Association *WMA Declaration on Euthanasia* (April 2015); and World Medical Association *WMA Statement on Physician-Assisted Suicide* (April 2015).

19 *R (Conway) v Secretary of State for Justice* [2017] EWHC 2447, [2018] 2 All ER 250, at [63]–[76], [94] and [112].

20 Health and Disability Commissioner (Code of Health and Disability Services Consumers' Rights) Regulations 1996, sch 1 Right 4(2).