

## INCORRECT STATEMENTS IN EXPLANATORY NOTE TO BILL

1. The Explanatory Note to the EOLC Bill contains a number of incorrect or questionable statements regarding New Zealand law and *Seales v Attorney-General*.<sup>1</sup> *Seales* was argued and decided on points of statutory interpretation – the evidence before the court was strictly limited, and none of it was subjected to cross-examination. The Court did not reach any conclusions on the matters of fact asserted in the Explanatory Note.

2. The following statements in the Explanatory Note are incorrect:

**“[T]he risks can be managed and the law targeted to the small but significant group of competent adults who are not vulnerable”**

3. Although the Bill’s claimed purpose is to target euthanasia and assisted suicide to a “small” group of New Zealanders who are “not vulnerable”, its effect is far from that. Large numbers of vulnerable New Zealanders across a variety of illnesses and conditions will find themselves eligible for euthanasia or assisted suicide under Cl 4 of the Bill. The Bill makes no effort to define what a “vulnerable” or an “invulnerable” person is, let alone try to ensure that the many thousands of New Zealanders who are suffering from these illnesses or conditions and are living in situations of vulnerability are not forced by their circumstances to request EAS.

**“Evidence and developments have established that there are serious problems with the state of the law”**

4. New Zealand courts have expressed no concern with the current state of the law. On the contrary, the law is clear and has been applied by the courts in a long series of criminal cases without difficulty. Those cases include: <sup>2</sup>

NAME	YEAR	CHARGE	VERDICT	RELATION TO VICTIM	VICTIM'S CONDITION	SENTENCE
Roger Stead	1991	murder	manslaughter (s 171)	mother	severe depression	3.5 years' jail
Warren Ruscoe	1992	aiding & abetting suicide (s 179)	guilty	close friend	tetraplegia	1 year supervision
Janine Albury-Thomson	1998	murder	manslaughter	daughter (aged 17)	autism	18 months' imprisonment
John Karnon	1999	manslaughter	guilty	wife	shingles, psoriasis, tinitis and Parkinson's disease	2 years' supervision

<sup>1</sup> *Seales v Attorney General* [2015] NZHC 1239, [2015] 3 NZLR 556.

<sup>2</sup> Rex Ahdar *Killing me Softly: Should Euthanasia Be Legalised?* (Family First, 2014); references to statutory provisions are to the Crimes Act 1961.

Chris Simpson	2000	murder	manslaughter, on grounds of provocation	mother	bowel cancer	3 years' jail
Rex Law	2002	murder	guilty	wife (73)	Alzheimer's	18 months' jail with leave to apply for home detention
Louise Bell	2002	attempted murder (s 173)	guilty	friend	depression	1 year imprisonment
B	2003	murder	criminal proceeding stayed permanently	wife (78)	dementia and physically crippled with arthritis	criminal proceeding stayed permanently against 89 year-old, cancer-ridden defendant
W	2004	murder	acquittal of murder and manslaughter	daughter (5 months)	brain damaged	discharged without conviction
Lesley Martin	2004 2005	attempted murder	guilty	mother (69)	bowel cancer	15 months' imprisonment with leave to apply for home detention
Lloyd Faithfull	2008	attempted murder	guilty	wife	pancreatic cancer	home detention for period of 12 months
Ian Crutchley	2008	attempted murder	guilty	mother (77)	stomach cancer	6 months' community detention plus 150 hours community work
KJK	2010	aiding attempted suicide (s 179), and failing to provide necessaries of life (s 152(2))	guilty of aiding attempted suicide charge	son (15)	depression	18 months' supervision plus 200 hours' community work. Convicted and discharged re failure to provide necessaries
Sean Davison	2011	attempted murder	counselling and procuring attempted suicide (s 179a)	mother (85)	cancer	5 months' home detention
Evans James Mott	2012	assisting suicide (s 179b)	guilty	wife (55)	primary progressive multiple sclerosis	discharged without conviction

**The law is unclear as “under [the current state of our law] it is becoming permissible in effect for family members to assist loved ones to take their own lives”**

5. That scenario is not permissible, as the cases listed above demonstrate. New Zealand courts have been very clear in rejecting any suggestion that ‘mercy killings’ are to be treated as a separate category of offences, and they are prosecuted and judged in the same way as any other offence (see above table). The individual circumstances of the offender and the victim are then properly considered in the routine application of standard sentencing principles.
6. In terms of what is currently “permissible” in New Zealand, David Seymour has also been quoted as saying:<sup>3</sup>

“It is ok if a doctor [in NZ] intentionally ends your life by giving you too much morphine and claiming that's a double effect. All that is ok. All that happens without any regulatory safeguards whatsoever.”

7. Dr Sinead Donnelly, a Palliative Care Specialist, responded:

“It is unacceptable that such uninformed statements go unopposed.... We do not intentionally end the lives of our patients by giving too much morphine. There is no evidence that doctors are using morphine to kill patients in New Zealand. There are extensive safeguards in the training and practice of medicine.”

**“Analysis from overseas jurisdictions where assisted dying is permitted demonstrates that concerns, including concerns about the abuse of the vulnerable, have not materialised and that risks can be properly managed through appropriate legislative safeguards”**

8. The overwhelming evidence in *Seales*, and the breadth of both the literature and media analyses of the impact of euthanasia and assisted suicide laws in those jurisdictions that have implemented them (discussed above), are in fact to the opposite effect – international experts and reports on / from these jurisdictions themselves demonstrate very significant concerns with the operation of the overseas jurisdictions. The United Nations Human Rights Committee and the UN Committee on the Rights of Persons with Disabilities have also expressed strong concern over the impact on the disabled and the vulnerable in those countries where euthanasia is legal.<sup>4</sup> A series of court decisions from a range of jurisdictions also contradict this claim in the Explanatory Note.<sup>5</sup> Various legislative bodies have come to the same conclusion.<sup>6</sup> The UK Supreme Court in *Nicklinson* provides a helpful summary of the general position:<sup>7</sup>

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<sup>3</sup> Sinead Donnelly “Dr Sinead Donnelly: Palliative medicine uses morphine with care” *The New Zealand Herald* (online ed, New Zealand, 15 December 2017).

<sup>4</sup> United Nations Human Rights: Office of the High Commissioner “Committee on the Rights of Persons with Disabilities considers the initial report of Belgium” (19 September 2014) <[www.ohchr.org](http://www.ohchr.org)>.

<sup>5</sup> *Fleming v Ireland* [2013] IESC 19 (Ireland); *R (Nicklinson) v Ministry of Justice* [2014] UKSC 38, [2015] AC 657, at [172], [178]–[190] and [224]–[225]; see also *R (Conway) v Secretary of State for Justice*, above n 163; *Minister of Justice and Correctional Services v Estate of Stransham-Ford* [2016] ZASCA 197, 2017 (3) SA 152 (South Africa); *Morris v Brandenburg* 2015-NMCA-100 (NM Ct App 2015) (New Mexico); and *Myers v Schneiderman* 2017 NY Slip Op 6412 (NY 2017) (New York); contrast *Carter v Canada (Attorney-General)*, above n 236, at [105]–[109] where the Canadian Supreme Court declined to reconsider the evidence and relied on the analysis of the lower court – the lower court’s analysis and the evidence upon which it was based was reviewed by the High Court of Ireland in *Fleming* and by the UK Supreme Court in *Nicklinson* who both disagreed with the conclusion reached by the Canadian court, and confirmed that there was significant risk of harm.

<sup>6</sup> Similar conclusions have been expressed by the relevant parliamentary committees considering legislative proposals in Scotland, Health and Sport Committee *Stage 1 Report on Assisted Suicide (Scotland) Bill* 30 April 2015; and the UK, Select Committee on the Assisted Dying for the Terminally Ill Bill *Assisted Dying for the Terminally Ill Bill - First Report* (3 March 2005) (UK).

<sup>7</sup> *R (Nicklinson) v Minister of Justice* [2014] UKSC 38, [2015] AC 657, at [225]–[229]; see also at [255]–[256] (emphasis added).

“It is plain from the expert evidence ... that there is a diversity of opinion about the degree of risk in relaxing or qualifying the ban on assisted suicide, but not about its existence. **The risk exists and no one appears to regard it as insignificant.** There is a reputable body of experienced opinion which regards it as high. ... **The real question ... is how much risk to the vulnerable we are prepared to accept in this area in order to facilitate suicide by the invulnerable ...**”

9. In the Netherlands, 431 citizens were euthanized “without explicit request” in 2015, according to the government website “Statistics Netherlands”.<sup>8</sup> There, the euthanasia system has in recent years generated such levels of concern that the original architects and proponents of the Dutch euthanasia legislation, academics and doctors such as Professor Theo Boer and the prominent Dutch pro-euthanasia geriatric psychiatrist Boudewijn Chabot, have reversed their previous positions. Dr Boudewijn Chabot recently declared that “euthanasia practice is running amok” in the Netherlands.<sup>9</sup> Theo Boer, Professor of Health Care Ethics, one of the pioneers of Dutch euthanasia law, and a former member of one of five Regional Review Committees on Euthanasia (2005-2014) has also since reversed his position.<sup>10</sup>

**“The evidence considered in *Seales* and overseas studies show that, when assisted dying is permitted, the quality and uptake of palliative care increases and the doctor – patient relationship is positively enhanced”**

10. Expert evidence in the *Seales* case from leading palliative care experts in New Zealand and internationally was to the contrary (for example, Professor Montero described the integration of euthanasia into end of life care in Belgium as “disastrous”).<sup>11</sup> The evidence was that assisted suicide would irrevocably damage the doctor-patient relationship and significantly compromise palliative care in New Zealand.<sup>12</sup>

**“The state of the law in New Zealand is out of step ... with developments overseas”**

11. It is not clear which overseas “developments” the Explanatory Note is referring to. Possibly the statement is a reference to the Canadian parliament’s passing of an Act in June 2016 amending its criminal code in order to permit “medical assistance in dying”, following the Supreme Court of Canada’s ruling in *Carter v Canada (AG)* and the Court’s issuance of a 12-month suspended declaration of invalidity in order to give the government time to amend its criminal law.<sup>13</sup> However,

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<sup>8</sup> Centraal Bureau voor de Statistiek [Statistics Netherlands] Overledenen naar medische beslissing rond levensende,leeftijd,doodsoorzaak [Defendants to medical decision about end of life, age, cause of death] (24 May 2017) StatLine < <http://statline.cbs.nl/Statweb/publication/?DM=SLNL&PA=81655NED&D1=a&D2=a&D3=a&D4=l&VW=T> >.

<sup>9</sup> Boudewijn Chabot “Worrisome Culture Shift in the Context of Self-Selected Death” (19 June 2017) TrudoLemmens <<https://trudolemmens.wordpress.com>>.

<sup>10</sup> Alex Schadenberg “Dutch ethicist – ‘Assisted Suicide: Don’t Go There’” (16 July 2014) Euthanasia Prevention Coalition <<http://alexschadenberg.blogspot.com>>.

<sup>11</sup> Care Alliance “Submission of the Care Alliance Charitable Trust to the Justice Select Committee consideration of the End of Life Choice Bill” at [94]; *Seales v Attorney-General* HC Wellington CIV-2015-485-235, May 2015 (Affidavit of Professor Etienne Montero) at [86].

<sup>12</sup> *Seales v Attorney-General* HC Wellington CIV-2015-485-235, May 2015 (Affidavit of Roderick MacLeod) at [61]–[68].

<sup>13</sup> The Canadian law resulted from a ruling by the Supreme Court of Canada in *Carter v Canada (Attorney-General)*, above n 236, which stated that the law banning assisted suicide of terminally-ill patients was unconstitutional and a violation of s 7 of the Canadian Charter of Rights and Freedoms. The ruling in *Carter*, however, resulted from a legal construction that is peculiar to Canada’s own constitutional regime. Commenting on the *Carter* decision, the New Zealand Human Rights Commission in its *Submission to the Health Select Committee in Relation to its Investigation into End of Life Matters* (29 January 2016) at 19, has noted that the New Zealand Bill of Rights Act 1990 differs from the Charter of Rights and Freedoms, Part 1 of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11. The submission noted one crucial difference at [19]:

“... it is important to emphasise that there is a crucial distinction between the framing of the right to life under the Canadian Charter of Rights and the NZBORA. Section 7 of the Canadian Charter includes the rights to liberty and security of the person, alongside the right to life. These concepts are missing from s 8 of the NZBORA. Protection of the individual’s right to liberty and personal security were decisive factors in the Court’s judgment in *Carter*.”

The HRC also stated at [4]:

“The Commission notes that the New Zealand Bill of Rights Act 1990 (NZBORA) does not specifically include the core human rights principles of dignity, personal autonomy or the liberty and security of the person as free-standing rights. This stands

proposals to legalise assisted suicide/ euthanasia have been recently considered and rejected by the UK Parliament,<sup>14</sup> the Scottish Parliament,<sup>15</sup> and the Portuguese Parliament,<sup>16</sup> and cases similar to Ms Seales' have been rejected by the Irish courts,<sup>17</sup> the UK Supreme Court<sup>18</sup> and the European Court of Human Rights.<sup>19</sup> With the exception of Victoria<sup>20</sup> (and for a brief time in 1996, Northern Territory) nearly 50 euthanasia and assisted suicide bills have been rejected across Australia over the last few decades.<sup>21</sup> Since 1994, there have been 269 legislative attempts to legalise assisted suicide in 39 states across the United States. With the exception of only 8 jurisdictions that have legalised assisted suicide, all have failed.<sup>22</sup> Euthanasia remains illegal in every state in the US.<sup>23</sup>

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in contrast with some overseas jurisdictions. This position is particularly relevant to consideration of end of life matters but also has broader application. The Commission recommends that the Committee consider whether the current form of the NZBORA adequately engages the human rights issues that arise from end of life matters”.

<sup>14</sup> Rowena Mason “Assisted dying bill overwhelmingly rejected by MPs” *The Guardian* (online ed, United Kingdom, 12 September 2015).

<sup>15</sup> Libby Brooks “Scottish parliament rejects assisted dying law” *The Guardian* (online ed, United Kingdom, 27 May 2015).

<sup>16</sup> “Portugal parliament rejects euthanasia decriminalisation” *BBC* (online ed, United Kingdom, 29 May 2018).

<sup>17</sup> Mary Carolan “Marie Fleming appeal on assisted suicide rejected” *The Irish Times* (online ed, Ireland, 29 April 2014); and *Fleming v Ireland* [2013] IESC 19 (Ireland, at [166]).

<sup>18</sup> John Bingham “Supreme Court rejects right to die bid but challenges Parliament to review law” *The Telegraph* (online ed, United Kingdom, 25 June 2014); and *R (Nicklinson) v Ministry of Justice* above n 5 at [149], [195], [206], [257], [289], [293], [298] and [366].

<sup>19</sup> See *AFFAIRE HAAS c. SUISSE (Haas v Switzerland)*, Application No. 31322/07, 20 January 2011). See also “Right-to-die campaigners' case rejected in Europe” *BBC* (online ed, United Kingdom, 16 July 2015).

<sup>20</sup> Jean Edwards “Euthanasia: Victoria becomes the first Australian state to legalise voluntary assisted dying” *ABC* (online ed, Australia, 29 November 2017).

<sup>21</sup> G Alcorn, Crossing the threshold: how Victoria's assisted dying law finally made history, *The Guardian*, 23 November 2017.

<sup>22</sup> Assisted dying bills in the US have either been defeated, tabled for the session, withdrawn by sponsors, or have languished with no action taken; see “Attempts to Legalize Euthanasia/Assisted-Suicide in the United States”, Patient Rights Council, <[www.patientsrightscouncil.org/site/failed-attempts-usa/](http://www.patientsrightscouncil.org/site/failed-attempts-usa/)>

<sup>23</sup> CNN Library “Physician-Assisted Suicide Fast Facts” *CNN* (online ed, United States, 13 August 2018).