

# ACPNS LEGAL CASE REPORTS SERIES

This series compiles short summaries of significant cases involving charitable, philanthropic, nonprofit and social enterprise organisations in Australia and overseas.



## HOSPICE NEW ZEALAND V ATTORNEY-GENERAL [2020] NZHC 1356

**High Court of New Zealand, Mallon J, 16 June 2020**

Nonprofit hospice peak body sought declarations about the statutory meaning of parts of an Act concerning end of life issues passed by Parliament (but not yet in force) that will be put to electors in a general referendum for approval

**Key words:** Intervener, New Zealand, Voluntary Euthanasia, End of Life, *End of Life Choice Act 2019*, Declaration.

1. As in other liberal democracies, there have been several attempts to introduce legislation to legalise voluntary euthanasia in recent decades in New Zealand. In 2015, in the case of *Seales v Attorney-General* [2015] 3 NZLR 556, a terminally ill lawyer sought court approval for her doctor to be able to either administer to her, or provide her with, medication to enable her to end her life by herself. This triggered renewed interest in the topic and culminated in the *End of Life Choice Act 2019* being passed by Parliament. It is not yet in force.
2. If the Act comes into force, it will give persons who have a terminal illness, and meet certain other criteria, the option of lawfully requesting medical assistance to end their lives, and will establish a lawful process for assisting eligible persons to exercise that option. The assistance will be provided by health practitioners and it will be an offence for a health practitioner to wilfully fail to comply with any requirement on them under the Act. However, health practitioners will not be under any obligation to assist if they have a conscientious objection.
3. Whether the Act is to come into force is to be determined by a majority of electors voting in a referendum. The question that will be put to electors in the referendum will be: “Do you support the *End of Life Choice Act 2019* coming into force?”. Electors will be given two options to choose between:
  - (a) “Yes, I support the *End of Life Choice Act 2019* coming into force”; or
  - (b) “No, I do not support the *End of Life Choice Act 2019* coming into force”.
4. If a majority of voters chooses the first option, the Act will come into force 12 months after the date on which the official result of the referendum is declared.
5. Hospice New Zealand (Hospice NZ) applied for declarations intended to clarify the scope of the conscientious objection rights provided by the Act. It argued that it is important that electors be clear as to what they are voting

for and that declarations will allow it and its member organisations to understand the implications of the Act and in turn permit them, and the public at large, to fully engage in the public debate on the referendum question.

6. The Attorney-General appeared representing the public interest, with a neutral stance on the propriety of assisted dying. He argued that the court should not issue declaratory orders because the court should be cautious about its proper role in the constitutionally unique circumstances of the case, the questions posed were hypothetical and without the full factual context.
7. Palliative Care Nurses New Zealand Incorporated and the Australian and New Zealand Society of Palliative Medicine Limited appeared as interveners. The proceedings were not served on any pro-euthanasia organisations.

### *Jurisdiction*

8. The court found that the *Declaratory Judgments Act 1908* confers a broad right to seek the court's assistance on the meaning of the statute in anticipation of any event or act, but it is discretionary. The court agreed to hear the matter because the Parliamentary process was at an end, and the parties had a genuine interest in understanding the legislation. The court would not express a political opinion, but the public should be informed of what the Act means as a matter of law where confusion has arisen.

### *The Questions*

9. The questions before the Court were:

Question 1: A declaration that, if the *End of Life Choice Act 2019* comes into force, either:

- a) it will be lawful for an organisation such as a hospice to conscientiously object on valid grounds to Assisted Dying and to operate a 'euthanasia-free' service, explicitly promising patients and their families and whānau that it will not provide any of the services set out in the Act, without exposing their practitioners to criminal prosecution; or
- b) it will be unlawful for an organisation such as a hospice to conscientiously object on valid grounds to Assisted Dying and to operate a 'euthanasia-free' service, explicitly promising patients and their families and whānau that it not provide any of the services set out in the Act, and / or organisations that do so will thereby expose their practitioners to criminal prosecution.

10. Question 2: If the answer to question 1 is (a), a declaration that either:

- a) it will be unlawful for a DHB or other funding agency to decline to fund or contract with that organisation for the services it does provide, unless it also provides Assisted Dying services; or
- b) it will be lawful for a DHB or other funding agency to decline to fund or contract with that organisation for the services it does provide, unless it also provides Assisted Dying services.

11. Question 3: A declaration that, if the *End of Life Choice Act 2019* comes into force, either:

- a) the mandatory obligations on a health practitioner who receives a request for Assisted Dying services override the ethical, clinical or professional judgments of a practitioner and their obligations under the

Code of Health and Disability Consumers' Rights in relation to that patient, such that a practitioner who refuses to undertake a task or process mandated by the *End of Life Choice Act* based on their assessment that it conflicts with one or more of those judgements and obligations acts unlawfully and may be liable to prosecution under s 39 of the Act; or

- b) the mandatory obligations on a health practitioner who receives a request for Assisted Dying services do not override the ethical, clinical or professional judgments of a practitioner and their obligations under the Code of Health and Disability Consumers' Rights in relation to that patient, such that a practitioner who refuses to undertake a task or process mandated by the *End of Life Choice Act* based on their assessment that it conflicts with one or more of those judgements and obligations acts lawfully and will not be liable to prosecution under s 39 of the Act.

12. Question 4: Following on from question 3, declarations as to whether a refusal by a health practitioner to undertake a task or process mandated by the *End of Life Choice Act* for each of the following reasons would or would not be lawful. The reasons are where the practitioner:

- a) considers that they are not competent due to their specialisation or experience to undertake a task required under the Act; or
- b) considers that they have insufficient information or familiarity with the requesting person to competently undertake a task required under the Act; or
- c) has concerns about the patient's level of competence to provide informed consent, even though the patient meets the threshold prescribed in s 6 of the Act; or
- d) has concerns about the level of freedom of choice being exercised by the requesting person, where such concerns fall short of the threshold prescribed in s 24 of the Act; or
- e) forms a clinical judgement that Assisted Dying is not the best option for the patient at the time; or
- f) for any other reason, believes that they are unable to undertake the task in a way that does not conflict with their ethical, clinical or professional judgments or their obligations under the Code of Health and Disability Consumers' Rights.

### *Decision*

13. The court was unable to make the declarations as posed because they involved hypotheticals, without sufficiently certain factual bases to answer them in the form in which they are asked, or which will depend on the particular circumstances that may give rise to the concerns the questions posed seek to address in advance. However, there were some matters of statutory interpretation that are not fact-dependent, and on these, the court concluded that (at [214]):

The *End of Life Choice Act* does not require hospices or other organisations to provide assisted dying services. They are entitled to choose not to provide these services. This does not depend on a hospice or other organisation having a conscientious objection, although that may often be the reason, and allowing hospices or other organisations not to offer assisted dying services is consistent with the right to freedom of conscience under s 13 of NZBORA.

Hospices or other organisations that choose not to offer assisted dying services may employ or engage health practitioners on the basis that these services are not provided by the hospices or organisations, but it will also be necessary to have arrangements for how health practitioners can comply with their objections under the *End of Life Choice Act* if a request is made of them by a person in the hospice or organisation's care.

The End of Life Choice Act does not exclude the operation of the Code, except to the extent that it is expressly overridden by the Act or cannot apply alongside the requirements of the Act.

The *End of Life Choice Act* does not exclude the professional obligations of health practitioners as set by the Medical Council and the Nursing Council. Health practitioners required to take steps under the *End of Life Choice Act* may only do so if they have the competence to do so in accordance with their professional standards. "[T]he attending medical practitioner" is the patient's medical practitioner, whose scope of practice permits them to provide the services required of them under the Act and who has the necessary competence to provide those services.

The right to conscientiously object encompasses its usual meaning in medical practice. It will encompass when a doctor or nurse holds a deeply felt belief that it is wrong for them to provide the assistance for personal, moral reasons, internal to them.

## IMPLICATIONS



The model of passing an Act and having a national referendum on it appears to be a helpful way to let citizens have a direct say on legislation that may be socially controversial.

The ability of nonprofit organisations to seek the assistance of the court to expound on the statutory meaning of the Act's provisions also appears to be helpful, both for the organisations, their front line members and the general public in their voting deliberations. As the Attorney General was at pains to point out to the court, this is not without dangers of entering into the political sphere or providing guidance on hypothetical matters that a later court faced with the situation may decide differently on the facts.

## VIEW THE CASE



This case may be viewed at <http://www.nzlii.org/nz/cases/NZHC/2020/1356.html>

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