

Inquiry into End of Life Choices
Legal and Social Issues
Committee
Parliament of Victoria

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Core arguments

- 1. Human rights are a relevant framework for addressing the issues under the Committee's Terms of Reference concerning end of life choices
- 2. A proper application of a rights based approach favours amendment of the law to allow for assisted suicide in certain circumstances

1. The relevance of Human Rights

- (a) International obligations
 - Covenant on Civil and Political Rights
 - Convention on the Rights of Persons with Disabilities
- (b) Victorian Charter of Human Rights and Responsibilities Act
- Consider –
 - legal; moral and instrumental significance

2. The application of a rights based approach

2 stages

- (a) Which rights are engaged or subject to interference?
- (b) Can the interference be justified?

(a) The rights engaged

Rights Engaged	
Life	Art 9 Vic Charter Every person has the right to life and has the right not to be <i>arbitrarily</i> deprived of life
Privacy	Art 13 Vic Charter A person has the right (a) not to have his or her privacy, ... unlawfully or arbitrarily interfered with
<i>Inhuman and degrading treatment</i>	Art 10 Vic Charter A person has the right not to be ... (c) subjected to medical or scientific experimentation or treatment without his or her full, free and informed consent

(b) Can the interference be justified?

- Rights aren't absolute eg: life can be taken if not *arbitrary* but what does this mean?
- Justification a complex issue under Vic Charter and concerns relationship with s 7(2)
- Simple approach:
 - Does the interference pursue a legitimate aim?
 - If so, are the measures used to pursue the aim proportionate?

(i) Legitimacy of aim

- Crimes Act s 6B(2)(b) Any person who
- (b) aids or abets any other person in the commission of suicide or in an attempt to commit suicide—
- shall be guilty of an indictable offence and liable to level 6 imprisonment (5 years maximum)
- Aim = NOT preservation of life BUT protection of vulnerable persons: see *Carter v AG Canada*

(ii) Is absolute prohibition necessary to achieve aim?

- European Court of Human Rights
 - Issue falls within a state's margin of appreciation: *Nicklinson v UK* (ECHR) (2015)
- UK Courts
 - Issue to be determined by Parliament BUT strong views that not proportionate: *Nicklinson V Ministry of Justice* [2014] UKSC 38
- Canadian Court
 - Rational connection BUT overbreadth: *Carter v. Canada (Attorney General)* [2015] 1 S.C.R. 331

Carter – on the risk of a slippery slope

In the trial judge's view, an absolute prohibition would have been necessary *if* the evidence showed that physicians were unable to reliably assess competence, voluntariness, and non-ambivalence in patients; that physicians fail to understand or apply the informed consent requirement for medical treatment; or if the evidence from permissive jurisdictions showed abuse of patients, carelessness, callousness, or a slippery slope, leading to the casual termination of life. ...The trial judge, however, expressly rejected these possibilities [paras 104-105]

Carter – the test

- The appropriate remedy is therefore a declaration that s. 241(b) and s. 14 of the *Criminal Code* are void insofar as they prohibit physician-assisted death for a competent adult person who (1) clearly *consents* to the termination of life; and (2) has a *grievous and irremediable medical condition* (including an illness, disease or disability) that causes enduring suffering that is intolerable to the individual in the circumstances of his or her condition. “Irremediable”, it should be added, does not require the patient to undertake treatments that are not acceptable to the individual. [para 127]

Lady Hale (dissent) - UKSC

- That problem is certainly enough to justify a *general* ban on assisting suicide. But it is difficult to accept that it is sufficient to justify a *universal* ban, a ban which forces people like Mr Nicklinson, Mr Lamb and Martin to stay alive, not for the sake of protecting themselves, *but for the sake of protecting other people*. In *Pretty*, the Strasbourg court rejected the argument that Mrs Pretty was suffering inhuman and degrading treatment contrary to article 3. *But no-one who has read the appellants' accounts of their lives and their feelings can doubt that they experience the law's insistence that they stay alive for the sake of others as a form of cruelty.* [para 313]

Lady Hale's test

- It would not be beyond the wit of a legal system to devise a process for identifying those people, those few people, who should be allowed help to end their own lives. There would be four essential requirements. They would firstly have to have the **capacity** to make the decision for themselves. They would secondly have to have reached the decision freely without **undue influence** from any quarter. They would thirdly have had to reach it with **full knowledge** of their situation, the options available to them, and the consequences of their decision: that is not the same, as Dame Elizabeth pointed out in *Re B (Treatment)*, as having first-hand experience of those options. And they would fourthly have to be **unable**, because of physical incapacity or frailty, to put that decision into effect without some help from others. [para 314]

So the 'proper' application of a RBA

- Accept a general ban
- Allow for exceptions where:
 - (a) consent (no coercion; fully informed etc)
 - [(b) irremediable medical condition];
 - (c) unable to end life without assistance
- Strikes appropriate balance between need to protect vulnerable persons and need respect autonomy and rights of those suffering with irremediable medical conditions