



LEGISLATION DESIGN AND ADVISORY COMMITTEE

6 March 2018

Raymond Huo MP
Justice Committee
Parliament Buildings
Wellington

Dear Mr Huo

End of Life Choice Bill

1. The Legislation Design and Advisory Committee (LDAC) was established by the Attorney-General in June 2015 to improve the quality and effectiveness of legislation. LDAC provides advice on design, framework, constitutional and public law issues arising out of legislative proposals. It is responsible for the LAC Guidelines (2014 edition), which have been adopted by Cabinet.
2. In particular, LDAC's terms of reference include these dual roles:
 - a. providing advice to departments in the initial stages of developing legislation when legislative proposals are being prepared; and
 - b. through its External Subcommittee, scrutinising and making representations to the appropriate body or person on aspects of bills that raise matters of particular public law concern.
3. The External Subcommittee of LDAC referred to in paragraph 2b above is comprised of independent advisers, from outside Government, who have been appointed by the Attorney-General. Under LDAC's mandate, that External Subcommittee is empowered to review and make submissions on those bills that were not reviewed by LDAC prior to their introduction.¹
4. The End of Life Choice Bill is a Member's Bill so was not referred to LDAC prior to introduction. The External Subcommittee has therefore reviewed it, and desires to make the attached submission.
5. Thank you for taking the time to consider the Subcommittee's submission.

¹ Legislation bids identify whether Bills will be referred to LDAC for design advice before introduction. This is determined when Cabinet settles the Legislation Programme. Generally, significant or complicated legislative proposals are referred to LDAC before introduction. Other legislative proposals with basic framework/design issues, matters relating to instrument choice, issues relating to consistency with fundamental legal and constitutional principles, matters under the LAC Guidelines, or with the ability to impact the coherence of the statute book may also be suitable for referral to LDAC.

Yours sincerely

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Paul Rishworth QC

Chairperson

Legislation Design and Advisory Committee



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Introduction

1. The Legislation Design and Advisory External Subcommittee (the Subcommittee) has been given a mandate by Cabinet to review introduced Bills against the LAC Guidelines on Process and Content of Legislation (2014 edition) (the Guidelines). The Guidelines have been adopted by Cabinet as the government's key point of reference for assessing whether draft legislation is well designed and accords with fundamental legal and constitutional principles. Our focus is not on policy, but rather on legislative design and the consistency of a Bill with fundamental legal and constitutional principles.
2. This submission focuses on the elements of the End of Life Choice Bill that appear to be inconsistent with the Guidelines. In doing so, this submission adopts the relevant aspects of the submission made by Associate Professor Colin Gavaghan and Professor Andrew Geddis. Professor Geddis is a member of the Subcommittee.

Relationship between the Bill and existing law

3. As the Guidelines make clear, new legislation does not operate in a vacuum, and it is important to consider how the legislation interacts with existing law in order to ensure that a coherent and effective legal framework is maintained.² In this regard, we share the concerns of Gavaghan and Geddis about clauses 25 and 26 of the Bill. The following substantially reproduces their submission on this point.
4. Clauses 25 and 26 seek to carve out an exception for assisted dying from the general provisions and application of the Crimes Act 1961 (as well as any other potentially applicable law).

² LAC Guidelines (2014 edition) at chp 2.

5. Clause 25 states that:

A person who dies as a result of the provision of assisted dying is taken for all purposes to have died as if assisted dying had not been provided.

6. Clause 26 states that:

A person is immune from liability in civil or criminal proceedings for acts or omissions in good faith and without negligence in providing or intending to provide assisted dying.

7. These provisions do not sit easily with existing law in this area.

8. The immunity provision in clause 26 purports to exclude a person from liability for actions which still remain offences under the Crimes Act 1961. Consequently:

- a. A medical practitioner who provides medication for a person to self-administer (pursuant to clause 16(4)(a)) continues to commit the offence of assisting suicide;
- b. A medical practitioner who directly administers medication to a person (pursuant to clause 16(4)(b)) continues to commit the offence of murder.

The effect of clause 26 is that they cannot then be prosecuted or sanctioned for committing this offence.

9. There are a number of problems both with this general approach and its specific application in this Bill.

10. First, the immunity in clause 26 only appears to apply to those who “provide or intend to provide assisted dying”. Persons who aid a medical practitioner in the provision of assisted dying – nurses, pharmacists, etc – do not appear to benefit from the immunity and could therefore in theory remain liable as parties to the relevant offence.

11. Second, this statutory immunity is lost if a person is “negligen[t] in providing or intending to provide assisted dying”. Imposing criminal liability on the basis of “negligence” is very unusual—especially when the potential criminal consequences are extremely serious.

12. However, complicating matters is the effect of clause 25. It states that a person who dies as a result of receiving assisted dying is deemed for all purposes not to have died as the result of assisted dying. So, a person who negligently provides assisted dying loses his or her immunity under clause 26 ... but by virtue of clause 25, appears not to be the cause of the person’s death.

13. Third, under the Crimes Act 1961, section 41:

Every one is justified in using such force as may be reasonably necessary in order to prevent the commission of suicide ... or in order to prevent any act being done which he or she believes, on reasonable grounds, would, if committed, amount to suicide

14. Given the interpretation of “suicide” in *Seales v Attorney General* [2015] NZHC 1239 (*Seales*), this provision would appear to continue to apply in relation to persons seeking assisted dying—any person would have a defence in law for using “such force as may be reasonably necessary” to stop them from doing so.
15. Fourth, under the Crimes Act 1961, section 179, it will remain an offence to “incite[], counsel[], or procure[]” suicide. Given the interpretation of “suicide” in *Seales*, this provision would appear to continue to apply in relation to persons who discuss assisted dying with others. It is not clear how it might then affect, for instance, situations where a family member supports a decision by a relative to seek assisted dying.
16. We **recommend** that the Committee adopt the approach taken in Canadian legislation of amending relevant portions of the Crimes Act 1961 (and any other relevant statutes) to specifically exclude actions taken in respect of assisted dying from criminal liability. The Crimes Act 1961 also should be amended to state that assisted dying is not “suicide”. However, the Committee may wish to consider whether a special criminal offence should be created to cover the case of a person intentionally causing another person to request assisted dying against her or his will.

Additional concern regarding clause 26

17. We are also concerned about the vague language used in clause 26. It is important that legislation precisely articulates criminal offences and any carve outs from them.³
18. Clause 26 is unusual in referring to “providing or *intending* to provide” assisted dying. We assume the provision is designed to create an immunity for those who *attempt* to provide assisted dying. However, the use of the word “intending” could suggest that the clause is setting out an immunity for those who form an intention to provide assisted dying, but do not take any physical steps to execute the intention. We consider this ambiguity is another reason for adopting the approach recommended in para 16, instead of that proposed in the Bill.

Conclusion

19. Thank you for considering our submission. We do not wish to be heard.

³ Ibid at chp 21.1.

Yours sincerely

A handwritten signature in black ink, appearing to read 'G McLay', written in a cursive style.

Prof Geoff McLay

Chairperson

Legislation Design and Advisory External Subcommittee
