

# PROHIBITING HEALTH PRACTITIONERS FROM INITIATING ANY DISCUSSION ABOUT ASSISTED DYING:

## A RIGHTS-BASED ANALYSIS

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# OVERVIEW

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- I. End of Life Choice Act 2019: prohibition on initiating AD
- II. State regulation of clinician speech (therapeutic relationship)
- III. New Zealand Bill of Rights Act, right to freedom of expression (s 14)
- IV. Conclusion: a justified limitation on the right?

# END OF LIFE CHOICE ACT 2019

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## Eligibility, s 5

**A person who is eligible for assisted dying is a person who—**

- is aged 18 years or over; & is a NZ citizen / permanent resident; &
- suffers from a **terminal** illness that is **likely to end the person's life within 6 months**; &
- is in an **advanced state of irreversible decline in physical** capability; &
- experiences **unbearable suffering** that cannot be relieved in a manner that the person considers tolerable; &
- is **competent** to make an informed decision ...



# END OF LIFE CHOICE ACT 2019

## 10 Assisted dying must not be initiated by health practitioner

- (1) A **health practitioner** who provides **any health service** to a person **must not**, in the course of providing that service to the person,—
  - (a) **initiate any discussion** with the person that, in substance, is about AD under this Act; or
  - (b) **make any suggestion** to the person that in substance, is a suggestion that the person exercise the option of receiving AD under this Act.



## GENERAL CRITIQUE: s 10

### **Principles-based:**

- contrary to professional, ethical & legal principles (information regarding end of life options);
- presumes health literacy & knowledge of AD;
- risks inequitable outcomes.

### **Practice-based:**

- challenge in practice



# NEW ZEALAND BILL OF RIGHTS ACT 1990

## 14. Freedom of expression

Everyone has the right to **freedom of expression**, including the **freedom to seek, receive, & impart information** and opinions of any kind in any form.

**NZBORA** engaged when:

- HP speech is '**compelled**' by the state;
- HP speech is '**prohibited**' by the state (EOLC Act).



# NZ Bill of Rights Act 1990

If HP speech is '**prohibited**' by the state it may:

- engage the right to freedom of expression of HP; **AND** may also
- engage the right of **OTHERS** [patients] to seek & receive information

*Moncrief-Spittle v Regional Facilities Auckland Ltd* [2022] NZSC 138 at [67]-[74] &  
*NZ Health Professionals Alliance v Attorney General* [2021] NZHC 2510.



# AUTHORITY OF STATE TO REGULATE

## Obligation on Government:

- to regulate health care professions in the interests of public health;
- establish a legal framework that promotes competent, safe, qualified HP (Health Practitioner's Competence Assurance Act 2003);

## Regulatory Authorities established under HPCAA

- **'public' speech by a HCP - contrary to mainstream medical views:**
  - *Canaday v Medical Council of NZ* [2022] NZDC 443
- **'public' speech by a HCP – misinformation. highly offensive (facebook)**
  - *Turner v Nursing Council of NZ* [2025] NZHC 134

## CONCEPTUAL BASIS OF ARGUMENT

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professional speech  
in the context of a  
therapeutic  
relationship

**‘Professional speech’ means  
speech conveying ...**

*‘accurate, reliable and comprehensive  
advice that corresponds to the insights  
of their knowledge community’*

Claudia E Haupt “The Limits of Professional  
Speech” (2018) Yale Law Journal Forum 185 at 199

# JUSTIFIED LIMIT ON THE RIGHT?

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## New Zealand Bill of Rights Act

### 5 Justified limitations

Subject to s 4, the rights and freedoms in this BOR Act may be subject **only** to such **reasonable limits prescribed by law** as can be **demonstrably justified** in a **free and democratic society**

# METHODOLOGY:

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reasonable limit  
demonstrably justified in a  
free & democratic society?  
*R v Hansen* [2007] NZSC 7

## 1. Importance of the objective:

does the (rights limiting) provision serve a purpose sufficiently important to warrant overriding the protected right – i.e. it responds to pressing and substantial societal concerns?

## 2. Is the means used reasonable and demonstrably justified:

- (i) is the limit rationally connected to the objective (i.e. it is fair, not arbitrary)?
- (ii) does the limit [s 10] impair the right - FOE as little as possible?
- (iii) is the limit proportionate to the objective?

## PROPORTIONALITY

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When Parliament introduces new laws limiting NZBORA rights ...

‘a sledgehammer should not be used to crack a nut’

*R v Hansen (Tipping J)*

BUT ...



- EOL discussions require sensitivity & skill –
- partial prohibition?

# QUESTIONS?

## **Regulating Clinician Speech in Assisted Dying: Using a Sledgehammer to Crack a Nut?**

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