

## ARTICLE

**The Person Who Really Loves Me  
Will Be the One Who Helps Me Die:  
A Critique of *Seales v Attorney-General***

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Euthanasia is a deeply personal and multifaceted topic that has become increasingly relevant in contemporary society. New Zealand's stance on the practice of assisted dying was unsuccessfully challenged in the 2015 decision of *Seales v Attorney-General*. This article critically evaluates the foundations of that decision, applying the *R v Hansen* majority test for interpreting legislation that appears inconsistent with the New Zealand Bill of Rights Act 1990. It is contended that the right to life bears a broad meaning capable of including a right to die. Furthermore, Parliament's objective when it chose to criminalise assisted suicide can be achieved by regulating euthanasia and an alternative reading is—at a stretch—tenable.

This article argues that the criminalisation of assisted suicide is inconsistent with the right to life. Therefore, the Judge should have at least granted a declaration of inconsistency and could have perhaps even interpreted the Crimes Act 1961 to exclude euthanasia from the scope of suicide, as argued by Seales. Although lacking in legal significance, the decision's enduring importance lies in provoking discussion and potential reform. *Seales* should not be the end of the story but the catalyst for a wider social conversation.

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## I Introduction

I sincerely believe that those who come after us will wonder why on earth we kept a human being alive against his own will, when all the dignity, beauty and meaning of life had vanished ... I, for one, would be willing to give a patient the Holy Communion and stay with him while a doctor, whose responsibility I should thus share, allowed him to lay down his useless body and pass in dignity and peace into the next phase of being.

— Leslie Weatherhead<sup>1</sup>

The law is frequently called upon to grapple with challenging questions of what is right and what is wrong. The age-old debate of whether euthanasia should be permitted is particularly pertinent in light of technological developments enabling the extension of patients' lives and a greater recognition of autonomy in contemporary medicine.

I am not certain where I presently stand on this issue and this article does not take a conclusive side in the moral debate. Instead, this article discusses the reasoning of Collins J in *Seales v Attorney-General*, a recent New Zealand High Court judgment.<sup>2</sup> Ms Seales, a terminally ill Wellington lawyer, unsuccessfully sought two sets of declarations. First, she sought a declaration that her doctor would not be acting unlawfully in assisting her death. Secondly, in the alternative, she sought a declaration that the provisions in the Crimes Act 1961 governing murder and assisted suicide were inconsistent with the New Zealand Bill of Rights Act 1990 (BORA). *Seales* followed in the footsteps of overseas cases where individuals argued along similar lines that domestic laws prohibiting euthanasia breached their human rights.<sup>3</sup>

This article will focus on the alleged inconsistency between s 8 of the BORA—the right to life—and s 179(1)(b) of the Crimes Act 1961 which criminalises “aid[ing] or abet[ting] any person in the commission of suicide”. I share the view of Kathryn Tucker and Andrew Geddis that the exclusion of euthanasia from the ambit of s 179(1)(b) was a likely outcome.<sup>4</sup> Thus, I argue that it was open to Collins J to find in Ms Seales' favour.

Part II will examine Parliament's intended meaning of suicide. I contend that this meaning is inconsistent with the right to life. In Part III, I undertake a BORA s 5 analysis, querying whether the inconsistency between Parliament's meaning of suicide in the Crimes Act 1961 and the right to life in the BORA is nevertheless justifiable. Finally, this article will acknowledge that a declaration allowing Ms Seales' physician to assist her death may narrow the definition of suicide beyond what is tenable. However, it will conclude that a declaration of inconsistency was nevertheless feasible and should have been granted.

At the time of publication, the permissibility of euthanasia is being considered by the Health Select Committee. However, this inquiry is unlikely to lead to reform given that

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- 1 Leslie Weatherhead *The Christian Agnostic* (Festival Books, Abingdon/Nashville, 1965) at 187.
  - 2 *Seales v Attorney-General* [2015] NZHC 1239, [2015] 3 NZLR 556.
  - 3 *Carter v Attorney-General of Canada* 2015 SCC 5, [2015] 1 SCR 331; and *Stransham-Ford v Minister of Justice and Correctional Services* [2015] ZAGPPHC 230 (HCSA) (*Stransham-Ford*). It should be noted that the recent decision of the Supreme Court of Appeal of South Africa has since overruled the decision in *Stransham-Ford*. See generally *Minister of Justice and Correctional Services v Estate Stransham-Ford* 2016 ZASCA 197. However, I contend that the decision in the High Court of South Africa remains persuasive.
  - 4 See Kathryn Tucker and Andrew Geddis “Litigating for the right to die” (2015) 5 NZLJ 172 at 175 and 202. In this article, published prior to the decision, the authors reasoned that Ms Seales had a “very strong case”. At 202.

the issue does not have the Government's support.<sup>5</sup> In any case, there have been other recent developments in this space: the Green Party has become the first major political party to publicly announce support for legalising euthanasia;<sup>6</sup> and ACT Party leader David Seymour has submitted into the ballot a private members' bill regulating euthanasia.<sup>7</sup>

Although *Seales* has brought the issue of euthanasia into the public forum for debate and possible legislative reform in New Zealand, the result is disappointing and does not push the boundaries with regards to human rights recognition. Accordingly, a declaration of inconsistency would have sent a stronger message to Parliament that the current situation infringes unreasonably upon citizens' rights.

## II Defining Euthanasia

Euthanasia is a Greek term meaning *good death*.<sup>8</sup> It refers to several strands of assisted dying that are believed to offer a merciful and peaceful end to a patient's suffering. On the one hand, there is *non-voluntary* euthanasia which encompasses situations where a patient is deemed incompetent, in a medical sense, and the choice to end their life is made by a third party.<sup>9</sup> On the other hand, there is *voluntary* euthanasia where a patient requests their own death. The law draws a distinction within this category between *active* euthanasia, where positive steps are taken to bring about death, and *passive* euthanasia, where the patient's death is due to an omission.<sup>10</sup> In most jurisdictions where assisted death is prohibited, passive euthanasia is legally permissible.<sup>11</sup> As Ms Seales sought her physician's assistance to take positive steps to end her life, this article will primarily focus on active voluntary euthanasia.

## III Reviewing *Seales*

This article will critique Collins J's application of the *Hansen* test and argue that a different result was available on the facts. The test is set out by the majority in *R v Hansen* as follows.<sup>12</sup> First, Parliament's intended meaning of the provision must be identified. Secondly, it must then be determined whether that intended meaning conflicts with a right protected under the BORA. If there is an inconsistency, the third

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5 After all, it took the presentation of a public petition to Parliament to spark any formal response.

6 Isaac Davison "Green Party says it would legalise euthanasia" *The New Zealand Herald* (online ed, Auckland, 22 September 2016).

7 Isaac Davison "David Seymour's voluntary euthanasia bill set to join ballot" *The New Zealand Herald* (online ed, Auckland, 14 October 2015).

8 Stuart Beresford "Euthanasia, The Right To Die And The Bill Of Rights Act" [2005] HRR 1 at 2.

9 At 5.

10 At 5.

11 At 8.

12 *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1 at [92] per Tipping J. This approach is generally accepted in New Zealand as the appropriate application of ss 4, 5 and 6. Other tests have also been proposed, notably by Elias CJ in the minority in *Hansen* and Tipping J in *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9. The question as to which should be applied is beyond the scope of this article. The *Hansen* majority test gives due deference to parliamentary sovereignty and is tailored for situations where there are two contended meanings, as in this case.

step is to ascertain whether it is justified under s 5 of the BORA. Fourthly, if justified, Parliament's intended meaning must prevail. Alternatively, if unjustified, the provision must be examined to ascertain whether an alternative, less inconsistent, meaning is tenable. And if another meaning is reasonably possible, it must be adopted. However, if there is no other reasonably possible meaning, Parliament's intended meaning must stand.

#### A *Parliament's intended meaning*

The first step of the *Hansen* test requires ascertainment of the meaning Parliament intended to attribute to *suicide* in the Crimes Act 1961. In determining this, Collins J looked to the origins of New Zealand's criminal legislation. His Honour affirmed Sir James Stephen's conclusion that suicide occurs when "a man kills himself intentionally".<sup>13</sup> Stephen drafted the Criminal Code Act 1893, which forms the basis of New Zealand's current Crimes Act.

The most relevant amendment to the Crimes Act was the decriminalisation of attempted suicide in 1961 for humanitarian reasons.<sup>14</sup> Counsel for Ms Seales contended that the legislative changes relating to suicide displayed a shift in parliamentary intent from preserving the sanctity of life to actively upholding autonomy.<sup>15</sup> Although the provisions may be read consistently with an exclusion of euthanasia from suicide, it is highly unlikely Parliament intended to do so in the 1960s.

Collins J's conclusion that Parliament intended suicide to bear a broad meaning—intentionally taking one's own life—accords with socio-political attitudes towards *end of life* decisions, which were far less accepting of euthanasia 50 years ago. His Honour does, however, move beyond mere consideration of the statutory provision criminalising assisted suicide in his determination of Parliamentary intent; and this willingness to read in extraneous circumstances without having first touched upon the meaning of the right to life perhaps limited His Honour's analysis from the very start.

Section 179(1)(b) is not worded in a particularly rigid or restrictive way. Indeed, as is argued later in this article, the words therein are very much open to interpretation. Although His Honour's conclusion with regards to Parliamentary intent is undoubtedly correct in light of the historical context, there is a finality to the tone of this portion of the judgment that is telling in terms of Collins J's overall finding.

#### B *Inconsistency with the right to life*

The second step of the *Hansen* test asks whether Parliament's intended meaning is inconsistent with the relevant right. Collins J answered this in the negative. By contrast, this article asserts that criminalising assisted euthanasia does in fact infringe upon the right to life.

Before any potential curtailment of the right can be identified, the right to life itself must be defined. The following section will canvass orthodox and contemporary conceptions of the right to life and argue for the inclusion of a right to die within s 8 of the BORA.

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13 Sir James Stephens *A History of the Criminal Law of England* (McMillan and Co, London, 1883) vol 3 at 104 as cited in *Seales*, above n 2, at [87] and [117].

14 *Seales*, above n 2, at [129].

15 At [127].

### (1) Scope of the right

Section 8 of the BORA states that “[n]o one shall be deprived of life except on such grounds as are established by law and are consistent with the principles of fundamental justice”. Determining whether Parliament’s intended meaning of suicide is inconsistent with s 8 first requires an exploration of how the right should be construed. Various courts and academics have imbued the right to life with a range of meanings. Bernard McCloskey aptly describes the codification of this right in human rights instruments as “deceptively simple”.<sup>16</sup> The law does not expressly recognise a right to die. Therefore, such a right must be found to exist within an established right in order to be upheld.<sup>17</sup> Whether a right to die with dignity—or a right to choose the time and circumstances of one’s death—can be *read into* the right to life is fiercely contested in classical and contemporary scholarship. Put simply, the law is “fragile” in this area.<sup>18</sup>

The right to life is uniquely important as “the source of all other fundamental rights”.<sup>19</sup> Without it, an individual cannot access other rights. It may, therefore, appear contradictory to propose that the right to life contains the right to *end* one’s life.

There is a further oddity at play—the inevitability of death. Scott Shershow acknowledges that death “marks the very limit of all rights and all freedom[s]” and questions whether it is tenable to have a right to “that which comes inescapably to all”.<sup>20</sup> These concerns notwithstanding, the existence of a right to die is not as far-fetched as it may seem. Technology’s increasing ability to prolong life has prompted the law to adapt to reflect social and moral values. Individuals can already exercise control, albeit limited, over the manner in which they die. Section 11 of the BORA protects the right to refuse medical treatment and the law also upholds valid advance directives,<sup>21</sup> colloquially known as *living wills*. The boundaries between life and death have shifted, leading to widespread recognition that “while death may be the end of life, dying is a part of life and, therefore, how an individual dies is a vital aspect of how that individual has lived his or her life”.<sup>22</sup> In this contemporary outlook, life and death are not opposites but forces that overlap and are inextricably bound.

Opponents of legalising euthanasia often argue that the recognition of a right to die would give rise to a corresponding duty to assist. However, as with abortion, the right to end life should be defined as a right to authorise assistance, rather than a right to demand it.<sup>23</sup> Moreover, the negative framing of s 8 should not preclude a wide reading of the right. It is generally accepted that the right to life confers both positive and negative

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16 Bernard McCloskey “The right to life—human rights at birth and death” (2011) 37(2) CLB 219 at 224.

17 Margaret Otlowski *Voluntary Euthanasia and the Common Law* (Oxford University Press, Oxford, 1997) at 196.

18 John Coggon “Could the Right to Die with Dignity Represent a New Right to Die in English Law?” (2006) 14 Med L Rev 219 at 231.

19 Nicolae Pavel “The Right to Life as a Supreme Value and Guaranteeing the Right to Life” (2012) 4(2) Contemp Readings L & Soc Just 970 at 972.

20 Scott Shershow “The Sacred Part: Deconstruction and the Right to Die” (2012) 12(3) CR New Centen Rev 153 at 155.

21 Health and Disability Commissioner (Code of Health and Disability Services Consumers’ Rights) Regulations 1996, sch 1, cl 2, right 7(5).

22 Elizabeth Wicks “The Meaning of ‘Life’: Dignity and the Right to Life in International Human Rights Treaties” (2012) 12 HRLR 199 at 214.

23 Otlowski, above n 17, at 201–202.

obligations. Thus, states owe both a duty to abstain from killing and a duty to actively preserve life.<sup>24</sup> It is, therefore, not inconceivable for the words “no one shall be deprived of life” to be construed in a positive manner that enables individuals to assert their right to dignified death.

Underlying the ethical and legal discussion of the scope of the right to life is a perceived clash of values between the sanctity of life, individual autonomy and dignity. The sanctity of life principle stems from religious and natural beliefs that all life is sacred and belongs to a higher power.<sup>25</sup> It lies at the heart of modern society and places the utmost importance on the protection of life. This belief explains humankind’s instinctive aversion to murder and suicide.

Sanctity of life is most clearly upheld in case law interpreting the reach of art 2 of the European Convention on Human Rights (the right to life). In particular, the principle is upheld in judgments of the European Court of Human Rights which stress the “fundamental nature of the right to life”.<sup>26</sup> In *Pretty v United Kingdom*, the European Court of Human Rights rejected an application for assisted euthanasia.<sup>27</sup> In that case Mrs Pretty submitted that the provision “protected not only the right to life but also the right to choose whether or not to go on living”.<sup>28</sup> The Court narrowly defined the right to life and firmly rejected Mrs Pretty’s submission. Central to the Court’s reasoning was the distinction between freedoms and the right to life—the former conferring both positive and negative abilities, and the latter only guaranteeing a positive right to act.<sup>29</sup> *Pretty* is strong authority for the proposition that “[a]rticle 2 cannot, without a distortion of language, be interpreted as conferring the diametrically opposite right, namely a right to die”.<sup>30</sup> However, this construction of the right to life is tempered by the Court’s treatment of art 8, which protects an individual’s right to “respect for private and family life”.<sup>31</sup> The Court noted that quality of life issues are meaningful in the context of art 8, but cautioned that this should not undermine the significance of the sanctity of life.<sup>32</sup> Ultimately, the Court was “not prepared to exclude” the notion of inconsistency with art 8 in these circumstances.<sup>33</sup> While this further widens the scope for discussion about euthanasia, the Court in that case sidestepped a decision on that point and concluded that any inconsistency may be nonetheless justified.<sup>34</sup>

Subsequent cases have confirmed tentative conclusion in *Pretty*, exhibiting a “general reluctance” to push the boundaries of art 2,<sup>35</sup> and, instead, developing a dialogue around

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24 Wicks, above n 22, at 202. See also *Lambert v France* (2016) 62 EHRR 2 (Grand Chamber, ECHR) at [117].

25 Sheila McLean *Assisted Dying: Reflections on the Need for Law Reform* (Routledge-Cavendish, Oxon, 2007) at 28–29.

26 Wicks, above n 22, at 201.

27 *Pretty v United Kingdom* (2002) 35 EHRR 1 (Section IV, ECHR).

28 At [35].

29 At [39].

30 At [39].

31 European Convention on Human Rights 213 UNTS 221 (opened for signature 4 November 1950, entered into force 3 September 1953), art 8.

32 *Pretty v United Kingdom*, above n 27, at [65].

33 At [67].

34 At [78].

35 Shawn Harmon and Nayha Sethi “Preserving Life and Facilitating Death: What Role for Government after Haas v Switzerland?” (2011) 18 EJHL 355 at 363.

the quality of life within art 8.<sup>36</sup> Despite the case's reinforcement of the supremacy of the sanctity of life, the courts have indicated a willingness to read the two provisions together.

More recently, in *Lambert v France*, family members of a tetraplegic man in a chronic vegetative state challenged his doctors' plan to withdraw artificial sustenance.<sup>37</sup> The majority held that the applicants lacked standing to complain on Mr Lambert's behalf,<sup>38</sup> but went on to consider the alleged breach of art 2. Although *Lambert* pertains to non-voluntary euthanasia, the case contains a relevant discussion of the scope of the right to life. The majority directed that in cases concerning euthanasia, art 2 should be considered alongside art 8, in particular, "the right to respect for private life and the notion of personal autonomy which it encompasses".<sup>39</sup> Notwithstanding the strong tenor of the *Pretty* judgment, recent case law such as *Lambert* has created room for a broader interpretation of the right to life.

Autonomy<sup>40</sup> and dignity<sup>41</sup> have traditionally been viewed in opposition to the sanctity of life. Individuals seeking euthanasia commonly cite the loss of autonomy and dignity as their primary reason for wishing to die, as evidenced by surveys carried out in jurisdictions where euthanasia is legal.<sup>42</sup> If an individual's suffering is such that they believe their life is undignified, autonomy mandates that whether to undergo euthanasia is their decision to make. Prima facie this clashes with the sanctity of life, which upholds life over all else.

It is possible to marry these concepts together in a manner that better accords with modern understandings of human rights. To Ronald Dworkin, what is important is not whether the sanctity of life trumps other rights but how the sanctity of life can be "understood and respected".<sup>43</sup> Dignity and autonomy form a crucial part of the foundation of human rights instruments, many of which were enacted in response to wartime atrocities.<sup>44</sup> They are, therefore, believed to shape all human rights. Thus, interpreting the right to life requires the sanctity and quality of life to be read together. In doing so, a distinction must be drawn between life as something that is *inherently valuable* and life as something that is truly *valued in fact*. Emily Jackson alludes to this,

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36 See generally *Haas v Switzerland* (2011) 53 EHRR 33 (Section I, ECHR); *R (Purdy) v Director of Public Prosecutions* [2009] UKHL 45, [2010] 1 AC 345; *R (on the application of Nicklinson) v Ministry of Justice* [2014] UKSC 38, [2015] 1 AC 657; *Koch v Germany* (2012) 56 EHRR 6 (Section V, ECHR); and *Gross v Switzerland* (2015) 60 EHRR 18 (Grand Chamber, ECHR).

37 See generally *Lambert v France*, above n 24.

38 At [105].

39 At [142].

40 *Autonomy* is an individual's right to self-determination to the extent that their actions do not harm the rights of others. Constance Putnam "What Kind of a Right is the 'Right to Die?'" (2009) 4(2) EJM 165 at 171.

41 *Dignity* is related to the perception held by an individual, and others around them, about the individual's quality of life. See Ronald Dworkin *Life's Dominion: an argument about abortion, euthanasia and individual freedom* (Knopf, New York, 1993) at 89–101 as cited in Paul Tiensuu "Whose Right to What Life? Assisted Suicide and the Right to Life as a Fundamental Right" (2015) 15 HRL Rev 251 at 267.

42 Emily Jackson "In favour of the Legalization of Assisted Dying" in Emily Jackson and John Keown (eds) *Debating Euthanasia* (Hart Publishing, Oxford, 2012) 1 at 9.

43 Ronald Dworkin *Life's Dominion: an argument about abortion and euthanasia* (HarperCollins Publishers, London, 1995) at 217.

44 Wicks, above n 22, at 206.

noting that there is an “important difference between simply being alive and having a life which is worth living”.<sup>45</sup>

The quality of life approach dominated the reasoning of recent euthanasia cases *Carter v Canada (Attorney-General)* and *Stranham-Ford v Minister of Justice*.<sup>46</sup> In *Carter* the Court had to determine whether s 241(1)(b) of the Criminal Code, which criminalises assisted suicide,<sup>47</sup> unjustifiably violated “the right to life, liberty and security of the person”.<sup>48</sup> In a per curiam judgment, the Canadian Supreme Court found for the appellants, striking down s 241(1)(b).<sup>49</sup> In doing so, the Court approved the trial judge’s conclusion that the right to life was engaged because affected individuals faced the choice of either committing suicide at an early stage or risking their condition deteriorating to a point where they were suffering and physically unable to end their lives.<sup>50</sup> The Court reinforced the centrality of the sanctity of life to the right to life and observed that the right includes “life, liberty and security of the person during the passage to death.”<sup>51</sup> Autonomy and dignity were held to underpin an individual’s rights to liberty and security of the person,<sup>52</sup> and the Court expanded upon the implications of this in the context of euthanasia. According to the Court, the law’s refusal to allow terminally ill patients to request euthanasia hinders their liberty by limiting the options available to them at the end of their lives.<sup>53</sup> It also threatens their security by forcing them to undergo painful and undignified suffering.<sup>54</sup> Finally, the Court neatly encapsulated the codependence of the sanctity and quality of life, stating that: “s 7 recognises the value of life, but it also honours the role that autonomy and dignity play at the end of that life.”<sup>55</sup>

Fabricius J in the South African High Court took this construction of the right to life a step further in *Stranham-Ford*, explicitly recognising a right to die with dignity. The Bill of Rights—which is found in the Constitution of the Republic of South Africa—protects the dignity of all people<sup>56</sup> and upholds the right to “freedom and security of the person”, which includes “security in and control over their body”.<sup>57</sup> The Constitution of the Republic of South Africa emphasises the nation’s foundations of dignity, equality and freedom.<sup>58</sup> In his discussion of dignity’s place in the law, Fabricius J approved the reasoning of O’Reagan J in *S v Makwanyane*.<sup>59</sup>

It is not life as mere organic matter that the Constitution cherishes, but the right to human life: the right to share in the experience of humanity. This concept of human life is at the centre of our constitutional values. The Constitution seeks to establish a society

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45 Jackson “Legalization of Assisted Dying”, above n 42, at 42.

46 *Carter*, above n 3; and *Stranham-Ford*, above n 3.

47 Criminal Code RSC 1985 c C-46, s 241(1)(b).

48 Constitution Act RSC 1982, s 7.

49 *Carter*, above n 3, at [147].

50 At [57]–[58].

51 At [63].

52 At [64].

53 At [66].

54 At [66].

55 At [68].

56 Constitution of the Republic of South Africa 1996, s 10.

57 Section 12(2)(b).

58 Section 1(a).

59 *S v Makwanyane* (CCT3/94) [1995] ZACC 3, 1995 (3) SA 391 (CC) as cited in *Stranham-Ford*, above n 3, at [12].

where the individual value of each member of the community is recognised and treasured. The right to life is central to such a society. The right to life, thus understood, incorporates the right to dignity. So the rights to dignity and to life are intertwined. The right to life is more than existence, it is a right to be treated as a human being with dignity: without dignity, human life is substantially diminished. Without life, there cannot be dignity.

In support of this contention, Fabricius J also positively referenced the United States Supreme Court judgment *Cruzan v Director, Missouri Department of Health* which concluded that “dying is part of life, it is completion rather than its opposite”.<sup>60</sup> His Honour’s decision was also informed by *Carter*, which was a particularly useful comparison given the similarities between the jurisdictions’ human rights instruments.<sup>61</sup> Ultimately, Fabricius J, influenced by the South African rights-based background and a careful examination of the relevant authorities, remarked that weight should be placed upon “the sacredness of the quality of life” rather than “the sacredness of life per se”.<sup>62</sup> In reaching this conclusion, the Judge was able to interpret the right to life broadly, including the right to die. His Honour considered that the right to life obliges the state to protect life but does not “mean that an individual is obliged to live, no matter what the quality of his life is”.<sup>63</sup>

The BORA in New Zealand does not directly reference dignity or autonomy. It has no equivalent to art 8 of the European Convention of Human Rights, ss 10 and 12 of the South African Bill of Rights or s 7 of the Canadian Charter. New Zealand’s human rights framework can, therefore, be distinguished from other nations in which euthanasia cases have arisen. However, as dignity and autonomy inform an understanding of all human rights, the reasoning in these cases may still apply in New Zealand.

Collins J defines the right to life conservatively in *Seales*. First, his Honour sets out the key principles underlying Ms Seales’ claim, notably the sanctity of life, dignity and autonomy. His Honour goes on to discuss the importance of the sanctity of life and notes that it may be subservient to other interests in certain circumstances.<sup>64</sup> His Honour defines dignity and autonomy, and quotes passages from *Stransham-Ford* and *Carter* linking these values to the right to life.<sup>65</sup> Unfortunately, Collins J’s analysis ends there. There was apparent scope to include a right to die within the right to life, a reading that has garnered support overseas in recent years. *Carter* is especially persuasive because the BORA was modelled on the Canadian Charter.<sup>66</sup> However, *Seales* lacks a deeper discussion of how the right to life should be understood in New Zealand, and how dignity and autonomy fit into the equation.

Collins J later acknowledges the similarity between Ms Seales’ claim and that of the appellants in *Carter*,<sup>67</sup> and rightly cautions that s 7 of the Charter is wider than its BORA counterpart.<sup>68</sup> His Honour does accept that s 8 is engaged in Ms Seales’ situation on the

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60 *Cruzan v Director, Missouri Department of Health* (1990) 497 US 261 at 343 as cited in *Stransham-Ford*, above n 3, at [14].

61 *Stransham-Ford*, above n 3, at [18].

62 At [14].

63 At [23].

64 *Seales*, above n 2, at [63]–[65].

65 At [66], [70] and [75].

66 Tucker and Geddis, above n 4, at 174.

67 *Seales*, above n 2, at [162].

68 At [157].

same grounds as in *Carter*.<sup>69</sup> However, Collins J differs from the Canadian Supreme Court in respect of the scope of the right, the purpose of the allegedly inconsistent provision and the extent to which the human rights infringement is justified.

Unfortunately, the methodology employed by Collins J in *Seales* restricts the scope of the right to life at the second step of the *Hansen* analysis. It would have been more appropriate to consider the limitations within the right at the next stage, asking whether such an inconsistency is justified. However, his Honour stops at inquiring whether there is an inconsistency in the first place.

## (2) Rights methodology

Section 8 contains a limitation within the right itself. The right to life is not absolute—it is subject to lawful exceptions that accord “with the principles of fundamental justice”.<sup>70</sup> Section 7 of the Charter is similarly structured. It is, therefore, unsurprising that Collins J’s analysis of the scope of the right mirrors the Court’s discussion in *Carter*.

Petra Butler recommends that a BORA s 5 analysis should not be the starting point for interpreting a limited right.<sup>71</sup> Instead, one must acknowledge that rights are fundamental because they are at the core of what it means to be human.<sup>72</sup> As a result, their scope must be defined as widely as possible.<sup>73</sup> Butler argues that qualifying phrases in rights provisions must not be interpreted within the rights themselves. According to Butler, this would amount to “advanced and/or disguised s 5 scrutinies”.<sup>74</sup>

Although Parliament’s clear intention is to limit the scope of the right, the BORA bestows upon the courts a responsibility to protect individual rights.<sup>75</sup> This responsibility is best achieved by adopting a methodology that casts the reach of the right broadly when judging its compatibility with the statutory provision at issue.<sup>76</sup> The limitation should only be examined during the s 5 analysis, at which time it is appropriate to defer to parliamentary sovereignty by balancing the rights of the individual with those of the democratic majority.<sup>77</sup> Taking this approach avoids improperly restricting human rights whilst recognising Parliament’s prerogative to override rights where reasonably necessary. While the Supreme Court has begun to follow this approach, it has not yet expressly provided guidance on the matter.<sup>78</sup>

The Court of Appeal has approved a rights methodology that defines the scope widely and considers in-built limitations in s 5. In *Quilter v Attorney-General*, Tipping J advised that “it is better conceptually to start with a more widely-defined right and legitimise or justify a restriction if appropriate, than to start with a more restricted right”.<sup>79</sup> Tipping J’s guidance has been reinforced by subsequent judgments, most

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69 At [166].

70 New Zealand Bill of Rights Act 1991, s 8.

71 Petra Butler “Bill of Rights” in Mary-Rose Russell and Matthew Barber (eds) *The Supreme Court of New Zealand 2004-2013* (Thomson Reuters, Wellington, 2015) 255 at 266.

72 At 266.

73 At 266.

74 At 266.

75 At 267.

76 At 267.

77 At 267.

78 At 274.

79 *Quilter v Attorney-General* [1998] 1 NZLR 523 (CA) at 576.

recently in *Ministry of Health v Atkinson*.<sup>80</sup> In *Atkinson*, the Court of Appeal declined to follow the Canadian rights methodology. The Canadian Charter is supreme law—therefore, the consequences of an unjustified breach are more severe than in New Zealand where inconsistent statutes cannot be struck down.<sup>81</sup> Instead, the Court approved the Tribunal’s suggestion that New Zealand should develop its own jurisprudence in light of our unique legislative and constitutional makeup.<sup>82</sup> The Court affirmed that “matters of justification” should not be brought to bear upon the definition of the right itself but should rather remain within the confines of s 5.<sup>83</sup>

In *Carter*, the Court essentially carried out two justified limitation discussions: one surrounded the principles of fundamental justice within the right to life; and the other considered whether a prohibition of assisted euthanasia could be justified by wider social concerns. Although this is the accepted practice in Canada, I contend that undertaking the same analysis twice is impractical and lends itself to the strict approach Butler cautions against.

Given New Zealand’s stance on rights methodology, then, it was inappropriate for Collins J to follow *Carter*. His Honour should have defined the right to life broadly and examined the principles of fundamental justice during the justification stage of the *Hansen* test. A generous interpretation of the BORA upholds New Zealand human rights jurisprudence. Furthermore, the wording of s 8 expressly characterises the principles of fundamental justice as a condition of the right. Adopting this methodology would have better corresponded with previous New Zealand dicta. It would have also afforded Ms Seales’ claim a stronger chance of success.

In *Seales*, Collins J does not interpret the right to life in accordance with the accepted New Zealand methodology. His Honour includes the right’s limitation within its scope by breaking s 8 into three components—the right to life, lawful exceptions and “consistency with the principles of fundamental justice”<sup>84</sup>—and allows the qualified definition to guide his analysis of compatibility with the principles of fundamental justice.<sup>85</sup> These had not previously been examined in New Zealand. Therefore, Collins J looked to Canadian case law.<sup>86</sup> As the principles—arbitrariness, overbreadth and gross disproportionality—bear meanings equivalent to the limbs of a BORA s 5 analysis, applying the principles of fundamental justice within the scope of the right to life effectively adopted a s 5 inquiry within the scope of the right.

In incorporating what, in substance, resembles a s 5 analysis into the right to life, Collins J rendered it difficult for Ms Seales—or any plaintiff for that matter—to satisfy the

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80 *Ministry of Health v Atkinson* [2012] NZCA 184, [2012] 3 NZLR 456 at [101]. However, the question of methodology is still somewhat unsettled in New Zealand, as demonstrated by the Court of Appeal’s recent approach in *New Health New Zealand Inc v South Taranaki District Council* [2016] NZCA 462. The case concerned the conflict between the right to refuse medical treatment (s 11 of the BORA) and local government fluoridation of drinking water. Contrary to its standpoint in *Atkinson*, the Court interpreted the scope of the right narrowly at the definition stage. See [71]–[98]. This led to a judgment in favour of the defendants (the Council and the Attorney-General).

81 *Atkinson*, above n 80, at [118].

82 *Atkinson*, above n 80, at [109]–[110]. See also *Atkinson v Ministry of Health* (2010) 8 HRNZ 902 (HRRT) at [187].

83 *Atkinson*, above n 80, at [128].

84 *Seales*, above n 2, at [152].

85 It is also arguable that the reasoning of Collins J in Part III of the judgment was coloured by his Honour’s finding in Part II that the Crimes Act provisions could not accommodate euthanasia.

86 At [169].

onus of proof. Application of the Canadian approach places Ms Seales in the position envisaged by Butler—being required to bring evidence that the inconsistency between s 8 and s 179(1)(b) is unjustified.<sup>87</sup> This outcome contradicts the plaintiff’s usual position in a s 5 analysis in which the burden rests with the State to justify its breach of a human right. Indeed, it is more appropriate for the State to bear the onus at this stage—after all, the state enacted the law in question and, therefore, is best placed to deliver evidence validating its necessity. By adopting a different rights methodology, his Honour complicated Ms Seales’ claim by asking her to advocate, within the scope of the right to life, that the limitation on her rights was unjustified. *Seales*, therefore, takes a conservative approach that fits poorly with New Zealand’s contemporary stance on human rights litigation.

If Collins J had followed the rights methodology I have argued for, the right to life could more easily have been construed as including the right to die. Indeed, a finding of inconsistency at the second stage of the *Hansen* test would have been likely, since preventing individuals from determining the circumstances of their death could then be said to contradict s 8. Accordingly, Collins J’s analysis in *Seales* is unfortunate in this regard and a finding of consistency meant that none of the remedies sought by Ms Seales were available.

### C *Justified inconsistency*

This article will now consider the remaining limbs of the *Hansen* analysis, and explore the options available to the Court in *Seales*. Steps three and four require a discussion of whether the aforementioned inconsistency is a justified limitation per s 5 of the BORA. If satisfied, Parliament’s intended meaning must be applied. *Hansen* sets out the test for determining whether a limitation is justified. The test is derived from Canadian case law, creating yet another similarity between the two jurisdictions in this area. The test as set out by Tipping J is as follows.<sup>88</sup>

- (a) does the limiting measure serve a purpose sufficiently important to justify curtailment of the right or freedom?
- (b)
  - (i) is the limiting measure rationally connected with its purpose?
  - (ii) does the limiting measure impair the right or freedom no more than is reasonably necessary for sufficient achievement of its purpose?
  - (iii) is the limit in due proportion to the importance of the objective?

#### (1) Purpose

First, the purpose of the provision at issue must be ascertained. It must then be determined whether that aim is significant enough to validate limiting a right protected by the BORA.

Collins J adopted the wide purpose of s 179(1)(b) advocated for by the state: the “absolute protection of the lives of all who are vulnerable” and “so far as is reasonably possible” the protection of “the lives of those who are not vulnerable”.<sup>89</sup> In *Carter*, the

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87 Butler, above n 71, at 274.

88 *R v Hansen*, above n 12, at [104] per Tipping J.

89 *Seales*, above n 2, at [132].

Court opted for a narrower formulation, namely, to prevent “vulnerable persons from being induced to commit suicide at a time of weakness”.<sup>90</sup> Selecting this narrow purpose enabled a finding of inconsistency on the basis that prohibiting euthanasia is too broad.<sup>91</sup> A blanket ban on euthanasia went further than necessary to achieve the protection of vulnerable people. Only some people wishing to avail themselves of euthanasia can be classed as vulnerable—others are of sound mind and competent to make a voluntary and fully informed decision to end their lives.<sup>92</sup> In assessing the principles of fundamental justice against such a broad purpose, Collins J failed to heed the Court’s warning in *Carter* that doing so would render the outcome inevitable.<sup>93</sup>

In *Seales*, Collins J explained the necessity of a broad purpose by asserting that New Zealand and Canada have a “different legislative framework” for criminal offences relating to suicide.<sup>94</sup> I disagree. In my view there are no significant differences between suicide provisions in New Zealand and Canada. Both nations’ criminal legislation originated from Stephen’s Code, which was drafted in England but only implemented elsewhere.<sup>95</sup> New Zealand does have a provision enabling the use of necessary force to prevent suicide,<sup>96</sup> which Collins J relies upon to distinguish between New Zealand and Canada.<sup>97</sup> However, as Geddis notes, the validity of this reasoning is questionable.<sup>98</sup> Although Canada has no such statutory defence, the Criminal Code facilitates the continuation of common law criminal defences.<sup>99</sup> In practice, Canada’s necessity defence operates in the same way as s 41. Accordingly, I contend that the statutory context of the two jurisdictions with respect to assisted suicide is not materially different.<sup>100</sup>

Furthermore, Canada has no provision criminalising suicide pacts. In Canada, the survivor of a suicide pact may be charged with murder or assisted suicide.<sup>101</sup> In New Zealand, by contrast, s 180 reduces a survivor’s potential liability to manslaughter or being party to a suicide pact, which carries a maximum penalty of five years imprisonment.<sup>102</sup> According to Geddis, the Canadian government has taken a harder line against suicide pacts and, in this sense, focuses more on protecting life than New Zealand.<sup>103</sup> Again, a comparison of the two jurisdictions reinforces the conclusion that Collins J should not have construed the purpose of s 179(1)(b) more broadly than in *Carter*.

Therefore, it would have been more appropriate for Collins J to ascribe a narrow purpose to s 179(1)(b), given the similarities between Canadian and New Zealand criminal law. The narrow and wide purposes both seek to protect life, regardless of

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90 *Carter*, above n 3, at [78].

91 At [86].

92 *Carter v Canada (Attorney General)* 2012 BCSC 886 at [1136] as cited in *Carter*, above n 3, at [186].

93 *Carter*, above n 3, at [77].

94 *Seales*, above n 2, at [186].

95 At [87].

96 Crimes Act 1961, s 41.

97 *Seales*, above n 2, at [123].

98 Andrew Geddis “Where to next for aid in dying?” (9 June 2015) Pundit <[www.pundit.co.nz](http://www.pundit.co.nz)>. This blog entry was posted several days after the judgment was released.

99 Section 8(3).

100 See Geddis, above n 98.

101 Criminal Code, ss 222, 229 and 241(1)(b).

102 Crimes Act 1961, s 180.

103 Geddis, above n 98.

whether this is restricted to vulnerable classes or extended across society. Whichever purpose is preferred, both are compelling enough to justify infringing the right to life.

## (2) Rational connection

The limitation upon the right may still be ruled unjustified if it does not satisfy the second stage of the *Hansen* s 5 analysis. It must first be ascertained whether this restriction is rationally connected with its aim.

In *Carter*, the Court held that there was a rational connection between prohibiting assisted euthanasia and protecting vulnerable individuals.<sup>104</sup> Collins J came to the same conclusion through his analysis of the principles of fundamental justice. His Honour found that the provision did not operate arbitrarily in achieving its purpose of protecting vulnerable and—as far as possible—non-vulnerable individuals.<sup>105</sup> Whichever purpose is accepted, this ground is easily satisfied because s 179(1)(b) imposes a blanket ban and, therefore, applies broadly to all citizens.

## (3) Minimal impairment

It must next be determined whether the limitation infringes the right only as far as reasonably necessary to achieve its goal. The following section will argue that the protection of vulnerable individuals can be accomplished via a system that regulates euthanasia. It also argues that the current criminalisation of euthanasia goes further than required.

Collins J held that s 179(1)(b) did not overreach the broad purpose of protecting life.<sup>106</sup> If his Honour had based this inquiry on the narrower purpose contended for by Ms Seales, the result might well have differed. *Carter* turned on the Court's finding that criminalising assisted euthanasia impinges upon citizens' rights more than reasonably necessary to protect vulnerable individuals.<sup>107</sup> The Court stated that blocking all access to euthanasia goes beyond merely protecting vulnerable individuals from harm—it bars even rational adults from exercising their right to life.<sup>108</sup> Therefore, the provision governs behaviour that falls outside of its purpose. Fabricius J endorsed this reasoning in *Stransham-Ford*, observing that most euthanasia cases before the courts “would not be connected to the objective of protecting vulnerable persons at all”.<sup>109</sup> These recent judgments are each persuasive authorities that banning euthanasia goes further than required to satisfy the stated purpose of protecting vulnerable people. There is no material reason why this analysis should not apply in the New Zealand context, given that there is significant evidence to suggest that the purpose of s 179(1)(b) can be achieved through the regulation—as opposed to blanket banning—of euthanasia.

This article argues that exploitation of potential euthanasia patients can be prevented or minimised—at least as far as reasonably possible—under a regulatory regime in New Zealand. As a result, the criminalisation of euthanasia impairs the right to life more than is reasonably necessary for the safeguarding of vulnerable individuals.

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104 *Carter*, above n 3, at [101].

105 *Seales*, above n 2, at [180].

106 At [185].

107 *Carter*, above n 3, at [121].

108 At [86].

109 *Stransham-Ford*, above n 3, at [18].

A major and legitimate concern around permitting euthanasia is that vulnerable people, including the elderly and disabled, may feel pressured to end their lives to avoid burdening loved ones and the healthcare system. However, the situation confronting Collins J involved a competent, terminally ill woman facing unbearable suffering. Permitting euthanasia in Ms Seales' case would only open up the possibility to individuals in a similar position, which is a relatively small class. In Elizabeth Wicks' opinion, restricting euthanasia to patients who endure "unbearable suffering" and are "unable to take [their] own life unaided" is a "sensible solution" that is unlikely to endanger vulnerable people if guidelines are established and adhered to.<sup>110</sup> The Court in *Carter* affirmed the trial judge's factual finding that "a carefully designed and monitored system of safeguards" is capable of containing the inevitable risk of abuse towards the vulnerable.<sup>111</sup> The Court's ruling on this point is corroborated by evidence from jurisdictions where euthanasia is lawful; and this offers a useful comparative perspective. According to the Court, which drew on comments by the trial judge, these statistics reveal no disproportionate emphasis on "socially vulnerable populations".<sup>112</sup>

The Court also approved the trial judge's ruling that physicians can ascertain their patients' levels of vulnerability by assessing their competence and decision-making abilities.<sup>113</sup> The Court observed that individuals utilising legal methods of ending life, such as withdrawal of sustenance and palliative sedation, are similarly vulnerable—and, therefore, that there is no practical reason to treat those requesting euthanasia differently.<sup>114</sup> Given the similarities between the two jurisdictions, this reasoning should stand in New Zealand. Accordingly, the argument that regulation cannot protect vulnerable people can be classified as "[a] theoretical or speculative fear" that cannot validate criminalisation.<sup>115</sup> Furthermore, people in Ms Seales' position are, in fact, vulnerable and in need of legal protection. Prohibiting euthanasia forces these individuals to contemplate committing suicide in secret before they have reached the stage where their condition is unbearable.

Another argument commonly raised in objection to euthanasia is the difficulty of ascertaining whether a patient is competent to make a request. Terminally ill people often suffer from bouts of depression,<sup>116</sup> and their decision-making abilities are likely to be impaired while they process their situation. Yet physicians are able to assess patient competency for other major medical decisions without difficulty. Practically, there is little difference in this instance. In *Carter*, the Court referred to the trial judge's findings that physicians have the necessary training and experience to identify situations where patients are incompetent due to mental illness or are being pressured into euthanasia.<sup>117</sup> Similarly, the New Zealand medical profession could enforce the informed consent standard for euthanasia applications. For these reasons, it is contended that the

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110 Elizabeth Wicks *Human Rights and Healthcare* (Hart Publishing, Oregon, 2007) at 270.

111 *Carter*, above n 3, at [117].

112 *Carter v Canada (Attorney General)* 2012 BCSC 886 at [731] as cited in *Carter*, above n 3, at [107].

113 *Carter*, above n 3, at [115].

114 At [115].

115 At [119].

116 Danuta Mendelson and Mirko Bagaric "Assisted suicide through the prism of the right to life" (2013) 36 *Intl JL & Psychiatry* 406 at 412.

117 *Carter v Canada (Attorney General)* 2012 BCSC 886 at [795]–[798], [815], [837] and [843] as cited in *Carter*, above n 3, at [106].

correlation between depression and end of life requests is unlikely to justify the criminalisation of euthanasia.

The *slippery slope* justification is perhaps the most strongly-held belief of those opposed to euthanasia. Simply put, the idea is that if terminally ill adults are permitted to access euthanasia, society and the law will become increasingly accepting of this practice in other situations until we reach a point that would previously have seemed unforgivable—involuntary euthanasia.

Involuntary euthanasia occurs where a third party ends a competent patient's life without obtaining consent or in disregard of the patient's refusal. At first blush this argument may appear extreme. However, scholars have pointed to the Netherlands as an example of standards lowering over time in *end of life* practices. Although Dutch case law has permitted voluntary euthanasia in situations of mental illness and old age, empirical evidence shows no increasing propensity towards involuntary euthanasia. Euthanasia rates have remained stable over time and no instances of involuntary euthanasia have been reported since enacting legalisation.<sup>118</sup> Indeed, 2.8 per cent of deaths in the Netherlands resulted from euthanasia in 2010 and this is comparable with data obtained in both 1995 and 2001.<sup>119</sup>

Belgium is also commonly cited in relation to the *slippery slope*. Studies suggest that physicians face difficulties when determining the boundaries of acceptable euthanasia requests.<sup>120</sup> *Carter* dismissed this reasoning because legalising euthanasia in Belgium merely established guidelines for a medical practice that had long been accepted in society. As such, Belgium has “a very different medico-legal culture”.<sup>121</sup>

Much like Canada, New Zealand has never permitted euthanasia. Moreover, the medical profession has traditionally opposed it.<sup>122</sup> Accordingly, the reasoning developed in Canada should be persuasive in New Zealand. *Carter* and *Stransham-Ford* dismissed the *slippery slope* argument due to a lack of substantive evidence.<sup>123</sup> The Canadian Supreme Court were particularly emphatic, warning:<sup>124</sup>

We should not lightly assume that the regulatory regime will function defectively, nor should we assume that other criminal sanctions against the taking of lives will prove impotent against abuse.

These decisions provide convincing authority that the *slippery slope* concern is unlikely to justify a blanket ban on euthanasia.

Another frequently-argued justification for banning euthanasia is the availability and effectiveness of palliative care. Palliative care encompasses pain relief and emotional support for terminally ill patients.<sup>125</sup> It aims neither to extend life nor to end it.<sup>126</sup>

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118 Harry Lesser “Should it be legal to assist suicide?” (2010) 16(2) J Eval Clin Pract 330 at 332.

119 Arthur Schafer “Physician assisted suicide: The great Canadian euthanasia debate” (2013) 36 Intl JL & Psychiatry 522 at 529.

120 See generally Raphael Cohen-Almagor “First do no harm: Pressing concerns regarding euthanasia in Belgium” (2013) 36 Intl JL & Psychiatry 515.

121 *Carter*, above n 3, at [112].

122 *Seales*, above n 2, at [56]–[58].

123 *Carter v Canada (Attorney General)* 2012 BCSC 886 at [1241] as cited in *Carter*, above n 3, at [107]; and *Stransham-Ford*, above n 3, at [17].

124 *Carter*, above n 3, at [120].

125 Cohen-Almagor, above n 120, at 519.

126 Mélanie Vachon “Quebec proposition of Medical Aid in Dying: A palliative care perspective” (2013) 36 Intl JL & Psychiatry 532 at 537.

Unfortunately, palliative care cannot always satisfy the needs of dying patients.<sup>127</sup> Drugs may fail to fully relieve pain and can cause distressing side effects. Moreover, they are of little assistance in certain circumstances, for example, regarding patients with progressive muscle weakness diseases who gradually lose the ability to swallow and breathe.<sup>128</sup> Ms Seales faced this difficulty: her oncologist advised that palliative care would not substantially relieve her symptoms.<sup>129</sup>

Opponents claim the quality of palliative care would decrease if euthanasia was legalised because *end of life* care imposes a higher cost on the state. However, Harry Lesser argues that enabling those for whom palliative care is ineffective to access euthanasia should not prompt the majority of patients, who benefit from palliative care, to follow suit.<sup>130</sup> Furthermore, a higher quality of care has been observed in jurisdictions where euthanasia is lawful.<sup>131</sup> A recent study examining euthanasia trends in the Netherlands before and after legalisation indicates that physicians adhere strongly to the requirement that alternative options must be exhausted before resorting to euthanasia and respond to euthanasia requests by recommending palliative care.<sup>132</sup> These results show that euthanasia can complement—and would not necessarily replace—palliative care.

The use of palliative care has also increased in Oregon, as demonstrated by studies showing significant increases in referrals to hospice specialists.<sup>133</sup> Oregon implemented new policy systems for palliative care—considered to be “significant improvements”—before the Death with Dignity Act 1994 was enacted.<sup>134</sup> A similar approach could be taken in New Zealand to ensure that the important role that palliative care plays is not displaced by euthanasia. Regulation could enable the creation of a “palliative care filter”<sup>135</sup> to protect the vulnerable by ensuring that palliative care options are considered prior to deciding upon euthanasia.

Studies also reveal—overwhelmingly so in jurisdictions where euthanasia is legal—that individuals choose to end their lives due to an inability to partake in activities that make life enjoyable, as well as a loss of autonomy and dignity.<sup>136</sup> Unbearable pain—or fear of pain—features only in approximately one third of euthanasia cases.<sup>137</sup> Generally those who seek euthanasia do so for reasons relating to their perceived quality of life. This means that individuals who currently find solace in palliative care are likely to continue to do so. These statistics further disprove the idea that palliative care would become obsolete if euthanasia was legalised in New Zealand.

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127 *Seales*, above n 2, at [38]. See also Emily Jackson “Death, Euthanasia and the Medical Profession” in Belinda Brooks-Gordon and others (eds) *Death Rites and Rights* (Hart Publishing, Oregon, 2007) 37 at 44.

128 Jackson “Death, Euthanasia”, above n 127, at 44.

129 *Seales*, above n 2, at [29].

130 Lesser, above n 118, at 333.

131 R Tallis “Why I changed my mind about assisted dying” *The Times* (UK, 27 October 2001) as cited in Lesser, above n 118, at 333. This was affirmed in *Carter v Canada (Attorney General)* 2012 BCSC 886 at [731] and [1271] as cited in *Carter*, above n 3, at [107].

132 Vachon, above n 126, at 535.

133 Jackson “Death, Euthanasia”, above n 127, at 46.

134 S Tolle and others “Characteristics and proportion of dying Oregonians who personally consider physician-assisted suicide” (2004) 15(2) *J Clin Ethics* 1167 as cited in Schafer, above n 119, at 529. The Oregon Death with Dignity Act Or Rev Stat §§ 127.800–127.867 (2015).

135 Jackson “Legalization of Assisted Dying”, above n 42, at 50.

136 Mendelson and Bagaric, above n 116, at 412.

137 At 412.

Proponents of legalisation argue that euthanasia already occurs in countries where it is criminalised. Therefore, regulation protects the interests of those most susceptible to abuse through legal mechanisms. Lesser compares today's culture of "back-street euthanasia" to abortion, where only relatively recently was it judged to be safer and more human rights-friendly to allow trained physicians, who are subject to medical standards and disciplinary bodies, to terminate pregnancies.<sup>138</sup> A blanket ban on euthanasia can increase the potential for abuse by forcing the activity underground and creating a covert system in which the guidelines are inconsistently applied. It is on this basis that Emily Jackson believes *regulation* is of greater benefit to vulnerable individuals than *criminalisation*.<sup>139</sup> Furthermore, prohibiting euthanasia can impede the communication between the patient, their physician and their family. A forum for open communication about *end of life* possibilities may empower individuals to reach a decision that is appropriate for themselves. In the New Zealand framework, patients face making and bearing this important decision alone due to fear of exposing others to prosecution for assisted suicide.

Moreover, a terminally ill person who believes their quality of life is deteriorating may take great comfort in knowing that they can determine when and how they will die. This is a persuasive argument for legalisation. The alternative involves "condemning some people to very grave suffering" on the empirically unsubstantiated assumption that regulation cannot adequately support the vulnerable.<sup>140</sup> An oncologist who submitted to the Canadian Senate Committee on Euthanasia and Assisted Suicide likened this reassurance of control to that of a life jacket on an airplane—rarely used in reality but nonetheless a crucial means of easing people's nerves and boosting their confidence.<sup>141</sup> This analogy is consistent with evidence from Oregon, which shows that one in 50 terminal patients discuss euthanasia with their physician and one in six talk about it with their family. However, relatively few undergo euthanasia.<sup>142</sup>

It appears that many individuals contemplating euthanasia do not opt to go through with it. In *Seales*, doctors who had practiced in Oregon, New Mexico and Montana gave evidence that their patients often died of natural causes but valued having control over the process of their death.<sup>143</sup> That conclusion is reflected in Ms Seales' affidavit, in which she states that:<sup>144</sup>

As my death has become more inevitable, I constantly worry that it could be slow, unpleasant, painful and undignified. I worry that I will be forced to experience a death that is in no way consistent with the person that I am and the way that I have lived my life. I know that it might not turn out this way, but even the chance that it will is weighing on me very heavily.

It seems that for many what is significant is the ability to choose death when life becomes unbearable.

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138 Lesser, above n 118, at 332.

139 Jackson, above n 42, at 53.

140 Lesser, above n 118, at 333.

141 Special Senate Committee on Euthanasia and Assisted Suicide *Of life and death* (1995) as cited in Schafer, above n 119, at 529.

142 Only one in 800 people dying of any cause undergo euthanasia. Schafer, above n 119, at 529.

143 *Seales*, above n 2, at [59]–[61].

144 At [29].

In light of this discussion, I contend that 179(1)(b) impairs the right to life more than reasonably necessary for the protection of vulnerable individuals. Accordingly, the *Hansen* s 5 minimal impairment limb is unsatisfied.

#### (4) Proportionality

The final limb of the s 5 *Hansen* analysis asks whether the restriction on the right is proportionate to the gravity of its purpose. The evidence discussed above does not suggest that vulnerable individuals face an increased risk of harm under a well-regulated system. It is for this reason that the limitation is not proportionate to its purpose.<sup>145</sup>

#### (5) Summary

This Part of the article has resolved the s 5 analysis in favour of the limitation being unjustified. The purpose of s 179(1)(b)—protecting vulnerable individuals—is meritorious and does warrant the curtailment of the right to life. However, criminalising assisted euthanasia infringes upon the right more than is reasonably necessary to fulfil this aim.

#### D *Alternative meaning*

In the article so far I have established that Parliament's wide construction of suicide imposed an unjustified limitation on Ms Seales' right to life. The final stage of the *Hansen* test requires a rights-friendly meaning to be read into the legislative phrase in question if reasonably possible. If such an interpretation of *suicide* is not tenable, Parliament's intended meaning must prevail.

It is worth noting that any discussion of the meaning of suicide will inevitably be coloured by the emotion and stigma surrounding the act. Taking one's own life has been viewed in contradictory ways across a variety of cultures and periods. While contemporary conceptions both condemn and condone the practice, prevailing attitudes throughout modern history have tended towards a social aversion to suicide.

Ms Seales submitted that Collins J should adopt a narrower definition of suicide that excludes "rational decisions to die" made by competent, terminally ill adults.<sup>146</sup> Her preferred interpretation distinguishes between rational, self-determined death and death brought about by impaired thinking. Such a conception of suicide has not found favour with the courts but has gained some support amongst the mental health profession<sup>147</sup> and with academics.<sup>148</sup>

Sheila McLean describes *suicide* as a "private act"<sup>149</sup> and differentiates it from *euthanasia*, which she considers to be a "social act" that depends upon the assistance of

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145 See *Carter*, above n 3, at [90] and [122]. The Court did not need to consider this ground, as the limitation had already been found to be unjustified. As the Court noted, the consequences of prohibiting euthanasia are significant, but so too is the imperative of protecting the vulnerable.

146 *Seales*, above n 2, at [135].

147 Tucker and Geddis, above n 4, at 174.

148 See Otlowski, above n 17, at 65–84; and MH Parker "Words and reasons: Psychiatry and assisted suicide" 46 *The Australian and New Zealand Journal of Psychiatry* 80 at 80 as cited in Malcolm Parker "Defending the indefensible? Psychiatry, assisted suicide and human freedom" (2013) 36 *Intl JL & Psychiatry* 485 at 491.

149 See McLean, above n 25, at 36–37.

another.<sup>150</sup> According to David Lanham, *suicide* requires both a desire to die and “contempt for one’s own life”.<sup>151</sup> People in Ms Seales’ position lack this disregard for life. Instead, their choice to die *upholds* the dignity with which they have lived their lives.<sup>152</sup> While they would prefer to live, they choose death over their present quality of life. The absence of *contempt* amongst rational, terminally ill patients seeking euthanasia leads Lanham to conclude that these individuals do not fit the definition of suicide.<sup>153</sup>

Lanham also stresses the importance of defining suicide narrowly to uphold individuals’ rights to autonomy and dignity.<sup>154</sup> Interpreting suicide in this way focuses not on the outcome of self-inflicted death but on the reasons behind the decision. In *Department of Corrections v All Means All*, Panckhurst J held that a prisoner carrying out a hunger strike was not attempting suicide.<sup>155</sup> The individual was fasting as a form of protest. The Judge held this did not amount to *suicide*, which his Honour defined as an act in which “[d]eath is the desired and intended end result.”<sup>156</sup> Although a fasting prisoner is in a different position to a terminally ill patient seeking euthanasia, the reasoning applied in *All Means All* corresponds well with a narrow meaning of suicide. A terminally ill individual does not desire death. Rather, they wish to avoid unbearable suffering in circumstances where their death is imminent. Their intention is to control the circumstances of their death, rather than to die. Ms Seales emphasises this in her affidavit, which Collins J quotes at length:<sup>157</sup>

I am not depressed. I have accepted my terminal illness and manage it in hugely good spirits considering that it’s robbing me of a full life. I can deal with that, and deal with the fact that I am going to die, but I can’t deal with the thought that I may have to suffer in a way that is unbearable and mortifying for me.

The definition of suicide was also questioned in *Compassion in Dying v State of Washington*, in which the Federal Court of Appeal ruled that the prohibition of euthanasia was unconstitutional.<sup>158</sup> Although this decision was subsequently overruled, the United States Supreme Court did not engage with the lower court’s discussion of suicide. *Compassion in Dying* is significant because the Court was willing to accept the proposition that euthanasia falls outside the scope of suicide. The majority saw no substantial difference between active voluntary euthanasia and passive euthanasia—that is, patient death via termination of life support or withdrawal of sustenance.<sup>159</sup> Since the latter categories are not deemed to constitute suicide, the majority doubted the credibility of classifying active euthanasia as such.<sup>160</sup> The majority also observed that active voluntary euthanasia merely “hasten[s] by medical means a death that is already

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150 D Callahan *The Troubled Dream of Life: In Search of a Peaceful Death* (Georgetown University Press, Washington, DC, 2002) at 104 as cited in McLean, above n 25, at 36–37.

151 David Lanham *Taming Death by Law* (Longman Professional Publishing, Melbourne, 1993) at 13 (emphasis added).

152 At 14.

153 At 19.

154 At 20.

155 *Department of Corrections v All Means All* [2014] NZHC 1433, [2014] 3 NZLR 404 at [44].

156 At [44].

157 *Seales*, above n 2, at [29].

158 *Compassion in Dying v State of Washington* 79 F 3d 790 (9th Cir 1996) at 798.

159 At 824.

160 At 824.

in process,” and, therefore, does not meet the definition of suicide.<sup>161</sup> The *All Means All* and *Compassion in Dying* decisions strengthen Ms Seales’ assertion that suicide should bear a narrow meaning.

So too does the New Zealand High Court ruling in *Re G*, which enabled the withdrawal of nutrition and hydration from a patient suffering from severe brain disease.<sup>162</sup> Fraser J took into account the patient’s wishes—inferred through evidence given about his character—in determining that he would not have wanted to live given his diminished quality of life.<sup>163</sup>

The courts’ determination in non-voluntary euthanasia cases must consider what the patient indicates they would have wanted. Although not legally understood as suicide, the distinction between this decision by a third party and the patient’s active decision to die is certainly blurred.

In *Seales*, Collins J discusses the meaning of suicide early in his judgment in the context of Parliament’s intent. His Honour rejects the contention that active voluntary euthanasia is similar to passive voluntary euthanasia, which the law does not consider to amount to suicide.<sup>164</sup> However, his Honour provides little analysis on this point. As the reasoning in *Re G* suggests, both forms of euthanasia involve a rational decision to die and ultimately lead to the same outcome. It is, therefore, not a stretch of the imagination to see passive and active voluntary euthanasia as two sides of the same coin.

Collins J also engages in an interpretative exercise based upon the provisions dealing with suicide in the Crimes Act 1961. In New Zealand, committing suicide was decriminalised in 1893 with the passing of the Criminal Code Act; and attempting suicide followed suit in 1961 under the Crimes Act.<sup>165</sup> These changes reflect a social shift towards viewing suicide as a mental health issue that should not be approached with criminal sanctions but with rehabilitative measures. The decriminalisation of suicide should not be read as implying a right to kill oneself, but merely as recognition of the fact that suicidal individuals are vulnerable and require protection and assistance.<sup>166</sup> By contrast, assisted suicide has remained an offence under s 179(1)(b). Furthermore, in 1961 Parliament amended s 41, which enables the use of necessary force to prevent suicide; and enacted s 180, which criminalises suicide pacts.<sup>167</sup>

Although Collins J framed the purpose of s 179(1)(b) broadly, I find the narrower aim of protecting the vulnerable to be more persuasive, as discussed above. Terminally ill, rational adults—such as Ms Seales, Mr Stransham-Ford, Mrs Pretty and Ms Taylor—do not define themselves as vulnerable and it is difficult to see how they could reasonably be categorised as such.<sup>168</sup> These individuals have approached their fatal medical conditions with maturity and dignity, and sought death after careful consideration of their circumstances. They are distinguishable from those who contemplate suicide as a result of depression and other mental health issues—persons who most would agree are vulnerable and in need of the state’s protection.

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161 At 824.

162 *Re G* [1997] NZFLR 362.

163 At 371.

164 *Seales*, above n 2, at [143].

165 At [118].

166 At [129].

167 At [119]–[122].

168 See Tucker and Geddis, above n 4, at 175.

Collins J accepts that there are different forms of self-inflicted death—voluntarily taking one’s life, sacrificing one’s life, and being forced to take one’s life.<sup>169</sup> His Honour asserts that only the first category will amount to suicide.<sup>170</sup> Conceptually, however, it is individuals within the third category who are vulnerable due to compulsion and duress—and s 179(1)(b) aims to protect *this* social group. Accordingly, rational, terminally ill patients such as Ms Seales should fall outside the ambit of s 179(1)(b). It is thus more consistent with the purpose of s 179(1)(b) to interpret suicide narrowly.

Collins J asserts that suicide must be all-encompassing because s 41—which enables the use of necessary force to prevent suicide—would not make sense if it only applied to certain types of self-inflicted death.<sup>171</sup> Tucker and Geddis argue that a narrow interpretation of suicide in reality makes more sense in the context of s 41.<sup>172</sup> Euthanasia would most likely occur in a hospital or private home, and neither environments provide sufficient opportunity for members of the public to intervene. Section 41 is better suited to suicide where the decision to commit suicide is not rational or is the result of mental illness. Examples might include tackling an individual to prevent them jumping off a bridge or assaulting someone to remove a weapon from their person. As it is unlikely that members of the public would *stumble upon* the implementation of a euthanasia request, s 41 does not require a wide, catch-all definition of suicide.

A narrow interpretation of suicide is also more consistent with the purpose of s 180, which is to protect vulnerable individuals who form a suicide pact and may be pressured into ending their lives. Situations of this nature are associated with irrational suicides and would be unlikely to occur in respect of terminally ill, rational adults who decide to undergo euthanasia. Furthermore, if two such individuals did decide to seek euthanasia together and one survived, criminal liability would arguably be inappropriate.<sup>173</sup> For these reasons, I contend that defining suicide narrowly best facilitates the operation of the Crimes Act provisions that cover matters associated with ending one’s life.

Ms Seales’ proposed definition of suicide may seem strained and at odds with how the word is ordinarily used. However, the interpretation only relates to the meaning of suicide in the Crimes Act and does not need to sit comfortably alongside connotations of suicide in other contexts. It is also unclear whether contemporary New Zealand society has a common understanding of the meaning of suicide, given attitudes have changed significantly since 1961. The courts tend to be more willing to accept strained meanings where the rights being infringed are fundamental. Accordingly, understanding suicide to mean *the irrational ending of one’s life* is certainly plausible.

In the past, New Zealand courts have striven to alleviate human rights concerns by giving legislative phrases a contemporaneous meaning. In *Re Application by AMM and KJO to adopt a child*, Wild and Simon France JJ extended the meaning of *spouse* under the Adoption Act 1955<sup>174</sup> to include heterosexual de facto couples.<sup>175</sup> Parliament’s intention was clearly to allow married couples *only* to make joint adoption applications.<sup>176</sup> Nevertheless, the Court held that a more inclusive interpretation upheld

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169 *Seales*, above n 2, at [143].

170 At [144].

171 At [128] and [140].

172 See Tucker and Geddis, above n 4, at 175.

173 See 175.

174 Section 3(2).

175 *Re Application by AMM and KJO to adopt a child* [2010] NZFLR 629 (HC) at [73].

176 At [16]–[17].

the underlying purpose of the Act by preserving “the traditional concept of the family unit”.<sup>177</sup> Wild and Simon France JJ were willing to tolerate “[s]ome resulting awkwardness in language” because the BORA was passed decades after the Adoption Act.<sup>178</sup> *Seales* presented a similar situation: just as the Adoption Act was enacted in 1955, New Zealand’s current Crimes Act was enacted in 1961 and dates back to the late 19th century. As Parliament could not have legislated with the BORA in mind, a more strained and difficult interpretation may be possible under s 6.

For these reasons it was feasible for Collins J to exclude rational, terminally ill adults seeking euthanasia from the definition of suicide. His Honour noted that the Crimes Act might require an interpretation that contradicts Parliament’s intention at the time of enactment.<sup>179</sup> However, the issue was not examined due to his Honour’s finding of consistency.

If Collins J had endorsed this alternative meaning, euthanasia would have become lawful in New Zealand. Whether this would have been appropriate is another issue altogether. Many believe that legalising euthanasia is a step that should most properly be left to Parliament; and it is important to note that no legislative action was imminent when *Seales* was being decided. Several Bills had come before the House, but all of them had been voted down or withdrawn from the ballot.

Interpreting statutory provisions through a human rights lens is a responsibility that the legislature has designated to the courts under the BORA. Allowing euthanasia as a lawful activity was, therefore, a viable option. If Collins J had legalised euthanasia, this would have likely prompted clarification from Parliament; and also, presumably, prompted the enactment of a statute regulating euthanasia or the amendment of s 179(1)(b) to expressly include rational, terminally ill adults seeking euthanasia.

A second—less radical—option that was open to Collins J would have been to deem the narrow meaning of suicide untenable and to grant a declaration of inconsistency. Doing so would have acknowledged the unjustified infringement on Ms Seales’ right to life, but would not have enabled her to avail herself of assisted euthanasia due to the operation of s 4. The availability of this avenue to the Court was confirmed a month later by Heath J in *Taylor v Attorney-General*.<sup>180</sup> A declaration of inconsistency would not have forced Parliament to take action, but would have amounted to a strong push from the High Court. It would have, at least, provoked a more significant and immediate parliamentary reaction to the issue of euthanasia.

In his discussion of assisted euthanasia cases, TRS Allan urges the judiciary to read statutes creatively because this instigates an important dialogue between the courts and Parliament, which can in turn “generate a wider public discussion”.<sup>181</sup> It is regrettable that Collins J did not reach this stage in his analysis, which rendered the case less influential legally than it might have been. Irrespective of the result, the widespread publicity of the *Seales* case has encouraged national discussion and debate about euthanasia.

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177 At [35]. See generally [35]–[37].

178 At [31].

179 *Seales*, above n 2, at [88].

180 *Taylor v Attorney-General* [2015] NZHC 1706, [2015] 3 NZLR 791 at [77] and [79].

181 TRS Allan *The Sovereignty of Law: Freedom, Constitution, and Common Law* (Oxford University Press, Oxford, 2013) at 184.

## IV Conclusion

Whether physician-assisted euthanasia should be lawful is a complex and controversial issue. The topic invites a range of perspectives—grounded in morality, politics, religion, culture and philosophy—and these have all served to shape the development of legislation, case law and the discussion about what the law should be. There is something inherent in the nature of death and dying that provokes a strong response from humankind, whether in favour of euthanasia or against it. Ronald Dworkin best encapsulates this sensitivity, noting that:<sup>182</sup>

Death is special, a peculiarly significant event in the narrative of our lives, like the final scene of a play, with everything about it intensified, under a special spotlight ... how we die matters because it is how we *die*.

It is fitting, then, that this article should end by asking what lies ahead. From a legal standpoint, the *Seales* case did not challenge the boundaries of human rights law in New Zealand. Collins J approached the matter conservatively. But his Honour could have employed a measure of judicial creativity to reach the point at which a declaration of inconsistency was possible. He could have even interpreted s 179(b) as Ms Seales wished.

Given the tenor of overseas decisions, as well as increasing recognition in the academic literature, the scope of the right to life in New Zealand can be drawn widely enough to encompass a right to die; and limiting this right by fully prohibiting euthanasia is unjustified. There is also room for *suicide* to be interpreted in a way that excludes a rational, fully-informed decision by terminally ill patients. In applying a *Hansen* analysis to Ms Seales' circumstances, this article argues that it was open to his Honour to find in her favour.

The true legacy of the *Seales* case is the debate and emotion Ms Seales' claim has generated within New Zealand society. The ultimate outcome of *Seales* is now in the hands of Parliament and, by virtue of democracy, the public. Any amendment or clarification of the law relating to active voluntary euthanasia should now come from the legislature.

It is likely that euthanasia will become a reality for New Zealanders—statistics suggest that a majority of the country would support such a change.<sup>183</sup> Whether or not reform eventuates, this case will be remembered as a significant moment in New Zealand history; and Ms Seales' courage in pursuing justice for herself and others will not be forgotten.

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182 Dworkin, above n 43, at 209.

183 Tucker and Geddis, above n 4, at 172.