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**Voluntary Euthanasia and the New Zealand Bill of Rights Act
A Critical Analysis of the *Seales v Attorney-General* Decision**

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Abstract:

The recent decision of *Seales v Attorney-General* clarified the law surrounding voluntary euthanasia in New Zealand. In addition to seeking declaratory judgment from the High Court as to the proper interpretation of certain provisions of the Crimes Act 1961, Lecretia Seales sought two declarations regarding sections 8 and 9 of the New Zealand Bill of Rights Act 1990. Specifically, that insofar as certain provisions of the Crimes Act restrict a person with a terminal and incurable illness from seeking life-ending medical assistance, the Crimes Act is inconsistent with a person's rights not to be deprived of life and not to be subjected to torture or cruel treatment. This paper critiques Justice Collins' conclusions that sections 8 and 9 of the Bill of Rights Act were not breached in Ms Seales' tragic circumstances. Further, it argues that sections 8 and 9 of the Bill of Rights Act should extend to circumstances where people are suffering from terminal and incurable illnesses and recognise a right to seek life-ending medical assistance. Finally, the paper critiques the methodology used by the courts in New Zealand when assessing whether rights-infringing legislation is justified pursuant to section 5 of the Bill of Rights Act, and ultimately concludes that the courts should always query whether rights-infringing legislation serves a purpose sufficiently important to justify infringement of human rights. Further, the paper argues that the courts should exercise extreme caution in ascertaining the purpose of rights-infringing legislation, particularly statutes enacted prior to the Bill of Rights Act.

Keywords:

Voluntary euthanasia, human rights, Crimes Act 1961, New Zealand Bill of Rights Act 1990, right not to be deprived of life, right not to be subjected to torture or cruel treatment, justified limitations.

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Word count

The text of this paper (excluding table of contents, footnotes, and bibliography) comprises approximately 14,850 words.

I Introduction

Historically, voluntary euthanasia has been an incredibly divisive topic and its legality has been the subject of longstanding debate. Ethical, moral, and philosophical issues are at the forefront of two incredibly divergent viewpoints when the policy considerations surrounding a person's right to end their own life are reviewed. Although numerous jurisdictions have legalised voluntary euthanasia in recent decades, New Zealand has abstained from doing so. Since 1995, New Zealand has witnessed two legislative attempts to change the law in order to allow people suffering from terminal and incurable illnesses to have the right to seek assistance to have their lives ended.¹ However, on both occasions parliamentary opposition has prevailed. Despite their previous inability to attract majority support in Parliament, advocates of voluntary euthanasia have remained active. Another Bill had been drafted as recently as 2013 which sought to give people the right to seek life-ending medical assistance,² and another is supposedly being prepared as at the date of this paper.³

This year, the debate arose outside of Parliament as New Zealand witnessed a novel challenge to the issue in the High Court. Lecretia Seales sought clarification as to the proper interpretation of certain provisions of the Crimes Act 1961 in an attempt to receive a declaration that her doctor could lawfully administer her with a lethal drug without being at risk of criminal prosecution. Although Ms Seales' challenge was met with considerable criticism from certain parties and was ultimately unsuccessful, her attempt for recognition of a right to seek life-ending medical assistance attracted considerable sympathy from the public and has invited reconsideration of the issue as to whether voluntary euthanasia should be legal in New Zealand.

In addition to challenging the proper interpretation of certain provisions of the Crimes Act, Ms Seales sought two declarations from the High Court regarding sections 8 and 9 of the New Zealand Bill of Rights Act 1990. Specifically, Ms Seales sought declarations that insofar as the Crimes Act prevents a person from seeking medical assistance to end their life when they are suffering from a terminal and incurable illness, the Act is inconsistent with a person's rights not to be deprived of life and to not be subjected to torture or cruel treatment.

¹ Death with Dignity Bill 1995 (00-1); Death with Dignity Bill 2003 (37-1).

² End of Life Choice Bill (2013) (consultation draft).

³ David Seymour "Free thoughts – end of life choice" (23 June 2015) ACT <www.act.org.nz>.

The following paper principally focuses on the Bill of Rights Act declarations sought by Ms Seales. Particularly, it analyses and critiques Justice Collins' conclusions that sections 8 and 9 of the Bill of Rights Act were not breached by the relevant provisions of the Crimes Act in Ms Seales' circumstances. Specifically, this paper comprises five parts. First, the origins of euthanasia are discussed and the different categories of euthanasia are set out and explained. Secondly, the recent decision of *Seales v Attorney General* is analysed as it is the most recent and authoritative judgment on the law of voluntary euthanasia in New Zealand.⁴

Thirdly, the current law surrounding section 8 of the Bill of Rights Act (the right not to be deprived of life) is critiqued for three principal reasons. Namely, that it is not consistent with the International Covenant on Civil and Political Rights, fails to respect the principle of autonomy, and does not meet orthodox definitions of a human right and is therefore more reflective of a duty, rather than a right, in the case of people suffering from terminal and incurable illnesses.

Fourthly, section 9 of the Bill of Rights Act (the right to not be subjected to torture or to cruel, degrading, or disproportionately severe treatment) is analysed. It is ultimately concluded that the restrictive approach that has been taken to section 9 is both unnecessary and illogical. Further, it is argued that the ambit of section 9 should be expanded to include certain situations where the State has knowledge of, and is actively able to, intervene to prevent a person's suffering.

Finally, a critical examination of section 5 of the Bill of Rights Act (demonstrably justifiable limits) is undertaken. The section 5 methodology is then contrasted with the substitute test adopted by Collins J in *Seales v Attorney-General*. As a result of that contrast it is then argued that, contrary to the existing position in New Zealand, the courts should always inquire as to whether a limiting measure serves a purpose that is sufficiently important to justify the infringement of a right affirmed by the Bill of Rights Act. Further, it is ultimately concluded that in addition to questioning the purpose of a limiting measure, the courts must take exceptional care in ascertaining the purpose of rights-infringing statutes that have been enacted prior to the Bill of Rights Act.

⁴

[2015] NZHC 1239.

II *What is Euthanasia?*

The phrase “euthanasia” has Greek origins and was historically defined as “good death”. While there are multitudes of ways in which euthanasia can be defined nowadays, it is generally understood to be the deliberate killing of a person, motivated by the impulse of compassion, in order to relieve the physical pains of someone who is suffering from an incurable disease and is facing inevitable death.⁵ This broad definition can be narrowed by considering: the consent (if any) required by the incurably ill person, who ultimately causes the person's death, and how the incurably ill person's death is brought about (either by the provision of lethal medication, or by the omission of providing the person with a measure to prolong their life). The policy considerations differ vastly depending on what type of euthanasia is being considered, therefore an understanding of how euthanasia differs in all of its forms is critical for any informed debate.

Voluntary euthanasia is the principal focus of this paper. *Voluntary euthanasia* requires that the killing of an incurably and terminally ill person must be with that person's express and informed consent.⁶ Additionally, *voluntary euthanasia* can be further distinguished by considering the ultimate cause of the patient's death. Passive voluntary euthanasia occurs where the patient refuses life-prolonging treatment and that request is granted, while active voluntary euthanasia is where the patient requests, and is given or administered, lethal medication. Conversely, *involuntary euthanasia* is the killing of an incurably ill person against that person's express consent. Similarly, passive involuntary euthanasia involves the cessation of life prolonging treatment against a patient's will, while active involuntary euthanasia requires that lethal medication be administered to a conscious and rational patient against their will.⁷

The final category of euthanasia is *speculative euthanasia*. Speculative euthanasia involves the killing of an incurably ill person in the absence of that person's express consent or refusal. It commonly arises with comatose patients, infants, or people who are mentally retarded. Once again, speculative euthanasia can occur passively where life-prolonging treatment for the patient is ceased, and actively where lethal medication is administered to a person who is otherwise unable to provide their informed consent. The importance of speculative euthanasia cannot be overlooked as it often becomes an issue

⁵ Emily Jackson and John Keown *Debating Euthanasia* (Hart Publishing, Oxford, 2012), at 1.

⁶ Parliamentary Library "Voluntary Euthanasia and New Zealand" [2003] Background Note at 2.

⁷ At 2.

in situations where an incurably ill person has formerly provided their informed consent to receive lethal medication, but has subsequently entered a coma. This hypothetical is highly problematic as the issue then becomes whether the comatose person's family should have the right to decide whether or not to permit a medical professional to accede to the incurably ill person's wish to have their life ended.⁸ This particular issue is beyond the ambit of this paper and will therefore not be considered.

III Seales v Attorney-General

A Introduction

The judgment of Collins J in *Seales v Attorney General* is the most recent and authoritative statement on the law of voluntary euthanasia in New Zealand.⁹ It is the first judicial decision in New Zealand to directly consider the purpose of certain provisions of the Crimes Act which, *prima facie*, illegalise voluntary euthanasia. Moreover, it is also the first judicial pronouncement that a person suffering from a terminal and incurable illness does not, pursuant to either section 8 or 9 of the Bill of Rights Act, have a right to seek life-ending medical assistance.

Lecretia Seales was diagnosed with a brain tumour in March 2011. Since that time, she had undergone surgery, chemotherapy and radiation treatment in an attempt to combat her illness. Tragically, despite the vast array of medical care she received, her tumour was inoperable and ultimately led to her death on 5 June 2015.¹⁰ While Ms Seales' body was suffering rapidly in her final months, her mind continued to function without impairment. Ms Seales' own account of her final months recorded that she treasured every day and had no desire to end her life. However, as her death had become more inevitable, she began to fear that it would be unpleasant, painful and undignified. This meant that she may have to experience a death that, to use her own words, was in no way consistent with the person that she was. Ms Seales wanted to be able to die with a dignity and independence that represented how she had always lived her life.¹¹

B Relief and Declarations Sought

Ms Seales sought declaratory judgment from the High Court giving effect to her wishes. Specifically, Ms Seales sought two declarations relating to the proper interpretation of certain provisions of the Crimes Act 1961 (the Crimes Act declarations).

⁸ Arval Morris "Voluntary Euthanasia" (1970) 45 WLR 239 at 246.

⁹ *Seales v Attorney-General*, above n 4.

¹⁰ At [211].

¹¹ At [29].

First, Ms Seales wanted the High Court to declare that her doctor would not be at risk of facing prosecution for either murder or manslaughter if she provided “administered aid in dying” to Ms Seales.¹² Specifically, the first declaration sought an interpretation of the Crimes Act which meant that a medical practitioner who administered medication in order to bring about the death of a patient, that had both consented to that medication and was suffering from a grievous and terminal illness causing enduring and intolerable suffering, would not be committing a criminal offence. Secondly, Ms Seales sought a declaration that her doctor would not be assisting her to commit suicide (which is also, *prime facie*, unlawful pursuant to the Crimes Act) by providing facilitated aid in dying. That is to say, that if a doctor makes available to a patient the means by which the patient can bring about their own death, that doctor would not be committing a criminal offence if the patient had consented to the provision of that medication and the patient was suffering from a grievous and terminal illness causing enduring and intolerable pain.¹³

In addition to seeking declarations as to the ambit of the criminal law in her circumstances, Ms Seales also sought two declarations that the aforementioned provisions of the Crimes Act are inconsistent with two of the rights contained in the Bill of Rights Act (the Bill of Rights Act declarations). First, Ms Seales sought a declaration that section 160 of the Crimes Act (culpable homicide) is inconsistent with sections 8 and 9 of the Bill of Rights Act (the right not to be deprived of life and the right not to be subjected to torture or cruel treatment) insofar that a patient consents to administered aid in dying and has a grievous and terminal illness causing enduring and intolerable suffering. Secondly, Ms Seales sought a declaration that section 179 of the Crimes Act (aiding and abetting suicide) is also inconsistent with sections 8 and 9 of the Bill of Rights Act insofar as section 179 prohibits facilitated aid in dying in the same circumstances as the first Bill of Rights Act declaration sought.¹⁴

C Judgment

Collins J declined to issue any of the declarations sought by Ms Seales. First, in respect of the declaration that Ms Seales' doctor would not be at risk of being prosecuted if she provided Ms Seales with "administered aid in dying", Collins J held that a person cannot consent to the intentional infliction of death upon himself or herself.¹⁵ Collins J came to this conclusion by following United Kingdom precedent, and stated that to hold

¹² Crimes Act 1961, ss 160(2)(a) and 160(3), *Seales v Attorney-General*, above n 4, at [5].

¹³ At [6].

¹⁴ At [11].

¹⁵ *R v Lee* [2006] 3 NZLR (CA) at [312].

otherwise would frustrate the purpose of section 63 of the Crimes Act, which provides that a victim's consent to death does affect the offender's criminal responsibility.¹⁶

Secondly, in respect of the declaration that Ms Seales' doctor would not be at risk of being prosecuted if she provided Ms Seales with the medication necessary to take her own life (facilitated aid in dying), Collins J held that Ms Seales' doctor's actions *may* not constitute an unlawful act within the meaning of section 160(2)(a) of the Crimes Act. For this to be the case, Ms Seales' doctor's intention must have been to provide Ms Seales with palliative relief, although Ms Seales' life may have been shortened as an indirect but foreseeable consequence.¹⁷ It is arguable, therefore, that Collins J could have made a limited declaration that in the specific context of Ms Seales' case, Ms Seales' doctor would not have been at risk of being criminally liable. However, given that Ms Seales' doctor had already manifested her willingness to provide Ms Seales with lethal medication *to enable Ms Seales to end her life*, it is likely that this would have been considered intent on part of Ms Seales' doctor thereby putting her at risk of prosecution. Accordingly, the second criminal law declaration was not granted.¹⁸

Similarly, the Bill of Rights Act declarations were not granted either. First, in relation to section 8 (the right not to be deprived of life), Collins J concluded that section 8 was engaged because there was an increased risk that Ms Seales would seek to end her life prematurely given the Crimes Act's prohibition on physician-assisted dying.¹⁹ However, it was held that Ms Seales' section 8 rights were not breached because the relevant Crimes Act provisions did no more than achieve the purpose that Collins J had attributed to them, the protection of *all* life.²⁰ Accordingly, the Crimes Act provisions were not arbitrary, overly broad, or grossly disproportionate and were therefore in accordance with fundamental justice (as permitted by section 8 of the Bill of Rights Act).²¹

¹⁶ *Seales v Attorney-General*, above n 4, at [93] and [94].

¹⁷ At [106].

¹⁸ At [210].

¹⁹ At [165] and [166].

²⁰ At [178]. For the purposes of this paper, the "relevant Crimes Act provisions" refers to sections: 41 (justification of using force to prevent suicide), 63 (consent to death not affecting the culpability of an offender), 179 (aiding and abetting suicide), 180 (suicide pacts), which, along with the culpable homicide provision in section 160, led Collins J to conclude that the purpose of the Crimes Act provisions was to protect *all* life.

²¹ At [178], [185], [190] and [191]; New Zealand Bill of Rights Act 1990, s 8.

Secondly, in relation to Ms Seales' section 9 rights to not be subjected to cruel or disproportionately severe treatment, Collins J held that there were three reasons militating against a conclusion that Ms Seales' rights were breached. First, Ms Seales' circumstances were a direct consequence of her tumour, not her treatment.²² Secondly, the treatment that Ms Seales was receiving prior to her death was for the purpose of alleviating, not exacerbating, the worst effects of her tumour.²³ Finally, it was held that the duty of the State under section 9 of the Bill of Rights Act is to not subject people to cruel, degrading or disproportionately severe treatment. It was held that although this duty is a positive obligation, it is not engaged where the criminal law prohibits culpable homicide and assisted suicide where the effect of the law is that the person in question will continue to suffer from illness.²⁴

IV New Zealand Bill of Rights Act 1990 Analysis – Sections 8 and 9

Much of the existing New Zealand scholarship on the topic of voluntary euthanasia involves a critique of the Crimes Act 1961 and an analysis as to the appropriate options for reform of the criminal law, in order to allow people to seek life-ending medical assistance.²⁵ There has, however, been minimal attention paid to the topic of the relationship between voluntary euthanasia and the Bill of Rights Act.²⁶ Accordingly, having outlined the existing legal position on voluntary euthanasia, the remainder of this paper: assesses the correctness of Collins J's decision that sections 8 and 9 of the Bill of Rights Act do not recognise a right to seek life-ending medical assistance, advocates for reform of sections 8 and 9 to recognise such a right, and discusses how the courts should assess whether human rights infringements amount to justified limitations as permitted by section 5 of the Bill of Rights Act.

²² At [205].

²³ At [206].

²⁴ At [207].

²⁵ See, for example, Sarah Elizabeth Mathieson "*Live and Let Die: The Legalisation of Euthanasia in New Zealand*" (LLB (Hons) dissertation, University of Otago, 2013).

²⁶ As was the case in the *Seales v Attorney-General* decision itself. The only publically accessible piece of writing on the topic appears to be the research of Stuart Beresford "Euthanasia, the Right to Die and the Bill of Rights Act" [2005] HRR 3.

A Section 8 of the New Zealand Bill of Rights Act 1990 – The Current Legal Position

Section 8 of the Bill of Rights Act, entitled the “right not to be deprived of life”, relevantly provides that:²⁷

No one shall be deprived of life except on such grounds as are established by law and are consistent with the principles of fundamental justice.

A literal reading of section 8, particularly the section's title, would render any argument that the provision includes a right to seek assistance to end one's own life as, in the words of Collins J, counterintuitive.²⁸ Numerous domestic precedents would also support the proposition that section 8 cannot be construed so expansively as to include such a right.²⁹ However, section 8 and its foreign equivalents have nevertheless warranted a considerable amount of relevant judicial attention in a wide variety of different contexts. For example, it has been held that the United Kingdom equivalent of section 8 is not merely a restriction on the State's ability to take a life. Rather, there is an active obligation on the State to protect or preserve a person's life where the authorities know, or ought to know of, the existence of a real and immediate risk to that person's life.³⁰ More recently it has also been held that in circumstances where the State is properly to be regarded as responsible for harm inflicted (or threatened) on a victim, there is a positive obligation on the State to act to protect a person's life,³¹ provided that the risk is immediate, present and on-going.³²

Albeit in a different context, it has also been held in New Zealand that section 8 brings rise to positive duties on the State. In *Attorney-General v Zaoui*,³³ the Supreme Court held that the right not to be deprived of life acts as a limit on the State's ability to remove, deport or extradite people from New Zealand where there is good reason for

²⁷ New Zealand Bill of Rights Act 1990, s 8.

²⁸ *Seales v Attorney-General*, above n 4, at [162].

²⁹ See, for example, *B and B v Director-General of Social Welfare* [1996] 2 NZLR 134, (1996) 2 HRNZ 342 (CA) where it was held that a child's parents' decision to withhold consent to the child receiving a blood transfusion, which was necessary to keep the child alive, would breach the child's section 8 rights. See also *R v Martin (No 3)* [2004] 3 NZLR 69 (HC) where it was held that a patient cannot insist upon medical steps for the purpose of ending their life.

³⁰ *Osman v United Kingdom* (1998) 29 EHRR 245 at [116]; *Opuz v Turkey* (2010) 50 EHRR 28 (ECHR).

³¹ *R (On the application of Limbuela) v Secretary of State for the Home Department* [2005] 3 WLR 1014 (HL).

³² *Re Officer L* [2007] 1 WLR 2135 (HL).

³³ [2006] 1 NZLR 289, (2005) 7 HRNZ 860 (SC).

believing that the removal of a person may result in that person losing their life.³⁴ Otherwise put, that where the circumstances are appropriate, there is a positive duty on the State to allow people to remain in New Zealand, when they would otherwise be extradited and potentially subjected to conditions where their life would be in danger.

However, the extent of any duties imposed on the State by section 8 is far from far-reaching, as was evidenced by the decision of *Lawson v Housing NZ*, which held that a person's section 8 rights are not breached by the State's failure to charge market rent for accommodation without considering the affordability and impact on the tenant's living standards.³⁵ That said, Williams J did hold that a liberal approach to section 8 is warranted. However, this statement was immediately qualified by stating that the courts are ultimately constrained by the express wording of section 8 itself.³⁶

In the specific context of voluntary euthanasia, two particularly relevant examples of section 8 being considered include *Shortland v Northland Health Ltd* and *R v Martin (No 3)*.³⁷ *Shortland* involved a patient suffering from a fatal non-functioning kidney that required dialysis until there could be a transplant.³⁸ In that case, the Court of Appeal placed considerable emphasis on the word "deprive" in section 8, and concluded that because the patient was unable to co-operate with active therapy, it could not be said that the refusal to provide dialysis could be regarded as deprivation for the purposes of the section.³⁹ Although not stated explicitly, the Court appears to have been suggesting that in circumstances where it is impractical or impossible for medical practitioners to provide patients with measures necessary to ensure their survival, section 8 is not engaged as the failure to provide the necessary life support cannot sensibly be regarded as deprivation. Conversely, *Martin* was an attempted murder case where the defendant was accused of murdering her mother. The defendant sought to extend the application of the "double effect" principle to those outside the medical profession.⁴⁰ However, the prosecution contended that to do so would intrude on the right not to be deprived of life.⁴¹ The High

³⁴ At [79].

³⁵ *Lawson v Housing NZ* [1997] 2 NZLR 474 (HC) at 494.

³⁶ At 494.

³⁷ [1998] 1 NZLR 433 (CA); [2004] 3 NZLR 69 (HC).

³⁸ *Shortland v Northland Health Ltd*, above n 37.

³⁹ At 444.

⁴⁰ *R v Martin (No 3)*, above n 37, at [4]. The double effect principle provides that if palliative care is provided to a patient by a doctor, with the purpose of alleviating the patient's pain, the doctor may not be criminally liable if the patient dies even though he or she knew that an incidental effect of that application would be to abbreviate the patient's life.

⁴¹ At [8].

Court agreed with the prosecution's argument and held that intrusions on section 8 need to be made with caution, and that a patient has no legal right to insist upon medical intervention that would end their life.⁴²

Overall, the preceding discussion of the current law surrounding section 8 of the Bill of Rights Act reveals two important points about the section that are crucial to the critique that follows. First, section 8 is not an absolute prohibition on the taking of a human life. Not only can there be intrusions on section 8 in accordance with fundamental justice, but as *Shortland* demonstrates,⁴³ there are circumstances where the law recognises that additional exceptions to the sanctity of life principle are permitted. Secondly, precedent from both New Zealand and the United Kingdom supports the proposition that, in certain circumstances, the right not to be deprived of life brings rise to positive duties on the State.

B Section 8 of the New Zealand Bill of Rights Act 1990 – Critique

1 Section 8 should be consistent with the International Covenant on Civil and Political Rights

The vast majority of states that have enacted human rights legislation over the past half century have done so in order to give effect to the International Covenant on Civil and Political Rights.⁴⁴ The rationale behind the enactment of New Zealand's Bill of Rights Act is, without question, no different.⁴⁵ Consistently, the Court of Appeal has previously noted similarity between section 8 of the Bill of Rights Act and article 6(1) of the Convention.⁴⁶ Article 6(1) stipulates that: "Every human being has the inherent right to life. This right shall be protected by law. No one shall be *arbitrarily deprived* of his life".⁴⁷

While it is not uncommon for there to be a degree of dissimilarity between domestic legislation and the international instruments upon which the domestic legislation is based, the disparity between article 6(1) of the Convention and section 8 of the Bill of Rights Act is difficult to reconcile. Unless section 8 of the Bill of Rights Act was intended to

⁴² At [15].

⁴³ Above n 37.

⁴⁴ International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976).

⁴⁵ The preamble to the New Zealand Bill of Rights Act 1990 provides that it is an Act to affirm New Zealand's commitment to the International Covenant on Civil and Political Rights.

⁴⁶ *Shortland v Northland Health Ltd*, above n 37, at 444.

⁴⁷ International Covenant on Civil and Political Rights, above n 44, article 6(1).

have been given a significantly different meaning to its parent provision in the Convention, which is doubtful given the lack of any detailed scrutiny of article 6(1) during the passage of the Bill of Rights Act,⁴⁸ it is difficult to ascertain exactly why section 8 has been interpreted so narrowly in New Zealand, and does not include a right that allows terminally and incurably ill patients to seek life-ending medical assistance.⁴⁹

Despite the vastly different wording of section 8 and article 6(1), it is undisputable that there is an obvious correlation between the two insofar as they both seek to protect life. However, both a literal reading of section 8's title and the manner in which the section has been interpreted in New Zealand case law is much more restrictive than article 6(1) insofar as voluntary euthanasia is concerned. Materially, article 6(1) stipulates two related, but importantly distinct components of a human right. First, the article makes it unequivocally clear that a person has a right to life. Secondly, the proviso to that right is that a person shall not be *arbitrarily deprived* of their life. Conversely, section 8 of the Bill of Rights Act does not explicitly state that New Zealand citizens have a right to life. Rather, it stipulates there is a right *not* to be deprived of life.⁵⁰ It is arguable that the distinction between article 6(1) and section 8 is insignificant, evidenced by the fact that some of New Zealand's leading rights academics have previously described section 8 as a right to life.⁵¹ However, there is a material difference between section 8 and article 6(1), which lies in the fact that section 8 is a negative affirmation of a right, in that it is a right *not to be* deprived of life, which differs considerably from the positive affirmation evident in article 6(1). This difference did not exist at the time when the Bill of Rights was in the form of a White Paper. Rather, both article 6(1), and what eventually became section 8, were positive affirmations of a right to life.⁵² Surprisingly, when the clause that eventually became section 8 was changed from a positive affirmation of a right to a negative affirmation following select committee revision, this was completely overlooked by Parliament. It was said that select committee consideration of the then Bill of Rights Bill "[did] not change or alter in any dramatic

⁴⁸ (10 October 1988) 502 NZPD 13038 to 13057.

⁴⁹ Although Collins J did hold that Ms Seales section 8 rights were engaged in *Seales v Attorney-General*, it was not stated that section 8 included a right to seek life-ending medical assistance.

⁵⁰ Except on such grounds as are established by law and are consistent with the principles of fundamental justice.

⁵¹ See Claudia Geiringer and Matthew Palmer, "Human rights and social policy in New Zealand" (2007) 30 Social Policy Journal of New Zealand 12 at 16 where the authors described the prohibition on murder in New Zealand as a means of protecting the "right to life", not the "right not to be deprived of life".

⁵² Geoffrey Palmer "A Bill of Rights for New Zealand: A White Paper" [1984–1985] 1 AJHR A6 at 12, where the equivalent of section 8 was entitled the "right to life" rather than its title as enacted, the "right not to be deprived of life".

form the nature of the Bill as introduced".⁵³ In my view, this proposition is flawed in respect of the clause that eventually became section 8. If section 8 was enacted in a manner consistent with article 6(1) of the Convention in that it was a positive affirmation of a right to life (rather than a right not to be deprived of life), the only proviso to which being that a person shall not be arbitrarily deprived of life, it is highly probable that the relevant provisions of the Crimes Act 1961 would be in breach of section 8, because they would be inconsistent with a person's choice as to whether they wish to exercise their section 8 rights.

In my view, there is also a respectable argument that section 8 should include a right to seek life-ending medical assistance in the form that it is currently enacted. Prior to the *Seales v Attorney-General* decision, Paul Rishworth had dismissed any suggestion that section 8 includes a right to seek life-ending medical assistance for two reasons.⁵⁴ First, Rishworth argued that the absence of any rights to liberty or security of the person in section 8 meant that it could not be said that the provision includes a right to seek life-ending medical assistance.⁵⁵ Secondly, Rishworth suggested that any argument would have to proceed on the basis that a person's right to seek life-ending medical assistance would be the "opposite" of the right that section 8 guarantees.⁵⁶ That is to say, that because section 8 guarantees a right not to be deprived of life, the section also contains the opposite, namely, a right to seek life-ending medical assistance. Although the Canadian Supreme Court has recently declared otherwise,⁵⁷ the *Seales v Attorney-General* decision does mean that Rishworth's criticism holds true in New Zealand. To put Rishworth's second argument in another way, his proposition is that there is no analogy between voluntary euthanasia and other rights, such as the right to freedom of expression, for which the opposite (the right to silence) is merely a form of not exercising the right in question, because unlike rights such as freedom of expression, the right not to be deprived of life is a negative affirmation of a person's right.

⁵³ (17 July 1988) 499 NZPD 2799 Bill Dillon MP.

⁵⁴ Paul Rishworth and others *The New Zealand Bill of Rights Act* (Oxford University Press, Oxford, 2003) at 236.

⁵⁵ At 236. Unlike, for example, other jurisdictions such as Canada, where the Canadian equivalent of section 8 of the Bill of Rights Act reads: "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice".

⁵⁶ At 236.

⁵⁷ *Carter v Canada (Attorney-General)* [2015] SCC 5.

Although Rishworth's contention is somewhat convincing, it is arguable that his position fails to consider modern-day statutory interpretation techniques. First, it is arguable that the omission of any express mention of rights to liberty or security of the person from the Bill of Rights Act should not preclude an interpretation that a right to seek life-ending medical assistance is within the ambit of section 8. The preamble to the International Convention on Civil and Political Rights (again, the international instrument on which the Bill of Rights Act is based) provides that the rights contained in the Convention are to recognise the inherent dignity of all people, and that the rights are a manifestation of the ideal of free human beings enjoying civil and political freedom.⁵⁸ If section 8 was interpreted in accordance with those purposes enunciated in the preamble to the Convention, it is difficult to see why section 8 should not include a right to seek life-ending medical assistance. The promotion of human dignity is the bedrock underlying voluntary euthanasia. Human dignity, in the view of advocates of voluntary euthanasia, demands that people have control over the choice to die, and that such control should be acknowledged and respected by others.⁵⁹ To not interpret section 8 in accordance with those views completely contradicts the primary rationale behind the very international instrument upon which the Bill of Rights Act is based.

That said, it is common ground that the judiciary is constrained by the express wording of section 8,⁶⁰ and it is undisputable that if statutory wording is clear it must be given effect to regardless of whether or not it accords with international obligations.⁶¹ However, it requires no more than a brief outline of section 8's interpretive history to see that section 8 is anything but clear. If section 8 was clear, Ms Seales and arguably New Zealand's leading Bill of Rights Act academic would not have challenged its proper interpretation in the High Court. Collins J would not have placed excessive reliance on *Carter v Canada (Attorney-General)* (the very case he sought to distinguish as it effectively legalised voluntary euthanasia in Canada) when construing section 8. Williams J, in one of the first decisions to consider the ambit of section 8, would not have held that a "liberal approach" to section 8's interpretation is required.⁶² Finally, and

⁵⁸ International Covenant on Civil and Political Rights, above n 44, preamble.

⁵⁹ See, for example, Margaret Otlowksi *Voluntary Euthanasia and the Common Law* (Oxford University Press, New York, 1997) at 189 and George Fletcher *Morals and Medicine* (Princeton, New Jersey, 1979) at 205-206.

⁶⁰ *Lawson v Housing NZ*, above n 35, at 494.

⁶¹ This position has been accepted since the early 20th century: *Ellerman Lines Ltd v Murray* [1931] AC 126; and has very recently been implicitly acknowledged in New Zealand in *LM v R* [2014] NZSC 110; [2015] 1 NZLR 23 at [52].

⁶² *Lawson v Housing NZ*, above n 35.

perhaps most convincingly, there would not have been rigorous debate from the major political parties in Parliament surrounding the appropriate ambit of section 8 and its correct interpretation, before it was even enacted.⁶³

Given section 8's ambiguity, and the Canadian Supreme Court's recent declaration that the Canadian equivalent of section 8 is breached by the relevant provisions of the Canadian Criminal Code, it invites the question as to whether a purposive approach to the interpretation of section 8 in accordance with the recognition of human dignity stated in the International Covenant on Civil and Political Rights, is tenable in New Zealand. In my view, it is difficult to see why such an interpretation is not possible. First, it is beyond dispute that recourse can be had to international aids when resolving ambiguities in statutes. This is the case even where no reference is made to an international obligation in an enactment.⁶⁴ Further, criticism regarding the use of international aids has primarily been focussed on their use to read-in qualifications to domestic statutes; it has not been directed towards judges using them to afford expansive interpretations to domestic statutes.⁶⁵ It is, therefore, undisputable that reference to the policy rationale underlying the Covenant (the recognition of human dignity and allowing people to enjoy civil and political freedom) in the interpretation of the Bill of Rights Act is a perfectly sensible interpretative technique given the Act's preamble, which unequivocally provides that it is an Act to affirm New Zealand's commitment to the International Covenant on Civil and Political Rights.⁶⁶

Secondly, as foreshadowed earlier, the principal assertion put forward by critics who argue that section 8 does not extend to life-ending medical assistance is that the section does not explicitly state that it includes a right to "liberty", unlike its Canadian and North American equivalents.⁶⁷ Putting aside the fact that this was not actually pertinent to the Canadian Supreme Court's decision in *Carter*,⁶⁸ Collins J did not refer to any New Zealand precedent which precluded such an interpretation in New Zealand, and declined to consider whether a right to liberty was nevertheless impliedly present in the section. As

⁶³ (10 October 1988) 502 NZPD 13038 to 13057.

⁶⁴ *Salomon v Commissioners of Customs & Excise* [1967] 2 QB 116.

⁶⁵ John Burrows "The Changing Approach to the Interpretation of Statutes" (2002) 33 VUWLR 981 at 998.

⁶⁶ New Zealand Bill of Rights Act 1990, preamble.

⁶⁷ *Seales v Attorney-General*, above n 4, at [156]; Paul Rishworth, above n 54, at 236.

⁶⁸ *Carter v Canada (Attorney-General)*, above n 57, at [30] where it was held that all three components of section 7 of the Canadian Charter of Rights and Freedoms (life, liberty, and security) were impacted on by the relevant provisions of the Canadian Criminal Code 1985.

discussed, if a purposive approach of section 8 was undertaken to ensure accordance with the Covenant, it is difficult to see why this would not be the case. The question depends entirely on what can be made from Parliament's omission of the phrase "liberty" in section 8. Unsurprisingly, critics assume that because the phrase was not included, there is no way that it can exist in the section.⁶⁹ However, the fallacy of that assumption is that there is nothing in the way that statutes are ordinarily construed in New Zealand that would give merit to that suggestion. Rather, this country's highest courts have recently deemed provisions in statutes to include words that they expressly do not, where a purposive approach would require them to do so.⁷⁰ That being the case, it is difficult to accept the assumption of critics that the omission of the phrase "liberty" means that it is inconceivable that the concept is not within the ambit of section 8, when a purposive interpretation obviously suggests that it would be. Ironically, the same critics expressly acknowledge that the Bill of Rights Act is only an ordinary statute, like any other piece of legislation.⁷¹ Why then, should it then not be subject to the same interpretative discretion as other ordinary statutes when being construed to give effect to its purpose?

Thirdly, it has been accepted for over a decade, and was this year implicitly recognised by the Canadian Supreme Court, that: "judges play a significant and creative role as guardians of the social good and the values of our legal system".⁷² That said, can it truthfully be the case that interpreting section 8 to include a right to seek life-ending medical assistance would be an example of judicial activism?⁷³ A form of constitutionally impermissible judicial legislation?⁷⁴ Parliamentarians themselves were aware of the risk that once the Bill of Rights Act was enacted, political decisions

⁶⁹ Paul Rishworth, above n 54, at 236.

⁷⁰ See, for example, *Rabobank New Zealand Ltd v McAnulty and others* [2011] NZCA 212, which held (at [25]-[27]) that the definition of a lease for a term of more than one year in section 16 of the Personal Property Securities Act 1999 included bailments (other than bailments for a term of more than one year) despite the fact that the phrase "bailment" was omitted from the relevant subsections (which only used the phrase "lease") immediately following both phrases ("bailment" and "lease") being used in the subsection immediately prior.

⁷¹ Paul Rishworth "The New Zealand Bill of Rights Act 1990: The First Fifteen Months" (Legal Research Foundation, Auckland, 1992) at 8.

⁷² *Carter v Canada (Attorney-General)*, above n 57; John Burrows, above n 65, at 998.

⁷³ As it was in Canada following *Carter v Canada (Attorney-General)*, above n 57, see Andrew Coyne "Crossing the Rubicon, Supreme Court seems eerily complacent about ramifications of assisted suicide ruling" (6 February 2015) National Post <www.news.nationalpost.com> and Andrew Coyne "Supreme Court euthanasia ruling marks the death of judicial restraint" (13 February 2015) National Post <www.news.nationalpost.com>.

⁷⁴ Claudia Geiringer "The Principle of Legality and the Bill of Rights Act: A Critical Examination of *R v Hansen*" (2008) 6 NZJPIIL 60 at 64.

regarding rights infringements would pass from the hands of parliamentarians to judges, and that doing so would not make those decisions any less political.⁷⁵ Parliament proceeded to enact the Bill of Rights Act in light of that realisation. That being the case, it was not necessarily correct of Collins J to defer to parliamentary inaction on the issue of voluntary euthanasia to evidence the fact that it is not within the ambit of section 8.⁷⁶ Rather, in light of the express parliamentary acknowledgement that rights infringements are political decisions that were partially passed to judges through the enactment of the Bill of Rights Act, it is arguable that the appropriate role of the New Zealand courts in such cases is to follow the Canadian approach and make decisions in accordance with contemporaneous "social and factual landscape[s]",⁷⁷ and administer the laws of New Zealand in accordance with social justice.⁷⁸ If one accepts that this as an appropriate role of judges in New Zealand, as Professor John Burrows has done so himself,⁷⁹ the overwhelmingly large support for the legalisation of voluntary euthanasia should permit judicial adaptation of section 8 to ensure that it accords with contemporary circumstances and the international instrument upon which it is based.⁸⁰

2 *Section 8 fails to respect the principle of autonomy*

In addition to not being reflective of the international instrument upon which it based, a literal reading of section 8 and the narrow manner in which it has been interpreted fails to respect one of the fundamental principles of human rights theory and practice, namely, the principle of autonomy.⁸¹ The principle of autonomy, otherwise known as the self-determination principle, stipulates that each person has value and is worthy of respect, bears basic rights and freedoms, and has the right to make his or her own life choices which determine his or her future.⁸²

Section 8 contradicts the principle of autonomy for two interrelated, but importantly distinct reasons. First, although Collins J did hold that Ms Seales' section 8 rights were engaged owing to her tragic circumstances,⁸³ his Honour did not do so on the basis that

⁷⁵ (10 October 1988) NZPD 502 13046 Jim Bolger MP.

⁷⁶ *Seales v Attorney-General*, above n 4, at [211].

⁷⁷ *Carter v Canada (Attorney-General)*, above n 57, at [28].

⁷⁸ *Collector of Customs v Lawrence Publishing Co Ltd* [1986] 1 NZLR 404 (CA) at 414-415.

⁷⁹ John Burrows, above n 65, at 999.

⁸⁰ Renee Graham "Lecretia Seales' widower praises Kiwis for poll showing support for doctor assisted euthanasia" (27 July 2015) One News Now <www.tvnz.co.nz>.

⁸¹ Christopher McCrudden "Human Dignity and Judicial Interpretation of Human Rights" (2008) 19 EJIL 655 at 656.

⁸² Margaret Otlowski, above n 59, at 189.

⁸³ *Seales v Attorney-General*, above n 4, at [12].

section 8 includes a right to seek life-ending medical assistance. Rather, it was because the State's actions in illegalising all forms of assisted suicide meant that Ms Seales was more likely to take her own life sooner than she otherwise would, if she could seek medical assistance to end it.⁸⁴ Accordingly, the section does not, either expressly or impliedly, include a right to seek like-ending medical assistance. The result of that interpretation is that a person, like Ms Seales, who makes a conscious, informed, and rational decision to have their life ended is denied the right to do so, which completely erodes the notion that a person should be self-determinative and able to make their own life decisions.

Secondly, even if one does not accept the argument that section 8 either does or should incorporate a right to seek life-ending medical assistance, the fact that people suffering from terminal and incurable illnesses have no discretion to choose whether or not to exercise their section 8 rights, also contradicts the principle of autonomy. When the Death with Dignity Bill 2003 was being debated, the then Attorney-General, Hon Margaret Wilson MP, reported that the Bill appeared to be inconsistent with section 8 of the Bill of Rights Act.⁸⁵ However, Ms Wilson also stated that it could be argued that the right not to be deprived of life was a discretionary right.⁸⁶ This comment has, as at the date of this paper, received little to no attention from advocates of voluntary euthanasia. In *Seales v Attorney-General*,⁸⁷ Collins J was obviously not oblivious to the fact that Ms Seales wanted to make a conscious and rational choice to seek assistance to have her life ended.⁸⁸ However, this did not inform Collins J's analysis as to whether section 8 was breached. Rather, it was held that the section was engaged because of Ms Seales' illness, not because Ms Seales wanted the choice to decide when to end her life.⁸⁹ Accordingly, contrary to Margaret Wilson's previous suggestion, section 8 is not a discretionary right. The lack of a discretionary component to section 8 raises a number of thought-provoking questions, the most concerning of which is what section 8 actually is, if not a discretionary right.

⁸⁴ At [164] and [166].

⁸⁵ Parliamentary Library, above n 6, at 2.

⁸⁶ At 2; "Euthanasia - a breach of rights" (27 June 2003) The Dominion Post <www.stuff.co.nz/dominion-post>; New Zealand First "Death with Dignity Consistent with Bill of Rights" (press release, 28 July 2003); *Attorney-General's Report on the Death with Dignity Bill 2003* (2003).

⁸⁷ Above n 4.

⁸⁸ At [54].

⁸⁹ At [165] and [166].

Unsurprisingly, the appropriate definition as to what a human right is has been contentiously debated amongst scholars. Furthermore, definitions are largely context-specific depending on what form of protection is afforded to human rights, and how they are articulated in statute (if at all) in any given jurisdiction. That said, there are a number of ways in which authors have attempted to define human rights in a generically applicable manner. First, in a common law context, academics have submitted that human rights are of a fragmented nature, and that they are protected in various ways through both statute and common law. For example, Geiringer and Palmer have submitted that the prohibition of murder in New Zealand is one of the means by which the "right to life" (as the authors describe it) is protected.⁹⁰

Secondly, there has been consensus among authors that a human right is an entitlement that the right-holder has the autonomy to decide whether or not they wish to exercise. Geiringer and Palmer have contributed to this suggestion, stating that "the language of rights is the language of demand or entitlement".⁹¹ Consistently, Jeremy Waldron has described the language of rights as the language of empowerment. Waldron sees rights-holders as self-sufficient and independent rights-bearers whose assertion of rights amounts to a vindication of their autonomy, personhood and dignity.⁹²

Thirdly, it has generally been accepted that a human right is something that brings rise to correlative duties on others. Otherwise put, that if one person is entitled to exercise a right, the corollary of that entitlement is that there is another party, which is under a duty to ensure that the right in question can be exercised by the right-holder.⁹³ This concept can be illustrated through the use of Geiringer and Palmer's simple example of "John has a right to food", which brings rise to a duty on another party to ensure that John receives food.⁹⁴

⁹⁰ See Claudia Geiringer and Matthew Palmer, above n 51, at 16.

⁹¹ At 27.

⁹² Waldron, J. (1996) "Rights and needs: The myth of disjunction" in Austin Sarat and Thomas Kearns *Legal Rights: Historical and Philosophical Perspectives* (University of Michigan Press, Michigan, 1996) at 96 and 104.

⁹³ See Arthur L Corbin "Rights and Duties" (1924) YLJ 501 at 502; Brian Orend *Human Rights: Concept and Context* (Broadview Press Limited, Ontario, 2001) at 129; Claudia Geiringer and Matthew Palmer, above n 51.

⁹⁴ Claudia Geiringer and Matthew Palmer, above n 51, at 15.

If the preceding definitions of what a human right actually is are correct, they are difficult to reconcile with section 8 of the Bill of Rights Act. First, the suggestion that prohibiting certain types of conduct contributes to the existence of rights has already been challenged by authors, and is by no means a generically applicable concept.⁹⁵ Particularly, in the specific context of voluntary euthanasia, the prohibition on depriving people of life cannot appropriately be regarded as a right because the provision does not provide a person with any discretion as to whether or not they wish to exercise it. Rather, section 8 is imposed, not conferred, on New Zealand citizens. If a right is something that, as Waldron contends, is contingent on assertion, then it cannot be said that section 8 amounts to a right.

Secondly, the structure of section 8's as a negative affirmation of a person's right, and the manner in which it has been interpreted, skews the correlative distinction between rights and duties. As discussed, the notion that a person's right to something brings rise to duties is not contentious. However, the duties that ordinarily arise owing to the existence of rights are *correlative* duties.⁹⁶ That is to say, that one person's right to something brings rise to a duty on another party to ensure that the person's right is upheld.⁹⁷ In New Zealand, the sole party that is subject to the correlative duties that arise from citizens' rights affirmed in the Bill of Rights Act is the Government.⁹⁸ The Bill of Rights Act does not, under any circumstances, apply to individuals.⁹⁹ Accordingly, the fact that section 8 is not a discretionary right and does not include a right to seek like-ending medical assistance skews the correlative distinction between rights and duties, as it effectively imposes a duty on people like Ms Seales to exercise their section 8 rights against their will.

This criticism of human rights that are not discretionary is far from unique, and similar arguments have previously been made in a number of different contexts. For example, in countries such as Australia where voting is compulsory it has been said that the right to vote cannot appropriately be regarded as a right. Rather, it is more correctly

⁹⁵ See, for example, Joseph Raz "Human Rights without Foundations" (2007) 14 University of Oxford Faculty of Law Legal Studies Research Paper, series 1 at 13.

⁹⁶ David M Paciocco "The Pragmatic Application of Fundamental Principles: Keeping a Rogues' Charter Respectable" (Legal Research Foundation, Auckland, August 1992).

⁹⁷ See, for example, Geiringer and Palmer, above n 51, where the example of a person having a right to food is used as imposing a duty on others to ensure the person in need of food receives it.

⁹⁸ Paul Rishworth, above n 71.

⁹⁹ New Zealand Bill of Rights Act 1990, s 3.

categorised as a duty.¹⁰⁰ Compulsory voting has also been criticised because it compels certain people to act against their will as some people would rather not vote for religious reasons which require political neutrality.¹⁰¹ Conversely, it is said that there is sound policy underlying compulsory voting as it is necessary to ensure political legitimacy by producing a high voter turnout.¹⁰²

If that same analysis is applied to section 8 of the Bill of Rights Act, it produces a very compelling argument that the section should be discretionary in the case of terminally and incurably ill people. As discussed, because section 8 is non-discretionary, and does not include a right to seek life-ending medical assistance, it compels people like Ms Seales to act against their will. The same criticism is applicable in the case of compulsory voting. However, there is a sound policy rationale underlying compulsory voting, in that it ensures political legitimacy. It ensures, albeit imperfectly, that those who would vote voluntarily do not have a disproportionate influence on the formation of a government than those who would not. Simply put, if compulsory voting did not exist (as it does not in New Zealand) it would mean that people's decisions to not exercise their right to vote would affect the rights of those who do exercise the right to vote, as the effect of voters' rights to vote would be proportionately enhanced by those who do not.

The policy underlying voter compulsion is sound. However, what similar policy rationale can be said to apply in the case of section 8 and voluntary euthanasia? What material affects are there on anyone else, let alone society at large, if an individual who is suffering from a terminal and incurable illness willingly chooses to not exercise their section 8 right to not be deprived of life? There are absolutely none. If a terminally and incurably ill person elects to have their life ended, there are no effects that arise on other people's rights, directly or indirectly, that are even remotely analogous to the effects on voters' rights as a result of low voter turnout. Advocates of voluntary euthanasia are privy to this realisation, which is why they argue that individuals should be able to choose how and when they will die, *provided that it has no effect on other people*.¹⁰³

¹⁰⁰ Amy Pracilio "Compulsory voting – Does it keep the community at large more connected? Have First World countries forgotten the value of the vote?" (Parliamentary Research, Edith Cowan University, 2010).

¹⁰¹ "Why Do Jehovah's Witnesses Maintain Political Neutrality?" Jehovah's Witnesses <www.jh.org>.

¹⁰² Jonathan Levine "The Case for Compulsory Voting" (2 November 2012) The National Interest <www.nationalinterest.org>.

¹⁰³ Margaret Otlowski, above n 59, at 189.

This proposition explicitly recognises the difference between the exercise of rights that affect other people when they are not exercised, and those that do not.

On the contrary, if section 8 was not discretionary, but instead included a right to seek life-ending medical assistance, a person choosing to exercise that right would still not have the potential to impact on another person's rights. It would be immune from the criticism that ensues, for example, when a person's exercise of their right to freedom of expression infringes another person's privacy. Instead, if someone elects to seek medical assistance to end their life, it does not impede on the ability of any person to exercise any of their rights affirmed by the Bill of Rights Act. Rather, a person's rational, informed decision to end their life, when they are suffering from a terminal and incurable illness, does not affect anyone else's right to do anything.

The logical counterargument to the suggestion that section 8 should be discretionary or include a right to seek life-ending medical assistance is the primacy of section 8 and its importance relative to the other rights that the Bill of Rights Act affirms. The Court of Appeal has previously endorsed this argument by stating that section 8 is "the one right on which all other rights depend".¹⁰⁴ While this proposition is undoubtedly true in the case of people who are fit and able to exercise all of the rights that the Bill of Rights Act entitles them to, there is doubt that section 8 should be afforded the same primacy in the case of terminally and incurably ill people who wish to seek life-ending medical assistance. Ms Seales provides a prime illustration of this point. Leading up to her death, she was unable to speak, the entire left side of her body was paralysed, and she faced the imminent reality of losing her mental faculties, memory and mobility.¹⁰⁵ Further, she was at risk of losing the ability to control her personality and behaviour, given the effects of her tumour.¹⁰⁶

In circumstances such as that of Ms Seales, it is extraordinarily difficult to see the policy rationale behind a person not being able to choose whether or not to exercise their section 8 rights. It is arguable that for people in circumstances similar to that of Ms Seales prior to her death, a significant number of rights affirmed by the Bill of Rights Act are unable to be exercised. For example, Ms Seales' ability to exercise her rights to freedom of expression and movement were heavily compromised given her inability to speak and her partial paralysis. Moreover, her ability to exercise her right to freedom of

¹⁰⁴ *Shortland v Northland Health Ltd*, above n 37, at 444.

¹⁰⁵ "Lecretia Seales' case to live at peace with the way she will die" (16 May 2015) The Dominion Post <www.stuff.co.nz>.

¹⁰⁶ *Seales v Attorney-General*, above n 4, at [39].

thought was also about to be compromised given the imminent threat of losing her mental faculties. In those circumstances, can it really be said that a person who cannot exercise the most basic of human rights necessary to live an active life, should be required to continue their life against their will? In my view, that question can only be answered in the negative.

Overall, the preceding discussion has sought to highlight how section 8 of the Bill of Rights Act fails to conform to its parent provision in the International Covenant on Civil and Political Rights, does not accord with the orthodox definitions of a human right, and is unnecessarily restrictive on the principle of autonomy. The fact that the section is structured, and has not been judicially construed, to either be discretionary or include a right to seek life-ending medical assistance represents an unduly restrictive approach that is now inconsistent with the Canadian Charter of Rights, one of the foundations of the Bill of Rights Act.¹⁰⁷ As discussed, it is difficult to see any practical policy rationale underlying this conclusion. Given the novelty of this analysis, and the lack of any detailed critique of Margaret Wilson's suggestion that section 8 could be regarded as a discretionary right, it is difficult to ascertain what the likely opposition would be from those who object to the recognition of a right to seek life-ending medical assistance. It is probable that critics would persist with the same historical argument that the sanctity of life is unimpeachable and voluntary euthanasia amounts to an unjustified intrusion on that principle. However, such arguments are outdated, subjective,¹⁰⁸ and no longer reflect the wishes of the public. It is unacceptable for dated precedent to retain primacy over public opinion and impede on the rights and the self-determination of minorities, particularly those suffering from dire illnesses whose rational decision to seek life-ending medical assistance has no effect on anyone else.

¹⁰⁷ (10 October 1998) 502 NZPD 13040.

¹⁰⁸ As per the comments of Brian Donnelly MP (30 July 2003) 610 NZPD 7490.

C Section 9 of the New Zealand Bill of Rights Act 1990 – The Currently Legal Position

Section 9 of the Bill of Rights Act, entitled the "right not to be subject to torture or cruel treatment" states that:

Everyone has the right not to be subjected to torture or to cruel, degrading, or disproportionately severe treatment or punishment.

Section 9 is a provision that, *prima facie*, is relatively uncontroversial and in some respects strongly accords with its foreign counterparts. However, it has also been submitted that there are important differences in wording when the section is contrasted with comparable legislation abroad.¹⁰⁹ Unlike section 8, the provision was enacted in the exact same form as it was presented in the Bill of Rights White Paper.¹¹⁰ Andrew and Petra Butler have submitted that the purpose of section 9 is to ensure that all persons are treated with respect for their inherent dignity and worth, and are not treated as means to an end.¹¹¹ Further, the authors submit that sections 8 to 11 of the Bill of Rights Act (the rights not to be: deprived of life, subjected to torture or cruel treatment, medical or scientific experimentation, and the right to refuse to undergo medical treatment) are directed towards securing bodily integrity.¹¹² Not only in a physical sense, but the sections also seek to preserve mental and psychological integrity.¹¹³

In the context of voluntary euthanasia, the prohibition on subjecting a person to disproportionately severe treatment is the pertinent inquiry insofar as any argument that section 9 is breached is concerned. The term "treatment" was, prior to the enactment of the Bill of Rights Act, intended to be very broad. Commentary on the equivalent of section 8 in the Bill of Rights Act White Paper (which was then article 20(1)) suggested that the section would apply to "*any form of treatment...incompatible with the dignity and worth of the human person*".¹¹⁴ In New Zealand, however, the judiciary has adopted a far more restrictive approach to the phrase "treatment" in section 9 than what appears to have been envisaged by the Bill of Rights' drafters. One of the first cases to consider the

¹⁰⁹ Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act – A Commentary* (1st ed, LexisNexis, Wellington, 2005) at [10.2.1].

¹¹⁰ At [10.3.1].

¹¹¹ At [10.4].

¹¹² At [10.6.2].

¹¹³ At [10.6.2].

¹¹⁴ Palmer, above n 52, at [10.162].

application of section 9, *R v P*,¹¹⁵ held that imprisoning a sex offender who was mentally retarded constituted disproportionately severe treatment and punishment. However, any apprehension that *R v P* was an indication of the judiciary affording an expansive interpretation to section 9, in accordance with the views articulated in the White Paper, was very short-lived. Three years later, the Court of Appeal held that the decision to remove an over-stayer of approximately nine years did not amount to disproportionately severe treatment, despite the fact that removal of the over-stayer would bring rise to considerable distress, sadness, and difficulty for the over-stayer's family,¹¹⁶ as the particular circumstances of that case did not invoke the high threshold of disproportionately severe treatment. The Court of Appeal also reiterated that in order for section 9 to be breached there must be "treatment that is so excessive as to outrage standards of decency".¹¹⁷ Nevertheless, it is now common ground that immigration decisions involving deportation or removal of people from New Zealand do fall within the ambit of section 9 in certain circumstances.¹¹⁸ This position is consistent with foreign jurisdictions,¹¹⁹ some of which have also construed equivalent legislation to include administrative issues inside prisons,¹²⁰ and failures to adequately enforce criminal prohibitions on sexual offending.¹²¹

Further, the meaning of the phrase "degrading", in the context of treatment prohibited by section 9 has also warranted considerable judicial and academic attention. While the phrase has not endured a significant amount of consideration by the judiciary in New Zealand, the Supreme Court in *Taunoa v Attorney General* has importantly held that treatment,¹²² if it is to be considered degrading, must involve some form of gross humiliation.¹²³ In assessing whether a person has been subjected to "gross humiliation", there must be a factual assessment that takes into account all of the relevant circumstances.¹²⁴ Relevant considerations include the nature of treatment, its physical and mental effects, and (as necessary) the sex, age, and state of health of the alleged

¹¹⁵ (1993) 10 CRNZ 250, (1994) 1 HRNZ 417 (HC).

¹¹⁶ *Puli'uvea v Removal Review Authority & Anor* (1996) 2 HRNZ 510, (1996) 14 FRNZ 322 (CA) at 18.

¹¹⁷ At 18.

¹¹⁸ *Wolf v Minister of Immigration* (2004) 7 HRNZ 469 (HC).

¹¹⁹ See for example, *Kindler v Canada (Minister of Justice)* [1991] 2 SCR 779 (SCC), *Soering v United Kingdom* (1989) 11 EHRR 439 (ECtHR) and *D v United Kingdom* (1997) 24 EHRR 423 (ECtHR).

¹²⁰ *Re Soenen* (1983) 3 DLR (4th) 658, [1984] 1 WWRL 71.

¹²¹ *MC v Bulgaria* (2003) 40 EHRR 459 (ECtHR).

¹²² [2008] 1 NZLR 429 (SC).

¹²³ At [93].

¹²⁴ Andrew Butler and Petra Butler, above n 109, at [10.12.1].

victim.¹²⁵ As foreshadowed earlier, there is limited guidance in New Zealand as to how section 9 applies; the same is true in relation to the proper definition of “degrading”. However, foreign jurisprudence provides some further assistance. The European Court of Human Rights has held that “degrading” connotes an assault on the dignity and personal integrity of an individual, which debases and, as discussed, humiliates.¹²⁶

However, against that background, the Supreme Court in *Taunoa v Attorney-General* has made some generic comments regarding section 9 which colour its interpretation.¹²⁷ Specifically, the Supreme Court held that the standards as to what level of conduct breaches section 9 is a question of fact and degree, and previous cases cannot be regarded as “binding precedents”.¹²⁸ Instead, what constitutes a breach of section 9 turns on “today’s concepts” and is an objective assessment,¹²⁹ and it would be wrong to be categorical about what types of treatment may amount to a breach of section 9.¹³⁰

The final consideration relevant to the discussion regarding section 9 is whether or not the section brings rise to positive duties. In New Zealand, there is, as at the date of this paper, no precedent that has directly considered this question in significant detail. However, in *Seales v Attorney-General* itself, Collins J did describe section 9 as bringing rise to a positive duty on the State. However, this concept was not explored in any detail, nor was there any speculation as to what the ambit of any duties may be, except to say that the obligation is not engaged in situations:¹³¹

Where the criminal law prohibits culpable homicide and assisting suicide when the effect of the law is that persons in Ms Seales’ position will continue to suffer from the effects of their illnesses.

Overseas precedents are again useful in addressing what positive duties section 9 would bring rise to if a novel issue arose in New Zealand. In the United Kingdom, in the context of seeking asylum, *Nasseri v Secretary of State for the Home Department* held that a thorough investigation of individual applications for refugee status is necessary because of the risk to life or torture, and that a statutory regime that prevents such an

¹²⁵ At [10.2.1]; *Indelicato v Italy* (2001) 35 EHRR 1330 (ECtHR) at [31].

¹²⁶ At [10.11.1]; Y Arai-Yokoi, “Grading Scale of Degradation: Identifying the Threshold of Degrading Treatment or Punishment under article 3 ECHR” (2003) 21 Neth HRQ 385.

¹²⁷ [2007] NZSC 70, [2008] 1 NZLR 429.

¹²⁸ At [93].

¹²⁹ At [93].

¹³⁰ At [93].

¹³¹ *Seales v Attorney-General*, above n 4, at [207].

investigation is a substantive breach of the right.¹³² Similar comments were made by the New Zealand Supreme Court in *Attorney-General v Zaoui*.¹³³ There, it was held that it would be unlawful for the State to deport a person if there were grounds for believing that the person would be in danger of being subjected to torture or to cruel, inhuman or degrading treatment if the person were to be deported.

Finally, the House of Lords has also held that despite the fact that the United Kingdom's equivalent of section 9 does not go so far as to require the State to provide sufficient levels of social assistance to those in need, the State is not permitted to exclude particular sectors of the community from social assistance entitlements with the knowledge that the people in question have no other means of support.¹³⁴ No similar precedent exists in New Zealand, and it is doubtful that the English position would be adopted given the rejection that section 8 encompasses any right to social assistance as articulated in *Lawson v Housing NZ*.¹³⁵

D Section 9 of the New Zealand Bill of Rights Act 1990 – Critique

As foreshadowed earlier in this paper it was argued in *Seales v Attorney-General* that Ms Seales' suffering constituted a form of suffering that could be prevented, and that by depriving Ms Seales the opportunity to receive life-ending medical assistance, Ms Seales was being subjected to cruel, degrading or disproportionately severe treatment.¹³⁶ This was a novel argument, and Collins J's rejection of it invites consideration as to the appropriate ambit of the concept of "treatment" in section 9 of the Bill of Rights Act.

First, his Honour's rejection of the argument that Ms Seales' section 9 rights were infringed was on the basis of the Canadian decision of *Rodriguez v British Columbia*,¹³⁷ which held that before it could be said that a person was subjected to "treatment" for the purposes of section 12 of the Canadian Charter of Rights (the Canadian equivalent of section 9 of New Zealand's Bill of Rights Act) there had to be some greater form of state control over the individual.¹³⁸ Further, that a person was not subjected to "treatment" for

¹³² [2007] EWHC 1548 (Admin).

¹³³ Above n 33.

¹³⁴ *R (Limbuella) v Secretary of State for the Home Department*, above n 31.

¹³⁵ Above n 35.

¹³⁶ *Seales v Attorney-General*, above n 4, at [196].

¹³⁷ [1993] 3 SCR 519.

¹³⁸ *Seales v Attorney-General*, above n 4, at [197].

the purposes of section 12 of the Canadian Charter of Rights if the person's suffering was due to the effects of disease.¹³⁹

In my view, it was inappropriate of Collins J's to adopt the narrow approach to the phrase "treatment" that has been taken in Canada. First, to do so arguably contradicts what was intended by the drafters of the Bill of Rights Act. As previously noted, the White Paper suggested that section 9 would apply to "*any form of treatment... incompatible with the dignity and worth of the human person*". The wide ambit of the phrase "treatment" has also been acknowledged by Andrew and Petra Butler, who have previously stated that:¹⁴⁰

The term treatment is a broad one, nothing inherently limits it to judicially-imposed punishments or the like. On its face the term is sufficiently wide to refer to *any measure applied to a particular person or persons, or the manner in which a particular person or persons is dealt with*.

Given these broad definitions that have afforded to "treatment", particularly the comments relating to article 20(1) of the White Paper (the exact wording of which was enacted in the Bill of Rights Act in the form of section 9) it seems odd to conclude that subjecting Ms Seales to ongoing pain and suffering, would not constitute "treatment" for the purposes of section 9. Furthermore, Collins J's conclusion in this regard evinces a considerable disparity between the method by which his Honour interpreted section 9 of Bill of Rights Act, and the method used to ascertain the purpose of the relevant Crimes Act provisions. When considering the purpose of the assisted suicide and culpable homicide provisions of the Crimes Act 1961, Collins J had recourse to Stephen's Code, a draft criminal statute upon which the New Zealand Crimes Act is based, the origins of which are traceable back to 1833.¹⁴¹ Given Collins J's use of legislative history spanning almost two centuries in interpreting the correct meaning of the relevant Crimes Act provisions, it is curious to wonder why Collins J did not undertake a consideration of the New Zealand Bill of Rights White Paper when construing section 9 of the Act.

Furthermore, in my view it is inconceivable to suggest that subjecting Ms Seales to ongoing suffering, against her express wish to receive assistance to have her life ended, would not constitute a "manner in which a particular person is dealt with" and, therefore,

¹³⁹ At [197].

¹⁴⁰ Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (2nd ed, LexisNexis, Wellington, 2015) at [10.9.1].

¹⁴¹ *Seales v Attorney-General*, above n 4, at [87].

treatment.¹⁴² Ms Seales was being dealt with; she was being denied, by the State, the ability to make a conscious choice to have her life ended by her doctor when she was enduring intolerable suffering. It is difficult to see what the rationale is behind holding that Ms Seales' circumstances did not amount to "treatment", on the basis that her suffering was owing to the fact that she was suffering from disease and not some sort of overt action on part of the State. In *Rodriguez v British Columbia*, the case that Collins J followed in holding that section 9 was not engaged,¹⁴³ Sopinka J reasoned that there was an analogy between those seeking life-ending medical assistance, and heroin addicts and people who were starving. It was said that a heroin addict, denied from receiving heroin would not be subjected to "treatment" for the purposes of the Canadian equivalent of section 9, because of laws which prohibit the consumption of drugs.¹⁴⁴ Similarly, a person being prohibited from stealing food because theft is a crime would not be subjected to "treatment" by the State because they were starving.¹⁴⁵

These analogies are difficult to reconcile with voluntary euthanasia. Voluntary euthanasia is about people making decisions for themselves. It is not a decision based on anyone else, nor is it, as discussed earlier, a decision leading to detrimental flow-on effects that harm other people. It is about a manifestation of an individual person's right to make a life decision that upholds and respects their human dignity,¹⁴⁶ the very purpose of section 9 as recorded by the Bill of Rights White Paper.¹⁴⁷ Therefore, comparing terminally and incurably ill patients with thieves and drug addicts, as the basis of an argument that certain forms of state action cannot amount to "treatment", for the purposes of infringement of human rights, is completely nonsensical. The rationale behind ensuring that "treatment" does not extend to criminals who steal to secure the necessities of life is clear. It is to prevent the victims of those crimes from suffering losses. Likewise with drug addicts, to extend the concept of "treatment" to addicts who are denied drugs would implicitly indicate government approval of the use of substances which have significant unintended side effects on those who use them, facilitate the use of an unmonitored black market, and would encourage people to engage in highly culpable criminal behaviour. No such policy rationale exists in the case of voluntary euthanasia insofar as section 9 of the Bill of Rights Act is concerned. Accordingly, it is difficult to see what policy underlies Collins J's conclusion that "treatment" cannot

¹⁴² Andrew Butler and Petra Butler, above n 140, at [10.9.1].

¹⁴³ [1993] 3 SCR 519.

¹⁴⁴ At 610 to 612.

¹⁴⁵ At 612.

¹⁴⁶ George Fletcher *Morals and Medicine* (Princeton, New Jersey, 1979) at 205-206.

¹⁴⁷ Palmer, above n 52, at [10.162].

include people in circumstances of those such as Ms Seales immediately prior to her death.

Moreover, the notion of "control" was another factor that led Collins J to conclude that Ms Seales' section 9 rights, insofar as "treatment" was concerned, were not engaged. The test for "control" as articulated by Sopinka J in *Rodriguez* requires that:¹⁴⁸

There must be some more active state process in operation, involving an exercise of state control over the individual, whether it be positive action, inaction or prohibition.

This concept was not explored in significant detail by Collins J. However, like the narrow definition afforded to the phrase "treatment" in section 9, it is difficult to see why in a New Zealand context, the "control" proviso is not met in the case of people in similar circumstances to that of Ms Seales. As discussed, there are significant positive duties that are imposed on the State pursuant to both sections 8 and 9 of the Bill of Rights Act. This paper has comprehensively set out those duties, which include: acting to protect a person's life,¹⁴⁹ thorough investigation as to whether someone is entitled to refugee status,¹⁵⁰ and potentially ensuring that social assistance is provided to certain people.¹⁵¹ In light of all of those duties that the State has to adhere to pursuant to section 9, it is nonsensical to suggest that there cannot be a further duty which would be less burdensome than any of those listed. The only duty that would be required in order to extend section 9 to people suffering from terminal and incurable illnesses would be the exercise of a prosecutorial discretion to not charge certain doctors of criminal offences in the case of an extremely limited class of patients that have consented to life-ending medical assistance. The risks surrounding the adequacy of procedures to ensure that coercion of those patients has not taken place can be adequately addressed as was evidenced by each of the Bills that have sought to legalise voluntary euthanasia.¹⁵²

Furthermore, the notion of control includes deportation decisions where there are grounds for believing that a person could be subjected to torture or to cruel, inhuman or degrading treatment if the person were to be deported.¹⁵³ Accordingly, if the Executive can be said to be in "control" of a person when deciding whether to subject them to cruel,

¹⁴⁸ [1993] 3 SCR 519 at 610 to 612.

¹⁴⁹ *Re Officer L* [2007] 1 WLR 2135 (HL), above n 33.

¹⁵⁰ *Nasseri v Secretary of State for the Home Department* [2007] EWHC 1548 (Admin).

¹⁵¹ *R (Limbuella) v Secretary of State for the Home Department*, above n 31.

¹⁵² See, for example, Death with Dignity Bill 2003 (37-1), clauses 4 and 5.

¹⁵³ *Attorney-General v Zaoui*, above n 33.

or degrading treatment by means of a deportation decision, why can the same not be true in the case of deciding whether or not to prevent a person from being subjected to intolerable suffering as a result of an illness? The relevant provisions of the Crimes Act that restrict a person from seeking life-ending medical assistance are a form of State control. The cumulative effect of Parliament passing the Crimes Act 1961 and the judiciary interpreting the relevant provisions as having the purpose of protecting *all* life is that people who are terminally and incurably ill *are* subject to State control insofar as they are not permitted to seek life-ending medical assistance. What basis can there be for saying that such people are not within the "control" of the State, when the State is the one denying them from exercising their own autonomy? Like deportation decisions, terminally and incurably patients are subject to the whim of the State in deciding whether or not to alleviate that person from their suffering. If the Bill of Rights Act is to apply to all branches of government,¹⁵⁴ it is illogical for the judiciary to be permitted to create a notion of "control" and then arbitrarily decide which forms of "treatment" are to be subject to section 9.

Overall, this part has critiqued the current law surrounding section 9 of the Bill of Rights Act. It has advocated that section 9 should be engaged in circumstances where people are suffering from terminal and incurable illnesses. The current position, that section 9 does not include such people, is both illogical and contradictory of the purpose of the section as evidenced by the Bill of Rights Act White Paper.

V Section 5 of the New Zealand Bill of Rights Act 1990 – What role should it play?

The preceding discussion surrounding the relationship between voluntary euthanasia and sections 8 and 9 of the Bill of Rights Act is novel. It is probable that the reason for such little attention having been paid to the topic is owing to the fact that the rights affirmed in the Bill of Rights Act are largely overridden when they are met by legislation that is inconsistent with those rights.¹⁵⁵ However, pursuant to section 5 of the Act, rights are supposedly only meant to be subject to reasonable limits that can be demonstrably justified in a free and democratic society.¹⁵⁶ Unsurprisingly, the test for assessing whether a limiting statute amounts to a reasonable limit is highly contentious. This part analyses certain components of the section 5 test. Further, it critiques the decision of

¹⁵⁴ New Zealand Bill of Rights Act 1990, s 3.

¹⁵⁵ s 4.

¹⁵⁶ s 5.

Collins J to not have recourse to section 5 in *Seales v Attorney-General*. It ultimately concludes that judges should always query the importance of a limiting measure, irrespective of whatever reasonable limit test is adopted.

The Bill of Rights Act sets out a unique method by which other legislation is to be interpreted in accordance with the rights and freedoms that it affirms. Section 4 states that no enactment shall be held to be impliedly repealed solely because it is inconsistent with any rights affirmed in the Bill of Rights Act.¹⁵⁷ However, section 6 provides that where an enactment can be given a meaning consistent with the rights and freedoms contained in the Act, that meaning shall be preferred to any other meaning.¹⁵⁸ Between those two sections lies the highly contentious section 5, which states that the rights contained in the Bill of Rights Act may be subject only to such reasonable limits, prescribed by law, as can be demonstrably justified in a free and democratic society.¹⁵⁹

The methodology as to how these provisions operate was addressed by the Supreme Court in the well-documented decision of *R v Hansen*.¹⁶⁰ Despite a rigorous dissent from the Chief Justice, the majority judgment in that case set out a four step process as to how legislation that is allegedly rights-infringing is to be interpreted in accordance with the Bill of Rights Act. First, the statute is construed in accordance with ordinary principles of statutory interpretation. Second, the statute is checked to see whether it conflicts with a right affirmed by the Bill of Rights Act.¹⁶¹ If there is a conflict between the statute and a right affirmed by the Bill of Rights Act, the Court then asks if that conflict amounts to a "justified limitation". In assessing whether a conflict is justified, the Court asks whether the limitation:¹⁶² is sufficiently important, rationally connected with its purpose, limits the right no more than necessary to achieve its purpose, and is applied proportionately to the importance of the purpose. If a limitation is not justified, section 6 of the Act is used to interpret the statute (if possible) in accordance with the relevant right that the statute infringes.

This methodology was not directly followed by Collins J in *Seales v Attorney-General* when assessing whether Ms Seales' section 8 rights were infringed by the relevant provisions of the Crimes Act 1961. Instead, it was held that the "wider societal

¹⁵⁷ New Zealand Bill of Rights Act 1990, s 4.

¹⁵⁸ s 6.

¹⁵⁹ s 5.

¹⁶⁰ [2007] NZSC 7, [2007] 3 NZLR 1.

¹⁶¹ At [92].

¹⁶² At [104].

perspective" required by section 5 is not relevant when assessing whether a person's section 8 rights breached.¹⁶³ This outcome is unsurprising given that prior to *Seales v Attorney-General* it had already been suggested by authors that recourse to section 5 was unlikely to be necessary when a person's section 8 rights were being considered.¹⁶⁴ The redundancy of a section 5 analysis is said to be because section 8 can only be intruded upon in accordance with "grounds that are established by law and are consistent with the principles of fundamental justice".¹⁶⁵ Admittedly, there is an obvious correlation between the section 5 analysis and principles of fundamental justice given that the latter involves consideration as to whether a limiting measure is arbitrary, overly broad, or grossly disproportionate in achieving its objective.¹⁶⁶ This similarity has led authors to describe section 5 of the Bill of Rights Act and the fundamental justice proviso in section 8 as "analogous".¹⁶⁷

In my view, to suggest that an assessment as to whether a limiting measure complies with fundamental justice principles is akin to a section 5 analysis is misleading. Further, to hold that the section 5 analysis does not form part of the inquiry as to whether a person's section 8 rights have been unjustifiably infringed, overlooks a critical component in assessing whether a limiting measure is justified. That is, whether the limiting measure serves a purpose sufficiently important to justify curtailment of the relevant right or freedom.¹⁶⁸ If the limiting measure does not serve a sufficiently important purpose that justifies infringement, the Supreme Court has declared that it cannot even begin to be regarded as a justified limitation.¹⁶⁹

Critically, the question as to whether the relevant provisions of the Crimes Act serve a purpose sufficiently important to justify curtailment of section 8 of the Bill of Rights Act was not answered by Collins J in *Seales v Attorney General*. Rather, it was held that the relevant Crimes Act provisions were not arbitrary or overly broad because they do no more than achieve the purpose that Collins J attributed to them; the protection of *all* life. The only example of any analysis resembling an inquiry as to the importance of the purpose of the relevant parts of the Crimes Act was Collins J's page long analysis of

¹⁶³ *Seales v Attorney-General*, above n 4, at [175].

¹⁶⁴ See for example Paul Rishworth and others, above n 54, at 228; Andrew Butler and Petra Butler, above n 109, at 9.6.1.

¹⁶⁵ New Zealand Bill of Rights Act 1990, s 8.

¹⁶⁶ *Seales v Attorney-General*, above n 4, at [176], [182] and [187].

¹⁶⁷ Paul Rishworth and others, above n 54, at 228.

¹⁶⁸ *R v Hansen*, above n 160, at [104].

¹⁶⁹ At [104].

whether the provisions were grossly disproportionate. In reliance on the Canadian decision of *Canada (Attorney-General) v Bedford*, which relevantly held that a law is grossly disproportionate where "the connection between the draconian impact of the law and its object [are] entirely outside the norms accepted in [a] free and democratic society", Collins J held that the absolute protection of *all* life is "well within the norms accepted by New Zealand society".¹⁷⁰

In my view, the line of reasoning adopted to assess compliance with fundamental justice principles is both flawed and contradicts the Supreme Court's *R v Hansen* methodology. Furthermore, putting aside the correctness of Collins J's conclusion that the purpose of protecting *all* life is "well within norms accepted by New Zealand society", assessing compliance with fundamental justice fails to serve any meaningful purpose insofar as voluntary euthanasia is concerned. The reason being is that gross disproportionality cannot be regarded as a sensible substitute for assessing whether a limiting measure serves a purpose sufficiently important to justify curtailment of a right. As was noted in *Seales v Attorney-General*, the threshold is captured by "the hypothetical of a law with the purpose of keeping the streets clean that imposes a sentence of life imprisonment for spitting on the sidewalk".¹⁷¹ This threshold is impossibly high and it is difficult to imagine any law that a democratically elected Parliament, fettered by political considerations, would pass that would be even remotely analogous to that example. Conversely, the aforementioned section 5 test for assessing whether a limiting measure constitutes a justified limitation is far more realistic. It does not require an infringement of a right to be beyond any notion of sensibility or fairness. This was evidenced by the factual scenario that arose in *R v Hansen* where the defendant was found with 25 grams of cannabis,¹⁷² an amount so large that the law presumes that the collection is for the purpose of supply.¹⁷³ In that case, Tipping, McGrath and Anderson JJ all held that the infringement on the presumption of innocence was not a justified limitation pursuant to section 5. The disparity between the hypothetical referred to in *Seales* and the views of the majority of the Supreme Court in *Hansen* reveal that the gross disproportionality standard and the justified limitation analysis in section 5 are in no way reconcilable.

¹⁷⁰ *Seales v Attorney-General*, above n 4, at [191].

¹⁷¹ At [189], referring to *Canada (Attorney-General) v Bedford* [2013] SCC 72, [2013] 3 SCR 1101 at [120].

¹⁷² *R v Hansen*, above n 160, at [1].

¹⁷³ Misuse of Drugs Act 1975, s 6(6).

The approach taken in *Seales* as to whether section 8 was breached continues a concerning approach taken by members of the judiciary in assessing whether human rights are infringed. Particularly, Collins J's decision to not consider section 5 may have initially appeared as though it would be easier for Ms Seales to succeed in showing that her section 8 rights were infringed, given that Collins J held that the right was engaged. In actuality, the threshold mandated by section 8 (compliance with fundamental justice principles) turned out to be considerably higher than that of section 5, given that Collins J did not consider whether the relevant Crimes Act provisions served a purpose sufficiently important to justify curtailment of the right.

The judiciary is currently divided as to whether section 5 forms part of the inquiry as to whether a person's human rights as affirmed by the Bill of Rights Act are infringed. Elias CJ and Lord Cooke have previously stated that section 5 is not a provision that should be considered by the judiciary, and that it is exclusively directed at Parliament.¹⁷⁴ Conversely, numerous former Supreme Court justices have rejected that approach and have held that section 5 is a directive to the judiciary as the courts have been tasked with a review function to assess whether limiting measures are within the degree of latitude afforded to Parliament when making policy decisions that limit human rights.¹⁷⁵ In *Seales v Attorney-General*, an approach somewhere between those two ends of the spectrum appears to have been adopted, evidenced by Collins J's decision to not have recourse to the *R v Hansen* methodology and his statement that "the wider societal perspective required by s 5 of the [Bill of Rights Act] analysis does not form part of the individual rights focus required by [section] 8".¹⁷⁶

These competing positions make it difficult to ascertain what the appropriate role of section 5 is (if any) when the courts are assessing whether a person's rights as affirmed by the Bill of Rights Act have been infringed. This was acknowledged by Blanchard J in *R v Hansen* where it was noted that the Act does not mandate one method by which sections 4, 5 and 6 are to be reconciled and applied.¹⁷⁷ That said, the majority of decisions following *R v Hansen* have rejected Elias CJ's approach, which has revealed that judges do consider that they are required to undertake a section 5 assessment and ask whether

¹⁷⁴ *R v Hansen*, above n 160, at [6].

¹⁷⁵ At [111].

¹⁷⁶ *Seales v Attorney-General*, above n 4, at [175].

¹⁷⁷ At [61].

limiting measures are justified in a free and democratic society.¹⁷⁸ However, it is far from clear as to what exactly constitutes a section 5 analysis. While there has been a degree of consistency as to how section 5 has been applied, there is still judicial disagreement as to what questions should be asked by the courts.¹⁷⁹ This uncertainty is highly undesirable, and without the courts having a clear direction as to how section 5 is to apply, it also has the potential to drastically diminish the Bill of Rights Act's ability to achieve its goal of protecting minority interests.¹⁸⁰

In my view, irrespective of whatever approach the judiciary takes regarding section 5, the courts must always ask whether the purpose of the limiting measure is sufficiently important to justify curtailment of human rights. It is the pivotal assessment in deciding whether a rights infringement is justified, as the purpose of a limiting measure informs every other component of section 5. Accordingly, the courts should be vigilant in ensuring that they do not lightly arrive at a conclusion that a purpose is sufficiently important to justify infringement of human rights. *Seales v Attorney-General* was a prime illustration of this problem.¹⁸¹ At no point in his judgment did Collins J query whether the purpose of the protection of *all* life was sufficiently important to justify curtailment of Ms Seales' section 8 rights. Every question that followed (disproportionality, over breadth, and arbitrariness) were all asked with that purpose having been afforded to the relevant Crimes Act provisions. As Andrew Geddis has rightly noted, Collins J did not ask the pivotal question as to what rationale there is behind that conclusion.¹⁸² Why must there be law in place that restricts terminally and incurably ill people from seeking life-ending medical assistance? The courts need to be able to assess what social good arises from an end and to balance that against a person's rights that have been infringed. If the courts do not query the importance of the rationale behind a limitation, their review role becomes heavily circumscribed. This problem is attenuated when an excessively broad purpose is afforded to a limiting measure, such as in *Seales v Attorney-General*, where the purpose that Collins J afforded to the relevant

¹⁷⁸ See, for example, *Re Application by AMM and KJO to adopt a child* [2010] NZFLR 629 (HC) at [13]; *Ministry of Health v Atkinson* [2012] NZCA 184, [2012] 3 NZLR 456 at [143]; *Commerce Commission v Air New Zealand Ltd* [2011] NZCA 64, [2011] 2 NZLR 194 at [65].

¹⁷⁹ For example, *R v Hansen*, above n 160, at [270], where Blanchard J disagreed with the notion that courts should consider the importance of limiting measures.

¹⁸⁰ Lord Cooke of Thorndon "The Myth of Sovereignty" (2005) 3 NZJPIL 39.

¹⁸¹ Above n 4.

¹⁸² Andrew Geddis "Aid in Dying in the High Court *Seales v Attorney General*" (2015) 11 Policy Quarterly 27 at 28.

Crimes Act provisions was the protection *all* life.¹⁸³ An assessment as to whether a limiting measure is justified then becomes futile, because if the purpose of a rights-infringing statute is stated too broadly, that limiting measure then becomes immune from review.¹⁸⁴

Ascertaining the purpose of a limiting measure is not always an easy task. In the absence of a clear intent, the courts are often faced with a significant number of different indicators as to what the purpose of a statutory provision is. These indicators include legislative history,¹⁸⁵ statutory context,¹⁸⁶ international aids,¹⁸⁷ and parliamentary debates.¹⁸⁸ Again, *Seales v Attorney-General* is informative in illustrating this point. In deciding that the purpose of the relevant Crimes Act provisions was to protect *all* life, Collins J placed significant reliance on the legislative history of the Crimes Act 1961. Specifically, Collins J held that the cumulative of effect of:¹⁸⁹ Parliament's decriminalisation of attempted suicide; the enactment of the offence of aiding and abetting suicide; the introduction of provisions relating to the use of force to prevent suicide; and provisions rendering suicide parts culpable, meant that Parliament's purpose was to protect *all* life. This conclusion was reached, however, without any express indication from the legislature that the protection of *all* life was in fact Parliament's purpose.¹⁹⁰ Accordingly, in my view, it is not inconceivable to suggest that the purpose that has been afforded to equivalent criminal legislation in both the United Kingdom and Canada, namely, the protection of the vulnerable, could have been attributed to the equivalent provisions of the Crimes Act in New Zealand.¹⁹¹

The salient point arising from this discussion is that due care must be exercised when ascertaining the purpose of a limiting measure. In my view, this is particularly the case when courts are ascertaining the purpose of dated legislation, passed prior to the

¹⁸³ *Seales v Attorney-General*, above n 4, at [132], [178] and [184].

¹⁸⁴ Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (2nd ed, LexisNexis, Wellington, 2015) at [9.4.33]; *RJR-MacDonald Inc v Canada (Attorney-General)* [1995] 3 SCR 199 at [144].

¹⁸⁵ *Frucor Beverages Ltd v Rio Beverages Ltd* [2001] 2 NZLR 604 (CA) at [13]-[21].

¹⁸⁶ John Burrows, above n 65, at 985.

¹⁸⁷ At 998.

¹⁸⁸ Hon John McGrath "Purpose, *Hansard*, Rights, and Language" in Rick Bigwood *The Statute – Making and Meaning* (LexisNexis, Wellington, 2004) 227 at 230.

¹⁸⁹ *Seales v Attorney-General*, above n 4, at [132].

¹⁹⁰ (3 October 1961) 328 NZPD 2682.

¹⁹¹ *R (Nicklinson) v Ministry of Justice* [2014] UKSC 38 at [171] and [311]; *Carter v Canada (Attorney-General)*, above n 57, at [132].

enactment of the Bill of Rights Act, which does not expressly indicate an unequivocal purpose. In those circumstances, the limiting measure should, if at all possible, be attributed with a purpose which acknowledges that a democratically elected Parliament has passed the Bill of Rights Act since the enactment of that statute. In the context of voluntary euthanasia, given that it has now been held that 8 is engaged when people are terminally and incurably ill, my view is that the relevant Crimes Act provisions should have been declared to have the purpose of protecting the vulnerable. To hold otherwise not only ignores the fact that a less rights-infringing purpose has been attributed to equivalent legislation in both the United Kingdom and Canada, but it also impliedly ignores the fact that a more recent Parliament has directed the courts to construe legislation in accordance with the Bill of Rights Act, than the Parliament that passed the Crimes Act 1961. That being the case, it also impliedly contradicts the notion that an earlier Parliament cannot bind a later Parliament.¹⁹² While the suggestion that the courts should have discretion to tweak the purpose of a dated statutory provision may seem radical, it is important to note that the Bill of Rights Act does not preclude an amended purpose being afforded to provisions in a statute enacted prior to the Bill of Rights Act. Rather, it restricts the courts from changing the meaning of the words themselves, where a rights-compliant interpretation is not possible.¹⁹³ That distinction may seem subtle, but from a constitutional perspective it is of considerable significance given the methodology that the courts use when attempting to reconcile sections 4, 5 and 6 of the Bill of Rights Act. It is the purpose attributed to a statutory provision which dictates the extent to which the provision can be reviewed pursuant to section 5. Conversely, the meaning of the provision can only be made rights-compliant if a section 5 review reveals that an infringement is not justified. Accordingly, the courts should be vigilant in ensuring that excessively broad purposes are not afforded to rights-infringing statutes. If they do not, one cannot help but apprehend that the courts' section 6 directive to ensure rights-compliant interpretation will gradually become a redundancy.¹⁹⁴

Overall, the preceding discussion has critiqued the currently uncertain state of the law surrounding section 5 of the Bill of Rights Act. In addition to acknowledging the critical importance of ascertaining the meaning of a statute that infringes human rights, it has advocated for a stronger judicial mandate in that the courts should *always* ask whether a limiting measure serves a sufficiently important purpose to justify curtailment of a right. Although the lack of diversity in the New Zealand judiciary and the fact that judges are

¹⁹² Geoffrey Palmer "*Westco Lagan v AG*" (2001) NZLJ 163 at 168.

¹⁹³ New Zealand Bill of Rights Act 1990, s 4.

¹⁹⁴ s 6.

not democratically elected may raise questions as to whether the courts are sufficiently equipped to undertake this inquiry, in my view, is it absolutely pivotal. The reason being is not only because certain laws will otherwise become immune from review, but it must also be appreciated that modern-day Parliament has the ability to legislate around the Bill of Rights Act and to give a clear indication that a statute is intended to contradict the Act. This was not the case with statutes that preceded the Bill of Rights Act, and to attribute an excessively broad purpose to such legislation completely erodes the notion that, in the words of New Zealand's finest jurist, "a meaning inconsistent with the rights and freedoms affirmed by the Bill of Rights should not lightly be attributed to Parliament".¹⁹⁵

VI Conclusion

Voluntary euthanasia is a topic that is inherently divisive and will inevitably never attract the consensus of public opinion. It has been the subject of longstanding debate throughout recent decades in New Zealand yet advocates have failed to attract majority support in favour of its legalisation. It is a rare example of a topic that exemplifies the complex interplay between various ethical, moral, and political considerations that cumulatively influence judicial opinion and parliamentary decision making.

This paper has not sought to examine those considerations in any significant detail. To do so would be to repeat that which has been already done by numerous authors in a wide variety of different contexts. Instead, it has sought to undertake a novel examination and critique of the relationship between voluntary euthanasia and sections 8 and 9 of the Bill of Rights Act. That examination has revealed a series of findings that, in my view, demonstrate a number of respectable arguments that the recent decision of Collins J in *Seales v Attorney-General* may in fact have been decided differently.

Perhaps more meaningfully though, the critique has revealed a number of broader findings from which conclusions can be drawn regarding the relationships between Parliament, the courts and the unique position that the Bill of Rights Act occupies in the New Zealand legal system. The section 8 analysis has revealed the judicial reluctance to take a liberal approach towards, and expand the ambit of, certain rights where to do so would potentially fall foul of Parliament's purpose of enacting a statute inconsistent with human rights. However, the section 5 analysis revealed the imperfect means by which the courts are required to ascertain Parliament's intent. This point was exemplified by Collins J's conclusion that the purpose of the relevant Crimes Act provisions is to protect *all* life. That conclusion is a modern representation of the practical difficulties that the

¹⁹⁵ *R v Hansen*, above n 160, at [89] as per Tipping J.

courts face when attempting to ascertain the meaning of a particular statutory provision. The effects of that problem are compounded when questions regarding statutory compliance with human rights are asked.

Additionally, the section 9 analysis has also revealed the judicial reluctance to take an expansive, liberal approach to the development of human rights in New Zealand. However, that analysis revealed that the judiciary can qualify, rather than fail to expand, particular human rights. That distinction, although apparently subtle, may warrant more attention than it has been paid in this paper. However, for present purposes, it will suffice to conclude that the cumulative effect of judicial qualification of rights and the reluctance to afford an autonomous approach to certain rights has the potential to greatly diminish the effect of the Bill of Rights Act.

That effect is also attenuated by the Bill of Rights Act's status as an ordinary statute. Although that ordinariness is well-documented, this paper sought to demonstrate the Act's exemplified ineffectiveness when a rights-compliant interpretation of a statute enacted prior to the Bill of Rights Act is attempted. An assessment as to the appropriate options for reform is also beyond the scope of this paper. However, it has concisely advocated for a greater judicial review role insofar as section 5 is concerned. If that adaptation of section 5 does not take place, it is difficult to avoid the inclination that the Bill of Rights Act will gradually lose its status as an interpretative check on parliamentary supremacy, and eventually become no more than yet another failed attempt to uphold minority rights.

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