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THE PERSON WHO REALLY LOVES ME WILL BE THE ONE WHO HELPS ME DIE: A CRITIQUE OF *SEALES v ATTORNEY-GENERAL*

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Euthanasia is a deeply personal and multifaceted topic that has become increasingly relevant in contemporary society. New Zealand's stance on the practice of assisted dying was unsuccessfully challenged in Seales v Attorney-General. This paper critically evaluates the foundations of that decision, applying the R v Hansen majority test for interpreting legislation that appears inconsistent with the New Zealand Bill of Rights Act 1990. The right to life bears a broad meaning capable of including a right to die; furthermore the rights methodology adopted is out of step with New Zealand case law and commentary. The purpose of criminalising assisted suicide is attainable through regulating euthanasia, and an alternative reading was, at a stretch, tenable. This paper argues that the criminalisation of assisted suicide is inconsistent with the right to life, so a declaration of inconsistency was an appropriate remedy, if not a strained reading of the Crimes Act 1961 excluding euthanasia from the scope of suicide. Although lacking in legal significance, the decision's enduring importance lies in provoking discussion and potential reform. Future developments in this area will be watched with interest; Seales is undoubtedly not the end of the story but rather the beginning of a wider social conversation.

Key words
New Zealand Bill of Rights Act 1990; *Seales v Attorney-General*; euthanasia; right to life; suicide.

I Introduction

In 1965, theologian Leslie Weatherhead wrote:[1]

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

The law is frequently called upon to grapple with confronting questions of what is right and what is wrong. The age-old debate of whether physician-assisted euthanasia should be permitted is particularly pertinent in light of technological developments enabling the extension of patients' lives, and a greater recognition of autonomy in contemporary medicine. The author is not certain where she stands, nor does this paper seek to take a side in the moral debate.

Instead, it aims to discuss the reasoning of Collins J in *Seales v Attorney-General*, a recent New Zealand High Court judgment.[2] Ms Seales, a terminally ill Wellington lawyer, unsuccessfully sought two sets of declarations, firstly that her doctor would not be acting unlawfully in assisting her death and, in the alternative, that the Crimes Act (CA) provisions governing murder and assisted suicide were inconsistent with the Bill of Rights Act (BORA). *Seales* followed in the footsteps of overseas decisions in which individuals argued along similar lines that domestic laws prohibiting euthanasia breached their human rights.[3]

This paper will focus on the alleged inconsistency between the BORA s 8, the right to life, and the CA s 179(b), which criminalises "aid[ing] or abet[ting] any person in the commission of suicide." In an article published prior to the decision, Kathryn Tucker and Andrew Geddis reasoned that Ms Seales had a "very strong case" in respect of the aforementioned inconsistency, and therefore the exclusion of euthanasia from the ambit of s 179(b) was a likely outcome.[4] The author shared this view, and in consequence this

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[1] Leslie Weatherhead *The Christian Agnostic* (Festival Books, Abingdon/Nashville, 1965) at 187.

[2] *Seales v Attorney-General* [2015] NZHC 1239.

[3] *Carter v Canada (Attorney-General)* 2015 SCC 5; *Stransham-Ford v Minister of Justice and Correctional Services and Others* [2015] ZAGPPHC 230 (HCSA).

[4] Kathryn Tucker and Andrew Geddis "Litigating for the right to die" (2015) 5 NZLJ 172 at 179.

paper will argue it was open to Collins J to find in Ms Seales' favour. The first section will examine Parliament's intended meaning of suicide, and contend that this meaning is inconsistent with the right to life. The second part will undertake a BORA s 5 analysis, querying whether that inconsistency is nevertheless justifiable in a free and democratic society. Lastly, this paper will acknowledge that a declaration allowing Ms Seales' physician to assist her death may narrow the definition of suicide past what is tenable. However, a declaration of inconsistency was feasible and should have been granted.

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

II Physician-assisted euthanasia

Euthanasia is a Greek term meaning 'good death.'[5] It refers to several strands of assisted dying that are believed to offer a merciful and peaceful end to a patient's suffering. Non-voluntary euthanasia encompasses situations where a patient is medically incompetent and the choice to end their life is made by a third party.[6] At the other end of the spectrum lies voluntary euthanasia, where a patient themselves requests death. The law draws a distinction within this category between active euthanasia, where positive steps are taken to bring about death, and passive euthanasia, where the patient's death is due to an omission.[7] In most jurisdictions where assisted death is prohibited, passive euthanasia is legally permissible.[8] Ms Seales sought her physician's assistance to take positive steps to end her life; therefore this paper will primarily examine active voluntary euthanasia.

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[5] Stuart Beresford "Euthanasia: The Right to Die and the Bill of Rights Act" [2005] HRR 3: 2 <www.vuw.ac.nz\nzcpl\>.

[6] Beresford, above n 5, at 5.

[7] Beresford, above n 5, at 5.

[8] Beresford, above n 5, at 8.

III Reviewing Seales

This paper will apply the process set out by the majority in *R v Hansen*:[9]

> Step 1. Ascertain Parliament's intended meaning.
> Step 2. Ascertain whether that meaning is apparently inconsistent with a relevant right or freedom.
> Step 3. If apparent inconsistency is found at step 2, ascertain whether that inconsistency is nevertheless a justified limit in terms of s 5.
> Step 4. If the inconsistency is a justified limit, the apparent inconsistency at step 2 is legitimised and Parliament's intended meaning prevails.
> Step 5. If Parliament's intended meaning represents an unjustified limit under s 5, the Court must examine the words in question again under s 6, to see if it is reasonably possible for a meaning consistent or less inconsistent with the relevant right or freedom to be found in them. If so, that meaning must be adopted.
> Step 6. If it is not reasonably possible to find a consistent or less inconsistent meaning, s 4 mandates that Parliament's intended meaning be adopted.

A Parliament's intended meaning

The first step of the *Hansen* test requires the ascertainment of the meaning Parliament intended to attribute to suicide in the CA.

In determining this, Collins J looked to the origins of New Zealand's criminal legislation. His Honour affirmed Sir James Stephen's conclusion that suicide occurs when "a man kills himself intentionally."[10] Stephen drafted the Criminal Code Act 1893, which forms the basis of New Zealand's current CA, the most relevant amendment being the decriminalisation of attempted suicide in 1961 for policy reasons.[11] Counsel for Ms Seales contended that the CA legislative changes relating to suicide displayed a shift in parliamentary intent from preserving the sanctity of life to actively upholding autonomy.[12] Although the provisions may be read consistently with an exclusion of

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

[10] *Seales*, above n 2, at [87] and [117].

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

[12] At [127].

euthanasia from suicide, it is highly unlikely Parliament intended to do so. Collins J's conclusion that Parliament intended suicide to bear a broad meaning – intentionally taking one's own life – accords with socio-political attitudes towards end of life decisions, which were far less accepting of euthanasia fifty years ago.

B Inconsistency with the right to life

Step two of *Hansen* asks whether Parliament's intended meaning is inconsistent with the relevant right. Collins J answered this in the negative, however this paper asserts that criminalising assisted euthanasia does infringe upon the right to life. Before any potential curtailment of the right can be identified, the right to life itself must be defined. The following section will canvass orthodox and contemporary conceptions of the right to life and argue for the inclusion of a right to die within the BORA s 8, which states "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."

1 Scope of the right

Determining whether Parliament's intended meaning of suicide is inconsistent with s 8 first requires an exploration of how the right should be construed. Various courts and academics have imbued the right to life with a range of meanings. Bernard McCloskey aptly describes the codification of this right in human rights instruments as "deceptively simple."[13] The law does not expressly recognise a right to die, therefore such a right must be found to exist within an established right in order to be upheld.[14] Whether a right to die with dignity, or a right to choose the time and circumstances of one's death, can be read into the right to life is fiercely contested in classical and contemporary scholarship. As John Coggon notes, the law is "fragile" in this area.[15]

The right to life is uniquely important as "the source of all other fundamental rights."[16] Without it, an individual cannot access other rights. It may therefore appear contradictory to propose that the right to life contains the right to end one's life. There is a further oddity at play – the inevitability of death. Scott Shershow acknowledges that death "marks the limit of all rights and all freedom," and questions whether it is tenable to have

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[13] Bernard McCloskey "The right to life – human rights at birth and death" (2011) 37 CLB 219 at 224.

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

[15] John Coggon "Could the right to die with dignity represent a new right to die in English law?" (2006) 14 Med L Rev 219 at 231.

[16] Nicolae Pavel "The Right to Life as a Supreme Value and Guaranteeing the Right to Life" (2012) 4 Contemp Readings L & Soc Just 970 at 972.

a right to "that which comes inescapably to all."[17] However, the existence of a right to die is not as far-fetched as it may seem. Technology's increasing ability to prolong death has prompted the law to adapt to reflect social and moral values. Individuals are already able to exercise control, albeit limited, over the manner in which they die. The BORA protects the right to refuse medical treatment,[18] and the law upholds valid advance directives,[19] colloquially known as 'living wills.' The boundaries between life and death have shifted, leading to widespread recognition that "while death may be the end of life, dying is a part of life and, therefore, how an individual dies is a vital aspect of how that individual has lived his or her life."[20] In this contemporary outlook, life and death are viewed not as opposites, but as forces that overlap and are inextricably bound. Opponents of legalising euthanasia often argue that the recognition of a right to die would give rise to a corresponding duty to assist. However, as with abortion, the right to end life should be defined as a right to authorise assistance, rather than demand it.[21]

Underlying the ethical and legal discussion of the scope of the right to life is a perceived clash of values between the sanctity of life, individual autonomy and dignity. The sanctity of life principle stems from religious and natural beliefs that all life is sacred and belongs to a higher power.[22] It lies at the heart of modern society and places the utmost importance on the protection of life, which explains humankind's instinctive aversion to murder and suicide. Sanctity of life is most clearly upheld in case law interpreting the reach of Article 2 of the European Convention on Human Rights, in particular the judgments of the European Court of Human Rights, which stress the "fundamental nature of the right to life."[23]

In *Pretty v The United Kingdom*, the European Court of Human Rights rejected an application for assisted euthanasia. The Court narrowly defined the right to life, and firmly rejected Mrs Pretty's submission that the provision "protected not only the right to

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[17] Scott Shershow "The Sacred Part: Deconstruction and the Right to Die" (2012) 12 CR–New Centen Rev 153 at 155.

[18] New Zealand Bill of Rights Act 1990, s 11.

[19] Health and Disability Commissioner (Code of Health and Disability Service Consumers' Rights) Regulations 1996, sch 1, cl 2, right 7(5).

[20] Elizabeth Wicks "The Meaning of 'Life': Dignity and the Right to Life in International Human Rights Treaties" (2012) 12 HRLR 199 at 214.

[21] Otlowski, above n 14, at 201–202.

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

[23] Wicks, above n 20, at 201.

life but also the right to choose whether or not to go on living."[24] Central to the Court's reasoning was the distinction between freedoms and the right to life, the former conferring both positive and negative abilities and the latter only guaranteeing a positive right to act.[25] *Pretty* is strong authority for the proposition that "Article 2 cannot, without a distortion of language, be interpreted as conferring the diametrically opposite right, namely a right to die."[26] However, this construction of the right to life is somewhat tempered by the Court's treatment of Article 8, which protects an individual's "right to respect for his private and family life."[27] The Court noted quality of life issues will be meaningful in the context of Article 8, but cautioned that this should not undermine the significance of the sanctity of life.[28] The Court was "not prepared to exclude" the notion of inconsistency with Article 8 in these circumstances,[29] which further widened the scope for discussion of assisted euthanasia. Disappointingly, the Court sidestepped a decision on this point, concluding any inconsistency would be nonetheless justified.[30]

Subsequent cases have confirmed *Pretty*'s tentative conclusion, exhibiting a "general reluctance" to push the boundaries of the meaning of Article 2[31] and developing a dialogue around the quality of life within Article 8.[32] Despite *Pretty*'s reinforcement of the supremacy of the sanctity of life, the courts have indicated a willingness to read the two provisions together. Most recently, in *Lambert and Others v France*, family members of a tetraplegic man in a chronic vegetative state challenged his doctors' plan to withdraw artificial sustenance.[33] The majority held the applicants lacked standing to complain on Mr Lambert's behalf,[34] but went on to consider the alleged breach of Article 2. Although *Lambert* pertains to non-voluntary euthanasia, the case contains relevant discussion of the

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[24] *Pretty v The United Kingdom* (2002) 35 EHRR 1 (Section IV, ECHR) at [35].

[25] At [39].

[26] At [39].

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

[28] *Pretty*, above n 25, at [65].

[29] At [67].

[30] At [78].

[31] Shawn Harmona and Nayha Sethib "Preserving Life and Facilitating Death: What Role for Government after Haas v Switzerland?" (2011) 18 Eur J Health L 355 at 363.

[32] See generally *Haas v Switzerland* (2011) 53 EHRR 33 (Section I, ECHR); *R (Purdy) v Director of Public Prosecutions* [2009] UKHL 45, [2010] 1 AC 345; *R (on the application of Nicklinson and another) v Ministry of Justice* [2014] UKSC 38, [2015] 1 AC 657; *Koch v Germany* (2012) 56 EHRR 6 (Section V, ECHR); *Gross v Switzerland* [2014] ECHR 1008 (Grand Chamber, ECHR).

[33] *Lambert and Others v France* (46043/14) Grand Chamber, ECHR 5 June 2015 at [80].

[34] At [105].

scope of the right to life. The majority directed that in cases concerning euthanasia Article 2 should be considered alongside Article 8, in particular "the right to respect for private life and the notion of personal autonomy which it encompasses."[35] Notwithstanding the strong tenor of the *Pretty* judgment, recent case law has created room for a broader interpretation of the right to life.

Autonomy and dignity have traditionally been viewed in opposition to the sanctity of life. Individuals seeking euthanasia commonly cite the loss of autonomy and dignity as their main reasons for wishing to die, as evidenced by surveys carried out in jurisdictions where euthanasia is legal.[36] Autonomy is an individual's right to self-determination to the extent that their actions do not harm the rights of others.[37] Dignity encompasses both objective and subjective perceptions of an individual's quality of life.[38] If an individual's suffering is such that they believe their life is undignified, autonomy mandates that ending their life is their decision to make. Prima facie this clashes with the sanctity of life, which upholds life over all else.

It is possible to marry these concepts together in a manner that better accords with modern understandings of human rights. To Ronald Dworkin, what is important is not whether the sanctity of life trumps other rights, but how the sanctity of life can be "understood and respected."[39] Dignity and autonomy form a crucial part of the foundation of human rights instruments, many of which were enacted in response to atrocities committed during wartime.[40] They are therefore believed to shape all human rights. Interpreting the right to life thus requires the sanctity and quality of life to be read together, drawing a distinction between life that is merely biological and life that is truly valued. Emily Jackson alludes to this, noting the "important difference between simply being alive and having a life which is worth living."[41] The quality of life approach

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[35] At [142].

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

[37] Constance Putnam "What kind of a right is the right to die?" (2009) 4 EJMH 165 at 171.

[38] Coggon, above n 15, at 228; Paul Tiensuu "Whose Right to What Life? Assisted Suicide and the Right to Life as a Fundamental Right" (2015) 15 HRLR 251 at 267.

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

[40] Wicks, above n 20, at 206.

[41] Jackson, above n 36, at 42.

dominated the reasoning of recent euthanasia cases *Carter v Canada (Attorney-General)* and *Stransham-Ford v Minister of Justice*.[42]

Carter concerned whether s 241(b) of the Criminal Code, which criminalises assisted suicide,[43] unjustifiably violated the right to life, liberty and security of the person.[44] In a per curiam judgment, the Canadian Supreme Court found for the appellants, striking down s 241(b).[45] The Court approved the trial judge's conclusion that the right to life was engaged because affected individuals face the choice of committing suicide at an early stage or risking their condition deteriorating to a point where they are suffering and physically unable to end their lives.[46] The Court reinforced the centrality of the sanctity of life to the right to life, and observed that the right includes "life, liberty and security of the person during the passage to death."[47] Autonomy and dignity were held to underpin an individual's rights to liberty and security of the person,[48] and the Court expanded upon the implications of this in the context of euthanasia. The law's refusal to allow terminally ill patients to request euthanasia hinders their liberty by limiting the options available to them at the end of their lives, and threatens their security by forcing them to undergo painful and undignified suffering.[49] The Court neatly encapsulated the codependence of the sanctity and quality of life, stating that "s 7 recognises the value of life, but it also honours the role that autonomy and dignity play at the end of that life."[50]

Fabricius J in the South African High Court took this construction of the right to life a step further, explicitly recognising a right to die with dignity in *Stransham-Ford*. The South African judicial landscape is somewhat different in that courts must develop the common law if a statute does not uphold the Bill of Rights.[51] The Bill of Rights protects the dignity of all people,[52] and upholds the right to freedom and security of the person, which includes security in and control over the body.[53] The South African Constitution

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[42] *Carter v Canada (Attorney-General)* 2015 SCC 5; *Stransham-Ford v Minister of Justice and Correctional Services and Others* [2015] ZAGPPHC 230 (HCSA).

[43] Criminal Code RSC 1985 c C-46, s 241(b).

[44] Canadian Charter of Rights and Freedoms (1982), s 7.

[45] *Carter v Canada (Attorney-General)* 2015 SCC 5 at [147].

[46] At [57]–[58].

[47] At [63].

[48] At [64].

[49] At [66].

[50] At [68].

[51] Constitution of the Republic of South Africa 1996, ch 2, s 39(2)(a).

[52] Chapter 2, s 10.

[53] Chapter 2, s 12(2)(b).

emphasises the nation's foundations of dignity, equality and freedom.[54] In his discussion of dignity's place in the law, Fabricius J approved the reasoning of O'Reagan J in *S v Makwanyane*:[55]

> It is not life as mere organic matter that the Constitution cherishes, but the right to human life: the right to share in the experience of humanity. This concept of human life is at the centre of our constitutional values. The Constitution seeks to establish a society where the individual value of each member of the community is recognised and treasured. The right to life is central to such a society. The right to life, thus understood, incorporates the right to dignity. So the rights to dignity and to life are intertwined. The right to life is more than existence, it is a right to be treated as a human being with dignity: without dignity, human life is substantially diminished. Without life, there cannot be dignity.

In support of this contention, Fabricius J also positively referenced United States Supreme Court judgment *Cruzan v Director, Missouri Department of Health*, which concluded that "dying is part of life, it is completion rather than its opposite."[56] His Honour's decision was also informed by *Carter*, which was a particularly useful comparison given the similarities between the jurisdictions' human rights instruments.[57] The South African rights-based background as well as an examination of the relevant authorities led Fabricius J to remark that weight should be placed upon "the sacredness of the quality of life" rather than "the sacredness of life per se."[58] Reaching this conclusion enabled the Judge to interpret the right to life broadly, including the right to die. His Honour considered that the right to life obliges the state to protect life but does not "mean that an individual is obliged to live, no matter what the quality of his life is."[59]

The New Zealand BORA does not contain direct reference to dignity and autonomy. It has no equivalent to Article 8 of the European Convention of Human Rights, or ss 10 and 12 of the South African Bill of Rights, nor does it mention liberty and security of the person alongside the right to life as s 7 of the Canadian Charter does. New Zealand's human rights framework can therefore be distinguished from other nations in which

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[54] Chapter 1, s 1(a).

[55] *S v Makwanyane and Another* (CCT3/94) [1995] ZACC 3, 1995 (3) SA 391 (CC), cited in *Stransham-Ford v Minister of Justice and Correctional Services and Others* [2015] ZAGPPHC 230 (HCSA) at [12].

[56] *Cruzan v Director, Missouri Department of Health* 497 US 261 (1990) at 343, cited in *Stransham-Ford*, above n 55, at [14].

[57] *Stransham-Ford*, above n 55, at [18].

[58] At [14].

[59] At [23].

euthanasia cases have arisen, however the same reasoning should still apply because dignity and autonomy inform an understanding of all human rights. Furthermore, the negative framing of s 8 should not preclude a wide reading of the right. It is generally accepted that the right to life confers both positive and negative obligations, thus states owe a duty to abstain from killing and to actively preserve life.[60] It is therefore not inconceivable for "no one shall be deprived of life" to be construed in a positive manner that enables individuals to assert their right to dignified death.

Collins J defines the right to life conservatively in *Seales*. There was apparent scope to include a right to die within the right to life, a reading that has garnered support in contemporary scholarship and recent overseas decisions. *Carter* is especially persuasive because the BORA was modeled on the Charter.[61] Collins J sets out the key principles underlying Ms Seales' claim, notably the sanctity of life, dignity and autonomy. His Honour discusses the importance of the sanctity of life, and notes it may be subservient to other interests in certain circumstances.[62] His Honour defines dignity and autonomy, and quotes passages from *Stransham-Ford* and *Carter* linking these values to the right to life.[63] It is disappointing that Collins J's analysis ends there, without discussing how the right to life should be understood in New Zealand, nor how dignity and autonomy fit into the equation.

Collins J later acknowledges the similarity between Ms Seales' claim and that of the appellants in *Carter*,[64] and rightly cautions that s 7 of the Charter is wider than its New Zealand counterpart.[65] His Honour does accept that s 8 is engaged in Ms Seales' situation on the same grounds as in *Carter*.[66] In all other matters, Collins J differs from the Canadian Supreme Court regarding the alleged inconsistency. Regrettably, the methodology employed by Collins J in *Seales* restricts the scope of the right to life at the second step of the *Hansen* analysis – inquiring whether there is an inconsistency. It would have been more appropriate to consider the limitations within the right at the next stage, asking whether such an inconsistency is justified.

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[60] Wicks, above n 20, at 202. See also *Lambert and Others v France* (46043/14) Grand Chamber, ECHR 5 June 2015 at [117].

[61] Tucker and Geddis, above n 4, at 176.

[62] *Seales*, above n 2, at [63]–[65].

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

[64] At [162].

[65] At [155]–[158].

[66] At [166].

2 Rights methodology

The right to life is not absolute; it is subject to lawful exceptions that accord with the principles of fundamental justice.[67] Section 8 therefore contains a limitation within the right itself. Section 7 of the Charter is similarly structured. It is therefore unsurprising that Collins J's analysis of the conflict between the BORA s 8 and the CA s 179(b) mirrors the Court's discussion in *Carter*.

Petra Butler recommends that a BORA s 5 analysis should not be the starting point for interpreting a limited right; instead one must acknowledge that rights are fundamental because they are at the core of what it means to be human.[68] As a result, their scope must be defined as widely as possible.[69] She argues that qualifying phrases in rights provisions must not be interpreted within the rights themselves, because this would amount to "advanced and/or disguised s 5 scrutinies."[70] Although Parliament's clear intention is to limit the scope of the right, the BORA bestows upon the courts a responsibility to protect individual rights.[71] This responsibility is best achieved by adopting a methodology that casts the reach of the right broadly when judging its compatibility with the statutory provision at issue.[72] The limitation should only be examined during a s 5 analysis, at which time it is appropriate to defer to parliamentary sovereignty by balancing the rights of the individual with those of the democratic majority.[73] Taking this approach avoids improperly restricting human rights whilst recognising Parliament's prerogative to override rights where reasonably necessary. The Supreme Court has begun to follow this approach, but has not yet expressly provided guidance on the matter.[74]

The Court of Appeal has approved a rights methodology that defines the scope widely and considers in-built limitations within s 5. In *Quilter v Attorney-General*, Tipping J advised that "it is better conceptually to start with a more widely defined right and legitimise or justify a restriction if appropriate, than to start with a more restricted right."[75] Tipping J's guidance has been reinforced by subsequent judgments, most

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[67] New Zealand Bill of Rights Act, s 8.

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

[69] At 266.

[70] At 266.

[71] At 267.

[72] At 267.

[73] At 267.

[74] Butler, above n 68, at 274.

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

recently in *Ministry of Health v Atkinson*.[76] In *Atkinson,* the Court of Appeal declined to follow the Canadian rights methodology approach, approving the Tribunal's suggestion that New Zealand should develop its own jurisprudence in light of our unique legislative and constitutional makeup.[77] The Court affirmed that "matters of justification" should not be brought to bear upon the definition of the right itself but rather remain within the confines of s 5.[78] The Canadian Charter is supreme law, therefore the consequences of an unjustified breach are more severe than in New Zealand, where inconsistent statutes cannot be struck down.[79]

In *Carter*, the Court essentially carried out two justified limitation discussions, one surrounding the principles of fundamental justice within the right to life, and one considering whether a prohibition of assisted euthanasia could be justified by wider social concerns. Although this is the accepted practice in Canada, the author ventures that undertaking the same analysis twice is impractical and lends itself to the strict approach Butler cautions against. It was inappropriate for Collins J to follow *Carter*, given New Zealand's stance on rights methodology. His Honour should have defined the right to life broadly, and examined the principles of fundamental justice during the justification stage of the *Hansen* test. A generous interpretation of the BORA upholds New Zealand human rights jurisprudence, furthermore the wording of s 8 expressly characterises the principles of fundamental justice as a condition of the right. Adopting this methodology would have corresponded with previous New Zealand dicta, and given Ms Seales' claim a stronger chance of success.

In *Seales*, Collins J does not interpret the right to life in accordance with the accepted New Zealand methodology. His Honour includes the right's limitation within its scope by breaking s 8 into three components – the right to life, lawful exceptions, and consistency with the principles of fundamental justice.[80] His Honour does not discuss the right to life in a broad, human rights friendly setting but instead allows the qualified definition to guide his analysis of compatibility with the principles of fundamental justice.[81] These had not previously been examined in New Zealand, so Collins J looked to Canadian case

[76] *Ministry of Health v Atkinson* [2012] NZCA 184, [2012] 3 NZLR 456 at [101].

[77] *Atkinson*, above n 76, at [109]–[110]; *Atkinson v Ministry of Health* [2010] NZHRRT 1, (2010) HRNZ 902 at [187].

[78] At [128].

[79] *Atkinson*, above n 76, at [118].

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

[81] It is arguable that Collins J's reasoning in Part III of the judgment was coloured by his Honour's finding that the CA provisions could not accommodate euthanasia in Part II.

law.[82] The principles – arbitrariness, overbreadth and gross disproportionality – bear meanings equivalent to the limbs of a BORA s 5 analysis. As a result, applying the principles of fundamental justice within the scope of the right to life makes little sense.

In both jurisdictions it is for the plaintiff to prove a human rights breach.[83] In incorporating what is in substance a s 5 analysis into the right to life, Collins J renders it extremely difficult for Ms Seales, or any plaintiff for that matter, to satisfy this onus. His Honour's methodology places Ms Seales in the position envisaged by Butler – being required to bring evidence that the inconsistency between s 8 and s 179(b) is unjustified.[84] This outcome runs contrary to the plaintiff's usual position in a s 5 analysis, where the burden rests with the state to justify their breach of a human right. Placing the onus of proof on the state at this stage is appropriate. The state enacted the law in question and therefore is best placed to deliver evidence validating its necessity. Collins J effectively made it impossible for Ms Seales' claim to succeed by forcing her to advocate within the scope of the right to life that the limitation on her rights was unjustified. His Honour's methodology is not human rights friendly because it makes proving inconsistency far more challenging for plaintiffs. *Seales* takes a disappointingly conservative approach that fits poorly with New Zealand's contemporary stance on human rights litigation.

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

C Justified inconsistency

This paper will now consider the remaining limbs of the *Hansen* analysis, and explore the options available to the Court in *Seales*. Steps three and four require a discussion of whether the aforementioned inconsistency is a justified limitation per s 5 of the BORA. If satisfied, Parliament's intended meaning must be applied. *Hansen* sets out the test for determining whether a limitation is justified. The test is derived from Canadian case law, creating another similarity between the two jurisdictions in this area:[85]

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[82] At [169].

[83] *Seales*, above n 2, at [174]; Butler, above n 68, at 274.

[84] Butler, above n 68, at 274.

[85] *R v Hansen*, above n 9, at [104] per Tipping J.

(a) does the limiting measure serve a purpose sufficiently important to justify curtailment of the right or freedom?

(b)

(i) is the limiting measure rationally connected with its purpose?

(ii) does the limiting measure impair the right or freedom no more than is reasonably necessary for sufficient achievement of its purpose?

(iii) is the limit in due proportion to the importance of the objective?

1 Purpose

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

Collins J adopted the wide purpose of s 179(b) advocated for by the state, the "absolute protection of the lives of all who are vulnerable" and the protection of the lives of those who are not vulnerable, "so far as is reasonably possible."[86] In *Carter*, the Court opted for a narrower formulation, namely "preventing vulnerable persons from being induced to commit suicide at a time of weakness."[87] Selecting this narrow purpose enabled a finding of inconsistency on the basis that prohibiting physician-assisted euthanasia is overly broad.[88] A blanket ban on assisted euthanasia went further than necessary to achieve the protection of vulnerable people. Only some people wishing to avail themselves of euthanasia can be classed as vulnerable, while others are of sound mind and make a voluntary and fully informed choice to end their lives.[89] In assessing the principles of fundamental justice against such a broad purpose, Collins J failed to heed the Court's warning in *Carter* that doing so would render the outcome inevitable.[90]

In *Seales*, Collins J explained the necessity of a broad purpose by asserting that New Zealand and Canada have a "different legislative framework" for criminal offences.[91] There are no significant differences between suicide provisions in New Zealand and Canada. Both nations' criminal legislation originated from Stephen's Code, which was drafted in England but only implemented elsewhere.[92] New Zealand does have a

[86] *Seales*, above n 2, at [132].
[87] *Carter*, above n 45, at [78].
[88] At [86].
[89] At [86].
[90] At [77].
[91] *Seales*, above n 2, at [186].
[92] At [87].

provision enabling the use of necessary force to prevent suicide,[93] which Collins J relies upon to distinguish between New Zealand and Canada.[94] Geddis notes that the validity of this reasoning is questionable.[95] Although Canada has no such statutory defence, the Criminal Code facilitates the continuation of common law criminal defences.[96] In practice, Canada's necessity defence operates in the same way as s 41; hence the statutory context of these two jurisdictions with respect to assisted suicide is not materially different.[97]

Furthermore, Canada has no provision criminalising suicide pacts. In Canada, the survivor of a suicide pact may be charged with murder or assisted suicide,[98] whereas in New Zealand s 180 reduces a survivor's potential liability to manslaughter or being party to a suicide pact, which carries a maximum penalty of five years imprisonment.[99] According to Geddis, the Canadian government has taken a harder line against suicide pacts, and in this sense focuses more on protecting life than New Zealand does.[100] Again, a comparison of the two jurisdictions reinforces the conclusion that Collins J should not have construed the purpose of s 179(b) more broadly than in *Carter*.

It would therefore have been more appropriate for Collins J to ascribe a narrow purpose to s 179(b), given the similarities between Canadian and New Zealand criminal law. The narrow and wide purposes both seek to protect life, regardless of whether this is restricted to vulnerable classes or extended across society. Whichever purpose is preferred, both are compelling enough to justify infringing the right to life.

2 Rational connection

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

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[93] Crimes Act 1961, s 41.

[94] At [123].

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

[96] Section 8(3).

[97] Geddis, above n 95.

[98] Sections 222, 229, and 241(b).

[99] Crimes Act, s 180.

[100] Geddis, above n 95.

In *Carter*, the Court held there was a rational connection between prohibiting assisted euthanasia and protecting vulnerable individuals.[101] Collins J came to the same conclusion through his analysis of the principles of fundamental justice, finding the provision did not operate arbitrarily in achieving its purpose of protecting vulnerable and, as far as possible, non-vulnerable individuals.[102] Whichever purpose is accepted, this ground is easily satisfied because s 179(b) imposes a blanket ban and therefore applies broadly to all citizens.

3 Minimal impairment

The next limb requires determining whether the limitation infringes the right only as far as reasonably necessary to achieve its goal. The following section will argue that the protection of vulnerable individuals can be accomplished under a system that regulates physician-assisted euthanasia, and, as a result, the current criminalisation of euthanasia goes further than required.

Collins J held s 179(b) did not overreach the broad purpose of protecting life. If his Honour had based this inquiry on the narrower purpose contended for by Ms Seales, the result might well have differed. *Carter* turned on the Court's finding that criminalising assisted euthanasia impinges upon citizens' rights more than reasonably necessary to protect vulnerable individuals.[103] The Court stated that blocking all access to euthanasia goes beyond merely protecting vulnerable individuals from harm, by stopping rational adults from exercising their right to life.[104] The provision therefore governs behaviour falling outside its purpose. Fabricius J endorsed this in *Stransham-Ford*, observing most euthanasia cases before the courts "would not be connected to the objective of protecting vulnerable persons at all."[105] These recent judgments are persuasive authority that banning euthanasia goes further than required to protect vulnerable people. There is no material reason why this analysis should not apply in the New Zealand context, presuming the purpose of s 179(b) can be achieved through the regulation of physician-assisted euthanasia. If preventing exploitation cannot be maintained through legalising euthanasia, a blanket ban is the only appropriate recourse.

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[101] At [101].

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

[103] At [121].

[104] At [86].

[105] At [18].

A major concern around permitting euthanasia is that vulnerable people, such as those who are elderly, disabled or ill, may feel pressured to end their lives to avoid burdening loved ones and the healthcare system. However, the situation confronting Collins J involved a competent, terminally ill woman facing unbearable suffering. Permitting euthanasia in Ms Seales' case would only open up the possibility to individuals in a similar position, which is a relatively small class. In Elizabeth Wicks' opinion, restricting euthanasia to terminally ill patients is a "sensible solution" that is unlikely to endanger vulnerable people if guidelines are established and adhered to.[106] The Court in *Carter* affirmed the trial judge's factual finding that a "carefully designed and monitored system of safeguards" is capable of containing the inevitable risk of abuse towards the vulnerable.[107] The Court's ruling on this point is corroborated by evidence from jurisdictions where euthanasia is lawful, which offer a useful comparative perspective. According to the trial judge, these statistics reveal no disproportionate emphasis on "socially vulnerable populations."[108]

The Court also approved the trial judge's ruling that physicians can ascertain their patients' level of vulnerability by assessing their competence and decision-making abilities.[109] The Court observed that individuals utilising legal methods of ending life, such as withdrawal of sustenance and palliative sedation, are similarly vulnerable, therefore there is no practical reason to treat those requesting euthanasia differently.[110] Given the similarities between the two jurisdictions, this reasoning should stand in New Zealand. The argument that regulation cannot protect vulnerable people can accordingly be classified as "a theoretical or speculative fear"[111] that cannot validate criminalisation. Furthermore, people in Ms Seales' position are also vulnerable and in need of legal protection. Prohibiting euthanasia forces these individuals to contemplate committing suicide in secret before they have reached the stage where their condition is unbearable.

Another argument commonly raised in objection to allowing euthanasia is the difficulty of ascertaining whether a patient is competent to make a request. Terminally ill people often suffer from bouts of depression,[112] and their decision-making abilities are likely to

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

[107] At [117].

[108] At [107].

[109] At [115].

[110] At [115].

[111] *Carter*, above n 45, at [119].

[112] Danuta Mendelson and Mirko Bagaric "Assisted suicide through the prism of the right to life" (2013) 36 Int J Law Psychiat 406 at 412.

be impaired while they process their situation. However, physicians assess patient competency for other major medical decisions without difficulty, so practically there is little difference in this instance. In *Carter*, the Court held physicians have the necessary training and experience to identify situations where patients are incompetent due to mental illness, or are being pressured into euthanasia.[113] Similarly, the New Zealand medical profession could enforce the informed consent standard for euthanasia applications. Therefore, the correlation between depression and end of life requests does not amount to a strong argument against euthanasia.

The 'slippery slope' justification is perhaps the belief most strongly held by euthanasia opponents. Simply put, this discourse posits that if terminally ill adults are permitted to access euthanasia, society and the law will become increasingly accepting of this practice in other situations until we reach a point that would previously have seemed unforgivable – involuntary euthanasia. Involuntary euthanasia occurs where a third party ends a competent patient's life without obtaining consent or disregarding the patient's refusal. At first blush this argument may appear laughable, but scholars have pointed to the Netherlands as an example of standards lowering over time in end of life practices. Although Dutch case law has permitted voluntary euthanasia in situations of mental illness and old age, empirical evidence shows no increasing propensity towards involuntary euthanasia. Euthanasia rates have remained stable over time, and no instances of involuntary euthanasia have been reported since legalisation.[114] In 2010, 2.8% of deaths in the Netherlands resulted from euthanasia, which matches data obtained in 2001 and 1995.[115]

Belgium is also commonly cited regarding the 'slippery slope.' Studies suggest physicians face difficulties when determining the boundaries of acceptable euthanasia requests.[116] *Carter* dismissed this reasoning because legalising euthanasia in Belgium merely established guidelines for a medical practice that had long been accepted in society, and as such Belgium has a "very different medico-legal culture."[117] Much like Canada, New Zealand has never permitted euthanasia and the medical profession has

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[113] At [106].

[114] Harry Lesser "Should it be legal to assist suicide?" (2010) 16 J Eval Clin Pract 330 at 332.

[115] Arthur Schafer "Physician assisted suicide: The great Canadian euthanasia debate" (2013) 36 Int J Law Psychiat 522 at 529.

[116] See generally Raphael Cohen-Almagor "First do no harm: pressing concerns regarding euthanasia in Belgium" (2013) 36 Int J Law Psychiat 515.

[117] At [112].

traditionally opposed it,[118] hence the same reasoning should apply. *Carter* and *Stransham-Ford* dismissed the 'slippery slope' argument due to a lack of substantive evidence.[119] The Canadian Supreme Court were particularly emphatic, warning "we should not lightly assume that the regulatory regime will function defectively, nor should we assume that other criminal sanctions against the taking of lives will prove impotent against abuse."[120] These decisions provide convincing authority that the 'slippery slope' justification is not compelling.

Another frequently argued justification for banning euthanasia is the availability and effectiveness of palliative care. Palliative care encompasses pain relief and emotional support for terminally ill patients.[121] It aims neither to extend life nor end it.[122] It is generally accepted that palliative care will not always satisfy the needs of dying patients.[123] Drugs may fail to fully relieve pain and can cause distressing side effects, moreover in some circumstances they will be of little assistance, for example, patients with progressive muscle weakness diseases who gradually lose the ability to swallow and breathe.[124] Ms Seales faced this difficulty, as her oncologist advised that palliative care would not substantially relieve her symptoms.[125]

Opponents claim the quality of palliative care would decrease if euthanasia was legalised, because end of life care imposes a higher cost on the state. However, Harry Lesser argues that enabling those for whom palliative care is ineffective to access euthanasia should not prompt the majority of patients, who benefit from palliative care, to follow suit.[126] Furthermore, a higher quality of care has been observed in jurisdictions where euthanasia is lawful.[127] A recent study examining euthanasia trends in the Netherlands before and after legalisation indicates physicians adhere strongly to the requirement that alternative options must be exhausted before resorting to euthanasia, and respond to euthanasia

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

[119] *Carter*, above n 45, at [107]; *Stransham-Ford*, above n 55, at [17].

[120] At [120].

[121] Cohen-Almagor, above n 116, at 519.

[122] Melanie Vachon "Quebec proposition of Medical Aid in Dying: A palliative care perspective" (2013) 36 Int J Law Psychiat 532 at 537.

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

[124] Jackson, above n 123, at 44.

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

[126] Lesser, above n 114, at 333.

[127] Lesser, above n 114, at 333. This was affirmed in *Carter*, above n 46, at [107].

requests by recommending palliative care.[128] These results show that, far from being a replacement, euthanasia complements palliative care. The use of palliative care has also increased in Oregon, as demonstrated by studies showing significant increases in referrals to hospice specialists.[129] Oregon implemented new policy systems for palliative care before the Death with Dignity Act was enacted.[130] A similar approach could be taken in New Zealand to ensure the important role palliative care plays is not overshadowed by euthanasia. Regulation would enable the creation of a "palliative care filter"[131] that ensures palliative care options are considered prior to deciding upon euthanasia.

Studies also reveal that overwhelmingly in jurisdictions where euthanasia is legal, individuals choose to end their lives due to an inability to partake in activities that make life enjoyable, and a loss of autonomy and dignity.[132] Unbearable pain, or fear of pain, only features in approximately one third of euthanasia cases.[133] Generally those who seek euthanasia do so for reasons relating to their perceived quality of life, so individuals who currently find solace in palliative care are likely to continue to do so. These statistics further disprove the idea that palliative care would become obsolete if euthanasia was legalised in New Zealand.

Proponents of legalisation argue euthanasia already occurs in countries where it is criminalised, therefore regulation protects the interests of those most susceptible to abuse through legal mechanisms. Lesser compares today's culture of "back-street euthanasia" to abortion, whereby it was judged to be safer and more human rights friendly to allow trained physicians who are subject to medical standards and disciplinary bodies to end the lives of fetuses.[134] A blanket ban on euthanasia increases the potential for abuse by forcing the activity underground and creating a covert system in which guidelines may be applied inconsistently. It is on this basis that Emily Jackson believes regulation is of greater benefit to vulnerable individuals than criminalisation.[135] Furthermore, prohibiting euthanasia shuts down dialogue between the patient, their physician and their family. A forum for open communication about end of life possibilities empowers individuals to reach a decision that is right for them. In the New Zealand landscape, patients face

[128] Vachon, above n 122, at 535.
[129] Jackson, above n 123, at 46.
[130] Schafer, above n 115, at 529.
[131] Jackson, above n 36, at 50.
[132] Mendelson and Bagaric, above n 112, at 412.
[133] Mendelson and Bagaric, above n 112, at 412.
[134] Lesser, above n 114, at 331.
[135] Jackson, above n 36, at 53.

making this important choice on their own, for fear of exposing others to prosecution for assisted suicide.

A terminally ill person who believes their quality of life is deteriorating may take great comfort in knowing they have the ability to determine when and how they will die. This is a persuasive argument for legalisation because the alternative involves "condemning some people to very grave suffering" on the unsubstantiated assumption that regulation cannot adequately support the vulnerable.[136] An oncologist who submitted to the Canadian Senate Committee on Euthanasia and Assisted Suicide likened this reassurance of control to a life jacket on an airplane – rarely used in reality, nonetheless a crucial means of placating people's nerves and boosting their confidence.[137] This analogy is consistent with evidence from Oregon, which shows that one in 50 terminal patients discuss euthanasia with their physician, and one in 6 talk about it with their family, however only one in 800 undergo euthanasia.[138] It appears many individuals contemplating euthanasia do not opt to go through with it. For the majority, what is significant is the ability to choose death when life becomes unbearable. In *Seales*, doctors who had practiced in Oregon, New Mexico and Montana gave evidence stating their patients generally died of natural causes, but valued having control over the process of their death.[139] Their conclusion is reflected in Ms Seales' affidavit, in which she states:[140]

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

This paper asserts that s 179(b) impairs the right to life more than reasonably necessary for the protection of vulnerable individuals. The *Hansen* s 5 minimal impairment section is therefore unsatisfied.

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[136] Lesser, above n 114, at 333.
[137] Schafer, above n 115, at 529.
[138] Schafer, above n 115, at 529.
[139] At [59]–[61].
[140] At [29].

4 Proportionality

The final limb of the s 5 *Hansen* analysis asks whether the restriction on the right is in proportion with the gravity of its purpose. The evidence discussed above does not suggest vulnerable individuals face an increased risk of harm under a well-regulated system. It is for this reason that the limitation is not proportionate to its purpose.[141]

This paper has resolved the s 5 analysis in favour of the limitation being unjustified. The purpose of s 179(b), protecting vulnerable individuals, is meritorious and does warrant curtailment of the right to life, however criminalising assisted euthanasia impairs the right disproportionately and more than reasonably necessary to fulfill this aim.

D Alternative meaning

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

It is worth noting any discussion of the meaning of suicide will inevitably be coloured by the emotion and stigma surrounding the act. Taking one's own life has been viewed in contradictory ways across a variety of cultures and time periods. Popular conceptions of suicide have both condemned and condoned the practice. Prevailing attitudes throughout modern history have tended towards a social aversion to suicide, indeed killing oneself remained a criminal offence in most countries until relatively recently.

Ms Seales submitted that Collins J should adopt a narrower definition of suicide that excludes rational decisions to die made by competent, terminally ill adults.[142] Her preferred interpretation distinguishes between rational, self-determined death and death brought about by impaired thinking. Such a conception of suicide has not found favour with the courts, but has gained some support amongst the mental health profession[143] and academics.[144] Sheila McLean describes suicide as a "private act," differentiating

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[141] See *Carter*, above n 45, at [90] and [122]. The Court did not need to consider this ground, as the limitation had already been found to be unjustified. It was noted that the consequences of prohibiting euthanasia were significant, but so too is the imperative of protecting the vulnerable.

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

[143] Tucker and Geddis, above n 4, at 174.

[144] See Otlowski, above n 14, at 62–84; Malcolm Parker "Defending the indefensible? Psychiatry, assisted suicide and human freedom" (2013) 36 Int J Law Psychiat 485 at 491.

euthanasia as a "social act" that depends upon the assistance of another.[145] According to David Lanham, suicide requires both a desire to die and "contempt for one's own life."[146] People in Ms Seales' position lack this disregard for life; rather their choice to die upholds the dignity with which they have lived their lives.[147] While they would prefer to live, they choose death over their present quality of life. The absence of contempt amongst rational, terminally ill patients seeking euthanasia leads Lanham to conclude these individuals do not fit the definition of suicide.[148] Furthermore, he stresses the importance of defining suicide narrowly to uphold individuals' rights to autonomy and dignity.[149] Interpreting suicide in this way focuses not on the outcome of self-inflicted death but on the soundness of the reasoning behind the decision.

In *Chief Executive of the Department of Corrections v All Means All*, Panckhurst J held that a prisoner carrying out a hunger strike was not attempting suicide.[150] The individual was fasting as a form of protest, which the Judge held did not amount to suicide, where "death is the desired and intended result."[151] Although a fasting prisoner is in a different position to a terminally ill patient seeking euthanasia, the reasoning applied in *All Means All* corresponds well with a narrow meaning of suicide. A terminally ill individual does not desire death, but rather wishes to avoid unbearable suffering in circumstances where their death is imminent. Their intention is to control the circumstances of their death, rather than to die. Ms Seales emphasises this in her affidavit, which Collins J quotes at length:[152]

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

The definition of suicide was also questioned in *Compassion in Dying v State of Washington*, in which the Federal Court of Appeal ruled the prohibition of physician-

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[145] McLean, above n 22, at 36–37.

[146] David Lanham *Taming Death by Law* (Longman Professional Publishing, Melbourne, 1993) at 13.

[147] At 14.

[148] At 19.

[149] At 20.

[150] *Chief Executive of the Department of Corrections v All Means All* [2014] NZHC 1433 at [44].

[151] At [44].

[152] At [29].

assisted euthanasia unconstitutional.[153] Although this decision was subsequently overruled, the United States Supreme Court did not engage with the lower court's discussion of the meaning of suicide. *Compassion in Dying* is significant because the Court was willing to accept the proposition that euthanasia falls outside the scope of suicide. The majority saw no substantial difference between active voluntary euthanasia and patient death via termination of life support or withdrawal of sustenance. Since the latter categories are not deemed to constitute suicide, the majority doubted the credibility of classifying physician-assisted euthanasia as such.[154] The majority also observed that active voluntary euthanasia merely "hasten[s] by medical means a death that is already in process," and therefore does not meet the definition of suicide.[155] The *All Means All* and *Compassion in Dying* decisions strengthen Ms Seales' assertion that suicide should bear a narrow meaning.

In *Seales*, Collins J discusses the meaning of suicide early in his judgment, admittedly in the context of Parliament's intent. His Honour rejects the contention that active voluntary euthanasia is similar to passive voluntary euthanasia, which the law does not consider to amount to suicide.[156] His Honour provides little analysis on this point, and fails to address the fact that both involve a rational decision to die. Collins J also engages in an interpretative exercise based upon the CA provisions dealing with suicide. In New Zealand, committing suicide was decriminalised in 1893 with the passing of the Criminal Code Act, and attempting suicide followed suit in 1961 under the CA.[157] These changes reflect a social shift towards viewing suicide as a mental health issue that should not be approached with criminal sanctions but with rehabilitative measures such as counselling. The decriminalisation of suicide should not be read as implying a right to kill oneself, but merely the recognition that suicidal individuals are vulnerable and require protection and assistance.[158] Assisted suicide has remained an offence under s 179(b), and in 1961 Parliament amended s 41 and enacted s 180.[159]

Although Collins J framed the purpose of s 179(b) broadly, the author endorses the narrower aim of protecting the vulnerable, as discussed above. Terminally ill, rational adults such as Ms Seales, Mr Stransham-Ford, Mrs Pretty and Ms Taylor do not define

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[153] *Compassion in Dying v State of Washington* 79 F 3d 790 (9th Cir 1996) at 798.
[154] At 824.
[155] At 824.
[156] At [143].
[157] *Seales*, above n 2, at [118].
[158] *Seales*, above n 2, at [129].
[159] *Seales*, above n 2, at [119]–[122].

themselves as vulnerable and it is hard to see how they could be viewed as such.[160] These individuals have approached their fatal medical conditions with maturity and dignity, and they have sought death after careful consideration of their circumstances. They are distinguishable from those who contemplate suicide as a result of depression and other mental health issues, who most would agree are vulnerable and in need of the state's protection. Collins J accepts there are different forms of self-inflicted death – voluntarily taking one's life, sacrificing one's life, and being forced to take one's life.[161] His Honour asserts that only the first category will amount to suicide.[162] Conceptually, however, it is individuals within the third category who are vulnerable because their mental state is such that they feel pressured to take their lives. Section 179(b) aims to protect this social group, therefore rational, terminally ill patients such as Ms Seales should fall outside the ambit of s 179(b). It is thus more consistent with the purpose of s 179(b) to interpret suicide narrowly.

Collins J asserts that suicide must be all-encompassing because s 41 would not make sense if it only applied to certain types of self-inflicted death.[163] Tucker and Geddis convincingly argue that a narrow interpretation of suicide in reality makes more sense in the context of s 41.[164] Euthanasia would most likely occur in a hospital or private home, and neither environment provides sufficient opportunity for members of the public to intervene. Section 41 is better suited to situations involving irrational suicide, for example, tackling an individual to prevent them jumping off a bridge, or assaulting someone to remove a weapon from their person. It is unlikely members of the public will 'stumble upon' the execution of a euthanasia request, therefore his Honour's argument that s 41 requires a wide definition of suicide is a weak one. A narrow interpretation of suicide is also more consistent with the purpose of s 180, to protect vulnerable individuals who form a suicide pact and may be pressured into ending their lives. Situations of this nature are associated with irrational suicides and would be unlikely to occur in respect of terminally ill, rational adults who decide to undergo euthanasia. Furthermore, if two such individuals did decide to seek euthanasia together and one survived, criminal liability would arguably be inappropriate.[165] Defining suicide narrowly better facilitates the operation of the CA provisions that cover matters associated with ending one's life.

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[160] Tucker and Geddis, above n 4, at 177.

[161] At [143].

[162] At [144].

[163] At [128] and [140].

[164] Tucker and Geddis, above n 4, at 177.

[165] Tucker and Geddis, above n 4, at 177.

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

In the past, New Zealand courts have striven to alleviate human rights concerns by giving legislative phrases a contemporaneous meaning. In *Re Application by AMM and KJO to adopt a child*, Wild and Simon France JJ extended the meaning of spouse under the Adoption Act 1955 to include heterosexual de facto couples.[166] Parliament's intention was clearly to allow only married couples to make joint adoption applications.[167] Nevertheless, the Court held that such an interpretation upheld the underlying purpose of the Act by preserving the traditional concept of the family unit.[168] Wild and Simon France JJ were willing to tolerate "some resulting awkwardness in language" because the BORA was passed decades after the Adoption Act.[169] *Seales* presented a similar situation, as New Zealand's current CA was enacted in 1961 and dates back to the late 19th century. Parliament would not have legislated with the BORA in mind; hence a more strained and difficult interpretation may be possible under s 6. It was therefore feasible for Collins J to exclude rational, terminally ill adults seeking euthanasia from the definition of suicide. His Honour noted that the CA may require an interpretation that contradicts Parliament's intention at the time of enactment,[170] but the issue did not need to be examined further due to his Honour's finding of consistency.

If Collins J had endorsed this alternative meaning, physician-assisted euthanasia would have become lawful in New Zealand. Legalising euthanasia is a step many, including the author, believe should most properly be left to Parliament. When *Seales* was being decided, no legislative action was imminent. Several Bills have come before the House, and all have been voted down or withdrawn from the ballot. Collins J afforded Parliament an excessive amount of deference in respect of Ms Seales' claim. Interpreting a statutory

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[166] *Re Application by AMM and KJO to adopt a child* [2010] NZFLR 629 (HC) at [73].
[167] *AMM and KJO*, above n 166, at [16]–[17].
[168] At [35]–[37].
[169] At [31].
[170] *Seales*, above n 2, at [88].

provision in a human rights friendly way is a responsibility the legislature has designated to New Zealand courts under the BORA. Allowing physician-assisted euthanasia as a lawful activity was therefore a viable option. Legalising euthanasia would likely have prompted clarification from Parliament, presumably the enactment of a statute regulating euthanasia or the amendment of s 179(b) to expressly include rational, terminally ill adults seeking euthanasia.

A second, less radical, option would have been to deem the narrow meaning of suicide untenable and grant a declaration of inconsistency. Doing so would have acknowledged the unjustified infringement on Ms Seales' right to life, but would not have enabled her to avail herself of assisted euthanasia due to the operation of s 4. That this avenue was available to the Court was confirmed a month later by Heath J in *Taylor v Attorney-General*.[171] A declaration of inconsistency would not have forced Parliament to take action, but would have amounted to a strong push from the High Court and would at least have provoked Parliament to consider the matter.

In his discussion of assisted euthanasia cases, TRS Allan urges the judiciary to read statutes creatively because this produces important dialogue between the courts and Parliament, which will in turn "generate a wider public discussion."[172] It is regrettable that Collins J did not reach this stage in his analysis, which rendered the case less influential than it might have been. Irrespective of the result, the widespread publicity of the *Seales* case has encouraged national discussion and debate about euthanasia.

[171] *Taylor v Attorney-General* [2015] NZHC 1706 at [77] and [79].

[172] TRS Allan *The Sovereignty of Law: freedom, constitution, and common law* (Oxford University Press, Oxford, 2013) at 184.

IV Conclusion

Whether physician-assisted euthanasia should be lawful is a complex issue. The topic invites a range of perspectives – morality, politics, religion, culture and philosophy have all shaped the development of legislation, case law and academic discussion of what the law should be. There is something inherent in the nature of death and dying that provokes a strong response from humankind, whether in favour of euthanasia or against it. Ronald Dworkin best encapsulates this sensitivity, noting:[173]

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

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

The true legacy of the *Seales* case is the debate and emotion Ms Seales' claim has generated within New Zealand society. The ultimate outcome of *Seales* is now in the hands of Parliament, and, by virtue of democracy, the public. It is the author's opinion that any amendment or clarification of the law relating to assisted euthanasia should now come from the legislature. It is likely euthanasia will become a reality for New Zealanders; statistics suggest a majority of the country would support such a change.[174] Whether or not law reform eventuates, this case will be remembered as a significant moment in New Zealand history, and Ms Seales' courage in pursuing justice for herself and others will not be forgotten.

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[173] Dworkin, above n 39, at 209.

[174] Tucker and Geddis, above n 4, at 172.

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