Law and Life

The Lecretia Seales Memorial Lecture

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Lecretia's Plight

Lecretia Seales died of a cancerous brain tumour in Wellington on 3 June 2015. She was 42. Employed by the Law Commission as a senior legal and policy adviser for eight years, Lecretia had an abiding interest and competence in the field of law reform. She lived in Karori with her devoted husband Matt Vickers and their Abyssinian cat Ferdinand. I feel privileged to have known Lecretia well, both when I was President of the Law Commission and earlier when she worked with me at the law firm Chen, Palmer and Partners, public law specialists. Lecretia was a lawyer of high quality and she had a passion for the law. She hailed from Tauranga where her parents Shirley and Larry still live. She loved cooking and dancing. She had the gifts of friendship and empathy. I have met few people as determined and strong as she was. In the case she brought in the High Court concerning her impending death one witness described her personality as "young, bright, independent, perfectionist." I concur.

Lecretia was diagnosed with brain cancer in 2011. Earlier she began suffering from severe headaches and her general practitioner referred her to a neurologist. An MRI scan, some surgery and pathology tests led to a diagnosis of a serious and cancerous brain tumour, with tentacles reaching all through her brain. She underwent surgery of a most grave character, followed by six weeks of intensive radiation therapy that left her scalp very burnt. She continued to work and live as full a life as she could, despite tiring more easily and suffering from deteriorating eyesight. Lecretia was determined to live both her personal and professional lives to the full in what time she had left. And she did so with gusto. She continued working at the Law Commission until a very late stage. She travelled overseas to dance the tango in Buenos Aires. She went to San Francisco and Bermuda and then to Morocco in October 2014, by which time her mobility was seriously impaired. Chemotherapy worked well until August 2014, but bad symptoms set in and Lecretia's life became increasingly difficult. She had to have a walking stick. She could not drive. She needed help to stand up. Her left foot became useless. She became seriously impaired and could no longer dress herself without help, she experienced increased pain.

There could be no certainty how her illness would progress. It was clear to her and all her whānau that death was inevitable and time was running out. She wanted the option of determining when she died, if she began to experience enduring suffering that was intolerable.

As she told the court "If my death is manageable I should be the one to manage it."[1] The prospect of a slow, unpleasant, painful and undignified death weighed heavily on her mind. She had contemplated whether she could take her own life unaided, but this was not a choice she wanted to make. And were she to take such action she would have to take it earlier than if a doctor were available to assist. She felt deprived of choices. Her evidence was "I want to live as long as I can but I want to have a voice in my death and be able to say 'enough'."

Lecretia took a bold and courageous step. She decided to use her personal situation as an emblem of why New Zealand law should be changed. For a person as private as she was this must have been a difficult decision. It was not a decision she took lightly. She researched the law and discussed it in depth with a number of people, of whom I was one. She studied the very recent right to physician assisted dying established in the ground breaking decision of the Supreme Court of Canada on February 6, 2015. There, a person in a similar position to Lecretia won her case.[2] It was held the Canadian Criminal code infringed the Canadian Charter of Rights in a situation like Lecretia's, so that a blanket prohibition on physician assisted dying was constitutionally invalid. The New Zealand Bill of Rights Act 1990 is similar in many respects to the Canadian Charter under which the Canadian case succeeded. The New Zealand Bill of Rights Act borrowed heavily from the Canadian Charter. It should be noted that Canada also has a criminal code similar in its historical derivation to New Zealand's and the two systems remain in touch with one another. Lecretia reached the view that there was a fighting chance her case could succeed in the New Zealand courts. Even if she did not prevail, Lecretia reasoned, the evidence would demonstrate why New Zealand law should be changed. Her decision to use litigation as a law reform project was typical of the dedication she had to a legal system that is up to date, fair and just.

Lecretia sought declarations from the court that in her particular circumstances her doctor could lawfully accede to her requests for physician-assisted dying. This was necessary for the doctor to avoid the risk of prosecution for the crimes of murder or manslaughter in administering aid in dying. It was also necessary to secure a declaration that the doctor would not be at risk of prosecution for assisting Lecretia to commit suicide. So it was the case was mounted in front of Justice Collins in the High Court at Wellington, led by Andrew Butler, with 51 affidavits

1 Affidavit of Lecretia Seales, 9 April 2015 at [47]–[54].
2 *Carter v Canada (Attorney-General)* 2015 SSC 5, (2015) 1 SCR 331.

from 36 witnesses being filed in the case. The application was opposed by the Crown and other interests joined.

Lecretia had the Judge's decision read to her before she died on 3 June, and the judgment was announced publicly the day after her death.[3] The last day of the legal argument was 27 May, so the Judge produced his useful and detailed judgment in a remarkably short time. Lecretia's case failed, but the case and the evidence contributed powerfully to ensuring that the adequacy of New Zealand law on this subject would be examined. That examination is now occurring in front of a Parliamentary Select Committee. The Committee has received a greater quantity of submissions than any Select Committee has ever previously received in New Zealand.

In this lecture I want to traverse some of the issues that arise in the debate that Lecretia's case has raised. I will discuss the development of the New Zealand criminal law on suicide, then examine some philosophical consideration, look at some human rights issues and the decision of Collins J, followed by a possible policy direction that reforming legislation could take.

The New Zealand criminal law on suicide

Suicide is the intentional taking of one's own life. It has no statutory definition in New Zealand law. I now discuss the law relating to suicide in New Zealand, since in legal terms what Lecretia wanted was the assistance of a physician to help her commit suicide, but only in the circumstances that the pain caused by her affliction became too much to bear.

New Zealand law derives from English law and eight hundred years of legal tradition sits heavily upon it. The early English legal authority Bracton, who died in 1268, wrote a famous treatise about the laws and customs of England. According to renowned legal historian Frederic William Maitland, Bracton had many doubts about making suicide a crime and at first thought it should be a crime only if a criminal had killed himself in order to escape a worse fate.[4] But gradually the practice developed that if a sane man put an end to his own life it resulted in the

[3] *Seales v Attorney-General* [2015] NZHC 1239, [2015] 3 NZLR 556. Lecretia's journey is elegantly told by her husband, Matt Vickers, *Lecretia's choice-A story of love, death and the law* (Text Publishing ,Melbourne (2015)

[4] Frederick Pollock and Frederic Maitland *The History of English Law before the time of Edward 1* (Cambridge University Press, Cambridge, 1968) vol 2 at 488.

forfeiture of his goods in every case, and because of this the act of suicide itself became a felony. Forfeiture of goods was not abolished by statute in England until 1870.

By the time Sir William Blackstone wrote his classic *Commentaries on the Laws of England* in four volumes between 1765 and 1770, things had become rather more settled. Exhibiting a sense of moral outrage concerning what he calls self-murder, Blackstone pronounces as follows:[5]

> And although the law of England wisely and religiously considers, that no man had a power to destroy life, but by commission from God, the author of it: and as the suicide is guilty of a double offence: one spiritual, in evading the prerogative of the Almighty, and rushing into his immediate presence uncalled for: the other temporal, against the king, who hath an interest in the preservation of his subjects; the law has therefore ranked this amongst the highest crimes, making it a peculiar species of felony, a felony committed on one's self.

In this passage we encounter a connection between religion and religious belief on the one hand, and the law of the land on the other. Blackstone finds it reassuring that each reinforces the other. The Christian conception of the human personality endows the law with a religious and theological significance, being "sacred." Thus, attempts to destroy that person amount to sacrilege. In this sense, then, a person who commits suicide breaches a fundamental precept of the social order, thus justifying severe moral prohibition. Yet it may be questioned whether this is good theology. St Thomas Aquinas and St Augustine both agreed that human law does not prevent all vices, but mainly those that do harm to others; "This law, framed for governing the civil community, tolerates and leaves unpunished many things which are vindicated by Divine Providence."[6]

A foundation issue lies in the relationship between religious belief and the law. In this age we erect a wall between church and state, we practise religious tolerance and have no established church. The State guarantees in the New Zealand Bill of Rights Act "freedom of religion, and

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5 William Blackstone *Commentaries on the Law of England, Vol 4* (15th ed, A Strahan, London, 1809) at 188.

6 Thomas Aquinas *Summa Theologiae* (translated ed: Thomas Gilby (translator) (Blackfriars, London, 1963) vol 28 at 123-124.

belief" and the right of a person to manifest a person's religion.[7] The law in the modern age cannot be and should not be based on a particular religious belief, since there are many and they are not all compatible with one another. The law requires more substantial social and philosophical foundations that are anchored in social reality.

The relationship of law to morality is a complicated subject. But in the end, although they may overlap, their respective ranges are different. Morality, or what may be better described as social values and the law do inform one another. Criminal law is partly about the enforcement of social values. Where an affront to values becomes so great that it poses a risk to social cohesion or promotes disorder there will be issues.

New Zealand, of course, inherited the English common law, but soon we began making substantial statutory changes to it. One innovation was to codify the criminal law and this occurred in New Zealand in 1893. New Zealand used for this purpose the unsuccessful attempts that had been made in England over a long period time to codify the criminal law there. Efforts began in 1833 in England and led to the appointment of the Criminal Code Commission in 1878, under the chairmanship of Sir James Fitzjames Stephen. A highly respected code was produced by the Commissioners. Both Canada and New Zealand secured their criminal codes from this same primary source.

The great virtue of the 1893 code reform was that there was no longer a common law of crime that Judges could alter by their decisions. Unless the offence was in the statute enacted by Parliament, it was not an offence. The Criminal Code Act 1893 was nothing if not succinct on the issue of suicide:

> **71.** No one has a right to consent to the infliction of death upon himself; and, if such consent is given, it shall have no effect upon the criminal responsibility of any person by whom such death may be caused.
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> **172.** Everyone is liable to imprisonment with hard labour for life who counsels or procures any person to commit suicide actually committed in consequence of such

[7] New Zealand Bill of Rights Act 1990, ss 13 and15.

> counselling or procurement, or who aids or abets any person in the commission of suicide.
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> **173.** Everyone who attempts to commit suicide is liable to two years' imprisonment with hard labour.

Note that after 1893 in New Zealand suicide itself was not a crime. There was a certain logic in treating the dead person who had committed suicide as being beyond the reach of the law.[8] There was little mention of suicide when Parliament debated the Bill leading up to the 1893 statute. The penalty for counselling or procuring seems rather over the top to modern eyes. In 1961 the Act was totally revised and a new Crimes Act substituted. Although the 1961 statute has been heavily amended many times since, on this subject it repeats with some refinement largely the same approach to suicide as in 1893. (It was not materially altered in the 1908 codification of the statutes.) That in turn continues many features of the ancient common law of England. But there was one significant reform. No longer was attempted suicide to be a crime after 1961. It should be noted that the common law approach of treating suicide as self-murder did not survive the codification in New Zealand, since culpable homicide is defined as the killing of a human being "by another".

Section 41 of the 1961 Act provides:

> Every one is justified in using such force as may be reasonably necessary in order to prevent the commission of suicide, or the commission of an offence which would be likely to cause immediate and serious injury to the person or property of any one, or in order to prevent any act being done which he or she believes, on reasonable grounds, would, if committed, amount to suicide or to any such offence.

Section 179 deals with aiding and abetting suicide:

> (1) Every one is liable to imprisonment for a term not exceeding 14 years who—
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> (a) incites, counsels, or procures any person to commit suicide, if that person commits or attempts to commit suicide in consequence thereof; or
>
> (b) aids or abets any person in the commission of suicide.

[8] *Murdoch v British Israel Federation* [1941] NZLR 600 at 634.

(2) A person commits an offence who incites, counsels, or procures another person to commit suicide, even if that other person does not commit or attempt to commit suicide in consequence of that conduct.

(3) A person who commits an offence against subsection (2) is liable on conviction to imprisonment for a term not exceeding 3 years.

The essence of this provision remains the same as in 1893. The crucial parts of section 179 that relate to Lecretia's case were subsections (2) and (3). Were they compatible with the guarantee of the right to life and fundamental justice contained in the New Zealand Bill of Rights Act 1990? (Section 80 of the Crimes Act deals with suicide pacts and renders them unlawful.)

It was necessary to have a provision like section 179, because of the removal of suicide as a crime in 1893. Nevertheless, section 63 of the Crimes Act still provides that no-one can consent to being killed. Bear in mind as well that culpable homicide involves the killing of any person by an unlawful act. So the risk of a physician being charged with murder or manslaughter if that health professional assists another person to commit suicide is real as the law now stands. The fact that section 164 of the Crimes Act says that any act or omission of a person that causes the death of another, even if the effect of the injury caused was merely to hasten death, adds to the hazard from the point of view of the doctor.

One important purpose of section 179 and the related provisions is to protect vulnerable people from being coerced or manipulated into involuntary self-killing. But it applies to everyone in all circumstances. It aims to preserve life even though suicide itself is no longer a crime. It is a protection perhaps against the killing of those who have not genuinely consented to death, but feel under pressure to do so. And such consent may be induced by fear of worse consequences, such as murder. Section 179 also protects those not in a position to make informed decisions. The existing law stops self-destruction of people and this does seem to be a legitimate State interest. The policy of the law is that suicide is undesirable from a social point of view and is to be prevented where possible. As matters stand the State, through coronial inquiries and health measures, devotes considerable resources to understanding and taking measures to prevent people, especially young people, from committing suicide. For most categories that appears to be a sound policy. Suicide can cause considerable distress and hardship to the relatives and friends who remain. But the reverse is true in Lecretia's case. Her friends and relatives wished her to have the dignified repose and absence of suffering that she desired.

Section 179 goes further than is necessary to protect the interests to which it is directed and it impairs other interests, such as those of people in Lecretia's position.

It should also be noted, however, that section 126A of the Health Act 1956 allows for detention of those determined by the Court "to be in need of care or treatment or supervision or likely to make a further attempt to commit suicide." Here is evidence, that with suicide in many instances, there exist mental health issues. The 1956 legislation indicates a shift in attitude towards treating suicide as a health issue rather than a topic for the exclusive concern of the criminal law. There were no mental capacity or health issues in Lecretia's case. So the question remains whether the absolute rule should survive, given what we now know about the end of life for people with incurable illnesses.

The parliamentary debates that preceded the enactment of the Crimes Act 1961 are remarkably silent on the suicide provisions. There was little discussion of the suicide issue.[9] The Minister in charge, the Hon J R Hanan, did explain the reasons why attempted suicide would no longer be an offence. Essentially the reason was because of the overreach of the criminal law and what he called "the humanitarian misuse of the criminal law".[10] The MPs were principally concerned with debating the issue of the death penalty for murder, since the Bill as introduced by the Hon J R Hanan contained the death penalty. In introducing the Bill the Minister stated he would not vote for those provisions, and indeed they were defeated. That law had a long gestation and spanned two Parliaments and was punctuated by a report from the senior puisne Judge, Sir George Finlay.[11] That report did not comment on the provisions relating to suicide, except to approve the provision making a suicide pact unlawful, following then recent English legislation. The Crimes Bill 1989 that I introduced as the Minister of Justice did not attempt to reform the law on suicide. Clause 133 of that Bill sought to re-enact without substantive amendment section 179 of the Crimes Act 1961 on aiding and abetting suicide. It did amend in some respects the law relating to suicide pacts.[12]

So in a nutshell New Zealand inherited the common law of England with its heavy religious

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9 The debates on the 1961 Act are contained in volumes 328 and 329 of the New Zealand Parliamentary debates, 1961.

10 (3 October 1961) 328 NZPD 2682.

11 George Finlay *Report on the Crimes Bill 1957* (mimeographed, Victoria University of Wellington Library, 1959) at 82.

12 Crimes Bill 1989 (152-1). See (4 May 1989) 497 NZPD 10287.

overtones. New Zealand drew heavily upon work done in the 1870s in England to codify our criminal law, but the only substantive changes New Zealand has made was to enact that suicide itself was no longer a crime in 1893 and later in 1961 that attempted suicide was no longer punishable by the criminal law either. But the prohibition on anyone helping a person wishing to commit suicide remains absolute. The question has to be asked whether a law with such a derivation remains fit for purpose. The legislative history demonstrates that issue has never seriously been reconsidered.

The law on the subject of physician assisted death in New Zealand has never been systematically reviewed. The Select Committee examination is an occasion for such a review. The Committee has the advantage of all the voluminous evidence before the court in Lecretia's case. Seldom in the annals of Select Committee inquiries in New Zealand can so much evidence have been accumulated from all over the world on such a defined issue and from so many recognised experts. The evidence allows the legislators to reach a balanced and full view on the arguments concerning the need to change the law.

Some political philosophy

If we are to do justice to the sentiments that sit behind the New Zealand law it is necessary to recognise that suicide has been dealt with severely by the criminal law in New Zealand. The law recognises no gradations. It is a bright line legal rule and near absolute. Circumstances may come into consideration on penalty but not on the issue of criminality. The most significant change made in 1961 compared with 1893 was that the law in 1961 no longer punished the person who attempts to commit suicide and fails. The emphasis was shifted to some degree to prevent others helping anyone to commit suicide.

Is this the law simply because, as Blackstone's asserts, the monarch has an interest in the preservation of his or her subjects, or is there something deeper? We know a good deal more about suicide these days as it has been much studied, beginning with the French sociologist Emile Durkheim's classic and still controversial book *Suicide* published in 1897 in which he argued that differing suicide rates among Protestants and Catholics resulted from stronger social control among Catholics, which mean lower suicide rates. In the four categories of suicide that he isolates Durkheim does not appear to deal in detail with people who kill

themselves because they know they will otherwise die a painful death from incurable illness. He does analyse fatalistic suicide, where in oppressive societies people prefer to die than to carry on living in a prison, for example. One thing Durkheim did determine was that some suicide is a normal element in all societies.

The question now arises whether we have an over-extended criminal law in this area. For a long time most western countries have freighted the criminal law with burdens it cannot reasonably bear in the hope of producing forms of social control. Often they are not achieved. There is a tendency to prohibit a wider range of conduct, without addressing the important issue whether it will do any good. The proper ambit of the criminal law is a political question that must in its main principles be settled by Parliament. But the modern trend has been to distinguish between issues of private morality and conduct that damages society. As was memorably observed in the 1957 Wolfenden Report in the United Kingdom "there must remain a realm of private morality and immorality which is, in brief and crude terms, not the law's business."[13] Or to put it another way "intolerance, indignation and disgust" are not a sufficient base upon which to erect offences that involve the stain of conviction and imprisonment where there are no victims.[14] Those who favour using the criminal law to enforce moral codes need to answer the question whether such a goal is possible. One cannot make criminal offences of every behaviour people are against without regard to enforceability and changing social attitudes.

John Stuart Mill's *Essay on Liberty* made a distinction that remains pertinent to this debate. He was intent upon formulating a principle that should govern the imposition of legal penalties and moral coercion:[15]

> That principle is, that for the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. That is the only purpose for which power can be rightfully exercised over

[13] *Report of the Committee on Homosexual Offences and Prostitution* (Wolfenden Report) CMND 247 (1957) at [61].

[14] The phrase in quote is that of Lord Devlin in Patrick Devlin *The Enforcement of Morals* (Oxford University Press, London, 1965) at 17. The great debate in the United Kingdom between Devlin and Professor HLA Hart emanated on Hart's side from lectures he gave at Stanford University *Law Liberty and Morality* (Oxford University Press, London, 1963).

[15] John Stuart Mill *Utilitarianism Liberty Representative Government* (Everyman ed. Dent, London,1964) 72-73.

> any member of a civilised community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant.

Mill's principle did not escape criticism and it is not an easy matter to find a workable distinction between those acts that adversely affect the person involved and those which harm others. When the analysis is stated in terms of interests, those of both the individual and the society, the distinction seems more tenable.[16] Yet when Mill says "self-protection" and "harm to others" it begs the question of protection from what and what sort of harm? In essence the matter comes down to weighing up competing interests.

Whatever the logical difficulties with Mill's analysis the broad principle of overreach of the criminal law has been followed in New Zealand extensively in modern time- repeal of the laws criminalising homosexual behaviour for consenting adults, liberalising the law concerning prostitution and allowing marriage between persons of the same sex.[17]

In relation to suicide the application of these distinctions can be debated. The decision by a person of full age and competence to commit suicide may be said to affect that person alone; that could be the case if the person is a hermit with no family and no responsibilities. But people have many relationships- family members, employers, and the community in which the person lives. This converts the discussion into an issue of weighing the interests of the person wishing to commit suicide against the interests of others closely connected to that person. So refining the general principle, and applying it to particular circumstances seems to be necessary from both a philosophical point of view and from a policy point of view.

What interest society has in limiting the freedom of action of the person who proposes suicide will depend upon an analysis of what interests society has that may be damaged by the action. As C J F Parkin has suggested, it is necessary to go through a number of steps to decide what the outcome should be. How will the act affect others? What injurious consequences flow from the act and will it damage other interests? If there is damage to other interests, does that justify legal intervention through legislation to attempt to control the activity? The issues are nuanced

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[16] CJF Parkin "Limitation of Criminal Law" in RS Clark (ed) *Essays on Criminal Law in New Zealand* (Sweet & Maxwell, Wellington, 1971) 28 at 35.

[17] See Homosexual Law Reform Act 1986; Prostitution Reform Act 2003; and Marriage (Definition of Marriage) Amendment Act 2013.

and subtle. Such an analysis in Lecretia's case, however, will favour her wish being granted by the law.

Some Human rights issues and the Judge's decision

The New Zealand Bill of Rights Act 1990, following widely accepted international norms, provides in s 8 "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." An interpretation of this provision may mean that it includes "deprivations of certain elements of living that are crucial to a person's ability to live a dignified, meaningful life."[18] The word "deprived" that appears also in the Canadian Charter of Rights and has been interpreted by the Supreme Court of Canada to mean that complete prohibition on physician-assisted dying violated the right not to be deprived of life. This was because the effect of the prohibition was that some people who could not access physician assisted suicide dying services would kill themselves earlier than they would, if such services were lawful and they could access them. Human dignity and personal autonomy lies at the heart of the rights conferred by the New Zealand Bill of Rights Act. This was a point strongly made in submissions to the court in Lecretia's case by the Human Rights Commission.[19] As one Judge put it "such intrinsic dignity is a universal and inalienable value which is significantly tied up with human autonomy."[20] Or as Thomas J put it in another case: "Human dignity is the freedom of the individual to shape their identity. It is the autonomy of the individual's will. It is the freedom of choice."[21]

The right not to be deprived of life does not create an absolute prohibition on assistance in dying. There is no legal duty to live, although there is a right to life. The law makes it clear that people have to freely consent to medical treatment before treatment can be administered. People who are dying are clearly permitted, as the law now stands in New Zealand, to refuse to accept life sustaining treatment. Even where the refusal of treatment is unreasonable "the doctors responsible must give effect to his wishes, even though they do not consider it in his best interests to do so."[22]

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[18] Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (LexisNexis NZ Ltd, Wellington, 2015) at 319.

[19] *Seales v Attorney General*, Submissions of the Human Rights Commission, 15 May 2015 paragraphs 3.24-3.33.

[20] *Attorney-General v Udompun* [2005] 3 NZLR 204 at [200]-[201] per Hammond J.

[21] *Brooker v Police* [2007] NZSC 30; [2007] 3 NZLR 91.

[22] *Airedale NHS Trust v Bland* [1993] AC 789 (HL), cited in *Department of Corrections v All Means All* [2014] 3 NZR 404 (HC) at 494.

There is another provision in the Bill of Rights tangentially relevant, section 11 that enacts a right to refuse to undergo medical treatment that is also recognised by the common law.

In the case brought by Lecretia Seales, Collins J accepted that the provisions in the Crimes Act could have forced Lecretia to take her own life prematurely "for fear that she will be incapable of doing so when her terminal illness deteriorates further."[23] He nevertheless held that while Lecretia's right to life was engaged, it was not breached because the provisions in the criminal law were consistent with the rights and freedoms contained in the Bill of Rights Act. Thus, the learned Judge could not declare it lawful for the doctor to administer a fatal drug or provide it to Ms Seales. Further, he thought to make such an order as requested was to trespass on the role of Parliament and the constitutional role of Judges in New Zealand. In New Zealand, unlike in Canada, the Bill of Rights is not superior law. It is an interpretive instrument only. He remarked, however, in an eloquent passage in the judgment:[24]

> I fully acknowledge that the circumstances of the law against assisting suicide as it currently stands are extremely distressing to Ms Seales and she is suffering because the law does not accommodate her right to dignity and personal autonomy.

So the state of New Zealand law as found by Collins J left Lecretia with two options: she could take her own life prematurely, by a means that may well be dangerous and miscarry or she could "suffer until she dies by natural causes." The choice is " cruel" as the Supreme Court of Canada found in the 2015 case, in the first paragraph of its judgment.[25] Is it appropriate that this should continue to be the New Zealand law on the subject?

In this lecture I am not concerned to analyse the decisions of Collins J and to assess whether it was right or wrong in law. Suffice it to say in a jurisdiction like New Zealand where the Bill of Rights is not superior law, as it is in Canada, it would in my view have been a brave judicial call to grant Lecretia what she sought. It would have involved making significant qualifications into the plain language of section 179 and other provisions.

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23 *Seales v Attorney-General*, above n 3, at [166].
24 At [192].
25 *Carter v Canada (Attorney-General)*, above n 2, 2015 SSC 5 at [1].

On the Bill of Rights issue, rather than the statutory interpretation issue, Collins J took the view that the objective of section 179 was to protect all life irrespective of circumstances. The Canadian courts, however, considered that the Canadian legislation was designed to protect only the vulnerable. That point was central to their reasoning on why the prohibition on assisted dying was overbroad. These differences of view mean it is important that our Parliament revisit the issue to ensure that the objective and reach of section 179 fits with the social norms, medical developments and expectations of New Zealanders today.

The pressing issue now is whether on the known facts a case is made out to change the New Zealand's criminal law on the issue. This would involve fashioning a regime that would permit people in the position that Lecretia found herself to be helped to die, where dying had by then become the dying person's preferred option to suffering.

The policy issues for legislation

The policy issue that arises from the judgment in Lecretia's is a relatively narrow one and I will address it on its own terms. There do exist, however, wider issues. "Euthanasia" a term that derives from the Greek meaning "good death." It can embrace a wide range of behaviours that I cannot address in the present analysis. There exist a myriad of issues concerning the quality of life people enjoy and the difficulties that confront medical people where the person concerned becomes mentally incapable of making rational decisions about his or her treatment and care. People may wish to have quality of life issues take priority over the prolonging of life. I have examined a carefully drafted Advance Directive instructing health professionals taking care of a person about what to do when a number of specific factors occur that stop the person enjoying a reasonable quality of life. In particular, with people who lose the capacity to make decisions for themselves there are practical directives that can be given in advance that treatment and medication not be prolonged in the absence of sound evidence they will be effective in restoring a reasonable quality of life. These are matters that deserve more attention than I can give them in this lecture.

The question I ask on behalf of Lecretia is whether a legislative case can be made out to change the law so that it is lawful to allow the termination of life by a doctor at the request of the

patient where there is compelling reason to do so. I am exploring only the proposition that life can be ended intentionally in order to relieve pain and suffering and what checks and balances may be required to prevent abuse. That is the law reform issue that flows from Lecretia's case. I am not here concerned to argue the case for a general right to die. In matters of this sort it is better to proceed with careful, small steps. The sanctity of life is a big principle and it has so been for a long time.

The evidence in Lecretia's case showed that she suffered from a grievous and terminal illness. Further treatments could not cure her condition. The growth of the tumour would ultimately prove fatal and it did. Great physical and psychological suffering resulted from Lecretia's illness. Pain management for patients with brain tumours can be especially appalling, the evidence showed. Little could be done to manage it except by way of pain relief that may be ineffective and high steroid doses cause severe side-effects: depression, anxiety, muscle deterioration, agitation, increased blood pressure, hunger, ulcers and bleeding, weight gain and sleep disturbance. Lecretia experienced most of those, including a significant weight gain. Morphine was used to relieve her pain.

As the tumour diffused through her system Lecretia suffered severe pain and other effects including loss of mental acuity, inability to move, talk or swallow and she required palliative sedation. She was by the time that case was argued in a wheel chair, she suffered from visual impairments, lack of mobility, loss of independence, fatigue, incontinence and great difficulty in communicating. Pain in the neck and head is particularly difficult to control.

On top of all this was the psychological suffering- anxiety, hopelessness, frustration, loss of qualities that made her who she was and the sight of her loved ones being distressed at her plight. This was particularly serious for someone like her, who valued her self-sufficiency and autonomy and was a driven person. She felt overwhelming anxiety about the progression of her illness and the suffering that she may have to face before the end. That anxiety significantly impinged upon the enjoyment of the time she had left to be with her friends and family. She considered ending her own life before she reached the stage of intolerable suffering while she was still physically capable of doing so. This thought produced extreme anxiety in her. She was worried about implicating her husband or parents in her death and she worried about not being able to say a proper good bye.

She told the court in her first affidavit:[26]

> "It seems incomprehensible to me that I can exercise a choice to end my life when I am able, and still have quality of life, but can' t get any help to do so at a later point when my life no longer has any quality for me. I want to live as long as I can but I want to have a voice in my death and be able to say 'enough'."

Her argument was that if she was provided with a choice of an assisted death that it would improve the quality of her palliative care, it would alleviate her non-physical suffering and remove the need to contemplate taking her own life prematurely. It would return to her some of her valued autonomy. The evidence in front of the court shows a number of instances where people suicided early in order to avoid becoming incapable of doing so. The central values to be advanced by permitting such an action reside in the principles of human dignity, autonomy and self-determination.

In simple terms the issues can be put this way: "It is my life, no-one else's. I am free to end it when I am dying and the pain and suffering has become so intense that in accord with my own free will I want to end it all. Where I am suffering from a terminal illness, I am mentally competent and I fear a painful and undignified end I should be able to receive a prescription that enables me to exit gracefully so relieving my acute anxiety about the coming ordeal?" This makes clear the point of view Lecretia had. She was not wanting to commit suicide in the sense that most people who accomplish it do. She wanted to avoid what she regarded as a worse fate.

That seems a reasonable thing for the law to allow if it can be done without danger to others and with sufficient safeguards against abuse. What is the public purpose to be achieved from prolonging such a life? There comes a point when the life is simply not worth living. For the State and its law to place obstacles in the way of such a person experiencing intolerable suffering appears to the person to be a cruel punishment imposed by the law. But for what purpose? The values behind the law can relatively easily be protected and preserved. The bright line general rule in our law ought to admit of exceptions in such circumstances such as Lecretia's. Otherwise the law is disproportionate in its consequences and simply too wide.

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[26] Affidavit of Lecretia Seales, above n 1, at [51].

What is the best policy?

If the argument I am advancing is accepted what then is the best means of designing a workable scheme? There do exist some difficulties in drawing the line in the correct place. There are issues of how much medical evidence there needs to be and from whom. There are issues about sick people being pressured by relatives into taking the step for reasons that relate to the relatives, not to the person who is suffering. My own view is that it is desirable to proceed with caution in this area and not go further than the circumstances warrant. I am aware of the wider arguments concerning euthanasia generally. In many circumstances they may be persuasive. But in this lecture I am confining myself to the situation in which Lecretia found herself. The law needs to be changed to allow her wish to be granted. This is not in my view a step that lessens the sanctity to be accorded to life. Death is inevitable. By making this suggested exception to the general principle we would be respecting life. And such a measure would not be a slippery slope toward some ambiguous twilight zone.

There has been much discussion in New Zealand of the measures adopted overseas, particularly in Belgium, Canada, Colombia, California, Luxembourg, Montana, New Mexico, Oregon, the Netherlands, Switzerland and Washington. There is much to be learned from these jurisdictions to be sure. But we in New Zealand are in our own political space with our own culture. The risk is that a Bill to be introduced to the Parliament could easily end up being overly complex, involved and bureaucratic, as so much of the law has sadly become. To prevent abuse the safeguards need to be real, but at the same time the law needs to be as simple and clear as is practically possible.

The literature, and no doubt the 21,533 submissions to the New Zealand Select Committee, warn that many safeguards must be required if the law is to be changed. Among the issues that require such safeguards are such things as the irrevocable nature of ending life, the possibility of errors, the vulnerability of people who are suffering who may be induced to end their lives at the behest of others and the public health issues relating to suicide in the community generally. This last is an ongoing and substantial policy issue.

The proposal I put forward is not found in any of the overseas laws that I have examined. But

in the New Zealand context it could be useful to involve the Family Court as a means of ensuring that the standards of the new law are met and the public can be assured they have been met. The elements of a simple and clear policy that arrives at an equitable accommodation of all the interests could have the following elements. The existing criminal law would remain, although the penalty in section 179 is excessive and should be halved.

An exception should be enacted in the Crimes Act to allow a person to be lawfully provided with medical assistance in dying where:

(a) the person is of at least 18 years of age and capable of making decisions;
(b) the person is a permanent resident of New Zealand;
(c) the person has consented in writing to receive such assistance before two independent witnesses;
(d) two medical practitioners have certified that the person has a grievous and incurable medical condition;
(e) the medical condition is causing enduring suffering that is intolerable to the person in his or her circumstances and condition;
(f) the facts have been reviewed by the Family Court and a Judge has certified that the criteria laid down in the law have been met; and
(g) there is a medical practitioner prepared to provide the assistance approved by the Court.

I suggest that such a proposal has the advantage of avoiding health professionals having to take responsibility for decisions about whether the person should be permitted to die. Medical people have raised many issues concerning the ethical dilemmas they face in such situations. Making it a judicial decision obviates those difficulties. The evidence in front of Collins J suggested that "doctors would not contemplate taking any steps to shorten a patient's life."[27] There was considerable objection from palliative care specialists, although not all the evidence before the Judge was in that direction. The approval of the decision to end life should probably not be in the hands of the doctors, whose responsibilities are already heavy enough.
I do observe, however, that in practice they do make decisions now whether to continue

[27] *Seales v Attorney General*, above n 3, at [56]-[61].

treatment. Legislating for medical ethics is not desirable. The decision could be made by a Judge examining the papers and conducting a hearing if necessary to see that the requirements of the law had been satisfied. Making such decisions in the Family Court should eliminate the scope for unseemly adversarial contests, since the court is relatively informal and has many facilities for family conferencing.[28]

The judgment of Justice Collins analysed four principles engaged in Lecretia's case:

- the sanctity of life
- respect for human dignity
- respect for individual autonomy
- protection of the vulnerable.

These are all important considerations that need to be accommodated and it is submitted that they can each be satisfied by an appropriately drawn statute.

Conclusion

The topic of this lecture engages significant religious, social, moral, philosophical, and humanitarian issues. But the key issue lies in answering the question "what should be the appropriate New Zealand law on the issue?"

I wish the Select Committee well in what is a massive and important inquiry. The effort and resources that it entails should not be wasted. The Committee needs to produce some tangible policy outcome that is configured to the modern world and its conditions. The fundamentals of the existing law have not been re-thought since the reign of George III. We know much more about human suffering and disease than ever we did when the 1893 New Zealand law on this topic was framed in New Zealand. We also know what the limitations of modern medicine are in preventing unnecessary human suffering. Palliative care has serious limitations in some situations. Balancing the factors at play here should not be impossible when the issues are stripped of their undoubted emotional pull.

[28] The Family Courts Act 1980 provides a court with a wide jurisdiction. It can be given new jurisdiction by statute to deal with applications for a physician's assistance to die that satisfy the statutory conditions imposed by the new law I am proposing. Under Rule 175 of the Family Court Rules 2002 a Family Court Judge can call a judicial conference and under Rule 178 a settlement conference. These mechanisms with some adaptations could provide a suitable way to proceed.

It should be noted that many of the progressive changes in the over reach of the criminal law in New Zealand were accomplished in the New Zealand Parliament by the introduction not of Government Bills, but of Members' Bills. These matters are regarded as among those that MPs should have a conscience vote upon and not follow a party whip. But vagaries of the balloting of Members' Bills means that Governments are able to steer clear for long periods of time of issues of this type they would rather not confront. On three occasions the issue has been before the House since 1995 by way of Members' Bills.[29] The issue needs to be dealt with properly and comprehensively, with the weight of the Government's advisers brought to bear upon the issues, a facility not available to private members nor to Select Committees, unless they are made available by ministers.

As Collins J observed in his careful judgment in the High Court, Lecretia Seales:[30]

> …selflessly provided a forum to clarify important aspects of New Zealand law. The complex legal, philosophical, moral and clinical issues can only be addressed by Parliament passing legislation to amend the effect of the Crimes Act.

We await Parliament's response. The nation's central democratic institution must not fail to do its job in responding to new developments and keep the law up to date. Blackstone never lived in New Zealand. As the respected legal philosopher Ronald Dworkin wrote in 1993:[31]

> The right to choose to eliminate pain and suffering, and to die with dignity at the time and place of our own choosing when we are terminally ill is an integral part of our right to control our own destinies.

Can I remind you that law itself is a human construct, designed to promote the interests of human beings in the world in which they live.

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[29] See Death With Dignity Bill 1995 (00-1); Death With Dignity Bill 2003 (37-1); End of Life Choice Bill (published 14 October 2015, currently in the ballot); and also the petition of Hon Maryann Street and 8,974 others requesting "That the House of Representatives investigate fully public attitudes towards the introduction of legislation which would permit medically-assisted dying in the event of a terminal illness or an irreversible condition which makes life unbearable", which has given rise to the present inquiry.

[30] *Seales* v *Attorney-General* above n 3 at [211].

[31] Ronald Dworkin *Life's Dominion: An argument about abortion euthanasia and individual freedom* (Harper Collins, London, 1993) at 180.