

Medical Treatment for the Dying

Terms of Reference

In 1986 the Commission was asked to review the criminal and civil law in so far as it relates to the obligations to provide medical or life supporting treatment to persons suffering conditions which are terminal or recovery from which is unlikely. In particular, it was asked to consider whether medical practitioners or others should be permitted or required to act upon directions by such persons against artificial prolongation of life. The reference did not seek to address the issue of euthanasia.

Background of Reference

As a result of developments in recent decades, modern science can often substantially prolong life, even in respect of diseases for which there is no long-term cure. However, many illnesses and conditions eventually reach a point of hopelessness, such that there is neither any prospect of the patient being cured nor any prospect of a further period of life with reasonable quality.

In these circumstances, the patient, if able to make a rational decision, may express the desire that treatment aimed at the prolongation of life should cease in favour of palliative care which is designed to ensure that the minimum of pain and distress is suffered before death. Under the existing law, patients have a number of important rights including the right not to be treated without their consent. However, certain duties in the Criminal Code may conflict with this right. Two of these duties, the duty to provide the necessities of life and the duty to perform acts which, if omitted, may be dangerous to human life or health, are capable of applying to the provision of medical treatment.¹ Some doctors have expressed the fear that they remain bound by these duties notwithstanding the patient's withdrawal of consent to treatment.

Further, under the present Western Australian law there is no means by which people may give legally binding directions as to withdrawing or withholding treatment should they become incompetent. Nor is it legally possible for a person to appoint someone to make treatment decisions on their behalf.

Recognising the importance of resolving these issues, the Attorney-General asked the Commission to consider whether the law in Western Australia required clarification or amendment.

Nature and Extent of Consultation

With the aim of seeking public comment on the issues involved, the Commission published a discussion paper in 1988. A large number of individuals and organisations made submissions. These submissions did much to enable the Commission to gain a deeper appreciation of the emotional and social context in which patients, doctors, family and friends are placed in making decisions relating to terminal illness.

The Commission also had the benefit of detailed responses to the discussion papers from experts in the area, including, Dr CR Goucke of Sir Charles Gairdner Hospital; Ms Helga Kuhse of the Centre for Human Bioethics, Monash University; Mrs Jean Davies, President of the World Federation of Right to Die Societies and Professor Ian Kennedy of King's College, London. The Commission's final report was delivered in February 1991.²

Recommendations

The Commission's recommendations, like the Victorian provisions on which they are based,³ are capable of applying to all patients, and not just those who are terminally ill. The Commission's primary recommendations were:

¹ *Criminal Code Act 1913 (WA)* ss 262 & 267.

² Law Reform Commission of Western Australia, *Medical Treatment for the Dying*, Project No 84 (1991).

³ The Commission's recommendations are primarily based on the model enacted in Victoria by the *Medical Treatment Act 1988 (Vic)* and subsequent amendments.

- Adult patients should be able to complete a “refusal of treatment” certificate specifying that they do not wish to receive life-supporting treatment. As a corollary, doctors who act in accordance with the certificate would be immune from civil and criminal liability.
- Persons should be able to appoint an agent, in an enduring power of attorney, to make treatment decisions on their behalf. A person could not execute an enduring power of attorney unless the person was an adult who understood the nature and effect of the power.
- The agent would be required to make decisions in light of what the agent believed the patient would have wanted, as far as this was known. That is, a “substituted judgment” should be made. Where a patient has never indicated a preference, the agent should make a decision based on what would be conceived by a reasonable person in the patient’s circumstances to be in the patient’s best interests.
- Doctors should not be civilly or criminally liable for administering drugs or other treatment for the purpose of controlling or eliminating pain and suffering. This is the case even if the drugs or other treatment incidentally shorten the patient’s life, providing that consent of the patient or the patient’s agent, if the patient is not competent, is obtained and the administration of the drug or treatment is reasonable in all the circumstances.

A comprehensive outline of recommendations may be found at chapter six of the Commission’s final report.

Legislative or Other Action Undertaken

The Medical Care of the Dying Bill (WA), which was intended to implement many of the recommendations in the Commission’s report, was introduced into the Legislative Assembly in March 1995. It was considered in Committee in May 1996. Although the Bill was accepted in principle, certain issues pertaining to the drafting of the proposed legislation were not resolved and the Bill did not progress further than the second reading.⁴

Currency of Recommendations

The Commission’s recommendations remain current. The legal problems involved in the treatment of the terminally ill are part of a wide-ranging debate about the care of the dying. In other Australian jurisdictions, legislation has been enacted which, in various ways, clarifies the obligations of doctors and provides specific legal mechanisms whereby people can exercise some control over the treatment they receive.⁵

Action Required

The Commission’s recommendations may be effectively implemented by the reintroduction into Parliament of the Medical Treatment of the Dying Bill, following resolution of the drafting concerns. As the principle of the Bill was accepted in the second reading of the legislation, it is envisaged that it may be fast-tracked through Parliament.

Priority – High

This assessment is based upon the desirability to clarify the obligations of doctors and provide specific legal mechanisms whereby terminally ill people can exercise some control over the treatment they receive.

⁴ Western Australia, *Parliamentary Debates*, Legislative Assembly, 15 May 1996, 2027–2036.

⁵ *Medical Treatment Act 1988* (Vic); *Natural Death Act 1983* (SA); *Natural Death Act 1988* (NT).