



**THE PLAINTIFF BY HER SOLICITOR SAYS:****Parties**

1. The plaintiff, Lecretia Seales, is a lawyer employed by the Law Commission, who practises in the field of public law. She lives in Wellington.
2. The Attorney-General is sued in the following capacities:
  - (a) as representative of the public interest;
  - (b) as the person responsible for legal proceedings involving the Crown including as to the interpretation of legislation, the New Zealand Bill of Rights Act 1990 ("**BORA**") and applications under the Declaratory Judgments Act 1908; and
  - (c) as the person responsible for supervising public prosecutions in New Zealand.

**Background**

3. Lecretia is 42 years old.
4. Lecretia is suffering from a grievous and terminal illness:

**Particulars**

- (a) In or around March 2011, Lecretia was diagnosed with diffuse astrocytoma (grade II) with elements of oligodendroglioma. This combination is often abbreviated to "oligoastrocytoma".
  - (b) Both astrocytoma (grade II) and oligodendroglioma are forms of brain tumour.
  - (c) Both astrocytoma (grade II) and oligodendroglioma grow diffusely and infiltrate the brain.
  - (d) Oligoastrocytoma is rarely cured. In Lecretia's case, the tumour has not responded well to treatment.
  - (e) Lecretia has undergone surgery, courses of chemotherapy and radiation therapy.
  - (f) Lecretia's medical advice is that:
    - (i) the tumour is inoperable;
    - (ii) further treatment cannot cure the tumour;
    - (iii) the tumour will continue to grow and cause further damage to Lecretia; and
    - (iv) the tumour will ultimately prove fatal.
5. The tumour can cause enduring and intolerable suffering, including:
    - (a) loss of mental faculties;

- (b) total dependence on others, including as to daily hygiene activities;
  - (c) intense pain;
  - (d) loss of memory;
  - (e) seizures;
  - (f) personality and behavioural changes; and
  - (g) loss of mobility.
6. The tumour can cause loss of dignity including for the reasons set out in paragraph 5(a) to 5(g) above.
7. As a result of the tumour, already Lecretia:
- (a) is partially paralysed on the left side of her body;
  - (b) cannot see anything left of centre, and is permanently barred from driving;
  - (c) has lost the full use of her left arm, leg and hand;
  - (d) suffers from fatigue;
  - (e) is unable to complete day to day tasks such as dressing herself or cooking, without assistance;
  - (f) is heavily restricted in walking unaccompanied; and
  - (g) has suffered a number of falls and resulting injuries, and is at risk of further falls and injury.
8. As Lecretia's illness develops, palliative care:
- (a) will not be able to address all of her physical symptoms;
  - (b) may not be able to manage her pain;
  - (c) may not be able to address psychological, emotional and other forms of non-pain suffering experienced by Lecretia; and
  - (d) may require medication in doses, and with side effects, that are intolerable to Lecretia.
9. Lecretia would like to live as long as she can up to the point of intolerable suffering and loss of dignity.
10. The following options are potentially available to Lecretia:
- (a) **option (a):** dying by way of facilitated aid in dying or administered aid in dying at the point that she reaches a state of suffering that is enduring and intolerable to her as a result of her grievous and terminal illness;
  - (b) **option (b):** intolerable suffering and loss of dignity; or

- (c) **option (c):** taking her own life while she is still physically able in order to avoid that suffering, which would likely occur sooner than would be the case if facilitated aid in dying or administered aid in dying were available to her.

Facilitated aid in dying and administered aid in dying are defined in the Annex and, when used together in this statement of claim, are referred to as aid in dying.

11. Lecretia wishes to have the choice to die by way of facilitated aid in dying or administered aid in dying at the point that she reaches a state of suffering that is intolerable to her as a result of her grievous and terminal illness (that is, option (a)).
12. Lecretia has approached her general practitioner to provide aid in dying at the point of intolerable suffering and loss of dignity due to her grievous and terminal illness.
13. Lecretia's general practitioner:
  - (a) is currently unwilling to provide aid in dying services because of uncertainty in relation to the proper interpretation of provisions in the Crimes Act 1961 ("**Crimes Act**") as set out in paragraphs 17 to 22 below; but
  - (b) would be willing to provide aid in dying services if this Court were to grant the declaratory orders sought at paragraph 37.
14. Without the relief sought from this Court, option (a) is therefore not available to Lecretia, leaving her with a choice between options (b) and (c).
15. Faced with making a choice between options (b) and (c) Lecretia would seriously consider bringing about her own premature death (that is, option (c)). Lecretia is aware that in exercising option (c):
  - (a) she will likely need to make that choice to die long before she would want or need to if aid in dying were available;
  - (b) the means available to her to do so may well fail to achieve the aim of terminating life, but are likely to cause her severe harm and suffering; and
  - (c) taking her own life earlier than would be necessary if aid in dying were available to her is likely to cause further significant trauma and anguish to her loved ones.
16. Lecretia is suffering from the knowledge that she lacks the ability to bring a peaceful end to her life, and instead faces having to choose between intolerable suffering at the end of her life, stripped of dignity and independence, or prematurely taking her own life while she is still able.

### **Relevant provisions of the Crimes Act**

#### *Facilitated aid in dying*

17. In relation to facilitated aid in dying, the legal uncertainty arises from the question of the proper interpretation of section 179 of the Crimes Act.

18. Section 179 of the Crimes Act makes it an offence punishable by a term of imprisonment not exceeding 14 years to:
- (a) incite, counsel, or procure any person to commit suicide, if that person commits or attempts to commit suicide in consequence thereof; or
  - (b) aid or abet any person in the commission of suicide.
19. The effect of section 179 of the Crimes Act is that facilitated aid in dying will only amount to an offence to the extent that any action constitutes aiding and abetting a person in the commission of a suicide and / or inciting, counselling, or procuring any person to commit suicide.

*Administered aid in dying*

20. In relation to administered aid in dying, the legal uncertainty arises from the question of the proper interpretation of section 160 of the Crimes Act.
21. Section 160 of the Crimes Act provides as follows:
- (1) Homicide may be either culpable or not culpable.
  - (2) Homicide is culpable when it consists in the killing of any person—
    - (a) by an unlawful act; or
    - (b) by an omission without lawful excuse to perform or observe any legal duty; or
    - (c) by both combined; or
    - (d) by causing that person by threats or fear of violence, or by deception, to do an act which causes his or her death; or
    - (e) by wilfully frightening a child under the age of 16 years or a sick person.
  - (3) Except as provided in section 178, culpable homicide is either murder or manslaughter.
  - (4) Homicide that is not culpable is not an offence.
22. The effect of section 160 of the Crimes Act is that administered aid in dying will only amount to murder or manslaughter if it constitutes culpable homicide.

**Relevant provisions of BORA**

23. Section 8 of BORA provides:
- 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.
24. Section 9 of BORA provides:

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

25. Lecretia has a right to the protection set out in section 8 of BORA.
26. Lecretia has a right to the protection set out in section 9 of BORA, and in particular the right not to be subjected to cruel, degrading or disproportionately severe treatment.

**FIRST CAUSE OF ACTION: THE CRIMES ACT DOES NOT PREVENT FACILITATED AID IN DYING**

Lecretia repeats the pleadings in paragraphs 1 to 26 above and says further:

**BORA**

27. Lecretia's right under section 8 of BORA is infringed if facilitated aid in dying is unavailable to her as this may force her to prematurely take her own life earlier than she would otherwise if facilitated aid in dying were available to her.
28. Lecretia's right not to be subjected to cruel, degrading and disproportionately severe treatment is infringed if facilitated aid in dying is unavailable to her as the effect is to leave her with a cruel choice between: (i) taking her own life through potentially violent, painful and ineffective means; or (ii) suffering intolerably from a potentially slow, painful and undignified death.
29. Interpreted consistently with sections 8 and 9 of BORA, and section 5 of the Interpretation Act 1999, section 179 of the Crimes Act does not extend to facilitated aid in dying where Lecretia:
- (a) clearly consents to the facilitated aid in dying; and
  - (b) has a grievous and terminal illness that causes enduring suffering that is intolerable to her in the circumstances of her illness.

**Crimes Act without BORA**

30. **IN THE ALTERNATIVE:** Facilitated aid in dying in the circumstances described in paragraph 29 is not unlawful under section 179 of the Crimes Act.

**BORA inconsistency**

31. **IN THE ALTERNATIVE:** To the extent that section 179 of the Crimes Act extends to facilitated aid in dying in the circumstances set out in paragraph 29 (which is denied), this section is inconsistent with BORA.

**SECOND CAUSE OF ACTION: THE CRIMES ACT DOES NOT PREVENT ADMINISTERED AID IN DYING**

Lecretia repeats the pleadings in paragraphs 1 to 26 above and says further:

## **BORA**

32. Lecretia's right under section 8 of BORA is infringed if administered aid in dying is unavailable to her as this may force her to prematurely take her own life earlier than she would otherwise if administered aid in dying were available to her.
33. Lecretia's right not to be subjected to cruel, degrading and disproportionately severe treatment is infringed if administered aid in dying is unavailable to her as the effect is to leave her with a cruel choice between: (i) taking her own life through potentially violent, painful and ineffective means; or (ii) suffering intolerably from a potentially slow, painful and undignified death.
34. Interpreted consistently with sections 8 and 9 of BORA, and section 5 of the Interpretation Act 1999, administered aid in dying is not culpable homicide under section 160 of the Crimes Act where Lecretia:
- (a) clearly consents to the administered aid in dying; and
  - (b) has a grievous and terminal illness that causes enduring suffering that is intolerable to her in the circumstances of her illness.

## **Crimes Act without BORA**

35. **IN THE ALTERNATIVE:** Administered aid in dying in the circumstances described in paragraph 34 is not unlawful under section 160 of the Crimes Act.

## **BORA inconsistency**

36. **IN THE ALTERNATIVE:** To the extent administered aid in dying in the circumstances described in paragraph 34 is unlawful under section 160 of the Crimes Act (which is denied), this section is inconsistent with BORA.

## **RELIEF**

### **Wherefore the plaintiff claims:**

37. A declaratory order under section 3 of the Declaratory Judgments Act 1908 in the following terms:
- (a) In circumstances where the Court is satisfied that the plaintiff is a competent adult who: (i) clearly consents to the facilitated aid in dying; (ii) has a grievous and terminal illness that causes enduring suffering that is intolerable to her in the circumstances of her illness, facilitated aid in dying is not prohibited by section 179 of the Crimes Act.
  - (b) In circumstances where the Court is satisfied that the plaintiff is a competent adult who: (i) clearly consents to the administered aid in dying; and (ii) has a grievous and terminal illness that causes enduring suffering that is intolerable to her in the circumstances of her illness, administered aid in dying is not unlawful under section 160 of the Crimes Act.

38. Leave is reserved to the plaintiff to apply without notice to any party to adduce evidence to satisfy the Court as to the matters set out in 37(a) and/or (b) above.
39. **IN THE ALTERNATIVE:** If the Court does not agree to the declaratory orders referred to in paragraph 37 above, a declaratory order under section 3 of the Declaratory Judgments Act 1908 and BORA in the following terms:
- (a) Section 179 of the Crimes Act is inconsistent with sections 8 and 9 of BORA, to the extent that it prohibits facilitated aid in dying for a competent adult who: (i) clearly consents to the facilitated aid in dying; and (ii) has a grievous and terminal illness that causes enduring suffering that is intolerable to the individual in the circumstances of his or her illness.
  - (b) Section 160 of the Crimes Act is inconsistent with sections 8 and 9 of BORA, to the extent that administered aid in dying is unlawful under section 160 for a competent adult who: (i) clearly consents to the administered aid in dying; and (ii) has a grievous and terminal illness that causes enduring suffering that is intolerable to the individual in the circumstances of his or her illness.
40. Such other relief that the Court sees fit.
41. Costs.

This document is filed by **Andrew Stephen Butler**, solicitor for the plaintiff, of Russell McVeagh. The address for service of the plaintiff is Level 24, Vodafone on the Quay, 157 Lambton Quay, Wellington.

Documents for service on the plaintiff may be left at that address for service or may be:

- (a) posted to the solicitor at PO Box 10 214, Wellington; or
- (b) left for the solicitor at a document exchange for direction to DX SX 11189.



## ANNEX

### Definitions

#### *"facilitated aid in dying"*

For the purposes of this claim "facilitated aid in dying" means a medical practitioner, or a person acting under the supervision of a medical practitioner in the context of a patient/physician relationship, making available to a patient the means by which the patient may bring about his or her own death where the patient: (1) clearly consents to the provision of that aid; and (2) is suffering from a grievous and terminal illness that causes enduring suffering that is intolerable to the individual in the circumstances of his or her illness.

#### *"administered aid in dying"*

For the purposes of this claim "administered aid in dying" means the administration by a medical practitioner, or a person acting under the general supervision of a medical practitioner in the context of a patient/physician relationship, of medication or other treatment that brings about the death of a patient who: (1) clearly consents to the administration of that aid; and (2) is suffering from a grievous and terminal illness that causes enduring suffering that is intolerable to the individual in the circumstances of his or her illness.

#### *"medical practitioner"*

Medical practitioner has the same meaning as the definition in the Health Practitioners Competence Assurance Act 2003 as follows:

medical practitioner means a health practitioner who is, or is deemed to be, registered with the Medical Council of New Zealand continued by section 114(1)(a) as a practitioner of the profession of medicine.