



Protection of Conscience Project

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Hawaii legalizes assisted suicide

Refusing to refer for suicide may incur legal liability

Sean Murphy, Administrator
Protection of Conscience Project

Assisted suicide will become legal in Hawaii on 1 January, 2019, as a result of the passage of the *Our Care, Our Choice Act*. Introduced in the state House of Representatives only in January, it passed both the House and Senate and was approved by Governor David Ige on 5 April. Beginning next year, physicians will be able to write prescriptions for lethal medications for Hawaiian residents who are capable of informed consent, who are at least 18 years old, and who have been diagnosed with a terminal, incurable disease expected to result in death within six months.¹

And beginning next year, Hawaiian physicians who refuse to facilitate assisted suicide by referring patients to a willing colleague may face discipline — including expulsion from the medical profession — or other legal liabilities. Hawaii could become one of only two jurisdictions in the world where willingness to refer patients for suicide is a condition for practising medicine.²

This is possible because legislators and the governor himself ignored the advice of the governor's appointee, Acting Attorney General Russell Suzuki.³ During legislative hearings, Suzuki recommended that Section 19 of the bill be amended by adding a clause (italicized below) to the text:

19 (a)(4) No health care provider shall be under any duty, whether by contract, by statute, or by any other legal requirement, to participate in the provision to a qualified patient of medication to end the qualified patient's life in a humane and dignified manner[.], *including informing a patient about the option to obtain medication for the purpose of ending the patient's life under this chapter or referring a qualified patient to a new health care provider if a health care provider is unable or unwilling to participate in carrying out a qualified patient's request under this chapter*. If a health care provider is unable or unwilling to carry out a patient's request under this chapter, and the patient transfers the patient's care to a new health care provider, the prior health care provider shall transfer, upon request, a copy of the patient's relevant medical records to the new health care provider;⁴

Representative Andria Tupola twice moved floor amendments that included requests to act on this recommendation.^{5, 6} She spoke to the recommendation in moving the first amendment⁷, but not in proposing the second.⁸ Both amendments failed on voice votes without any meaningful discussion.

Reporting on the bill near the end of March, and referring to Hawaii’s “well-earned reputation” as an upholder of personal liberty, the Judiciary Committee stated that no healthcare providers or facilities would be forced to do anything allowed by the measure.⁹ The *Act* allows physicians and health care facilities to document patient eligibility for assisted suicide and prescribe and dispense lethal medication, and it allows physicians and health care facilities to refuse to do so. Assuming compliance with the *Act*, both those who document, prescribe or dispense and those who refuse to document, prescribe or dispense are protected from civil and criminal liability and professional discipline.

This is correct, as far as it goes. However, in articulating the essential elements of the *Act*, it does not go quite far enough. It leaves out the fact that the *Our Care, Our Choice Act* explicitly denies legal protection for physicians who refuse to refer their patients to colleagues willing to help them commit suicide. This is not immediately obvious, but becomes clear when one compares relevant passages in the Hawaiian statute to corresponding passages in Oregon’s assisted suicide law.

Oregon’s *Death With Dignity Act* was the model for Hawaii’s *Our Care, Our Choice Act*. Both include provisions that protect objecting and non-objecting physicians and health care facilities. Oregon’s protective provision is SECTION 127.885; Hawaii’s is SECTION 19 (which will be given a new number in the Hawaiian Revised Statutes).

<i>Death With Dignity Act</i> , 127.885(4)	<i>Our Care, Our Choice Act</i> , 19(a)(4)
No health care provider shall be under any duty, whether by contract, by statute or by any other legal requirement to participate in the provision to a qualified patient of medication to end his or her life in a humane and dignified manner. If a health care provider is unable or unwilling to carry out a patient's request under ORS 127.800 to 127.897, and the patient transfers his or her care to a new health care provider, the prior health care provider shall transfer, upon request, a copy of the patient's relevant medical records to the new health care provider.	No health care provider <u>or health care facility</u> shall be under any duty, whether by contract, statute, or any other legal requirement, to participate in the provision to a qualified patient of a prescription <u>or of medication</u> to end the qualified patient's life pursuant to this chapter. If a health care provider is unable or unwilling to carry out a patient's request <u>under this chapter</u> and the patient transfers the patient's care to a new health care provider, the prior health care provider shall transfer, upon request, a copy of the patient's relevant medical records to the new health care provider;

Here the statutes are virtually identical. Assuming that participation includes referral, these passages protect physicians who refuse to provide and also refuse to refer. The laws require only cooperation in a transfer of care arranged by the patient, not by the physician. Such a patient-initiated transfer of care in relation to a morally contested procedure is generally acceptable to objecting physicians. Thus, the problem with the *Our Care, Our Choice Act* does not arise here, but in the later part of the law dealing with the relationship between health care facilities and physicians.

Both Oregon and Hawaii permit health care facilities (defined by Oregon as health care providers) to prohibit “participation” in assisted suicide on their premises.

<i>Death With Dignity Act, 127.885(5)</i>	<i>Our Care, Our Choice Act, 19(b)</i>
(a) Notwithstanding any other provision of law, a health care provider may prohibit another health care provider from participating in ORS 127.800 to 127.897 on the premises of the prohibiting provider if the prohibiting provider has notified the health care provider of the prohibiting provider's policy regarding participating in ORS 127.800 to 127.897. Nothing in this <u>paragraph</u> prevents a health care provider from providing health care services to a patient that do not constitute participation in ORS 127.800 to 127.897.	Notwithstanding any other provision of law, a health care <u>facility</u> may prohibit <u>a</u> health care provider from participating in <u>actions covered by this chapter</u> on the premises of the <u>health care facility</u> if the <u>health care facility</u> has notified the health care provider of the health care <u>facility's</u> policy regarding participation in <u>actions covered by this chapter</u> . Nothing in this <u>subsection</u> shall prevent a health care provider from providing health care services to a patient that do not constitute participation in <u>actions covered by this chapter</u> .

To enforce the prohibition, both statutes, using virtually identical language, allow health care facilities to discipline physicians who knowingly violate the prohibition against participation [*Death With Dignity Act, 127.885(5)(b) and (c); Our Care, Our Choice Act, 19(c) and (d)*]. However, both go on to state that “participation” does not include referral, and it is here that a slight difference in wording gives the Hawaiian statute a completely different meaning and effect.

<i>Death With Dignity Act, 127.885(5)</i>	<i>Our Care, Our Choice Act, 19(e)</i>
(d) For purposes of <u>this subsection</u> : (B) "Participate in ORS 127.800 to 127.897" . . . does not include: (iii) Providing a patient, upon the request of the patient, with a referral to another physician;	(e) For the purposes of <u>this section</u> : . . . "Participate in actions covered by this chapter" . . . does not include: (3) Providing a patient, upon the request of the patient, with a referral to another physician;

The *Death With Dignity Act* limits the definition of participation to SUBSECTION 5 of SECTION 127.885, which is concerned only with the relationship between objecting health care facilities and non-objecting physicians. This passage is intended to ensure that non-objecting physicians who *want* to refer a patient for assisted suicide cannot be prevented from doing so by objecting facilities. Objecting physicians in Oregon who *refuse* to refer patients for assisted suicide continue to be protected by SUBSECTION 4 (above). Indeed, the explicit definition of “participation” in SUBSECTION 5 to exclude referral indicates that, elsewhere, participation is understood to include referral.

In contrast, in the *Our Care, Our Choice Act*, the definition of participation is *not* limited to passages that concern objecting health care facilities and non-objecting physicians [SUBSECTIONS (b) (c) and (d)], but is applied to the *whole* of SECTION 19. The consequence is that physicians who refuse to refer patients for assisted suicide are deprived of the legal protection otherwise offered by

SUBSECTION (a)(4).

This does not mean that objecting Hawaiian physicians will be required to refer patients for assisted suicide when the *Our Care, Our Choice Act* comes into force next year. However, the *Act* leaves the state medical regulator, employers and patients free to demand that they do so, and may expose them to legal liability if they refuse.

What remains unclear is whether this outcome is the result of blundering by legislators who failed to act with due diligence, or if legislators who want to compel objecting physicians to refer patients for suicide found a particularly clever and unobtrusive way of accomplishing their goal. Hawaiian physicians and others concerned to protect Hawaii's "well-earned reputation" for upholding fundamental freedoms are entitled to have this question answered.

Fortunately, if the outcome was unintended, there is plenty of time to correct the problem by amending the *Our Care, Our Choice Act* before it comes into force in January. It took only about two months to pass the entire 39 page statute. Changing one word in less than nine months should be a simple matter for legislators sincerely concerned about safeguarding freedom of conscience.

Notes

1. Governor of the State of Hawaii David Ige. HB No. 2739 HD1, approved by the Governor on 5 April, 2018. (<https://governor.hawaii.gov/wp-content/uploads/2018/04/DOC009.pdf>) Accessed 2018-04-07.
2. The state medical regulator in Ontario, Canada, supported by the provincial government, requires referral for both assisted suicide and euthanasia. See Warren D, Ross D. Physicians, conscience, and assisted dying: By requiring that physicians make referrals for assisted dying, Ontario is forcing them to leave medicine or abandon their ethical framework. *Policy Options*, 4 May, 2017 (<http://www.consciencelaws.org/law/commentary/legal079.aspx>).
3. Department of the Attorney General. News release 2018-20 (2 February, 2018). Chin to succeed Tsutsui as Hawaii Lieutenant Governor: Suzuki named Acting Attorney General (<https://ag.hawaii.gov/wp-content/uploads/2018/02/News-Release-2018-20.pdf>) Accessed 2018-04-07.
4. Testimony of the Department of the Attorney General on HB 2739: House Committees on Health and Human Services and Judiciary (27 February, 2018) Russell A. Suzuki, Acting Attorney General, or Angela A. Tokuda, Deputy Attorney General, p. 2. (https://www.capitol.hawaii.gov/Session2018/Testimony/HB2739_TESTIMONY_HHS-JUD_02-27-18_.PDF) Accessed 2018-04-07
5. House of Representatives. Floor Amendment 1, Amendment to HB No. 2739 HD1 (1 March, 2018) Representative Andria Tupola. (https://www.capitol.hawaii.gov/session2018/bills/HB2739_HD1_HFA1_.PDF) Accessed 2018-04-07.

6. House of Representatives. Floor Amendment 2, Amendment to HB No. 2739 HD1 (6 March, 2018) Representative Andria Tupola.
(https://www.capitol.hawaii.gov/session2018/bills/HB2739_HD1_HFA2_.PDF) Accessed 2018-04-07.
7. Hawaii State House of Representatives. Regular Session of 2018. Rough Draft Journal, Twenty-Third Day, March 1, 2018, p. 12-15
(https://www.capitol.hawaii.gov/journal/house/2018/HOUSEJOURNAL_03-01-18_DAY23_.PDF) Accessed 2018-04-07.
8. Hawaii State House of Representatives. Regular Session of 2018. Rough Draft Journal, Twenty-Third Day, March 6, 2018, p. 25-27.
(https://www.capitol.hawaii.gov/journal/house/2018/HOUSEJOURNAL_03-06-18_DAY25_.PDF) Accessed 2018-04-07.
9. Standing Committee Report No. 3251 (28 March, 2018) Re: HB 2379 HD 1
(https://www.capitol.hawaii.gov/session2018/CommReports/HB2739_HD1_SSCR3251_.pdf) Accessed 2018-04-07.