

CRIMINAL CODE (PALLIATIVE CARE) AMENDMENT BILL 2003

EXPLANATORY NOTES

GENERAL OUTLINE

Objectives of the Legislation

The object of this Bill is to clarify the obligations of doctors treating terminally-ill patients and to ensure that doctors, including those that follow their orders, who administer palliative care to such patients for the purpose of relieving pain and suffering, are not held under threat of prosecution because an incidental effect of the treatment is to shorten the life of the patient.

Reasons for the objectives and how they will be achieved

The Criminal Code of Queensland imposes criminal responsibility for the unlawful killing of another. Depending on the circumstances the appropriate charge will be murder or manslaughter. An intentional killing, regardless of whether the motive was to relieve the pain of another, will be murder. A person who assists another to kill himself or herself is liable to be charged with aiding suicide. Aiding suicide carries a maximum penalty of life imprisonment.

The common law has developed the doctrine of the double effect principle that permits medical treatment to be administered to terminally-ill persons to alleviate pain and suffering although the treatment may hasten death. The principle (*R v Pretty* [2001]¹ All ER 1) has been recognised by the House of Lords and other common law jurisdictions.

The double effect principle was set out in the case of *R v Bodkin-Adams* [1956]Crim LR 265 (UK) where Lord Devlin instructed the jury:

If the first purpose of medicine, the restoration of health, can no longer be achieved, there is still much for a doctor to do, and he is entitled to do all that is proper and necessary to relieve pain and suffering, even if the measures may incidentally shorten life.

In Queensland the application of the double effect principle is complicated by the existence of section 296 of the Criminal Code. This provision is a deeming provision that provides that *a person who does any act or makes any omission which hastens the death of another person who, when the act is done or the omission made, is labouring under some disorder or disease arising from another cause is deemed to have killed that person*.

Section 282 of the Code provides:

A person is not criminally responsible for performing in good faith and with reasonable care a surgical operation upon any person for the patient's benefit, or upon any unborn child for the preservation of the mother's life if the performance of the operation is reasonable, having regard to the patient's state at the time and the circumstances of the case.

However, section 282 only applies to surgical operations and not medical treatment. Hence, the provision of most palliative care (for example, pain relief) does not plainly come within the protection of section 282.

This Bill resolves any doubt as to the criminal responsibility of doctors, and those following the orders of a doctor, in the administration of palliative care.

Administrative cost to Government of implementation

The Bill will not incur any administrative cost to the Government

Consistency with Fundamental Legislative Principles

The Bill is consistent with fundamental legislative principles. Its purpose is not to bring about a change in the law but to clearly reflect the common law that already governs the conduct of those that administer palliative care.

Section 282A does not address consent. The administration of medical treatment, including palliative care, is already governed by a legal regime. If a person has capacity to decide their medical care the patient will consent to their medical treatment. Unauthorised administration of medical treatment would be assault.

If a person does not have capacity the *Guardianship and Administration Act 2000* sets out the hierarchy as to how consent may be obtained (advance health directive, guardian, attorney, health attorney and statutory health attorney). In cases of dispute the Act has a series of mechanisms to allow for speedy resolution. A doctor who administers health care to a patient with an incapacity without consent commits an offence under the *Guardianship and Administration Act 2000*.

CONSULTATION

Community

Queensland Branch of Australian Medical Association

Queensland Nursing Council

Queensland Nurses Union

Palliative Care Association Queensland

Government

NOTES ON PROVISIONS

PART 1-PRELIMINARY

Clause 1 provides that the short title of the Act is the *Criminal Code (Palliative Care) Amendment Act 2003*.

Clause 2 provides that the Act commences on a date to be fixed by proclamation.

Clause 3 provides that the Act amends the Criminal Code.

Clause 4 inserts a new section 282A (Palliative care).

The new section 282A of the Criminal Code provides that a person is not criminally responsible for providing palliative care to another person providing:

- the person provided the palliative care in good faith and with reasonable care and skill;
- the provision of the palliative care is reasonable, having regard to the persons state at the time and all the circumstances of the case.
- the person is a doctor or, if the person is not a doctor, the palliative care is ordered by a doctor who confirms the order in writing.

Section 282A(1) will apply even if the incidental effect of the provision of the palliative care is to hasten death.

To ensure the protection of the patient s interests this provision restricts the provision of palliative care, where the incidental effect of the provision of the care may be to hasten death, to palliative care provided by a doctor or, if the person providing the palliative care is not a doctor, the palliative care is ordered by a doctor who confirms the order in writing. This will ensure, for example, that a heroin user injecting another person with heroin cannot rely upon the defence in section 282A.

Palliative care is defined to mean care, whether by doing an act or making an omission, directed at maintaining or improving the comfort of a person who is, or would otherwise be, subject to pain and suffering. The definition is wide to encompass all the various treatments that may be administered by doctors. The definition also embraces the omission of treatment but only if the omission is directed at maintaining or improving the comfort of a patient.

Reasonable, in respect to section 282A(1)(b), is declared to specifically refer to good medical practice. The definition of good medical practice repeats the definition used in the *Guardianship and Administration Act 2000*. The purpose of the definition is to ensure palliative carers operate according to the recognised standards, practices and procedures of the Australian medical profession. A doctor cannot assert his or her own subjective belief that their practice was reasonable. Section 282A(1)(b) imposes an objective test that the administration of the palliative care was reasonable having regard to the person s state at the time and all the circumstances of the case. Reasonable in this provision is specifically defined as reasonable in the context of good medical practice.

Section 282A(3) provides that nothing in section 282A authorises, justifies or excuses an act done or omission made with intent to kill another person or aiding another to kill himself or herself. Section 282A does not, and cannot, provide any justification for euthanasia or suicide.