

# GUIDE TO ASSISTED DYING

Assisted dying raises significant constitutional issues around the rights to dignity, to life, to equality and to freedom and security of the person. There are now eleven countries and states around the world that have legalised assisted dying in some form, giving terminally ill people access to assistance from doctors when they decide to end their lives. Colombia, the Netherlands, Belgium, Luxembourg, Canada, Switzerland and the states of Oregon, Washington, California, Vermont and Montana in the United States have all recognised its importance in honouring a person's autonomy and human dignity. South Africa has yet to do so, but a case dealing with these issues will be heard at the Supreme Court of Appeal on **4 November 2016**.

In April 2015, Robert James Stransham-Ford brought an urgent application requesting the High Court to allow a willing doctor to assist him to die. At the time, he was living with a terminal illness which left him in constant extreme pain and prevented him from taking care of his own basic needs. Judge Fabricius handed down judgment in Mr Stransham-Ford's favour and ordered that any doctor who agreed to assist him should not face criminal charges or disciplinary action. Unfortunately, Mr Stransham-Ford died before he could make use of the order. The decision is being taken on appeal by the respondents in the matter, the Minister of Justice and Correctional Services, the Minister of Health, the National Director of Public Prosecutions and the Health Professions Council of South Africa. The Centre for Applied Legal Studies (CALS) has entered the matter as *amicus curiae* and will be one of the only groups arguing and potentially bringing evidence in support of the issue of assisted dying.

## TIMELINE OF THE CASE

### 15 APRIL 2015

Robert Stransham-Ford approaches the North Gauteng High Court for urgent relief, requesting to end his own life with the help of a doctor

### 30 APRIL 2015

Stransham-Ford passes away naturally without using the court order

### 29 MAY 2015

The respondents, led by the Department of Health, seek leave to appeal the decision

### 29 MARCH 2016

CALS is granted leave to enter the matter as *amicus curiae* or 'friend of the court'

### 30 APRIL 2015

Judge Fabricius hands down judgment in Stransham-Ford's favour, ordering that any doctor who agrees to assist him to end his life should not face criminal charges or disciplinary action

### 5 MAY 2015

Judge Fabricius refuses an application made by the respondents to rescind the court order

### 2 JUNE 2015

Judge Fabricius grants leave to appeal to the Supreme Court of Appeal

### 4 NOVEMBER 2016

The appeal is to be heard at the Supreme Court of Appeal

# FREQUENTLY ASKED QUESTIONS

## What is assisted dying?

Assisted dying (or physician-assisted dying) involves a terminally ill person making the choice to take prescribed medication to end their life. This option is generally open to mentally competent adults making the decision of their own free will and meeting strict legal safeguards.

## What does the law currently say about assisted dying?

In South Africa, assisted dying is currently criminalised. While suicide and attempted suicide are not illegal, assisting someone to end their lives is considered an offence. Medical professionals who do so face prosecution and disciplinary hearings. We would need a change in the law to give terminally ill, mentally competent adults access to assisted dying.

## Why should we legalise assisted dying?

Terminally ill people may endure intolerable suffering and want the choice to end their lives while they are still conscious and surrounded by their loved ones. Without access to assisted dying, they are faced with limited options. They are forced either to suffer against their wishes, end their lives unconscious in a medically-induced coma, painfully try to hasten their deaths by refusing treatment and food, or violently end their own lives alone.

## Isn't having good end of life care enough?

Palliative care can help many terminally ill patients to manage their pain and the other symptoms they experience. But even the best

palliative care cannot relieve the suffering of all terminally ill people. A limited number of patients do not get adequate relief from pain medication. Even for those who do, palliative care cannot prevent them from suffering mentally when they lose all bodily autonomy and feel they have no quality of life.

All people should have access to the highest possible standard of end of life care. Assisted dying should in no way replace this, but should instead complement and extend it by acknowledging a terminally ill person's choice of when and how to end their life. Many people simply find comfort in knowing that the option of assisted dying is available to them, even if they never access it.

## How is this different from palliative sedation?

Palliative sedation occurs when a terminally ill patient is placed in a medically-induced coma and will remain unconscious until they die naturally. This is currently a legal practice and one of the options available at the end of life to manage pain and suffering. However, not everyone sees this as an acceptable alternative to assisted dying. Many people would prefer not to have to undergo palliative sedation and would rather be conscious of their surroundings and be able to say goodbye to their loved ones in their final moments.

## Won't legalising assisted dying put vulnerable people at risk?

There are other countries and states in the world that have legalised assisted dying and have developed stringent safeguards in order to prevent this from happening. Medical professionals are able to assess a terminally ill patient's request and it is only considered if they are a mentally competent adult asking for this choice of their own free will. Should assisted dying be legalised in South Africa, similar independent

checks and balances must be in place to ensure that any request was the choice of the patient and that they were not influenced or coerced by others.

### Doesn't this go against medical ethics or the Hippocratic Oath?

There have been many developments in both medicine and social norms since the original Hippocratic Oath made its first appearance over 2000 years ago. Many medical professionals actually consider being unable to respect their patients' wishes to be in conflict with their medical ethics. In places where assisted dying is legal, no doctor is forced to prescribe medication to end a patient's life if they feel differently. Doctors are already asked to make complex decisions about their patients' end of life care, including discontinuing treatment and respecting their choice to refuse food and medication to hasten their death.

### Doesn't this undermine the right to life?

The right to life is also inseparably linked to the right to dignity and being unable to choose when and how to end one's life may impact deeply on one's dignity. Respecting a terminally ill person's wish to die does not devalue their life. Instead, it recognises the value they themselves place on an end to their life and their suffering that they deem dignified.

### Why is the right to die important to CALS?

CALS is a civil society organisation based at Wits University which remains committed to promoting human rights and challenging systems of power. Assisted dying raises important issues around the rights to equality, to life, to dignity and not to be tortured or treated in a cruel, inhuman or degrading way. Through our Rule of Law Programme, CALS has engaged in extensive work and research on torture including submissions on the Prevention and Combating of Torture of Persons Bill. This has put us in a position to make a unique contribution as *amicus curiae* in cases like this.

### What can CALS add to this case?

CALS supports the findings of Judge Fabricius and the submissions of Mr Stransham-Ford's estate and will be one of the only groups involved in the matter arguing in favour of assisted dying. Our main, novel argument is that denying a terminally ill person of sound mind the choice to end their life with the assistance of a willing doctor amounts to torture or cruel, inhuman and degrading treatment.

The suffering experienced by terminally ill patients like Mr Stransham-Ford can be torturous, with daily experiences of constant, extreme pain and a vastly reduced quality of life. In addition to the physical discomfort, which can be unbearable, torture also includes mental pain and suffering. This is true for terminally ill patients, where experiencing a lack of autonomy, knowing they will not recover, expecting further deterioration and pain, and being forced to depend on others for every menial task can amount to severe pain and suffering. Refusing a terminally ill person the choice of assisted dying intentionally prolongs this suffering and there is simply no justification for this.

CALS also hopes to assist the court further by presenting evidence in favour of assisted dying. This includes evidence from three experts in end of life care from the Netherlands and the state of Oregon in the United States where assisted dying is legal. The experts are able to describe the policy in place in these areas and their experiences in implementing the laws on assisted dying. They include Ann Jackson, a former hospice director from Oregon; Dr Peter Reagan, a retired physician and surgeon from Oregon; and Prof. Suzanne van der Vathorst, an ethicist and qualified medical doctor from the Netherlands. These experts are also able to speak to the evolution of medical ethics, the nature of terminal illnesses where pain and discomfort cannot be adequately managed by palliative care and the safeguards in place to protect against abuse of assisted dying laws.

We finally also hope to present evidence on legislation in other countries and states with assisted dying laws; and evidence from the United Kingdom where assisted dying is not legal, but in practice there are rarely prosecutions of physicians, friends or family members who assist a person to end their life.

# QUOTES AND CONTACT DETAILS

"Assisted dying is the only way that I will be released from my eventual unbearable suffering and for me to prevent the imminent intolerable and undignified suffering that is to occur in the future."

*Robert Stransham-Ford*

"The choice of a patient such as the present, is consistent with an open and democratic society and its values and norms as expressed in the Bill of Rights. There is of course no duty to live, and a person can waive their right to life."

*Judge H. J. Fabricius*

"The degree of pain, and the debilitating and excruciating demise that often accompany terminal illnesses, can be torturous. The refusal to allow an individual to choose when and how to die when terminally ill and suffering, constitutes a violation of the provisions against torture and cruel, inhuman and degrading treatment."

*Centre for Applied Legal Studies*

"There are illnesses where pain and suffering cannot be adequately managed, and with terminal illnesses the patient is deteriorating. Their level of function and comfort is going to get increasingly less satisfactory despite optimal care. This subset of dying patients wishes to avoid a prolonged and difficult dying process."

*Dr Peter Reagan*

"Assisted dying is not a replacement for palliative care. It is an option for terminally-ill adults who wish to direct the manner and timing of their death who would otherwise have to go through weeks of unnecessary suffering."

*Ann Jackson*

"Even with the best quality palliative care, there will always remain a substantial enough number of patients who would benefit from the availability of assisted dying, though these numbers remain proportionately small to the number of people who may qualify for assisted dying."

*Prof Suzanne van der Vathorst*

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