

STATES OF JERSEY



ASSISTED DYING (P.95/2021): COMMENTS

**Presented to the States on 19th November 2021
by H.M. Attorney General
Earliest date for debate: 23rd November 2021**

STATES GREFFE

COMMENTS

1. In P.95/2021 – *Assisted Dying*, lodged by the Council of Ministers (the “Proposition”), the States are asked whether they are of the opinion, having regard to the key recommendations of the Citizen’s Jury on Assisted Dying, to agree in principle, with the Citizen’s Jury that assisted dying should be permitted in Jersey, within the parameters outlined in that Proposition.
2. These Comments are provided to assist Members regarding potentially relevant aspects of the law, particularly the human rights considerations relating to the Proposition. They are restricted to the legal aspects of the Proposition and express no view on the wider ethical or policy issues.
3. A short summary of the Jersey law as regards suicide, encouraging or assisting suicide, and withdrawal of life-sustaining medical treatment, is set out at paragraphs 4 to 8 of the Report to the Proposition, and is not repeated here.
4. In summary, the proposed assisted dying framework set out in the Proposition is likely to be compatible with European Convention on Human Rights (“ECHR”) law, having regard to the wide margin of appreciation afforded to Contracting States in this area. Equally however, for the same reason a decision by the Assembly not to introduce the proposed framework in the Proposition is also likely to be compatible with ECHR law.

Jersey law

5. The ECHR was given effect in Jersey law by the Human Rights (Jersey) Law 2000 (the “Human Rights Law”) and its relevant Articles are set out below. Courts in Jersey must take into account relevant decisions of the European Court of Human Rights (“ECtHR”) when determining a question which has arisen in connection with an ECHR right. However, there is limited Jersey case law in the area surrounding assisted dying.
6. The 1995 judgment of the Royal Court *In the Matter of an Infant*¹ pre-dated the Human Rights Law, but confirmed that where it is in the patient’s best interests it is not unlawful to withdraw life-sustaining treatment.
7. The 2004 case of *Attorney General v X*² considered whether the prison or hospital authorities could force-feed a prisoner who was on hunger strike. The Royal Court’s judgment in that case was consistent with the view, set out further below, that Article 2 (the right to life) of the ECHR does not require the State to preserve life at all costs, and can to an extent give way to competing rights of self-determination afforded by Article 8 of the ECHR (the right to respect for private and family life).

European Court of Human Rights decisions

8. Assisted dying has been considered by the ECtHR. However, whilst some Contracting States have legalised assisted dying regimes, the majority have not

¹ [1995 JLR 296]

² [2004 JLR 1]

and there is as yet no consensus across ECHR Contracting States on assisted dying. States are therefore granted a wide margin of appreciation in relation to assisted dying by the ECtHR, but not an unlimited margin. The compatibility of any legislative framework on assisted dying with the ECHR will depend on the detail of that framework – i.e. the detail of legislation which may follow if the Proposition is approved by the Assembly.

9. The ECtHR has considered a series of cases in this area³ which indicate that laws permitting assisted dying are likely to be ECHR compatible provided they have adequate safeguards.
10. The ECHR Articles which are principally engaged are Article 2 (the right to life) and Article 8 (the right to respect for private and family life), but Article 14 (prohibition on discrimination) is also relevant insofar as an assisted dying service would be made available to certain groups of people but not others.
11. Article 2 provides:
 1. *Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.*
 2. *Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:*
 - (a) *in defence of any person from unlawful violence;*
 - (b) *in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;*
 - (c) *in action lawfully taken for the purpose of quelling a riot or insurrection.*
12. Article 8 provides:
 1. *Everyone has the right to respect for his private and family life, his home and his correspondence.*
 2. *There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.*
13. In the context of assisted dying, there is a tension between Article 2, which imposes an obligation on the State to protect life, and Article 8, which imposes obligations to respect personal autonomy and dignity.

³ Including *Pretty v UK* (2002) 35 EHRR 1; *Haas v Switzerland* (2011) 53 EHRR 33; *Gross v Switzerland* (2014) 58 EHRR 7 and *Lambert v France* (2016) 62 EHRR 2.

14. Although Article 2 is an absolute right, in relation to which there is, strictly speaking, no margin of appreciation, in reality that Article will be read in light of the ECHR as a whole and the current views of Contracting States, such that the development of one right can affect the reading of another.
15. The development of Article 8 in terms of the recognition that ‘private life’ encompasses issues of personal autonomy, and the right to a dignified (and therefore potentially assisted) death, impacts on the interpretation of Article 2.
16. Accordingly, in the end of life sphere, the ECtHR has emphasised that States enjoy a wide (but not unlimited) margin of appreciation to strike a balance between their obligation to protect lives and their obligation to ensure respect for their private life and personal autonomy⁴.
17. There has been no successful substantive Article 2 ECHR challenge that I am aware of in the ECtHR to the current systems of assisted dying in Switzerland, Belgium, the Netherlands, Luxembourg or Spain. Similarly, as far as I am aware none of those countries’ own courts have held their assisted dying legislation to breach the ECHR.
18. Applying to assisted dying by analogy the principles set out by the ECtHR in the context of withdrawal of treatment⁵, the safeguards proposed in the Proposition are likely to be adequate for ECHR purposes, particularly having regard to the following.
 - i. It would provide for the establishment of a precise and transparent regulatory framework, such that individuals (including medical professionals) can rely on it.
 - ii. It incorporates the essential requirement that the competently expressed wishes of the applicant are paramount. It would ensure that no one is assisted to die where it is not a decision truly taken as a matter of free will.
 - iii. It includes the possibility of approaching a court regarding whether the decision is in the person’s best interests. The ability to challenge an assisted dying decision by application to a Court is a minimum safeguard. At paragraph c) of the Proposition it is envisaged that there would be a pre-approval process via a Court or specialist tribunal for all cases. Although I do not consider that the involvement of a Court or specialist tribunal at the initial eligibility stage is required by the ECHR, if provision is made for such involvement that is plainly another factor that would weigh in favour of ECHR compatibility as an additional safeguard. However, consideration would need to be given to the amount of time that is taken by the involvement of a Court or specialist tribunal in a pre-approval process, and whether an individual may only apply within the final six months of life expectancy or whether the individual could apply earlier.

⁴ *Lambert v France* (2016) 62 EHRR 2

⁵ *ibid.*

19. Consideration has been given to Article 14 of the ECHR (prohibition on discrimination), and in particular whether excluding from an assisted dying service persons who are (i) under 18 years of age; (ii) not resident in Jersey; and (iii) suffering from a mental but not physical condition, would be incompatible with that Article when read with Article 8. However, in my view there would be no such breach, on the basis that in each instance the restriction is justified, in the sense that is a proportionate means of achieving a legitimate aim set out in the Report to the Proposition. Again, a wide margin of appreciation is afforded to States in this area.
20. Finally, in terms of justifying aspects of a legislative framework based on the Proposition, the Citizens' Jury process and the careful consideration which it gave to the issues surrounding assisted dying may be helpful evidence that those aspects reflect the views of Jersey's population.