

STATES OF JERSEY



ASSISTED DYING (P.18/2024): AMENDMENT

Lodged au Greffe on 7th May 2024
by the Assisted Dying Review Panel
Earliest date for debate: 21st May 2024

STATES GREFFE

ASSISTED DYING (P.18/2024): AMENDMENT

1 PAGE 2, PARAGRAPH (d) –

Delete the words “directly” and “direct”.

ASSISTED DYING REVIEW PANEL

Note: After this amendment, the proposition would read as follows –

THE STATES are asked to decide whether they are of opinion –

- (a) to request the Minister for Health and Social Services to bring forward primary legislation that permits assisted dying in Jersey and that requires the Minister to establish an assisted dying service in accordance with the essential provisions and safeguards outlined in the Appendix accompanying this proposition and to agree that assisted dying will only be lawful where a person meets all of the following eligibility criteria:
 - i. the person must meet the conditions set out in either paragraphs (b) or (c);
 - ii. the person must be aged 18 or over at the point at which they make a first formal request for an assisted death;
 - iii. the person must be ordinarily resident in Jersey;
 - iv. the person must have a voluntary, clear, settled and informed wish to end their own life; and
 - v. the person must have capacity to make the decision to end their own life;
- (b) to agree that, in addition to meeting all the eligibility criteria detailed in paragraph (a), the person must have been diagnosed with a terminal physical medical condition which is giving rise to, or is expected to give rise to, unbearable suffering that cannot be alleviated in a manner the person deems to be tolerable and that terminal condition must be reasonably expected to cause the person’s death within the timeframe specified in the Appendix, known as ‘Route 1 – terminal illness’;
- (c) to agree that, in addition to meeting all the eligibility criteria detailed in paragraph (a) and if the person does not meet the eligibility criteria detailed in paragraph (b), the person must have an incurable physical medical condition that is giving rise to unbearable suffering that cannot be alleviated in a manner the person deems to be tolerable (which may or may not be a terminal physical condition), known as ‘Route 2 – unbearable suffering’;

- (d) to agree that no person should be under a legal duty to participate in the provision of assisted dying and any such person will have a right to refuse participation; and
- (e) to agree that there will be a minimum timeframe between the point at which a person makes a first formal request for an assisted death and the administration of the substance that leads to that death.

REPORT

The purpose of this Amendment to the final proposals for Assisted Dying is to:

- remove references to “direct” and “directly” in relation to participation in assisted dying.
- give more clarity and also flexibility when interpreting the words “participate” and “participation” and not narrowing the definition of these within the final proposals.

Rationale for the Panel’s Amendment

The Assisted Dying Review Panel has decided to bring this Amendment following its Scrutiny Review of the final proposals for assisted dying in Jersey (‘P.18/2024’).

The Panel is concerned that the inclusion of the words “directly” and “direct” in the context of participation in assisted dying in P.18/2024, is unclear and may unduly restrict the right to refuse participation in assisted dying. The Panel believes it is important that all persons within the purview of assisted dying have the right to refuse to participate and that the meaning of “participate”, defined by the Oxford English Dictionary as *“To take part; to have a part or share with a person, in a thing”*, is sufficient wording on its own.

This Report will specifically address the existing body of evidence considered and collected by the Panel during its Review, as well as the use of “direct” and “directly” in the context of “participate” and “participation” in assisted dying in P.18/2024.

The construction of legislation

During its review of the final proposals, the Panel considered the original Proposition on assisted dying (P.95/2021), adopted as amended by the States Assembly in November 2021. P.95/2021 included a conscientious objection clause provision at Paragraph a(iii)(2), which stated that:

“the law should provide for a conscientious objection clause so that any nurse, medical practitioner or other professional is not under a legal duty to participate in assisted dying;”

However, the conscientious objection clause provided for in P.95/2021 does not include the words ‘direct’ and ‘directly’. During its Public Hearing with the Minister for Health and Social Services on 3rd April 2024, the Panel decided to ask about conscientious objection in relation to direct participation in assisted dying. The response indicated that the principle of “direct” as well as “indirect” participation, had been established through the UK Supreme Court ruling in *Greater Glasgow Health Board (Appellant) v Doogan and another (Respondents) (Scotland) 2014* (‘Doogan’), in relation to the Termination of Pregnancy (Jersey) Law 1997:

Deputy L.M.C. Doublet:

“[...] On the conscientious objection, I would like to ask about the principle of direct and indirect participation. The panel member who cannot be with us today raised some concerns about the definitions of direct and indirect and how they relate to other laws

that do not have the words “direct” and “indirect”. Could you clarify, Minister or (officer), what that means in practice?”

Director of Health Policy, Government of Jersey:

“The other law in Jersey that has a conscientious clause - and of course we are proposing something much broader, which is a right not to participate rather than conscientious objection - the termination of pregnancy law does not talk about direct or indirect. Our Termination of Pregnancy Law is based on the U.K.’s old Termination of Pregnancy Law, which also does not use the words “direct” or “indirect” but there was a Supreme Court case in the U.K. that determined that the U.K.’s Termination of Pregnancy Law, and therefore de facto our Termination of Pregnancy Law, only applied to direct participation because the application to indirect participation essentially was a veto to enabling women to be able to access termination of pregnancy. So, we are modelling that Supreme Court ruling and it is absolutely right that the words “direct” and “indirect” are not in the Termination of Pregnancy Law but the principle of direct and indirect is established through this ruling.”¹

The Panel found that P.18/2024 attempts to draw parallels between the conscientious objection clauses provided for under the provisions of the UK Abortion Act 1967, and the Termination of Pregnancy (Jersey) Law 1997, in relation to the proposals under P.18/2024 for conscientious objection to assisted dying., *“A conscientious objection clause is currently provided for under Article 5 of the Termination of Pregnancy (Jersey) Law 1997 which mirrors UK’s 1967 Abortion Act”.*

However, the Panel understands that Paragraph 93 of the Report accompanying the Proposition within P.18/2024, incorrectly states that, *“The Law will provide for a right to refuse to direct participation only. This mirrors the provisions of the Termination of Pregnancy (Jersey) Law 1997”.* It is incorrect because neither the provisions of the UK Abortion Act 1967, nor the Termination of Pregnancy (Jersey) Law 1997, include the words “direct” or “directly”. The conscientious objection provision under Article 5 of the Termination of Pregnancy (Jersey) Law 1997 states that:

- (1) “Subject to paragraph (2), no person shall be under a duty, whether by contract or by any requirement imposed by any enactment or by any other legal requirement, to participate in any treatment authorized by this Law to which he has a conscientious objection.*
- (2) Nothing in paragraph (1) shall affect any duty to participate in treatment which is necessary to save the life of or prevent grave permanent injury to the physical or mental health of a pregnant woman.*
- (3) In any legal proceedings, the burden of proof of conscientious objection shall rest on the person claiming to rely on it.”*

Additionally, Paragraph 93 of P.18/2024 states that an objection clause to assisted dying should not be “too wide” and allow the right to refuse “non-direct participation”, which *“could potentially have the effect of negating the underlying policy intent (i.e., the service could not be delivered if ancillary tasks were not undertaken)”.* However, the Panel notes significant on-Island support for the provision of assisted dying in Jersey, with 78% of the Jersey Assisted Dying Citizens Jury voting in favour.² Furthermore, a

¹ [Public Hearing – Minister for Health and Social Services – 3rd April 2024](#)

² [Final Report from Jersey Assisted Dying Citizens Jury – September 2021](#)

2021 survey undertaken by Island Global Research indicated that 73% of Islanders strongly supported assisted dying.³ As such, the Panel is of the view that the removal of the words “directly” and “direct” is unlikely to impact on the delivery of the service and negate the underlying policy intent.

The Panel understands that when construing the meaning of “participate” in future assisted dying legislation, a Court will likely have regard to the intentions and contemplations of the States Assembly in relation to P.18/2024. The Panel is aware that this occurred in *Doogan*, with the Supreme Court construing the meaning of “participate” with the regard to the contemplation of the UK Parliament in passing the Abortion Act 1967.

However, the Panel understands that, whilst a Jersey Court would likely find the case of *Doogan* ‘highly persuasive’ in the context of the Termination of Pregnancy (Jersey) Law 1997, the construction of the wording in the context of a piece of legislation covering abortions will not necessarily be the same when used in a piece of legislation covering assisted dying.⁴ The Panel is mindful that the treatment of assisted dying is likely to be different from abortions in some respects.

Individual facts and circumstances may differ

During its Review, the Panel also asked how the restriction to direct participation in assisted dying would operate in practice and was provided with additional examples of direct and indirect participation:

Deputy L.M.C. Doublet:

“What would that look like in terms of the proposals that we are discussing now? What would direct participation look like and what would indirect participation look like?”

Director of Health Policy, Government of Jersey:

“Direct participation would look like a person cannot be forced to directly participate by being a member of the assisted dying service, by not being a member of the assisted dying service but providing a supporting professional opinion or assessment, so a healthcare professional. So that would be examples of direct participation. If the assisted death was taking place in hospital, a nurse from another ward could not be pulled over to assist. That would be direct participation. A pharmacist cannot be forced to directly compound the substance that is going to be used. Indirect would be, for example, an administrator booking an appointment for that doctor to meet that person. That would be indirect participation.”⁵

The Panel asked about the production of guidance in relation to direct participation and learned that guidance would advise on the differences between direct and indirect participation, and that any professionals supporting a patient could not, “...*withdraw their services on the basis that they object to that person requesting assisted death but what they absolutely can do is object to in any way directly participating in that assisted death.*”⁶

³ [2021 – The End of Life Survey – Island Global Research](#)

⁴ Bennion, Bailey and Norbury on Statutory Interpretation, ss11.1-2

⁵ [Assisted Dying in Jersey – P.18/2024](#)

⁶ [Public Hearing – Minister for Health and Social Services – 3rd April 2024](#)

However, the Panel understands that it is not possible to anticipate the different circumstances or facts that might arise in future in relation to assisted dying, and allowing Courts the flexibility to define what constitutes participation, based around specific facts, is preferable. Participation is an ordinary English word with a clear meaning, and the addition of the word “direct” serves only to confuse.

The right to refuse participation on any grounds

During its Scrutiny Review of P.18/2024, the Panel analysed the evidence supporting the final proposals, including the [Government’s Phase 2 Consultation on Assisted Dying \(‘Consultation’\)](#). The Panel found that the Consultation incorrectly proposed that conscientious objection should be restricted to, “*‘direct participation’ in line with comparable provisions in the termination of pregnancy law*”. However, the Consultation asked whether conscientious objection should extend beyond direct involvement to include:

- “*professionals who provide supporting opinions or assessments but who are not directly involved in the assisted dying process, and / or*
- *premises operators (for example, care home providers).*”⁷

Furthermore, P.18/2024 sets out that feedback from the British Medical Association, stated that the right to refuse to participate should be extended to “*include direct participation on any grounds (for example, emotional impact on the professional or the professional’s other patients) as opposed to be limited to the grounds of conscience or belief*”. As such, P.18/2024 was amended to:

- “*extend the right to refuse on any grounds (not just conscientious objection)*
- *extend the definition of direct participation to include both professionals providing supporting opinions or assessments and premises operators.*”⁸

However, the recommendation of the British Medical Association to include a right to refuse to participate on any grounds, not only on conscientious grounds, contrasts with *Doogan*, which was limited to conscientious objection. The Panel considers that the policy ambit of P.18/2024 appears broader than that in *Doogan*, a case which P.18/2024 uses to support the decision to specify “direct” participation in assisted dying. Indeed, the policy ambit of P.18/2024 appears to give grounds for taking a liberal (broad) view of the restriction of any duty to participate; in other words, individuals should be free to decide for themselves whether they wish to take part in Assisted Dying and should not be under any compulsion to do so against their will.

Consideration of Article 9, European Convention on Human Rights (‘ECHR’)

The Panel also considered the Ethical Review during its work, which highlighted the UK Supreme Court case of *Doogan* in relation to conscientious objection to “non-direct participation” in assisted dying. The Ethical Review suggested that the European Court of Human Rights agrees with the approach taken in the case of *Doogan*:

⁷ [Ibid](#)

⁸ [Ibid](#)

“One of the criticisms levelled at the Doogan decision is that it failed properly to consider the right to freedom of conscience (etc.) under Article 9 ECHR. However, the limited evidence available from cases that have reached the European Court of Human Rights (e.g. Pichon and Sajous v France, 216 which involved pharmacists refusing to supply contraceptive medication) suggests that the European Court agrees with the approach in Doogan on the basis that personal beliefs should not take precedence over professional obligations. We see, therefore, that in relation to HCPs, a legal and ethical distinction has been drawn between direct involvement and non-direct involvement, and so the proposal (to allow CO only for direct participation) accords with that position. What constitutes direct involvement may be open to interpretation.”⁹

However, the Panel understands that the case of *Doogan* did not decide human rights law arguments under Article 9 of the ECHR, which includes the right to freedom of thought, conscience and religion. Furthermore, the Report accompanying P.18/2024 does not appear to specifically address whether limitations are being placed on Article 9 of the ECHR, in relation to the scope of the protection, and whether such limitations are legitimate and proportionate. A Jersey Court construing the word “participate” in the context of specific facts will be bound under the Human Rights (Jersey) Law 2000 to take account of human rights arguments under Article 9 of the ECHR.

Conclusion

If approved, this Amendment to P.18/2024 will ensure that the meaning of “participate” and “participation” in the context of assisted dying, can accommodate a variety of different circumstances. The Panel believes that this will improve P.18/2024 and subsequent assisted dying legislation, as the Amendment will allow a Court a reasonable degree of flexibility to determine what constitutes participation based on specific facts.

Financial and staffing implications

The Panel does not anticipate that this amendment will create financial and staffing implications.

Children’s Rights Impact Assessment

A Children’s Rights Impact Assessment (CRIA) has been prepared in relation to this proposition and is available to read on the States Assembly website.

⁹ [Assisted Dying in Jersey – Ethical Review](#)