Terminally Ill Adults (End of Life) Bill 2024

BRIEFING

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18 November 2024

1. We have been instructed by Dignity in Dying to advise on a number of aspects of the Terminally Ill Adults (End of Life) Bill 2024 ("**the Bill**") in the form of a short briefing that might be shared with people interested in understanding the Bill and the arguments around it.
2. Since 1961, it has not been a crime for anyone to bring their own life to an end in England and Wales. However, section 2 of the Suicide Act 1961 provides that it is a criminal offence to assist the suicide of another person, regardless of their circumstances. The blanket ban on assistance under statute admits of no exceptions.
3. It has been left to the policy of prosecutors on encouraging or assisting dying[1] to build flexibility into the system which statute lacks. Current policy developed since the *Purdy* case[2] outlines that compassionately motivated assistance to a mentally competent adult to end their life is very unlikely to be prosecuted. Nevertheless, families can face investigation after a loved one ends their life (whether in the UK or abroad). There is currently no established system for identifying abuse or coercion in advance of a person's death or for helping vulnerable people to make end of life decisions. A person who wishes to end their life may, under the current system, have to do so before they reach a point where they require assistance to do so. The Bill seeks to remedy some of these shortcomings in the current system, as well as the constitutional awkwardness of

[1] Suicide: Policy for Prosecutors in Respect of Cases of Encouraging or Assisting Suicide | The Crown Prosecution Service

[2] *R (Purdy) v Director of Public Prosecutions* [2009] 3 WLR 40

primary statute being effectively modified by the policy of the Director Public Prosecutions.

The Terminally Ill Adults (End of Life) Bill 2024

4. The Bill proposes an amendment to section 2 of the Suicide Act 1961 so that in closely prescribed circumstances and following a lengthy process, a doctor can provide to a terminally ill person in the last six months of life an approved substance which they may then self-administer to end their life. The Bill seeks to ensure by means of a lengthy process involving at least two doctors and a High Court judge that this limited exception to the general ban on assisting suicide will apply only where the person who wishes to die is terminally ill, in the last six months of their life; has capacity to make the decision; has a clear, settled and informed wish to die; has made the decision voluntarily, and has not been coerced or pressured. If the Bill becomes law, a terminally ill person who wishes to be assisted to end their own life will need to hold firm in that intention over a period of several weeks during which they will have to consider and affirm their decision formally in two signed declarations made with two separate doctors and may need to affirm their decision to a High Court judge at a hearing. A High Court judge will scrutinise the evidence and must meet and question at least one of the doctors before deciding whether the legal requirements are met and whether to grant a declaration in law. They may meet and speak to the dying person too. Immediately before they are provided by the doctor with the approved substance, the person will need to formally affirm their decision and the doctor will again need to be satisfied that the person has capacity, has a clear, settled and informed wish to end their life, and has not been coerced or pressured by another person. In practice, the terminally ill person will need to formally consider their decision at least eight times[3] and will need to re-affirm their decision on at least four or five occasions to a professional person[4].

[3](i) Following initial discussion with a doctor; (ii) on making the first declaration; (iii) in the first period of reflection; (iv) instructing lawyers or making the High Court application; (v) In front of the judge; (vi) during the second period of reflection; (vii) in making the second declaration; (viii) in self-administering the approved substance.

[4] (i) The preliminary discussion; (ii) the coordinating doctor's assessment and statement; (iii) the independent doctor's assessment and statement; (iv) The High Court judge's hearing and declaration; (v) at the time the coordinating doctor provides the approved substance.

Protection for Vulnerable People

5. The need to protect vulnerable people has been asserted as an argument against any change to the law. However, it is far from clear that the current state of the law offers much, or better, protection to vulnerable people. A terminally ill person who wishes to end their life currently has three main options. They may, if they can afford it, and while they are physically able, travel abroad. They must do that alone if they are not to put others at risk of prosecution. Second, they may attempt to take their own life. This may be dangerous, traumatic or unsuccessful. They may have to make an attempt before they reach a point of needing assistance. Third, they may ask for assistance, but in so doing they put loved ones at risk of prosecution. In any of these courses, there is no system available to allow the person to make a fully informed decision with the help of professionals. Currently, the only realistic safeguard for those who are vulnerable and might be under pressure or coercion to end their life is that of retrospective criminal investigation.
6. The Bill seeks to ensure that terminally ill people are instead given formal guidance and oversight by doctors and courts through a process of deliberation about a range of matters related to whether they wish to voluntarily end their life as it nears its end. There will be repeated assessment by professional people of whether a person is terminally ill and nearing the end of their life, of the person's capacity, and of the voluntariness of their decision. The person may opt out at any time. Their decision-making will not be clandestine, but out in the open. The general prohibition on assisting a person to die will be retained outside of the statutory scheme and presumably henceforth those who act outside the scheme will be subject to harsher sanction. New offences will be created if the Bill passes.
7. On a comparison of the existing and proposed systems, it does not appear that the current system is capable of better protecting the vulnerable than the system proposed by the Bill.

Sanctions Against Abuse

8. The Director of Public Prosecutions currently operates a policy whereby it is highly unlikely that offences under section 2 of the 1961 Act will be prosecuted where they are motivated by compassion and without personal gain. If the Bill is passed, assisting suicide will remain illegal in every circumstance other than where the formal process

prescribed by the Bill is followed. Accordingly, to the extent that section 2 of the 1961 Act currently operates as a deterrent to unscrupulous conduct, it will continue to do so. If the Bill is passed, section 2 will also be supplemented by new criminal offences of exerting pressure or coercion. It will bring the process of assisted dying into the open. The intention is that by bringing vulnerable people within the protective reach of the law terminally ill people at the end of life will be able to make decisions carefully, in an informed and voluntary way with the assistance of those who can help people understand the implications. If the Bill is passed, then prosecutorial policy may in future be less liberal for those who assist a person to die outside of the statutory process.

Human Dignity and the Primacy of Human Life

9. The law protects and strives to protect the basic values of human dignity, and of the primacy of human life. There is a strong legal argument that the blanket prohibition on assisting people to end their life fails to ensure that the law safeguards the basic requirements of human dignity.
10. The current criminalisation of assisting suicide might be said to work against, rather than to protect, the primacy and sanctity of human life. Lord Neuberger (in *Nicklinson*[5]) made the powerful observation that section 2 of the Suicide Act 1961 may actually serve to cut short some people's lives by encouraging people to take their own life before they wish to do so, rather than wait until they require assistance to do so. The new Bill would, if enacted, allow people within its ambit to live out their lives to their full extent, safe in the knowledge that they have an alternative if needed. Section 2 of the 1961 Act would continue to apply to all cases outside of the new formal system. The system created by the new Bill arguably safeguards the primacy or sanctity of life better than the current system.

The Prospect of English or European courts broadening this law

11. Another argument against the Bill is an assertion that once passed, its ambit will widen through litigation. This has never happened in any decision of the European Court of Human Rights in this area: on the contrary, that Court has said repeatedly and often that decisions about assisted dying are matters within the margin of appreciation of member states (i.e. it will not interfere with such decisions). Mrs Nicklinson's own appeal from

[5] *R (Nicklinson) v Minister of Justice* [2015] 1 AC 657.

the Supreme Court to the European Court of Human Rights was ruled inadmissible for that reason.

12. Domestically, the Supreme Court in Nicklinson's case declined to grant any remedy to the Appellant, the nine-Justice panel being almost unanimously of the view that it was for Parliament and not the courts to decide questions around assisted suicide[6]. Noel Conway's case[7] dealing directly with the case of a terminally ill Appellant was dismissed by a Divisional Court, the Court of Appeal and in turn refused permission to appeal by the Supreme Court, which acknowledged the "transcendent public importance" of the issue but noted that "Under the United Kingdom's constitutional arrangements, only Parliament could change this law". The Courts have repeatedly taken the view that legislation on assisted dying was a matter for Parliament and not for the courts. There is little or no prospect of English judges considering it appropriate to cross well-drawn lines of institutional competence so as to broaden the ambit of an Act that had been recently debated and passed by Parliament in this area.

The Role of the Courts

13. The proposal for supervision by the High Court emanates from the remarks of judges in the Supreme Court in *Nicklinson*. Lord Mance held "there is much to be said for the idea, first mooted by Baroness Hale… that it should a High Court judge who decides the issue. Indeed it appears to me that it may well be that the risks to the weak and vulnerable could be eliminated or reduced to an acceptable level if no assistance could be given to a person who wishes to die unless and until a judge of the High Court has been satisfied that his wish to do so was voluntary, clear, settled and informed". Lady Hale commented in *Nicklinson* at [314]-[316]*:*

> ***"****It would not be beyond the wit of a legal system to devise a process for identifying those people, those few people, who should be allowed help to end their own lives. There would be four essential requirements. They would firstly have to have the capacity to make the decision for themselves. They would secondly have to have reached the decision freely without undue influence from any quarter. They would thirdly have had to reach it with full knowledge of their situation, the options available to them, and the consequences of their decision: that is not the same, as Dame Elizabeth pointed out in Re B (Treatment), as having first-hand experience of those options. And they would fourthly have to be unable, because of physical incapacity or frailty, to put that decision into effect without some help from others. I do not pretend that such cases would*

[6] Lord Neuberger at [116], Lord Mance at [164], [166]-[168], [190], Lord Wilson at [197], Lord Sumption at [230]-[232], Lord Hughes at [267], Lord Clarke at [293], Lord Reed at [296]-[297], and Baroness Hale at [300].
[7] *Conway v Secretary of State for Justice* [2018] EWCA Civ 16.

always be easy to decide, but the nature of the judgments involved would be no more difficult than those regularly required in the Court of Protection or the Family Division when cases such as Aintree University Hospitals NHS Trust v James [2013] 3 WLR 1299 *or Re B (Treatment) come before them.*
I mention those courts as the decision-makers, because they are accustomed to dealing with such sensitive life and death questions, some of them (as Lord Neuberger points out) even more dramatic than this…
Were there to be such a procedure, it would appear to me to be more than sufficient to protect those vulnerable people whom the present universal prohibition is designed to protect. They simply would not meet the qualifications to be allowed help. The process would not be invoked and even if it were it would not succeed in securing them that help. It would be a more suitably targeted solution than any prosecution policy, however enlightened and humane, could ever be. It would have the merit of resolving the issue in advance rather than relying on ex post facto executive discretion to solve the problem (although it should not preclude the exercise of prosecutorial discretion in a case where prior authorisation had not been obtained). "

14. Sir James Munby in his blog dated 30 October 2024[8] (before the Bill was published) commented that "Specifically, a judge cannot authorise the administration to a patient of a drug intended to bring about the patient's death." That is not what the Bill proposes. The Bill proposes that the High Court will be tasked with confirming that the proper procedures have been followed and that the conditions are satisfied, namely that the person is terminally ill, has capacity, has a clear, settled and informed wish to end their own life and has made their decision voluntarily and has not been coerced or pressured. The Court does not authorise the administration of a drug, it is to be self-administered.
15. In a further blog on 14 November 2024 Sir James clarifies that "I am not contending that there can never be any role for the judge in the context of assisted dying." He further says that "I make clear for the avoidance of any misunderstanding that I agree entirely with Sir Nicholas Mostyn's very plain statement (see the Addendum to *Assisted Death: A Person with Parkinson's Perspective*) that "if the judges are to be involved their *competence* to decide the key question cannot be doubted."
16. Sir James raises concern as to the ability of courts to uncover cases of pressure. It is worth recalling that the Bill only allows people to pursue assisted dying in the last months of their life. It is not left to a judge to uncover pressure, rather the judge's supervision is part of a matrix of safeguards including that a person must be terminally ill (which may not be by reason only of a disability or a mental disorder); two doctors and a judge must reasonably regard their death as likely within six months; the person

[8] ASSISTED DYING : WHAT ROLE FOR THE JUDGE? | The Transparency Project

must discuss and confirm their decision several times in consultation with trained doctors, must be judged to have capacity, and be judged by the doctors and court involved to be free from pressure or coercion. It seems unlikely that an unscrupulous person would coerce a terminally person to go through such a highly regulated system over many weeks so as to hasten their death by a few months at most, while risking conviction for doing so. Under the new offences created by the Bill, a person convicted of such dishonesty, coercion or pressure would be liable to serve fourteen years in prison. The Bill appears to have ample, and indeed better safeguards against coercion and pressure than the current system.

Palliative Care

17. The Bill has a number of provisions concerned with palliative care. During the informal discussion with a doctor before a person embarks on the Bill's processes and again during consultations with the coordinating and independent doctor, those doctors must at each stage discuss any available palliative, hospice or other care including symptom management and psychological support (s.4(4)(c) and s.9(2)(b)(iii)). Codes of practice will guide such discussions (s.30(1)(b)). Section 35 of the Bill provides that at the end of five years the Secretary of State must undertake a review of the operation of the Act which is required, by section 35(3)(b), to set out an assessment of the availability, quality and distribution of appropriate health services with palliative care needs including:

    (i) pain and symptom management;

    (ii) psychological support for those persons and families; and

    (iii) information about palliative care and how to access it.

    Section 34 also requires an annual report to the Secretary of State on the operation of the Act which will necessarily include reporting on palliative care. It is not within the scope of the Bill to secure greater resources, but the Bill is intended to play a role in securing improvements in palliative care in England and Wales.

Conclusion

18. There is scant legal justification for the existing state of English law. It regards suicide as lawful, yet operates a blanket ban on assisting suicide, while in practice prosecutorial policy partially but awkwardly attempts to fill the gap by decriminalising assisting suicide in most cases. The system lacks coherence, lacks safeguards, and is constitutionally unsatisfactory. It allows the rich to travel abroad to be assisted to die, but denies the same basic right to the poor. It is liable to encourage people to take their life early, or else exposes people acting compassionately to help loved ones to investigation and stigma. The existing law fails to cut a proportionate balance between the rights of individuals to basic autonomy and dignity and such wider purposes as the blanket ban is presumed to serve. The changes proposed by the Bill are carefully circumscribed and defined. They will better safeguard the sanctity of life, will better protect the vulnerable, and will ensure that the framework for end of life decisions has the constitutional authority of parliament.

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18 November 2024