LAW SOCIETY SUBMISSION

DYING WITH DIGNITY BILL 2020

SUBMISSION TO THE JOINT OIREACHTAS COMMITTEE ON JUSTICE

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ABOUT THE LAW SOCIETY OF IRELAND

The Law Society of Ireland is the educational, representative and regulatory body of the solicitors' profession in Ireland.

The Law Society exercises statutory functions under the Solicitors Acts 1954 to 2011 in relation to the education, admission, enrolment, discipline and regulation of the solicitors' profession. It is the professional body for its solicitor members, to whom it also provides services and support.

The headquarters of the organisation are in Blackhall Place, Dublin 7.

Introduction

The Law Society of Ireland ('the Law Society') welcomes the opportunity to submit views to the Joint Committee on Justice ('the Committee') on matters relevant to the Dying with Dignity Bill 2020 ('the Bill'). The Law Society understands that there will be a plurality of views around the issues of euthanasia and assisted suicide and recognises that any detailed consideration of end-of-life choices engages with profound moral, ethical, religious and indeed legal issues, all of which will no doubt occupy the Committee during its consideration of the Bill.

The Law Society does not take a stance either for or against the subject matter of the Bill to allow for physician-assisted suicide.[1] Taking into account that the Committee will receive a range of submissions advocating for or against the Bill, the Law Society considers that it can be of most assistance to the Committee in considering the legal issues which may arise from the Bill if it were to be passed in its present form and makes recommendations to address these issues.

Current position under the Constitution and ECHR

The Supreme Court affirmed, in the case of *Fleming v Ireland* [2], that assisted suicide was an area where the Oireachtas was not prohibited (by the Constitution) from legislating within certain boundaries. The Court recognised that the State was constitutionally required to vindicate the right to life while, at the same time, it was not bound to ignore the circumstances of an individual such as the appellant who had a terminal illness which caused great suffering. The Court stated the following:

"*Nothing in this judgment should be taken as necessarily implying that it would not be open to the State, in the event that the Oireachtas were satisfied that measures with appropriate safeguards could be introduced, to legislate to deal with a case such as that of the appellant. If such legislation was introduced it would be for the courts to determine whether the balancing by the Oireachtas of any legitimate concerns was within the boundaries of what was constitutionally permissible. Any such consideration would, necessarily, have to pay appropriate regard to the assessment made by the Oireachtas both of any competing interests and the practicability of any measures thus introduced*."[3]

Having regard to this statement of principle, the following elements should form an important part of the Committee's consideration of the Bill:

(i) When legislating in relation to end-of-life choices, safeguards are required within the legislation that are appropriate to the circumstances;

(ii) The Oireachtas in legislating must identify any legitimate concerns regarding the operation of the legislation and address these before enacting law, to ensure that it can withstand constitutional challenge thereafter; and

(iii) The practicability of any measures introduced in the legislation are also relevant to the assessment of whether the Oireachtas has struck the correct balance in the legislation.

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[1] Section 11 of the Bill as drafted, allows a medical practitioner, subject to the conditions set out in the Bill, to either prescribe a substance to a qualifying individual under the Bill which they can self-administer or, if they are not capable of administering the substance themselves, it can be administered to them.

[2] *Marie Fleming v Ireland, Attorney General and the Director of Public Prosecutions*, Judgment of 29 April 2013.

[3] Ibid., at para.108.

While the Court also accepted that it was a legitimate aim of the prohibition on assisted suicide contained in section 2(2) of the Criminal Law (Suicide) Act 1993 ('the 1993 Act') to protect those who are vulnerable and may be open to abuse, it envisaged that limited exceptions could be made to the 1993 Act without undermining the constitutional protection of life.

In a similar vein, the European Court of Human Rights ('the ECtHR') has considered a limited number of cases whether there was a positive obligation on the State to provide for assisted dying pursuant to Article 2 (the right to the protection of life) and/or Article 8 (the right to respect for private and family life) of the Convention. To date, the Court has deferred to the choice of each individual Member State in this regard, noting that only a limited number of Member States allow for assisted suicide.[4] However, the principles established by the ECtHR under Article 8, while falling short of affirming a positive right to die enforceable against the State, is of relevance to the Bill.

Accordingly, the following two elements will be considered in this submission - whether the Bill is sufficiently certain as to its scope and operation (and is that linked to a pressing social need which justifies the measures it contains?) and the sufficiency of the safeguards (including procedural safeguards) that apply to decision-making under the Bill. Recommendations will be made in respect of each.

1. Is the Bill sufficiently certain in its scope and operation?

While the ECtHR has rejected the claim that there is a positive right to die pursuant to Article 2,[5] it has considered two cases related to Switzerland's physician-assisted suicide laws. The Court concluded in one case that issues of choice around when and how to die were within scope of Article 8 but that there was no breach of the Article in the particular circumstances of the case due to the refusal of medical professionals to prescribe a lethal substance to the applicant.[6] However, in the subsequent case of *Gross v Switzerland* the Court found that the scope of the applicable national law concerning physician-assisted suicide was uncertain which led to a breach of Article 8.[7] Although this case is not considered legally binding as a result of subsequent developments, the principles stated by the Chamber Court are relevant in the present context.[8]

Gross v Switzerland concerned the circumstances of an older woman who was in declining health related to her advanced age. She wished to end her life painlessly and safely by taking a lethal dose of sodium pentobarbital. The woman was adjudged competent to make the decision on foot of a psychiatric assessment but three doctors declined her request. Their refusals were based on their understanding that such a prescription could only be given to a person who, because of an illness, was within weeks of death. This was in accordance with the Swiss Medical Ethics Guidelines. The national courts rejected her appeal, which relied on previous case law which provided that the issuing of a medical prescription for sodium

[4] To date the Member States of the Council of Europe with some form of legislation allowing for assisted suicide are Belgium, Luxembourg, the Netherlands, Switzerland and most recently Spain.

[5] See *Pretty v The United Kingdom* (2346/02) [2002] ECHR 423 (29 April 2002)

[6] *Haas v Switzerland*, [2011] ECHR 2422, the reasoning of the Court seemed to identify that suicide without assistance was clearly an area of choice that comes within the concept of a person's private life and, in that regard, it is a right that requires protection.

[7] *Gross v Switzerland*, Chamber Judgment, [2013] ECHR 67810/10

[8] It is noted that this judgment was referred to the Grand Chamber of the ECtHR but, as the applicant had achieved her objective to take her own life before the matter came to hearing and had taken measures to prevent her legal representatives from being aware of this fact by instructing through an intermediary, the Grand Chamber dismissed the application and did not issue a substantive judgment. As such, the judgment is of uncertain legal standing but still expresses principles which are relevant in the present context.

pentobarbital to a person suffering from an incurable, persistent and serious psychological illness did not necessarily amount to a violation of a doctor's professional duties. However, the courts found that this exception (in the guidelines) had to be handled with the "utmost restraint" and did not require the medical profession, or the State, to provide the applicant with the requested dose to put an end to her life.

Mrs Gross then applied to the ECtHR, complaining that the Swiss authorities had violated her right to respect for her private life under Article 8, by preventing her from deciding when and how she would die. The Court first confirmed that her wish to end her life by means of obtaining a dose of sodium pentobarbital came within scope of her right to respect for her private life under Article 8. The Court distinguished previous case law in *Haas v Switzerland* on the basis that the earlier case had questioned whether there was a positive obligation on the State to provide a means to permit a dignified suicide (which argument was rejected) and the present case which questioned whether the State failed to "provide sufficient guidelines defining if and, in the case of the affirmative, under which circumstances medical practitioners were authorised to issue a medical prescription to a person in the applicant's condition." [9]

Having reviewed Swiss domestic law in relation to physician-assisted suicide, and having noted in particular that the legal position relied heavily on guidelines from a non-governmental body (a professional medical body), which did not have the quality of law, and were imprecise in relation to the position of a person such as the applicant who was not within hours or days of death, the Court concluded:

"….that the applicant must have found herself in a state of anguish and uncertainty regarding the extent of her right to end her life which would not have occurred if there had been clear, State-approved guidelines defining the circumstances under which medical practitioners are authorised to issue the requested prescription in cases where an individual has come to a serious decision, in the exercise of his or her free will, to end his or her life, but where death is not imminent as a result of a specific medical condition. The Court acknowledges that there may be difficulties in finding the necessary political consensus on such controversial questions with a profound ethical and moral impact. However, these difficulties are inherent in any democratic process and cannot absolve the authorities from fulfilling their task therein."[10]

It is clear, from the principles identified in *Gross*, that the present absolute ban on assisted suicide contained in section 2(2) of the 1993 Act provides the necessary certainty in law.[11] Accordingly, any change in the law must seek to achieve a similar level of certainty regarding the scope and application of the legislation while also recognising that certainty is an inevitable feature of an absolute prohibition on an action whereas legislating to allow for an action allows for a greater range of choices to be made, and some level of uncertainty is harder to exclude.

[9] Ibid., at para 63.

[10] Ibid., at para 66.

[11] The State is likely to enjoy a wide margin of appreciation around whether it considers it appropriate to legislate to regulate (and thereby relax) the absolute ban on assisted suicide but it should always have regard to the requirements of Article 8 as iterated in *Pretty v United Kingdom* and *Haas v Switzerland*. It is noted, in that regard, that the June 2018 report of the Joint Committee on Justice and Equality on the Right to Die with Dignity concluded that it was not in a position to recommend legislative change at that point in time as further debate was needed and suggested that the matter might be referred to the Citizens' Assembly.

Turning to the specific provisions of the Bill, under section 6[12] a medical practitioner may only provide assistance to a person to end his/her own life if that person comes within a defined category of "qualifying person". A "qualifying person" is defined in section 7 which provides, *inter alia,* that the person is "terminally ill".[13] The phrase terminally ill is then defined in section 8, as being an illness that is diagnosed as incurable and progressive, which cannot be reversed and the person is likely to die because of the illness or complications arising from same.

The Society considers that the definition of a qualifying person, as currently drafted, may be arbitrary in the absence of a clear rationale for including such a wide category of person within its scope (those that are terminally ill) while at the same time excluding other categories of person who might have an objectively justified reason to wish to have the choice of physician-assisted suicide. The category of persons who may be regarded as qualifying persons under the Bill, other than having a terminal illness in common, may be in very different circumstances that are not necessarily consistent with each other nor expressly identified in the Bill. For instance, there is no link made with temporal proximity to death, so that the Bill applies equally to a person who has many years to live and a person with a very short life expectancy, and no distinction is made between a person who is experiencing a significant loss of quality of life and a person who is not. This is problematic as it is difficult to understand the precise objective of the Bill in just addressing the situation of people who are terminally ill.[14]

The view of the Supreme Court in *Fleming v Ireland* was that the Oireachtas is free to legislate for assisted suicide, but only where an appropriate balance is achieved to also protect the constitutional right to life. In similar terms, the ECtHR has viewed the issue of assisted suicide as requiring a balance between the protection of life under Article 2 and the vindication of the right to respect for a private life under Article 8.[15] There is a risk, therefore, that having a terminal illness as a justification for accessing assistance to end one's life does not, in and of itself, accord sufficient weight to the right to life under the Constitution and Article 2. The objective of simply relieving a person of the necessity to live out their days may not constitute a sufficiently pressing need to justify the legislation in the absence of some additional substantial suffering being experienced by the person as a result of the illness.[16]

This problem is further underlined by the principle established in *Haas v Switzerland* and *Gross v Switzerland* that the individual "has a right to decide by what means and at what point his or her life will end". So, if a State decides to positively regulate the issue of assisted suicide, it must be in a position to defend its legislative choice to limit the entitlement to assisted suicide to those who are terminally ill without regard to others who might make a substantial claim that they too should have access to the entitlement. In other words, the legislative choice should not be arbitrary and should be capable of justification in accordance with Article 8 (2) which provides that:

"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

[12] Essentially, section 6 provides a carve out from the general prohibition on assisted suicide under section 2(2) of the 1993 Act.

[13] The other requirements of the Bill to be considered a "qualifying person" will be considered further below.

[14] It is noted that the June 2018 report of the Joint Committee on Justice and Equality on the Right to Die with Dignity provided a range of reasons as to why a person might seek such assistance and having a terminal illness was not identified as the singular reason in that context. Ibid., at p.10.

[15] See *Pretty v The United Kingdom* and *Haas v Switzerland*.

[16] Such suffering could be physical or psychological but would need to be of sufficient magnitude to justify the State legislating to make assistance to end life available to the person.

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."

To comply with Article 8 (2) the State would have to show that the legislation pursued a legitimate aim that is capable of being objectively justified and further, that the measure used is proportionate to that aim. One could therefore be faced with a person who, although not terminally ill in accordance with the section 8 definition, considers that through various factors (e.g. age, loss of function, imminent loss of faculties) their dignity and autonomy is threatened to the extent that they wish to avail of the assistance envisaged by the Bill. Such a person may consider that they had been excluded from that assistance, without a legitimate reason. It is evident on the basis of the case law to date that such a situation would fall to be considered under Article 8, and the State may be obliged to justify why such a person is excluded from the ambit of the legislation. [17]

Recommendation

The Law Society recommends that the definition of qualifying person under the Bill be reconsidered so that the objective for providing access to physician-assisted suicide would be more apparent, giving consideration to whether a qualifying person would have to be determined to be facing a specific limited life expectancy or experiencing a certain threshold of suffering or referring to some other legitimate objective for enacting the Bill.

2. The sufficiency of the safeguards (including procedural safeguards) which apply to decision-making under the Bill

The question of physician-assisted suicide creates a range of legislative choices which require delicate balancing, and engagement with complex issues, which the Oireachtas is well-placed to consider. The current process of consultation forms an element of that process of consideration which will no doubt inform the onward passage of this Bill. However, the Oireachtas will no doubt be mindful that, if passed, the Bill must meet the constitutional considerations set out in *Fleming* as well as the State's obligations under the European Convention on Human Rights. What is clearly discernible in this regard is that the legislation must contain safeguards to protect the fundamental value of the right to life, while also acknowledging other values, such as autonomy, self-determination and the dignity of the individual person.

In relation to the necessary safeguards, these may take a number of forms, most particularly in respect of the need for procedural safeguards under the legislation, so that where a person can avail of physician-assisted suicide the decision is made freely, without coercion or duress, and informed by relevant knowledge in respect of all available options. Such safeguards can also incorporate an element of oversight and review of the operation of the legislation to mitigate against any deviation from the legislative intent ,while providing for the reporting and investigation of any instances of non-compliance.

[17] While the Supreme Court did not accept that the appellant in *Fleming v Ireland* was discriminated against on the basis of her disability pursuant to Article 40.1 of the Constitution, by reference to the complete prohibition on assisted suicide, this might not be the case if assisted suicide were opened up to all those who are terminally ill and not to those who might also claim that they are entitled to assistance to end their lives to relieve suffering or avoid the worst infirmities of old age or a similar anguish that cannot be avoided. In addition, the right to equality in the enjoyment of rights as protected under Article 14 ECHR might also be relied on.

In terms of the procedural safeguards which apply where a person is seeking physician-assisted suicide, section 7 of the Bill provides that in order to be a qualifying person under the Bill, he or she must:

(i) Be an adult;
(ii) Be terminally ill (see above);
(iii) Have a clear and settled intention to end his/her own life; and
(iv) Make a declaration to that effect.

In order to be valid, the declaration must be signed by the qualifying person and a witness, their attending medical practitioner and an independent medical practitioner. The two medical practitioners must satisfy themselves, independently of each other, that the person is terminally ill, that they have the capacity to make the decision to end their own life and has a clear and settled intention in that regard, and that the decision is voluntary, informed and without coercion or duress. In respect of making an informed decision, the person must be advised of the palliative, hospice and other care options available to them. There is a "cooling off" period of 14 days (which may be shorter where death is imminent) and the declaration may be revoked at any time.

While this is a summary of the relevant safeguards, it is evident that care has been taken in drafting the Bill to ensure that a rigorous process is followed before the action to end life is taken, whether that is self-administration of a lethal substance or having the lethal substance administered. It is appropriate that such safeguards are robust and set out in clear procedural detail.

The Law Society considers that the present Bill may not be sufficiently robust in terms of safeguards. In this regard, it is noted that the person must be assessed as having capacity to make the decision to end their life on the date that they make the declaration under section 9. That declaration and the decision comes into effect 14 days later. However, the declaration does not appear to expire after any particular period of time.

In addition, it is apparent that there are two relevant decisions under the legislation, the first being the decision reflected in the declaration and the second being the decision to self-administer, or have administered, the substance under section 11. However, there may be a significant gap in time between the two and there is no requirement under the Bill that the person's capacity to make the decision under section 11 would be assessed again by a medical practitioner. While it might be expected that if the medical practitioner had concerns about the person's capacity to make the relevant decision at that point in time, they would not proceed to provide the assistance described under section 11 however, this is not specifically provided for. Given that the Bill contemplates two decisions being made by the qualifying person, it would seem appropriate that the qualifying person's capacity to make the decision would be assessed under both sections 9 and 11 particularly as there may be some considerable time lapse between the two decisions. The Law Society notes that the assessment of capacity is largely in accordance with that set out in the Assisted Decision Making (Capacity) Act 2015 and considers that this is the appropriate approach as it is time and decision specific.

Sections 14 and 15 appear to contemplate a system of oversight and reporting to ensure compliance with the provisions of the legislation. However, aside from the paperwork that is required to be submitted to the Assisted Dying Review Committee by the attending medical practitioner, there is no further provision dealing with the composition of the Committee, its functions/powers/funding and the range of other matters which fall to be provided for in the establishment of a statutory body. This omission must be addressed to ensure that there is proper oversight and reporting in relation to the operation of the Act.

Since the operation of any legislation in this area is likely to be of general interest/concern to the public, it is recommended that the Committee and/or the Minister for Justice would publish, on a periodic basis, anonymised information regarding the operation of the legislation and provide comments on the adequacy of the safeguards and disaggregated data in relation to the circumstances in which assistance has been provided. [18] In accordance with recent legislative practice, the Minister should also be required to undertake a review of the legislation within a number of years of its commencement to assess and inform the need for any amendments necessary.

Recommendation

The Law Society recommends that the safeguards under the Bill should be reviewed by the Committee to ensure that they are adequate to protect the right to life.

In particular, an assessment of capacity should be carried out under both sections 9 and 11 of the Bill to ensure that the qualifying person retains the capacity to decide to end their life at the very point where the assistance to do so is rendered.

In addition, the oversight and review provisions of the Bill should be strengthened, particularly in respect of the powers and functions of the proposed Assisted Dying Act Review Committee.

Conclusion

We hope that the Committee will find these comments to be constructive and will be glad to engage further on the issue.

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[18] This might deal with data such as age, gender, illness, socio economic/educational background, ethnicity, co-existing disability of any qualified person under the legislation, as well as statistics regarding the number of declarations completed, and the number of instances in which assistance was rendered and so on, to provide a complete picture of how the legislation is operating and to inform debate around any future amendments.