IN THE MATTER OF THE TERMINALLY ILL ADULTS (END OF LIFE) BILL

OPINION

A. INTRODUCTION AND SUMMARY

1. We are asked to advise on whether, if it were enacted in its present form, the Terminally Ill Adults (End of Life) Bill ("the **Bill**") would be compatible with the European Convention on Human Rights ("the **ECHR**").

2. In summary, our view is that it would not be compatible. That is because, without justification, it contains no adequate safeguard protecting the position of those with disabilities where suicidal ideation is more likely, and who are, because of that feature of their disability, more likely to express a clear and settled wish to die. By virtue of Article 14 of the ECHR, disabled persons enjoy special protection from discrimination, including in the enjoyment of the right to life under Article 2 of the ECHR. In law, *"very weighty reasons"* may be required to justify the same. Persons with disabilities of the above sort are in a significantly different situation from persons who do not have such disabilities, because they are - all else being equal - more likely to express the clear and settled wish to die required under the legislation to be eligible to be assisted to die. They are on that basis more vulnerable both than persons whose disabilities are not of that sort and than persons who are not disabled at all. Accordingly, they are on well-established principles required to be treated differently under Article 14 unless there is justification not to do so. However, without justification, the legislation fails to provide any adequate safeguard to address that greater vulnerability.

3. In our opinion, this failure to treat these different cases differently in the enjoyment of the right to life is in breach of the ECHR. We consider that, on that basis, an application for judicial review in respect of the legislation once enacted could be brought to obtain a Declaration of Incompatibility under the Human Rights Act 1998 ("**HRA**"); and a person

or body falling within the concept of a 'victim' for ECHR purposes could bring a complaint about the legislation in the European Court of Human Rights ("**ECtHR**").

4. We explain the reasons for this view in more detail below, structuring matters as follows. In section B, we explain the significance of the ECHR in relation to legislation of the present sort. In section C, we identify the relevant principles concerning the right to life as they have been identified in the case law of the ECtHR. In section D, we explain Article 14, and its relationship to Article 2. In section E, we apply those principles to the legislation at issue and set out why we consider that, if enacted, it would not be Convention-compliant. At Section F, we make concluding remarks.

B. <u>THE SIGNIFICANCE OF THE ECHR</u>

5. The ECHR guarantees rights and freedoms to citizens who live in one of the States that is a party to it. For present purposes, the three most important rights are as follows.

6. First, Article 2 (the right to life). This provides: "*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 the penalty is provided by law"*. Article 2 is an absolute right; that is to say it can never be interfered with by the State even if the State considers such interference justified.

7. Secondly, Article 8 (the right to respect for private and family life). The basic right is that *"Everyone has the right to respect for his private and family life, his home and his correspondence."* This right is not absolute and can be interfered with in certain circumstances. It is this right, broadly characterised by reference to personal autonomy, upon which proponents of assisted suicide principally rely.

8. Thirdly, Article 14 (the prohibition on discrimination in the enjoyment of rights). This provides: *"The enjoyment of the rights and freedoms set forth in the European Convention on Human Rights and the Human Rights Act shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."*. Article 14 is 'parasitic' on other Convention rights: it arises only in connection with the enjoyment of such other rights. It is important to

understand that, for Article 14 to be applicable, it is not necessary for a State measure to interfere with, far less breach, a Convention right. We explain this as it relates more particularly to Article 2 below.

9. The ECHR has been made a part of UK domestic law by way of the HRA. In the UK the courts are able to issue a *"declaration of incompatibility"* under section 4 of the HRA. A court may do so where the *"court is satisfied that the provision is incompatible with [an ECHR] right."*[1] If the court does make a declaration that the legislation is incompatible, a Minister can order amendments as necessary to remove the incompatibility (referred to as "Remedial Orders").[2] This does not remove the entitlement of a 'victim' of incompatible legislation from alleging before the ECtHR that the UK is in breach. The concept of 'victim' has been understood increasingly broadly by that Court[3].

10. Legislation cannot be challenged on any other basis; for example, that Parliament failed to take into account relevant matters when passing the Bill. Accordingly, our focus in this Opinion is, of necessity, the ECHR.

11. The Bill has proceeded as a Private Member's Bill. As a result, it has not been subject to the usual process in respect of HRA compliance. This means that MPs have had access to less information and assessment than that with which they would ordinarily be provided. We note that the Equality and Human Rights Commission has repeatedly raised concerns about this.[4]

12. Under section 19 of the HRA, the Minister of the Crown in charge of a Bill in either House of Parliament must, before the Second Reading of the Bill, make a statement that either (a) in their view the provisions of the Bill are compatible with the ECHR; or (b) while they are unable to make a statement about the compatibility, the Government nevertheless wishes the House to proceed with the Bill.

[1] Section 4(2) of the HRA
[2] Section 10(2) of the HRA
[3] For example, a campaign group can bring a complaint where there is no victim who is able to, see: *KlimaSeniorinnen Schweiz v Switzerland* (2024) 79 E.H.R.R. 1 at paras 460 – 461: *"The Court has repeatedly stressed that the victim-status criterion is not to be applied in a rigid, mechanical and inflexible way."*
[4] Including when the EHRC's Chair Baroness Falkner gave evidence to the Committee on 29 January 2025.

13. Since it is proceeding as a Private Member's Bill, this Bill will not have the endorsement that it would otherwise have from a Government minister making a statement as to its compliance. Moreover, normally a Bill would be accompanied by an equality impact assessment.[5] That is not the case here.

14. As we set out further below, this may explain why there has been a comparative lack of focus on the potential impact that the Bill will have on particular disabled persons.

C. THE RIGHT TO LIFE (ARTICLE 2)

15. Over the last twenty years cases concerning the compatibility of assisted suicide with the ECHR have received judicial consideration to some extent. Some have concerned blanket bans on assisted suicide (including in the UK[6]). Others have concerned challenges to regimes in which some form of assisted suicide is lawful. The following central principles emerge:

    a. The right to life under Article 2 does not include a right to death: *Pretty v United Kingdom* ((2002) 35 E.H.R.R. 1) at para 40[7].

    b. The State is required to protect vulnerable individuals, including against actions by which they endanger their own lives: *Haas v Switzerland* (2011) 53 E.H.R.R. 33 at para 54. The applicant in *Haas* was a man who suffered from a chronic bipolar disorder and who wanted to use particular drugs to end his own life in the way he wanted. He had been denied access to those drugs because he did not have a prescription. In finding that there had been no violation of Mr Haas' Article 8 rights, at para 54 the Court held: *"In the Court's view, that last provision obliges the national authorities to prevent an individual from ending his life if his decision is not freely made in full knowledge of the facts."* It further held at para 56: *"the requirement of a medical prescription*

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[5] As highlighted by the Equality and Human Rights Commission: https://www.equalityhumanrights.com/our-work/advising-parliament-and-governments/terminally-ill-adults-end-life-bill-house-commons.

[6] Where there is a prohibition on assisting suicide, the State is required to provide sufficient guidance as to when such an individual will be prosecuted in order to ensure that there is no unjustified interference with the right to respect for private life (under Article 8): see esp. *R (Purdy) v Director of Public Prosecutions* [2009] UKHL 45.

[7] That application was brought by a person suffering from motor neurone disease who wanted her husband to assist her to die. She sought an undertaking from the Director of Public Prosecutions ("**the DPP**") that her husband would not be prosecuted for his assistance. She argued, unsuccessfully, that the DPP's refusal was an infringement of her rights under the ECHR.

in order to prevent abuse, has a legitimate aim, namely to protect people from taking hasty decisions and to prevent abuse, in particular, to prevent a patient incapable of making up his own mind from obtaining a fatal dose…".

c. Article 2 does not prohibit, in general, the conditional decriminalisation of euthanasia. However, where assisted suicide has been decriminalised, it must be accompanied by appropriate and sufficient safeguards to secure respect for the right to life as well as to prevent abuse: *Mortier v Belgium* (Application no. 78017/17) dated 4 October 2022 ("*Mortier*") at paras 137 – 139.

16. In *Mortier,* the ECtHR was concerned with assessing whether adequate safeguards had been put in place for the purpose of an allegation of breach of Article 2 on the facts of a specific case of euthanasia. It made clear that, among other matters, there must exist in domestic law and practice a legislative framework concerning acts prior to euthanasia, as well as controls based on experience offering all the guarantees required by Article 2: see para 141.

17. Referring to the United Nations Human Rights Committee[8], the ECtHR observed at para 139:

> *"euthanasia does not in itself constitute an interference with the right to life if it is accompanied by robust legal and institutional safeguards to ensure that medical professionals are complying with the free, informed, explicit and unambiguous decision of their patient…"*

18. Certain further features of the cases to date should be noted:

a. Whilst relatively detailed consideration has been given over the years to the permissibility of a blanket ban on assisted suicide, the legalisation of assisted suicide, and the question of what is required by way of safeguards including to protect the most vulnerable, have received much less detailed judicial consideration. This no doubt reflects in part that very few Council of Europe States have legalised assisted suicide. As noted in *Haas* at para 55 *"the Benelux countries in particular have decriminalised the act of assisting suicide, but only in well-defined circumstances. Certain other countries only allow "passive" acts of assistance. The vast majority of Member*

[8] The United Nations Human Rights Committee (HRC) General Comment No. 36 (2019) on right to life (3 September 2019, CCPR/C/GC/36)

States, however, appear to place more weight on the protection of an individual's life than on the right to end one's life".

b. There has been no decided case concerning whether a State's legalisation of assisted suicide has been discriminatory under Article 14 ECHR[9].

c. It follows that the ECtHR has not addressed the proper approach to the concept of "margin of appreciation" in a discrimination case. It has certainly observed that issues involving medically assisted suicide involve sensitive moral and ethical questions on which opinions in democratic countries profoundly differ, leading it to permit States a wide margin of appreciation in a number of the cases before it: see e.g. *Nicklinson and Lamb v UK* (2015) 61 E.H.R.R. SE7 at para 84; *Haas v France* at para 55; *Karsai v Hungary* (Application no. 32312) dated 13 June 2024 at para 144. Discrimination cases, however, raise a particular problem. In such cases, where there is prima facie discrimination, the State must account for its differential treatment of certain groups (or, as in a case such as the present, its failure to treat groups in different situations differently). It is in that context that, for present purposes, the applicable margin of appreciation falls to be understood and applied.

D. NON-DISCRIMINATION (ARTICLE 14)

19. As set out above, Article 14 imposes an obligation on States to ensure that the rights and freedoms guaranteed by the ECHR are "*secured without discrimination.*" As a result, Article 14 is parasitic upon the rights and freedoms established in the ECHR.

20. It is engaged when the discrimination comes within the *"ambit"* of one of the substantive Articles, including Article 2. The scope of whether something comes within the "ambit" of the substantive rights has been construed very broadly. Anything that touches upon the rights enshrined in the ECHR can be within its ambit. In *EB v France* (2008) 47 EHRR 21 at para 48 the ECtHR held:

[9] In *Pretty* and *Karsai v Hungary* (Application no. 32312) dated 13 June 2024 the ECtHR briefly considered Article 14 (see paras 87-90 and paras 173-177 respectively), but in neither case did it address the question of the appropriate approach to discrimination cases. Each of those cases concerned alleged discrimination in the applicants' inability to access assisted suicide, rather than a challenge to the legalisation of assisted suicide.

> *"The prohibition of discrimination enshrined in article 14 thus extends beyond the enjoyment of the rights and freedoms which the Convention and the Protocols thereto require each state to guarantee. It applies also to those additional rights, falling within the general scope of any Convention article, for which the state has voluntarily decided to provide."*

21. Article 14 lists a series of 'statuses' on the ground of which unjustified discrimination is forbidden. The ECtHR has interpreted the concept of 'status' broadly. The Courts have consistently held that a "status" includes having a disability (see *Çam v Turkey* (Application no. 51500/08), 23 February 2016 at para 55: *"The Court reiterates that it has already held that the scope of Article 14 includes discrimination based on disability"*).

22. Discrimination under Article 14 does not only relate to a failure to treat everyone in the same way. The ECtHR has also made clear that there will be occasions where the State is obliged to treat different groups differently because of *"factual inequalities"* between them. In *DH v Czech Republic* (2008) 47 E.H.R.R. 3 at para 175 the Grand Chamber of the ECtHR held:

> *"Art.14 does not prohibit a Member State from treating groups differently in order to correct "factual inequalities" between them; indeed in certain circumstances a failure to attempt to correct inequality through different treatment may in itself give rise to a breach of the Article. The Court has also accepted that a general policy or measure that has disproportionately prejudicial effects on a particular group may be considered discriminatory notwithstanding that it is not specifically aimed at that group, and that discrimination potentially contrary to the Convention may result from a de facto situation."*

23. Discrimination by way of failure to attempt to correct inequality is often referred to as *"Thlimmenos"* discrimination, after the case *Thlimmenos v Greece* (2001) 31 E.H.R.R. 15. In *Thlimmenos*, the applicant was a Jehovah's witness who was prohibited from being appointed as an accountant because of a criminal conviction. His conviction was for refusing to enlist in the army for religious reasons. Greece's laws did not distinguish between those who had a criminal conviction on the basis of their religious beliefs, and those who had convictions on other grounds. As a result of this failure to treat these situations differently the ECtHR held that there had been a violation of Article 14 read with Article 9 (the right to religious freedom).

24. Where there is a prima facie case of discrimination, the burden of proof then shifts to the State to justify its actions. It is necessary to ask whether there is an *"objective and reasonable justification"* for a difference in treatment, judged by whether the measure pursues a *"legitimate aim" and there is a "reasonable relationship of proportionality" between the aim and the means employed to realise it:* (see *Ramussen v Denmark* (1984) 7 EHRR 371 at para 38; *X v Austria* (2013) 57 EHRR 14 at para 98). In relation to the HRA, Lord Reed for the UK Supreme Court in *Bank Mellat v HM Treasury (No 2)* [2014] AC 700 framed this exercise by reference to four questions, at para 74:

> *"(1) whether the objective of the measure is sufficiently important to justify the limitation of a protected right,*
> *(2) whether the measure is rationally connected to the objective,*
> *(3) whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective, and*
> *(4) whether, balancing the severity of the measure's effects on the rights of the persons to whom it applies against the importance of the objective, to the extent that the measure will contribute to its achievement, the former outweighs the latter."*

25. In performing this exercise, the Courts afford the State a form of leeway which is conceptualised in slightly different ways. The ECtHR affords a "margin of appreciation" (see for example *Glor v Switzerland* (Application no. 13444/04), 30 April 2009, at para 74). In domestic law, the Courts afford what is usually called "latitude" to Parliament in assessing whether its actions are justified (see for example Lord Reed in R *(SC) v Secretary of State for Work and Pensions* [2022] AC 223 ("***SC***") at paras 97 to 117).

26. In cases of disability discrimination, the latitude afforded or the margin of appreciation allowed is comparatively limited. Disability has been categorised as a *"suspect ground"* which requires *"very weighty reasons"* to justify a difference in treatment. As the ECtHR observed in *Kiss v Hungary* (2013) 56 E.H.R.R. 38 at para 42 where the discrimination relates to a "*particularly vulnerable group in society … such as the mentally disabled, then the state's margin of appreciation is substantially narrower and it must have very weighty reasons"* for that treatment.

27. Further, the latitude or margin to be afforded to Parliament is narrowed where Parliament has not specifically considered the matter in question. Parliament's consideration of a particular issue may be a relevant factor in assessing compatibility. In *SC*, Lord Reed said at para 182:

"It is of course true that the relevant question, when considering the compatibility of legislation with Convention rights, is not whether Parliament considered that issue before making the legislation in question, but whether the legislation actually results in a violation of Convention rights. In order to decide that question, however, the courts usually need to decide whether the legislation strikes a reasonable balance between competing interests, or, where the legislation is challenged as discriminatory, whether the difference in treatment has a reasonable justification. If it can be inferred that Parliament formed a judgment that the legislation was appropriate notwithstanding its potential impact upon interests protected by Convention rights, then that may be a relevant factor in the court's assessment, because of the respect which the court will accord to the view of the legislature. If, on the other hand, there is no indication that the issue was considered by Parliament, then that factor will be absent. That absence will not count against upholding the compatibility of the measure: the courts will simply have to consider the issue without that factor being present, but nevertheless paying appropriate respect to the will of Parliament as expressed in the legislation."

E. APPLICATION TO THE BILL

28. In simple terms the Bill provides for a person to be certified as eligible for assisted suicide[10] through the following of steps set out in Clauses 7 to 16. Expressed shortly, those steps principally include: a preliminary discussion (Clauses 5 and 6); a first witnessed declaration by the person wishing to die (Clauses 7 and 8); doctors' assessments (Clauses 9-13); and consideration by a multidisciplinary panel (Clauses 14-16). There must then be a second witnessed declaration by the person wishing to die (Clause 17), after which, under Clause 23, the coordinating doctor may provide the person with an approved substance with which the person may end their own life.

29. The core concepts that underpin the Bill, particularly at the key stages summarised above, have remained the same throughout its passage:

    a. **Terminal illness.** That the person must have an illness from which they can be reasonably expected to die within six months (Clause 2).

[10] Referred to in the Bill as "assisted dying", notwithstanding that it amends the Suicide Act 1961: see Clause 29(3).

b. **Clear, settled and informed wish to end their own life.** The person must express a clear, settled and informed wish to end their own life, and have made that decision voluntarily and not been coerced or pressured by any other person into making it (as ascertained at the various key stages).

c. **Capacity.** Capacity is to be assessed in accordance with the provisions of the Mental Capacity Act 2005 (Clause 3) (a, b, and c together: "the **Core Concepts**").

30. While the Core Concepts have stayed the same, the <u>safeguards</u> by which these concepts are policed and monitored has changed. Before the Bill proceeded to the Committee stage, it contained materially different safeguarding provisions. The most notable changes are these:

    a. **The oversight of the approval process**. The previous version of the Bill required that *"Court approval"* from a High Court judge be obtained under Clause 12, whereas the current version of the Bill requires referral to a *"multidisciplinary panel"* by a Voluntary Assisted Dying Commissioner (provided for by Clause 4) to assess eligibility (see Clauses 14 and 15). The multidisciplinary panel is to be made up of a senior lawyer, a psychiatrist and a social worker (as defined under Schedule 2, paragraph 2). This does not change the nature of the Core Concepts to be considered by the decision-maker.

    b. **Additional recording provisions.** There are new provisions requiring that preliminary discussions that a doctor may have with a patient about assisted dying be recorded (set out under Clause 6). Again, this does not change the Core Concepts themselves.

    c. **Independent advocate.** There is new provision for an *"independent advocate"* (Clause 20). The role of the independent advocate is said to *"provide support and advocacy to a [person with a learning disability, autism or mental disorder under s. 1 of the Mental Health Act 1983] <u>who is seeking to understand options</u> around end of life care, including the possibility of requesting assistance to end their own life, to enable them to effectively understand and engage with all the provisions of this Act"* (underlining added). The independent advocate does not have a role, therefore, where the person is <u>not</u> seeking to understand such options, and simply wishes to proceed to be assisted to die.

d. **Monitoring of the Bill's impact upon disabled people.** Clause 44 requires a "Disability Advisor Board" to be appointed to monitor the effect of the Bill on disabled people. This is of course premised on the other provisions of the Bill becoming law. It does not alter the Core Concepts underpinning those provisions.

31. These additional or alternative safeguards reflect the focus during the Committee stage on two issues in particular:

    a. whether the Bill had adequate provision for accurately assessing capacity; and

    b. whether there was sufficient provision for detecting and stopping coercion.

32. There is no doubt that considerable attention was given to those issues[11]. We nevertheless consider that the Bill contains a major omission in relation to the position of the very most vulnerable persons included within the eligibility for assisted suicide for which it provides. As set out further below, the issue is not concerned with capacity or coercion, but the failure to ensure that people who have certain disabilities are adequately protected.

33. We turn to apply Article 14 in relation to the Bill.

(i) <u>"Significantly different situation"</u>

34. There is clear and cogent evidence that particular disabilities are more likely to manifest in the sufferer expressing a wish to die, because they are more likely, by virtue of the disability, to experience suicidal ideation. While the precise scope of those disabilities is a factual matter lying beyond the scope of this Advice, we observe that there is well-documented medical evidence that, for example, those who have been diagnosed with the following conditions have greater rates of suicide and attempted suicide than the general population:

[11] At the Committee Stage alone, approximately 1500 pages were spent hearing evidence and debating the amendments.

a. **Bipolar disorder**, in respect of which the latest research suggests 15–20% of people with bipolar disorder die by suicide and 30–60% will make at least one attempt to end their own life;[12]

b. **Depression**;[13] and

c. **Autism**, as to which the latest research suggests that 35% of autistic adults had planned or attempted suicide in their lifetime with 72% reporting suicidal ideation.[14]

35. The Bill is nevertheless drafted so as to treat those suffering from such disabilities in the same way as those not suffering from such disabilities, in relation to the Core Concepts. Accordingly:

a. **Clause 3** defines capacity by reference to the Mental Capacity Act 2005 ("**the MCA**"). Once mental capacity for the purpose of the MCA has been found, the regime under the Bill assumes that the individual is entitled to make their own decisions. Persons suffering from disabilities such as those above will have capacity (unless there is some separate basis for them to lack it).

b. **Clause 2(3)** confirms that persons with a disability[15] or a mental disorder[16] are included within the scope of the terminally ill persons who may be eligible for assisted suicide; albeit that persons may not be treated as terminally ill *only* because they have such. Accordingly, for instance, a person who has had bipolar disorder, or clinical depression, or autism, throughout their life is, all else being equal, treated in the same way as to eligibility for assisted suicide as a person who has never suffered from any such disability or disorder.

[12] See for example, KR Jamison, *Suicide and bipolar disorder*, J Clin Psychiatry 2000:61 Suppl 9:47-51 and the latest research from T Gergel, F Adiukwu and M McInnis, *Suicide and bipolar disorder: opportunities to change the agenda,* The Lancet Psychiatry, Volume 11, Issue 10, p. 781, October 2024.
[13] B Harmer, S Lee, A Rizvi and A Saadabadi, *Suicidal Ideation*, StatPearls, April 2024.
[14] D Hedley and M Uljarević, *Systematic Review of Suicide in Autism Spectrum Disorder: Current Trends and Implications,* Current Developmental Disorder Reports, Volume 5, p. 65 (2018)
[15] Within the meaning of section 6 of the Equality Act 2010.
[16] Within the meaning of the Mental Health Act 1983.

36. Against that background we have no hesitation in concluding that persons whose disabilities manifest as above are in a significantly different situation for *Thlimmenos* purposes than those who have no such disability. That cohort of disabled persons, who undoubtedly possess a "status" for Article 14 purposes, are *particularly* vulnerable under an assisted suicide regime eligibility for which depends *inter alia* on expressing a wish to die. In order to avoid the risk arising from that comparatively greater vulnerability, they are in need of a safeguard requiring it to be determined (by a person able - and thus appropriately qualified - to do so) whether they are expressing a wish to die *in consequence of their disability* or otherwise. Absent such a safeguard, the State cannot know if it is treating them as eligible for assisted suicide because they have a disability manifesting in the expression of suicidal ideation.

37. We note in that respect that, in its submissions at the time of the Second Reading of the Bill, the House of Commons' attention was drawn to a study conducted in the Netherlands which considered whether *"any particular difficulties arise when the EAS [euthanasia and assisted suicide] due care criteria are applied to patients with an intellectual disability and/or autism spectrum disorder"*. In this study the authors searched 416 case summaries on the RTE (the Dutch authority monitoring euthanasia practice) between 2012–2016, looking for intellectual disability and autism spectrum disorder. Professor Tuffrey-Wijne, alongside co-authors (including Baroness Finlay and Baroness Hollins) concluded:

> *"Autonomy and decisional capacity are highly complex for patients with intellectual disabilities and difficult to assess; capacity tests in these cases did not appear sufficiently stringent. Assessment of suffering is particularly difficult for patients who have experienced life-long disability. The sometimes brief time frames and limited number of physician-patient meetings may not be sufficient to make a decision as serious as EAS. The Dutch EAS due care criteria are not easily applied to people with intellectual disabilities and/or autism spectrum disorder, and do not appear to act as adequate safeguards"*.[17] (underlining added)

38. We have therefore asked ourselves whether, on a close analysis of the Bill, it provides for a safeguard of the sort we have identified above. In order to be treated as eligible for assisted suicide, must it first be assessed by a suitably qualified person whether a person expressing

[17] I Tuffrey-Wijne, L Curfs, I Finlay, S Hollins *Euthanasia and assisted suicide for people with an intellectual disability and/or autism spectrum disorder: an examination of nine relevant euthanasia cases in the Netherlands (2012–2016).* BMC Med Ethics. (2018)

a clear and settled wish to die is, in doing so, manifesting their disability? The answer, in our view, is no. In fact, there is no requirement for such an assessment by <u>any</u> person, far less one qualified to make it.

39. As set out above, a number of amendments were inserted into the version of the Bill published after the Committee Stage on 26 March 2025. However, none of these amounted to a safeguard of the nature above. We would highlight four matters.

40. First, the independent advocate's role is targeted at understanding. It is to assist particular categories of person to <u>understand</u> and (so be able to) engage with the Bill. It does not require them to perform an assessment of the individual or to help them understand where their wish to die comes from. However, a person suffering from the sort of disability at issue may have a crystal clear understanding of the legislation and what is needed to engage with it. The existence of an independent advocate for any who do not does not therefore address the problem.

41. Secondly, the provision for post-enactment monitoring in Clause 44 is inherently incapable of serving as the required safeguard for those exposed to the risk at issue. It is no more than monitoring, with no guarantee, or even indication, that a safeguard addressing the problem will ever eventuate. This Clause has been inserted in positive recognition of the fact that the Bill has the potential to have detrimental impacts upon certain disabled people, but without itself providing for its rectification. The time for ensuring that the Bill protects the most vulnerable is during its passage through Parliament. In our view, it is inadequate, on analysis, to adopt a *"wait and see"* approach, by which the State may come to learn in due course whether rights of its citizens' have been violated. By that time the Bill will be law, and the horse will have bolted.

42. Thirdly, in our view it would be no answer that clause 36(1)(a)(ii) provides for a Code of Practice to be issued by the Secretary of State in connection with the assessment of whether a person has a clear and settled intention to end their own life, including *"recognising and taking account of the effects of depression or other mental disorders (within the meaning of the Mental Health Act 1983) that may impair a person's decision-making"*. The issue we have identified is not about *capacity*, which is what this aspect of the Code of Practice would relate to (see the word "*impair*"). The issue concerns instead the absence for those whose disabilities manifest in the expression of suicidal ideation of an assessment of the same. We note in that respect that, where the prescriptive criteria in Clause 15(2) are met, Clause 15(7) of the Bill <u>requires</u>

the reviewing panel to certify the person as eligible. The panel has no discretion where that is so; it is powerless to avoid certification in the cases with which we are concerned. The Code of Practice cannot operate so as to oust the obligation to certify. In any event, the only obligation in respect of the Code is that those who assess whether the person has a clear and settled intention "have regard to"[18] it. In our view, that is wholly inadequate.

43. Fourthly, the substitution for review by a High Court judge by a *"qualified panel"* under Clause 15, which must include a psychiatrist, does not in our view change matters. The purpose of a review panel is to ensure that the legal process has been followed and the Core Concepts are satisfied. It remains the case that there is no mechanism in the Bill through which the panel would be required to make the assessment which we consider is required in the case of the relevant disabled groups.

44. In our view, for the reasons above, those individuals with disabilities manifesting in suicidal ideation are in a significantly different situation from those who have no such disability.

45. That the legislation would have particularly prejudicial impact on the disabled cohort at issue is *a fortiori* given the evidence available in respect of other jurisdictions who have legalised assisted suicide. In short, the number of individuals who express the wish to die is ever increasing:

    a. In **Canada** one in twenty deaths is now as a result of assisted suicide.[19]

    b. Similarly, in the **Netherlands** 5.4% of all registered deaths were with assisted suicide. The uptake increases by 8% every year.[20]

46. We have no basis to suppose that a similar trend will not broadly be seen in the UK should the Bill in its current form be enacted. If it is, the volume of cases in which the risk we have identified will arise will increase, correspondingly, over time. The prejudicial impact on the particularly vulnerable cohort will, over time, become greater.

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[18] See Clause 36(7)
[19] See O. Dyer, *Assisted dying now accounts for one in 20 deaths in Canada, but rate of growth slows,* British Medical Journal, 2024, 387.
[20] *Ibid.*

(ii) Justification

47. We have explained that it is possible, in principle, for a State to justify a failure to treat differently situated groups differently. Could the State justify failing to make different provision for the more vulnerable cohort of disabled people here? Here, the State has not sought to justify the discrimination at all, because it has failed to engage with the discrimination which we have explained. In any event, we do not see what justification could sensibly be advanced. We do not consider that it could be sufficient to assert that the State does not have the resources to incorporate the further safeguard required. To do so would be to accept that because of resourcing constraints some of the most vulnerable in society will be placed at greater risk of ending their lives through a manifestation of their disability.

48. In our view, the latitude or margin of appreciation that is afforded to Parliament will not enable the State to successfully defend the Bill if it is passed into law. As set out above, very weighty reasons will be required to justify discrimination against the vulnerable groups of disabled individuals at issue. Since there has been no decided case in Strasbourg on the issue of whether the provision of assisted suicide may be discriminatory,[21] the matter falls to be addressed on first principles, as we have done above.

F. CONCLUSION

49. We have explained why we consider that the Bill unjustifiably discriminates against those persons whose disabilities manifest in the expression of suicidal ideation. In order to avoid an Article 14 violation, it would be necessary to include within its safeguards an assessment by a suitably qualified person of whether a person's expression of a clear and settled wish to die is in manifestation of a disability.

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RUTH KENNEDY

28 April 2025

[21] As highlighted by Mr Alex Ruck Keene in the Committee State on 28 January 2025, p. 94. We note that a leading text for human rights practitioners has noted more generally the relative lack of cases concerning discrimination on the basis of disability before the ECtHR: *"The dearth of cases may be that the problems facing those with disabilities concern more social and economic issues than civil and political ones, and would often involve the imposition of a positive obligation on authorities to act, rather than the negative obligation to refrain from acting. Or it may be that the voice of those with disabilities is still struggling to be heard"*: Reid and others, A Practitioner's Guide to the European Convention on Human Rights, 7th Ed. 2023 (Sweet & Maxwell) 46-003.