Assisted Suicide

A discussion of *Nicklinson* [2014] UKSC 38
and
***Hunter and New England Area Health Service v A* [2009] NSWSC 761**

CONTENTS

1. INTRODUCTION

The legality of assisted suicide is subject to extensive debate around the world. Many jurisdictions, including Australia and the United Kingdom, prohibit it even though a significant proportion of society calls for a solution to the unwarranted suffering of others.

In Australia, 75% of the population is said to support a limited form of limited suicide.[1] This is reflected in the practice of many individuals travelling to jurisdictions which allow assisted suicide in order to realise their wish to die. This phenomenon is now commonly referred to as "death tourism".[2]

In the recent case of *Nicklinson* [2014] UKSC 38 ("*Nicklinson*") the United Kingdom Supreme Court ("UKSC") considered assisted suicide in the light of the Convention ("the Convention"), and found that the legality of assisted suicide was an issue that should properly remain in the domain of the Parliament.[3]

A similar case has not yet arisen before the Australian courts, however, if a case was to arise, Australian courts are likely to refer to and follow *Nicklinson.* The Convention provides a well-structured and effective framework regarding human rights and the High Court of Australia ("HCA") has previously referred to decisions of the European Court of Human Rights ("ECHR") in the process of determining human rights cases.

[1] Hills, B. "Poll Backs Euthanasia" *Herald Sun* (25 September 2010).
[2] Steel, S. and Worswick, D. "Destination death: a review of Australian legal regulation around international travel to end life", *Journal of Law and Medicine*, 21 (2) December 2013 pp. 415-428
[3] *Nicklinson & Anor R (on the application of)* (Rev 1) [2014] UKSC 38 per Lord Neuberger and Lord Mance.

2. THE AUSTRALIAN CASE OF *A*

The common law in Australia in respect of assisted suicide is best stated in *Hunter and New England Area Health Service v A* [2009] NSWSC 761 ("*A*"). This case concerned the capacity of individuals to make Advance Care Directives, but did not specifically consider assisted suicide.

Mr A was a Jehovah's Witness and had been admitted to emergency in a critical state. His condition deteriorated and he was kept alive by mechanical ventilation and kidney dialysis. The hospital became aware of an Advance Care Directive, prepared by Mr A one year prior to this incident. Mr A's Advance Care Directive indicated that Mr A would refuse dialysis, which in the current circumstances would undoubtedly hasten his death. The hospital sought a declaration from the Court as to the validity of Mr A's Advance Care Directive.

In *A*, McDougal J held that any adult who has 'capacity' can refuse medical treatment. Further, that there is a general rebuttable presumption that an adult has 'capacity'. McDougal J stated that *"it is necessary to take into account both the importance of the decision and the ability of the individual to receive, retain and process information given to him or her that bears on the decision"* (per McDougal J at [40]).

Similar to the UK position, if an individual has capacity, it does not matter that the person's decision is based on religious, social or moral grounds rather than upon (for example) some balancing of risk and benefit. Indeed, it does not matter if the decision seems to be unsupported by any discernible reason, as long as it was made by a capable adult voluntarily, and in the absence of any vitiating factors. Vitiating factors include, for example, the individual's decision being overborne or the result of undue influence or misrepresentations.

McDougal J made a declaration that the Advance Care Directive was valid.

3. THE RECENT CASE OF *NICKLINSON*

Nicklinson
Mr Nicklinson suffered a stroke at age 51 and became paralysed. He could only move his eyes and head and communicated by blinking to spell out words, letter for letter, using an eye blink computer. He described his life as "dull, miserable, demeaning, undignified and intolerable" and wished to end it. Due to his physical state, the only way to end his life (other than self-starvation) was through assistance of a third party. He knew it was illegal for a third party to assist in his suicide, so he applied for a declaration that it be lawful for a doctor to assist him in committing suicide, or alternatively that the law be declared incompatible with section 8 of the ECHR (the right to life). The Court refused both forms of relief.

Following the decision, Mr Nicklinson embarked on the painful course of self-starvation and died of pneumonia on 22 August 2012.

Lamb
After a catastrophic car crash in 1990, Mr Lamb became completely immobile, save that he could move his right hand. He requires carers 24 hours a day, suffers pain every day and is permanently on morphine. His condition is irreversible and he wishes for a doctor to end his life, which he regards as consisting of a mixture of monotony, indignity and pain. He applied for the same relief as Mr Nicklinson and it was similarly refused by the Court of Appeal.

Martin
Martin suffered a brainstem stroke at age 43. He could only communicate through slow hand movements and via an eye blink computer. He wishes to end his life, which he regards as undignified, distressing and intolerable.

Apart from self-starvation, the only way Martin could achieve ending his life was to travel to Zurich in Switzerland to make use of the Dignitas service, which, lawfully under Swiss law, enables people who wish to die to do so. He needed assistance to complete this process. His wife did not want to be involved, and she also did not want any other family member to be involved. Accordingly, he needed assistance from one of his carers or from an organisation such as Friends at the End.

In Martin's case ([2013] EWCA Civ 961), Martin commenced proceedings seeking an order that the DPP clarify and modify the "Policy for Prosecutors in respect of Cases of Encouraging or Assisting Suicide" (the "2010 policy") to enable responsible people, including but not limited careers who are willing to do so, to know that they could assist Martin in committing suicide through Dignitas, without the risk of being prosecuted.

Martin succeeded (by a 2-1 majority) in his argument that the 2010 policy required further clarification.

Questions of law -

The first appeal was brought by Nicklinson and Lamb, and raised the following question:

1. Does the present state of the law of England and Wales relating to assisting suicide infringe the European Convention on Human Rights ("ECHR")?

The second appeal was brought by the DPP and challenged the Court of Appeals decision in Martin's case ([2013] EWCA Civ 961).

The third appeal was Martin's cross-appeal, which submitted that the Court of Appeal did not go far enough.

Appeals 2 and 3 raise the following question:

2. Is the code published by the Director of Public Prosecutions (the "DPP") relating to prosecutions of those who are alleged to have assisted a suicide lawful?

Throughout the proceedings, the Court was sympathetic towards the patients' circumstances, yet found itself entangled in moral issues put forward by limitations and the separation of powers.

4. THE COMMON LAW

The Court reflected on the current state of the common law and found that it was clear and unambiguous: assisted suicide is an offence. Accordingly, the Court was not prepared to depart from the common law principles on this point. The considerations of the Court were unanimous in this regard, and are set out below.

Murder
Murder represents the most serious form of homicide and it is a common law offence in England and Wales (*Homicide Act 1957*).

Mercy killing
Mercy killing involves the perpetrator intentionally killing another person, for motives which appear, at least to the perpetrator, to be well-intentioned, namely for the benefit of that person, and very often at that person's request. Nonetheless, mercy killing involves the perpetrator intentionally killing another person, and therefore, even where that person wished to die, or the killing was purely out of compassion or love, mercy killing will amount to murder or (if one or more of the mitigating circumstances are present) manslaughter [*R v Inglis* [2011] 1 WLR 1110 per Lord Judge CJ at [37].

Refusing treatment
A person who is legally and mentally competent is entitled to refuse food and water, and to reject any invasive manipulation of his body or other form of treatment, including artificial feeding, even though without it he will die. If he refuses, medical practitioners must comply with his wishes: *Sidaway v. Board of Governors of the Bethlem Royal Hospital and the Maudsley Hospital* [1985] A.C. 871, 904-905; *In re F (Mental Patient: Sterilisation)* [1990] 2 A.C. 1; *Airedale NHS Trust v Bland* [1993] AC 789. A patient may express his wishes on these points by an advance care directive (or "living will"), as discussed below.

In *Re B (Treatment)* [2002] 1 FLR 1090, it was accepted that the HCA should have the power to accede to a request by an individual that his/her life support machine be turned off.

Suicide
The state is not entitled to intervene to prevent a person of full capacity who has arrived at a settled decision to take his own life from doing so. However, such a person does not have a right to call on a third party to help him to end his life (per Lord Sumption at [255]).

Medical advice
A doctor may not advise a patient how to kill himself. But a doctor may give objective advice about the clinical options (such as sedation and other palliative care) which would be available if a patient were to reach a settled decision to kill himself. The doctor is in no danger of incurring criminal liability merely because he agrees in advance to palliate the pain and discomfort involved, should the need for it arise. This kind of advice is no more or less than his duty. The law does not countenance assisted suicide, but it does not require medical practitioners to keep a patient in ignorance of the truth lest the truth should encourage him to kill himself (per Lord Sumption at [225])

Positive acts v omissions
Lord Browne-Wilkinson held in *Airedale NHS Trust v Bland* [1993] AC 789, 885 that *"the doing of a positive act with the intention of ending life is and remains murder"*. However, a doctor

commits no offence when treating a patient in a way with hastens death if the treatment is to relieve pain and suffering. Medical treatment intended to palliate pain and discomfort is not unlawful only because it has the incidental consequence, however foreseeable, of shortening the patient's life [*Airedale NHS Trust v Bland* [1993] AC 789, 867D (Lord Goff), 892 (Lord Mustill), *R* (*Pretty) v Director of Public Prosecutions* [2002] 1 AC 800, 831H-832A (Lord Steyn)].

Further, an omission by a doctor which leads to a patient's death is permissible. In *Bland,* the House of Lords decided that no offence was involved in refusing or withdrawing medical treatment or assistance, ultimately because this involved an omission rather than a positive act. While Lord Goff, Lord Browne-Wilkinson and Lord Mustill were concerned about the artificiality of such a sharp legal distinction between acts and omissions in this context, they also saw the need for a line to be drawn, and the need for the law in this sensitive area to be clear. Accordingly, the law recognises a fundamental difference in a positive action and an omission causing death.

Their Honours found that the common law was clear that assisted suicide is unlawful.

5. THE SEPARATION OF POWERS

The Court addressed whether it was nonetheless appropriate to declare the law on assisted suicide incompatible with the Convention.

The Court considered whether or not judicial intervention was appropriate and the possibility of the Court usurping the doctrine of Parliamentary supremacy.

Lord Neuberger
Lord Neuberger referred to *R (Ullah) v Special Adjudicator* [2004] 2 AC 323 and found that, prima facie, it was inappropriate for the Court to even consider the incompatibility of the law with Article 8 of the Convention. However, his Honour distinguished this case from *R (Ullah)* and after considering the obiter of Lord Hoffmann in *Re G (Adoption: Unmarried Couple)* [2009] 1 AC 173 at [36] (who held that the Court was responsible for interpreting [the Convention] and applying the separation of powers in an appropriate way), found that it was constitutionally open to the Court to make an incompatibly declaration.

Lord Neuberger highlighted the controversial, difficult and sensitive moral and socio-politico nature of the issue and considered it one that required the assessment of many types of risk and the imposition of potentially complex regulations. His Honour considered that assisted suicide is not a matter on which judges are particularly well informed or experienced and on that basis, concluded that any question of decriminalisation should be left to Parliament (at [84]). In that regard, his Honour stated at [104] that "*parliamentary sovereignty and democratic accountability require that the legislature has the final say".*

Lord Mance

Lord Mance agreed with Lord Neuberger and cautioned against the Courts' interference in such difficult ethical and social issues. Further, that these controversial and complex issues arising out of moral and social dilemmas should properly be decided by citizens, through their elected representatives. Accordingly, Lord Mance considered that the issue should be resolved by Parliament. His Honour did note, however, that there was no general legal rule that Courts will not intervene.

In conclusion, Lord Neuberger, Lord Mance and Lord Wilson found that it is constitutionally open to the Court to consider the legality of assisted suicide, but that Parliament is the appropriate forum.

Lord Hughes, Lord Sumption, Lord Reed and Lord Clarke found it unconstitutional for the Court to make an incompatibility declaration. They also found that the legality of assisted suicide should be left to Parliament.

In dissent

Lord Kerr and Lady Hale found that it was constitutional for the Court to make an incompatibility declaration but opined that they would have made this declaration if it was not up to Parliament to give effect to their declaration. Lord Kerr noted at [347] that the view that Parliament might have the means to consider the issue more fully or on a broader canvas does not impel the conclusion that the courts should shy away from addressing the question whether the provision is incompatible with a Convention right. On the contrary, such is the Court's duty when presented with that claim.

Conclusion

The Court had great sympathy for the applicants' circumstances, but found that the law simply did not permit assisted suicide. Further, the Court noted that the DPP always has the discretion to prosecute, and therefore the Court cannot set out or amend guidelines as to whether or not to prosecute: that would usurp the role of the DPP. It would be institutionally and constitutionally open to the Court to declare the law incompatible, but a declaration was not considered appropriate at this point. Ultimately, it was left up to Parliament to amend the current state of the law.

6. RELEVANCE OF *NICKLINSON* IN AUSTRALIA

Both *Nicklinson* and *A* are clear that the common law does not currently provide for the "right to die". However, the courts are hesitant to address the question whether a right to die could potentially be implied and do not determine this question unambiguously. The cases do recognise the right of a competent adult to refuse medical treatment. The fundamental question in this regard is whether the patient has 'capacity'.

In the UK, an individual may express his wishes on these points by an Advance Care Directive ("ACD") (or "living will") and any contravention of the ACD will be a trespass to the person.

Similarly, in Australia, a person can refuse to receive medical treatment or medical treatment of specified kinds by an ACD. The directives are usually written and signed by the person himself, but may also be oral by making their wishes known through discussion with their family or health care team. The wishes should be clearly documented on the person's medical history, even if a specific 'form' is not used. [4]

Providing the person is a capable adult, and the directive is clear, unambiguous and extends to the situation at hand, the directive must be respected. Any administration of medical treatment to the person of a kind prohibited by the directive will be a batter (although, there may be a qualification if the treatment is necessary to save the life of a viable unborn child).

If there is genuine and reasonable doubt as to the validity of an ACD, or as to whether it applies in the situation at hand, a hospital or medical practitioner should apply promptly to the Court for its assistance. The hospital or medical practitioner is then justified in acting in accordance with the Court's determination as to the validity and operation of the ACD. Further, when the hospital or medical practitioner applies to the Court for relief and is awaiting a decision, the hospital or practitioner is justified, by the emergency principle, in administering the treatment in question until the Court gives its decision.

In *Nicklinson,* Lord Wilson at [205] referred to factors that the Court might wish to investigate before deciding whether or not a person's wish to commit suicide was voluntary, clear, settled and informed.

The guidelines were as follows:

[4] Ministry of Health, NSW Guideline "Advance Care Directives (NSW) – Using", 22 March 2005.

(a) the claimant's capacity to reach a voluntary, clear, settled and informed decision to commit suicide and the existence of any factor which, notwithstanding the requisite capacity, might disable him from reaching such a decision;
(b) the nature of his illness, physical incapacity or other physical condition ("the condition");
(c) the aetiology of the condition;
(d) its history and the nature of the treatments administered for it;
(e) the nature and extent of the care and support with which the condition requires that he be provided;
(f) the nature and extent of the pain, of the suffering both physical and psychological and of the disability, which the condition causes to him and the extent to which they can be alleviated;
(g) his ability to continue to tolerate them and the reasonableness or otherwise of expecting him to continue to do so;
(h) the prognosis for any change in the condition;
(i) his expectation of life;
(j) his reasons for wishing to commit suicide;
(k) the length of time for which he has wished to do so and the consistency of his wish to do so;
(l) the nature and extent of his discussions with others, and of the professional advice given to him, about his proposed suicide and all other options for his future;
(m) the attitude, express or implied, to his proposed suicide on the part of anyone likely to benefit, whether financially or otherwise, from his death;
(n) the proposed mechanism of suicide and his proposed role in achieving it;
(o) the nature of the assistance proposed to be given to him in achieving it;
(p) the identity of the person who proposes to give the assistance and the relationship of such person to him;
(q) the motive of such person in proposing to give the assistance; and
(r) any financial recompense or other benefit likely to be received by such person in return for, or in consequence of, the proposed assistance.

The factors outlined by Lord Wilson above may be relevant to an Australian Court's decision regarding the validity of an ACD and/or the individuals 'competence' or 'capacity' to make an ACD. Further, if assisted suicide were ever legalised in Australia, these factors might be considered useful by Parliament in deciding whether an individual is provided with the "right to die".

Australian courts are not bound by the Convention nor by case law from the UK. Regardless, the HCA often relies on UK case law when there is novel issue to be heard and Australian case law is <u>not</u> available. UK case law is not only relevant but highly persuasive, given our common legal history.

Human rights

Assisted suicide is an international human rights issue. Australia is a party to the UN Declaration of Human Rights and other human rights treaties and conventions. Australia does not have a Human Rights bill, yet human rights are embedded in our common law.

The ECHR has heard cases regarding the question of whether assisted suicide is part of, and enforceable under, article 8 of the Convention. It has been found that in principle it is, yet the member states can justify impairments if they are necessary and not disproportionate.

The enforcement of human rights in Australia is not as well-structured.[5] Accordingly, the Australian courts regularly refer to the Convention and cases of the ECHR. The Hon. Michael Kirby AC CMG, in his speech at the Australian National University conference on re-appraising the judicial role, called the Convention and the ECHR a "swift and astonishing" European achievement. He noted that "it is appropriate for us, in Australia, to acknowledge this legal and historical phenomenon. It is one far greater than anything we have ever achieved in our continent…" and acknowledged that Australian courts, notably the HCA, have utilised, and learned from, the jurisprudence of the ECHR."[6]

The HCA has relied on case law from the ECHR in the following cases: *Roach v Electoral Commissioner* (2007) 233 CLR 162 (the prisoner's voting rights case), *Dugan v Mirror Newspapers Ltd* (1978) 142 CLR 583 (re the right to a fair trial). The HCA has relied on the ECHR's jurisprudence extensively in its key cases relating to the right to freedom of speech, cases include: *Nationwide News Pty Ltd v Wills*, *Australian Capital Television Pty ltd v Commonwealth* and *Theophanous v The Herald & Weekly Times Ltd*, (i.e. the right to the freedom of speech).

Separation of powers in Australia

Australia has a similar doctrine of separation of powers as in the UK. Accordingly, it will be highly likely that the HCA, if faced with a similar set of circumstances as those in *Nicklinson*, would similarly find that proceedings to legalise assisted suicide would usurp the legislative power of Parliament. Further, that the matter remains a political issue which is best to be determined through the democratic system of Parliament.

Enforceability of Human Rights in Australia

An individual seeking assisted suicide in Australia will struggle to locate such a right in our common law and to ascertain what defines assisted suicide. Variations of the 'right to life' are contained in the International Covenant on Civil and Political Rights (ICCPR), the Second Optional Protocol to the ICCPR, the Convention on the Rights of the Child (CRC) and the Convention on the Rights of Persons with Disabilities (CRPD). However, even though Australia is bound by several international Conventions to respect the 'right to life', they are not as easily enforceable as they are under the European system.

[5] See e.g.: The Hon. Michael Kirby AC CMG, "Getting by Without a Charter: An Australian Perspective", Salford School of Law, Human Rights Conference on the 10th Anniversary of the *Human Rights Act* 1998 (UK), Manchester, England, June 2010

[6] The Hon. Michael Kirby AC CMG, "Australia and the European Court of Human Rights", The Australian University Centre for European Studies College of Arts and Social Sciences, Conference on Re-appraising the Judicial Role – European and Australian Comparative Perspectives, Canberra 14 February 2011, pp 1,5 & 21.

Should an individual attempt to rely on the 'right to life' and question the prohibition on assisted suicide, it is highly likely that the rationale of the UKSC in *Nicklinson* will be persuasive and an important consideration for the HCA.

7. CONCLUSION

Unfortunately, *Nicklinson* did not produce the legal breakthrough many hoped for and the law in the UK regarding assisted suicide remains unchanged. The case should, however, encourage Parliament to revise legislation and policies to provide those who seek assistance in suicide with more suitable means to realise their wish to die.

Australia's best remedy for those affected are Advance Care Directives. However, it goes without saying that ACDs will not always provide a suitable solution.

In the future, if a prospective litigant was to raise the issue in an Australian court, *Nicklinson* will be a key case for the court to consider. Hopefully, it will then become clear what the 'right to life' in Australia involves, and whether or not it entails the right to die. Until then, patients may/will have to continue to seek relief abroad.

8. RECENT EUTHANASIA DECISION

Although a separate issue from assisted suicide, euthanasia could obviously provide a solution for people in a similar medical condition to Mr Nicklinson. The issue of mental capacity will of course always apply to euthanasia as well.

Belgium was the second country to introduce euthanasia laws in 2002. Under the legislation, patients have the right to make a request for a medical practitioner to assist in their suicide. In other words, the patient has to find a medical practitioner who is willing to assist.

The Federal Euthanasia Commission monitors whether the procedures are carried out in accordance with the strict procedural regulations.
Furthermore, on 13 February 2014 the Belgian Parliament extended the existing right to request euthanasia by making it available to minors. Belgium is the first jurisdiction in the world not to have a minimum age to request euthanasia (parental approval is, however, required).

The assisting medical practitioner must ensure the patient's suffering is of a severe and permanent nature, that there are no other remedies available and liaise with another medical practitioner and discuss the severity of the patient's condition. The patient must have documented the request for euthanasia whilst being mentally capable to do so, similar to the requirement of mental capacity required for living wills and ACD's in England and Australia, as discussed in the case of *A.*

The recent case in this regard concerns a convicted murderer and rapist, Frank van den Bleeken, who served 30 years of a life sentence.[7] Van den Bleeken refused to apply for parole and admitted he remained a threat to society. Van den Bleeken suffered extreme psychological distress and asserted he received inadequate treatment and accordingly, he wished to exercise his right to request euthanasia in 2011 citing "unbearable psychological anguish". Existing treatment and rehabilitation programs within Belgian jails have been widely criticised and are said to be inadequate.

The European Court of Human Rights has previously criticised Belgium on numerous occasions for failing to adequately treat mentally ill prisoners.[8]

Belgium's Federal Euthanasia Commission refused to consent to Van den Bleeken's request and sought to consider every possible alternative treatment option. Van den Bleeken commenced legal proceedings seeking approval of his request for euthanasia.

The Court of Appeal in Brussels, in an interlocutory decision, approved Van den Bleeken's request for euthanasia on 16 September 2014. The decision is controversial, as the right to request euthanasia was initially meant for terminally ill people who suffer physically, as opposed to mentally, and who commonly have a short life expectancy.

Critics allege that judicial approval of requests for euthanasia by mentally ill convicted criminals will result in a rush! News bulletins (as at 16 September 2014) have already reported that at least 15 other prisoners have now sought advice [of a consultancy and advice organisation called the "Ultimate Life's End Matters Team"] as to their prospects of having their request for euthanasia approved.[9]

[7] Law Society of New South Wales, *Global Focus*, Law Society of NSW Journal, October 2014, p. 20.
[8] *L.B. v Belgium* ECHR 361 (2012), *Claes v Belgium* ECHR 010 (2013), *De Donder and De Clippel v Belgium* ECHR 272 (2011) and *Lankester v Belgium* ECHR no. 22283/10.
[9] E.g. Mens en Recht, *Nog 15 Geintineerden Willen Euthanasie* < http://www.mensenrecht.be/node/4386>, 16 September 2014 and De Standaard, *Vijftien Geintineerden Willen Euthanasie* <http://www.standaard.be/cnt/dmf20140915_01270167> 16 September 2014.