Written evidence submitted by Lord Etherton, KC, PC, Lord Brown of Eaton-under-Heywood PC and **Lord Pannick, KC (ADY0311)**

Introduction

This submission is from members of the House of Lords who have argued, heard and decided assisted dying cases at the highest courts in the land over the last 15 years.

We welcome the Health and Social Care Select Committee inquiry on assisted dying and assisted suicide. We do not attempt to answer all the questions in the Select Committee's call for evidence; instead, our comments reflect on legal developments on assisted dying and on the role of Parliament and Government in bringing some resolution to this longstanding societal debate.

Legal cases

The last 20 years have seen a series of individuals take cases to the courts arguing – albeit in different ways and with different emphases – that aspects of the blanket ban on assistance to end one's own life under section 2 of the Suicide Act 1961 should be changed.

During this time the courts' understanding of the engagement of human rights in decisions about the manner and timing of one's death has developed. It is now established that the right of an individual to decide how and when to end his or her life is an aspect of the right to respect for private life protected by Article 8 rights to private and family life. The House of Lords' decision on the Purdy case in 2009 required the publication of a prosecuting policy explaining the application of the law, so that individuals could make more informed decisions as to whether they would assist someone who asked for help to end their life.

However, despite these changes, the situation for terminally ill, mentally competent adults who would like the option to end their life safely and legally has changed very little in this time. The most recent attempts to take cases have been denied permission for full hearings.

In summary:

Pretty – Diane Pretty brought the first major case concerning the impact of the Suicide Act 1961 section 2(1) ban on the human rights of individuals who wished to seek assistance in bringing about their own death.[1] Mrs Pretty had motor neurone disease (MND), a progressive, terminal illness. She wished to control the time and manner of her dying but her physical disabilities prevented her from doing so without assistance. The House of Lords accepted that she faced *"the prospect of a … distressing death".* Mrs Pretty wanted her husband to assist her and sought an assurance from the Director of Public Prosecutions (DPP) that her husband would not be prosecuted if he assisted her to end her life. The House of Lords unanimously dismissed Mrs Pretty's claim, holding that the DPP had no power to undertake that a crime yet to be committed should be immune from prosecution, and also that the Suicide Act 1961 s2 was not incompatible with her Article 8(1) rights to respect for private and family life.

Purdy - In 2009 Debbie Purdy won a landmark legal victory in the House of Lords.[2] Ms Purdy had primary progressive multiple sclerosis (MS) and was considering travelling to Switzerland for help to die at such time as her MS reached a terminal phase. She wanted to understand the considerations that would be taken into account in making the decision whether or not to prosecute her husband Omar Puente if he helped her with the travel and arrangements. Whilst the Suicide Act 1961 s2 includes a blanket ban on assistance to help someone end their life regardless of the circumstances, Ms Purdy argued that it was unclear how the particular discretion of the Director of Public Prosecutions (DPP) mandated under the Suicide Act s2(4) would be applied.

The Law Lords found in Ms Purdy's favour that her article 8 right to respect for her private life was engaged in decisions about the end of her life. The court also ruled that the article 8.2 requirement that any interference with 8.1 rights be accessible and foreseeable (as part of the requirement to be in accordance with the law) was not met, and therefore ordered the DPP to publish a prosecuting policy outlining the kind of factors that would make prosecution for assisting a loved one to die more or less likely. As Lord Hope said in his judgment, the DPP should be required to: *"… promulgate an offence-specific policy identifying the facts and circumstances which he will take into account in deciding, in a case such as that which Ms Purdy's case exemplifies, whether or not to consent to a prosecution under section 2(1) of the 1961 Act."*

Nicklinson - In 2014 the Supreme Court gave its landmark decision on the Nicklinson case.[3] Two of the claimants in that case (Mr Tony Nicklinson and Mr Paul Lamb) suffered from irreversible physical

[1] R (Pretty) v Director of Public Prosecutions [2001] UKHL 61, [2002] 1 AC 800
[2] R (Purdy) v Director of Public Prosecutions [2009] UKHL 45, [2010] 1 AC 345.

disabilities. This meant that they were almost completely immobile, although they remained of sound mind. Amongst other relief, they sought a declaration of incompatibility with their Article 8(1) rights in respect of the Suicide Act s2(1).

Though divided on the issue of whether the Suicide Act's universal prohibition on assisted suicide is incompatible with the right to respect for private and family life, a majority of the Court indicated that they thought the court could (depending on the application before it) declare section 2 of the Suicide Act incompatible with Article 8 ECHR rights in the future if Parliament did not amend it. Lord Neuberger observed: *"…before making such a declaration [of incompatibility], we should accord Parliament the opportunity of considering whether to amend section 2 so as to enable Applicants, and, quite possibly others, to be assisted in ending their lives, subject of course to such regulations and other protective features as Parliament thinks appropriate, in the light of what may be said to be the provisional views of this Court, as set out in our judgments in these appeals."*

A third claimant, known as **AM or Martin**, wanted clarity on whether his paid care workers would be under risk of prosecution if they provided essential care to him on his journey to Switzerland if he chose to have assistance to die there. The DPP updated the prosecuting policy as a result, clarifying that the fact of being a healthcare professional or care worker and providing assistance weighing in favour of prosecution applies only where there is, in addition, a relationship of care between the suspect and the victim such that it will be necessary to consider whether the suspect may have exerted some influence on the victim.[4]

Conway – Noel Conway had MND and sought a judicial review challenging the blanket ban on assisted dying. Noel's case was heard and rejected by the High Court in 2017 and the Court of Appeal in 2018, though the Court of Appeal's judgment underlined the progress that had been made since Pretty, confirming that the right to make decisions about how and when to end your own life is protected by article 8, stating: *"It is now well established, and common ground before us, that the right of an individual to decide how and when to end his or her life is an aspect of the right to respect for private life protected by Article 8 of the Convention."*

---

[3] R (Nicklinson) v Ministry of Justice [2014] UKSC 38, [2015] AC 657

[4] R (on the application of AM) v The Director of Public Prosecutions [2014] UKSC38, Policy for Prosecutors in Respect of Cases of Encouraging or Assisting Suicide, Issued by the Director of Public Prosecutions February 2010, updated October 2014

Mr Conway and his legal team applied to the Supreme Court for permission to appeal the decision against his claim. The Supreme Court Justices denied permission but made clear the importance of the issues raised by the case for society, commenting *"No-one doubts that this issue is of transcendent public importance"*.[5] The decision again confirmed that *"the ban on assisted suicide is an interference with the right to respect for private life protected by article 8"* and explained that *"Under the United Kingdom's constitutional arrangements, only Parliament could change this law. But the Supreme Court could, if it thought right, make a declaration that the law was incompatible with the Convention rights, leaving it to Parliament to decide what, if anything, to do about it."*

T or Omid and **Newby** – A claimant known as **T or Omid** was diagnosed with the progressive neurological illness Multiple System Atrophy (MSA) in 2014, and subsequently sought to take a case challenging the law, whereby the courts would examine a large body of evidence and to cross-examine experts. Shortly after his death in October 2018, the High Court ruled against Omid's legal team in a preliminary matter to his challenge.

Phil Newby has MND. Like Omid before him, he asked the Courts to undertake a detailed examination of the evidence to determine whether the blanket ban on assisted dying is compatible with his human rights. Following a hearing at the High Court, a decision was handed down denying the case permission to proceed in November 2019. Mr Newby and his legal team sought to appeal the decision, but were unsuccessful, with the Court of Appeal denying permission in January 2020.

Paul Lamb - In July 2019 Paul Lamb (who had been a claimant in Nicklinson) started a new case, inviting the court to grant a declaration of incompatibility, on the grounds that the Suicide Act was incompatible with his rights under Article 14 (prohibition on discrimination) and Article 8. In December 2019, the High Court denied him permission to proceed to a full hearing, on the basis that rulings from previous case law held that assisted dying is a matter for Parliament and not the courts. A final appeal was then lodged to the Court of Appeal, and rejected in May 2020 on similar grounds.

[5] R (on the application of Conway) v Secretary of State for Justice (2018)

The roles of Parliament and of Government

As noted above, in Nicklinson the majority of the Supreme Court indicated that they thought the court **could** declare section 2 of the Suicide Act incompatible with Article 8 rights in the future if Parliament did not amend it, but: *"…before making such a declaration [of incompatibility], we should accord Parliament the opportunity of considering whether to amend section 2 … subject of course to such regulations and other protective features as Parliament thinks appropriate."*

Three years later the Court of Appeal in Conway concluded: *"There can be no doubt that Parliament is a far better body [than the courts] for determining the difficult policy issue in relation to assisted suicide in view of the conflicting, and highly contested, views within our society on the ethical and moral issues and the risks and potential consequences of a change in the law…"*

It is notable that four former judges that spoke in the debate in the House of Lords on Baroness Meacher's Assisted Dying Bill (Second Reading, October 2021)[6] spoke in favour of law change on assisted dying. Those that heard the Nicklinson and Conway cases emphasised in their speeches that Parliament should now take forward this issue:

Lord Mance: *"in my former judicial capacity in the Supreme Court in the case of Nicklinson ... I was one of the clear seven-to-two majority who said that this was not a matter for judges but for Parliament to decide…" "…my present view is therefore that Parliament should accept the present carefully limited and balanced Bill."*

Lord Neuberger of Abbotsbury: *"…I was one of the judges in the Supreme Court Nicklinson case. The more I considered the extensive facts and the arguments, the clearer it became to me as judge that it was inappropriate, at least at that stage, for the courts to seek to force Parliament to change the law on assisted suicide and the clearer it became to me as citizen that Parliament should change the law."*

Lord Etherton: *My Lords, I presided in the Court of Appeal on the case of Noel Conway. We …decided that …it was a matter for Parliament to decide the principles and the policy behind assisted dying. I*

[6] Lord Mance, Lord Etherton, Lord Neuberger of Abbotsbury, Lord Brown of Eaton-under-Heywood, Assisted Dying Bill [HL], 22 October 2021, https://hansard.parliament.uk/lords/2021-10-22/debates/11143CAF-BC66-4C60-B782-38B5D9F42810/AssistedDyingBill(HL)#main-content

now find myself in Parliament itself and feel I cannot, as it were, deviate any further and must nail my colours to the mast. I support the Bill for a number of reasons…"

But the fact is, that Parliament has largely not dealt with the issue of assisted dying. We note the oral evidence of former Attorney General Dominic Grieve to the Joint Committee on Human Rights (JCHR) which set out that whilst the Supreme Court was split in Nicklinson and that it encouraged Parliament to act on the issue, it did not make a declaration of incompatibility; and Lady Hale's observation that: *"We [the Supreme Court] did not have a choice about deciding, whereas Parliament does have a choice; Parliament has a "do nothing" option…"*.[7]

Writing recently in the New Statesman, David Gauke, former Secretary of State for Justice, commented on his attempt, whilst in Government, to launch a call for evidence on the impact of the current law (our emphasis): *"Leaving matters as they are is a choice, just as much as voting for change. For this reason, I wanted to provide an opportunity for people to come forward with evidence on how the law works. It was not to be, and no subsequent government has decided to issue a call for evidence."*[8]

The current Government and those preceding it have stated that assisted dying is a matter for Parliament rather than Government, and that it should be dealt with through a private member's bill. The reality is however, that it is virtually impossible for a private member's bill on a subjects as complex as this to get the time in Parliament that would be needed for them to become law. Indeed, two attempts to progress the assisted dying debate in the House of Lords in the last decade have attracted majority support in the Lords but fallen due to lack of time.

In the Commons the last private member's bill on assisted dying was defeated in a vote at second reading in 2015, and since then no MP has introduced a private member's bill on the subject.

As noted by Baroness Hale, Parliament has a 'do nothing' option, and David Gauke's more recent comments allude to the role of Government in what Parliament can practically achieve. If Parliament is to fully consider the moral, social and ethical considerations that make up the assisted dying debate, it is clear that in some way Government must allow it the proper time to do so. This is not to argue that that Government should abandon its neutrality on the issue of assisted dying, only that it

[7] Oral evidence to JCHR https://committees.parliament.uk/oralevidence/1603/html/ *and* https://committees.parliament.uk/oralevidence/1661/html/

[8] David Gauke, The New Statesman, January 2023, *The law against assisted dying is causing avoidable misery*

should facilitate Parliament having the time needed to fully explore and debate the issue, and take forward legislation if that is the will of Parliament.

Even after the decision in Conway, assisted dying claims kept coming back to the courts, despite the increasingly high bar to take such cases. This in itself is a demonstration of the strength of feeling involved for the people involved, and indeed for the public who have supported these cases through donations, letter writing, and so on.

It is imperative that Parliament is given the opportunity to fully explore and address this issue, and we hope that the Health and Social Care Select Committee Inquiry will be the first step in that process.

Analysis

We conclude with a brief analysis of the legal issues and context.

A right to request assisted dying in certain safeguarded circumstances is an exercise of personal autonomy. Personal autonomy is an inseparable aspect of human dignity, which has been at the heart of the western concept of human rights since the United Nations Universal Declaration of Human Rights in 1948.

A person of full mental capacity, who has not been unduly influenced by others, has an absolute right in common law to insist on the withdrawal of treatment. This prevails over the desire of medical and nursing professions to keep the patient alive. It makes no difference that, in the eyes of others, the decision to insist on withdrawal of treatment is unwise. Many have questioned the logic, given that refusal of treatment which will inevitably lead to death is legal, of precluding a patient with appropriate safeguards from seeking assistance to terminate his or her life.

Furthermore, difficult decisions already have to be made in relation to termination of the life of incapacitated individuals. There are many decided cases on this, and often the court, usually the Court of Protection, has to intervene in the event of disagreement between the treating medical professionals and the patient's family. The overriding principle is that a decision should be made in the best interests of the incapacitated patient, but that is a many-faceted concept and includes, in this context, what the patient himself or herself would have wanted, had they had capacity.

This situation presents at least as much risk as some fear would assisted dying for terminally ill, competent adults, were that to be legalised, of family and friends being able to influence the decision. Many withdrawal of treatment cases raise difficult issues, such as that of Anthony Bland, and the conjoined twins case.[9] Those were not strictly assisted dying cases, but the moral and ethical difficulties are no less significant than in cases to which the Bill would apply.

The case law – both in relation to assisted dying and other treatment decisions – has moved on yet Parliament is not grasping the nettle, leaving terminally ill, mentally competent adults who would like the choice of assisted dying in great distress. We suggest that there is an obvious flaw in logic and consistency in making early termination of life possible for incapacitous people but not permitting a person of full capacity, free from undue influence and properly informed, to request assistance in dying. Inconsistency in the application of the law heralds injustice, which is why Parliament should act.

- Ends –

Signatories to this submission:

1. **Lord Etherton, KC PC** is a former Master of the Rolls (2016-21), and presided in the panel of the Court of Appeal that considered the Noel Conway case in 2018

2. **Lord Brown of Eaton-under-Heywood PC** is a former Law Lord (2004-09) and Justice of the Supreme Court (2009-12). He was on the panel of the House of Lords that considered the Purdy case in 2009.

3. **Lord Pannick KC** is a barrister who argued the Purdy case before the House of Lords, represented Dignity in Dying in an intervention in the Nicklinson case before the Supreme Court and represented Noel Conway in his appeal for permission for a Supreme Court hearing in 2018.

[9] Airedale N.H.S. Trust v Bland [1993] A.C. 789 House of Lords, *and* Re A (Children)(Conjoined Twins) [2001] 2 WLR 480, Court of Appeal