THE HIGH COURT

Record No. 2012 / 10589

BETWEEN

MARIE FLEMING

PLAINTIFF

AND

IRELAND, THE ATTORNEY GENERAL AND THE DIRECTOR OF PUBLIC PROSECUTIONS

DEFENDANTS

AND

HUMAN RIGHTS COMMISSION

AMICUS CURIAE

OUTLINE SUBMISSIONS ON BEHALF OF THE HUMAN RIGHTS COMMISSION

Filed by Sinead Lucey, Solicitor
Irish Human Rights Commission
Jervis House, Jervis Street, Dublin

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A. Background

1. By letter dated the 24th of October, 2012, the Irish Human Rights Commission [hereinafter "the Commission"] was put on notice of these proceedings pursuant to Order 60A of the Rules of the Superior Courts. In the correspondence, it is stated:

> *"The Plaintiff is terminally ill and wishes to end her life by suicide. She is precluded from doing so by the extent of her physical disability and would therefore require assistance to end her life in accordance with her wishes. Section 2, subsection (2) of the Criminal Law (Suicide) Act 1993 provides that:*
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> *"A Person who aids, abets, counsels or procures the suicide of another, or an attempt by another to commit suicide, shall be guilty of an offence and shall be liable on conviction on indictment to imprisonment for a term not exceeding fourteen years".*

2. Under section 2(4) of the Criminal Law (Suicide) Act, 1993 (hereinafter "the Act") a prosecution for an offence of assisting suicide may only be brought with the consent of the DPP. The DPP has published general Guidelines for Prosecutors which treat of the decision to prosecute in general terms but does not specifically address the offence of assisted suicide.

3. The primary relief sought in this case is a finding that section 2(2) of the Act is unconstitutional. In the alternative, the Plaintiff seeks an order directing the DPP to "promulgate guidelines stating the factors that will be taken into account in deciding, pursuant to section 2(4) of the Criminal Law (Suicide) Act, 1993, whether to prosecute or to consent to the prosecution of any particular person" in circumstances of assisted suicide.

4. From the pleadings, the Commission formed the view that this case raises important human rights issues and sought liberty from this Honourable Court to appear as *amicus curiae* in the within proceedings which said liberty was granted by order made on the 8th of November, 2012.

B. General Introduction and Issues Arising

5. The legal issues arising in relation to assisted suicide are complex. Under our law suicide is not a crime but assisted suicide is. A person who is physically capable may therefore lawfully decide to end their own lives but when a disabled person does so, a crime is committed. Although assisted suicide is a crime under our domestic law, not everyone who assists in a suicide is prosecuted due to a residual discretion or "judgment call" vesting in the Director of Public Prosecutions under section 2(4) of the Act.

7. The issues that arise in these proceedings have been the subject of consideration by courts in other jurisdictions and the Commission proposes to draw on a body of developing international jurisprudence (which in turn has been informed by expert opinion and empirical evidence) to assist this Honourable Court in deciding the issues in this case. Themes which have shaped responses elsewhere include the question of legal certainty within a State's "margin of appreciation". Under the "margin of appreciation" doctrine developed by the European Court of Human Rights, States have certain discretion, within their particular constitutional tradition, in framing legal responses to sensitive moral issues such as the right to life and specifically in the present context how to address suicide and assisted suicide. However, the "margin of appreciation" doctrine also holds that a State's discretion on such moral issues is not unlimited and that the "margin" permitted will "narrow" where the law directly impacts on the personal rights of the individual concerned. Thus, even in circumstances where assisted suicide is as such outlawed for people in end of life situations, or with debilitating disabilities, the rights of the individual may require the publication of detailed guidelines clarifying the circumstances in which a prosecution in respect of assisted suicide will be brought or maintained. In the balance here is the question of the right to bodily autonomy and to self-determination and whether this can require provision for assisted suicide in certain circumstances, as against the public policy of preserving the right to life. Also at issue is the question of equality before the law.

8. Whilst the international jurisprudence will be of assistance in informing the Court as to the complexity of the legal and policy issues which arise and

the rationale underpinning the approach to these difficult issues elsewhere, in many ways we are in uncharted waters in that none of the decided case-law originates against the special background of our Constitution which has at its heart the sanctity of the right to life but also encompasses a recognized right to personal autonomy and a separate commitment in clear terms to the dignity and equality rights of the person.

C. Irish Constitutional Law

The Right to Equality

9. The concept of equality has been said to be *"fundamental to the democratic nature of the State"* and to be implicit in the concept of constitutional justice. The Commission considers the proper interpretation of the equality guarantee under the Constitution to be of central importance in this case. The Commission sees it as relevant both to the question of the constitutionality of the provision criminalising assisted suicide under section 2(2) of the Act and to the question of the exercise of the residual power of the Director of Public Prosecutions to refuse to direct a prosecution. This is because, if the concept of equality is fundamental to the democratic nature of the State, it follows that all statutory powers (including a power to direct a prosecution) must be exercised in a manner which respects the fundamental principle of equality and is thereby in accordance with the requirements of constitutional justice.

10. Whatever one's views on the morality of suicide (of which there are many), the reality is that if the Plaintiff were not suffering from her particular disability, she could elect at a time of her choosing to lawfully end her own life and her choice would be considered, in law, an exercise of a right to personal autonomy whereby she determines the manner and circumstances in which her life ends. A difference in treatment arises where the Plaintiff is prevented from lawfully ending her own life in exercise of a right to personal autonomy when others may do so. The question of whether this difference in treatment of the Plaintiff on the basis of her disability status constitutes discrimination arises from the fundamental question: why should she be treated differently? To answer this question a focus is required on the rationale, purpose and means under which the public policy concern to prevent loss of life is given effect by the State. The act of suicide is not the same, however, when it is an assisted suicide. Whilst death in the case of assisted suicide is also the result of the exercise of a right of personal autonomy whereby the person determines

the manner and circumstances of her death, it has been achieved through the assistance of a third party. In essence the question is whether this difference, namely, the involvement of a third party, is a sufficient or proper basis for the different treatment of the ending of life by suicide in our criminal law having regard to Article 40.1?

11. Although the jurisprudence in reliance on Article 40.1 is not vast, nonetheless, there are many examples of cases where the Courts have been prepared to vindicate personal rights in reliance on Article 40.1 of the Constitution. It is also true to say that the use of the equality guarantee is increasing and "it is moving towards its natural place as the cornerstone of Irish Human Rights jurisprudence".[1] Our understanding of constitutional equality may also be amplified by having regard to the manner in which other equality guarantees have been interpreted and applied under other legal systems, a matter we will return to in the course of these submissions.

12. Turning to the decided case-law to identify how our equality provision falls to be construed in this context, it is recalled that in ***Kelly v. The Minister for the Environment,***[2] McKechnie J. ruled that the State cannot through statute or in any manner of implementation of statute cause unjustified advantage to accrue to one person, class or classes of the community as against or over and above, another person or class of that same community. In ***Kelly***, Mr. Justice McKechnie stated in the context of electoral laws that:

> *"the State must .... ensure that with any provision passed into law the guarantee of equality as contained in Article 40, section 1 of the Constitution will be respected. It cannot therefore, by any provision of a statute, or by the manner and way in which it might implement such a provision, cause unjustified advantage to accrue to one person, class or classes of the community as against or over and above, another person or class of that same community. Equals must be treated equally."*

13. In its seminal judgment in ***Blascaod Mor Teo v. Commission for Public Works,***[3] the Court found the Blascaod Mor National Park Act, 1989 to be unconstitutional. There the Supreme Court ruled in the context of a discriminatory statutory system of compulsory purchase of land on the Blasket Islands, that despite the fact that the discrimination in question had a statutory

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[1] Dewhurst, The Recent Developments of the Irish Equality Guarantee by the Superior Courts, The Bar Review, Volume 17, Issue 5, November, 2012.
[2] [2002] 4 IR 191.
[3] [200] 1 IR 6.

basis, there was no legitimate legislative purpose to be served where the policy in question was based on a principle of pedigree which appeared to have no place in a democratic society committed to the principle of equality.

> *"The Court agrees with the Learned Trial Judge that a Constitution should be pedigree blind just as it should be colour blind or gender blind except when those interests are relevant to a legitimate legislative purpose."*

14. The Supreme Court ruled by reference to such cases as ***Quinns Supermarket Ltd. v. Attorney General***[4] and ***Brennan v. Attorney General***[5] and notwithstanding the findings in those cases to the effect that Article 40.1 is not a guarantee of absolute equality for all circumstances and the recognition that the legislature is entitled to classify citizens into groups for legislative purposes, such classifications must be for a legitimate legislative purpose i.e. relevant to that purpose and fair. The Court said:

> *"in the present case the classification appears to be at once too narrow and too wide. It is hard to see what legitimate legislative purpose it fulfils. It is based on a principle – that of pedigree – which appears to have no place (outside the law of succession) in a democratic society committed to the principle of equality. This fact alone makes the classification suspect.*

15. Applying the test to the evidence in this case, the Court will be required to consider the legislative purpose behind the criminalisation of assisted suicide and also to consider whether the classification is too wide in failing to differentiate adequately between the nature and type of assistance and the nature and type of decision to end one's own life for the purpose of the (legitimate) legislative objective identified by the State. Anticipating that the State will argue that the purpose of the criminal provision is to protect and vindicate the right to life and protect against improper motive in assisting the ending of life, noting how "suspect" legislative criteria based on direct or indirect differential classification will attract closer scrutiny by the court, one can see that factors which might well influence a determination whether criminalisation of assistance of suicide is consistent with the equality guarantee in the Constitution could include factors such as:

- the level of assistance given,

[4] [1972] I.R. 1
[5] [1983] I.L.R.M. 449.

- the age of the deceased,
- the capacity of the deceased, the extent to which the decision to commit suicide was voluntary, clear, settled or informed,
- the manner in which the decision is communicated,
- the extent to which the decision was initiated by the deceased,
- the motivation of the person assisting,
- the extent to which pressure was brought to bear on the deceased,
- any history of violence or undue influence on the part of the person who assists against the deceased,
- the level of physical incapacity of the deceased and capability of doing an act themselves without assistance,
- the relationship between the deceased and the person assisting,
- whether the assistance was remunerated,
- the capacity in which the person assisting acted,
- whether the assistance given was on foot of the clear wishes of the deceased, evidenced in an Advance Directive, sworn Affidavit or other attested document,
- whether the deceased previously attempted to dissuade the deceased from suicide but ultimately acceded to her/ his will.

16. The above list comprises factors drawn from a list of public interest factors which have been identified by the Crown Prosecution Service in the UK in their document "The CPS: Assisted Suicide Policy" which was issued by the Director of Public Prosecutions in February, 2010 following the decision of the Appellate Committee of the House of Lords in ***R (on the application of Purdy) v. Director of Public Prosecutions***[6] where the DPP was required "to clarify what his position is as to the factors that he regards as relevant for and against prosecution"(paragraph 55) in cases of assisted suicide. The Guidelines are appended hereto at Appendix A. Similar guidelines on the exercise of prosecutorial discretion exist in Canada (the guidelines in British Columbia are described in some detail in the decision in ***Carter v. Canada***[7] from July, 2012 referred to below – see paragraph 299 of judgment onwards).

17. It is recalled by reference to the Guidelines published by the DPP in the UK, that there is no constitutional equality guarantee in the UK and, therefore, no requirement for the State to demonstrate that a legislative classification which treats persons differently is neither too wide nor too narrow measured

[6] [2010] 1 AC 345
[7] [2012] BCSC 886

against the concept of equality that lies at the core of the State and its constitutional democracy. It may be that in the Irish context the adoption and publication of Guidelines by the Director of Public Prosecutions might contribute to legal certainty (which was the purpose and intention in the UK) and to the exercise of her power to direct prosecution in a constitutionally just or fair manner but it is respectfully submitted that such guidelines (particularly where of a general discretionary rather than prescriptive character) would not be enough in themselves to save section 2(2) from a finding of unconstitutionality because the section itself is absolute and does not prescribe the relevant factors which should be weighed in deciding whether an offence is committed.

18. The decision of the Supreme Court in ***Re Article 26 and the Employment Equality Bill 1996,***[8] is considered to have implicitly abandoned the restrictive version of the "human personality" doctrine by engaging on an enquiry which required to be established both the relevance of the statutory provisions under scrutiny and the fact that they were neither irrational or unfair, widening the scope of review under Article 40.1 of the Constitution. More recently, Article 40.1 of the Constitution has been considered in a number of cases to varying degrees. In a case involving a disabled litigant who required assistance to give instructions due to a speech difficulties following a largnectomy but who was denied that assistance in reliance on the "in camera" rule (***X (D) v. Judge Buttimer***)[9], the Court (Hogan J.) observed that:

> "Article 40.1 obliges the judicial branch of government to ensure that all persons are "held equal before the law." In practical terms, this means that the courts must see to it that, where this is practical and feasible in the circumstances, litigants suffering a physical disability (such as Mr. X.) are not placed at a disadvantage as compared with their able-bodied opponents by reason of that disability, so that all litigants are truly held equal before the law in the real sense which the Constitution enjoins."

19. No reference is made to disability in section 2 of the Act but it is axiomatic that those who require assistance to end their own lives are persons who suffer from a disability and the offence disproportionately impacts upon disabled persons. It is also noted in this regard that the different types of

[8] [1997] 2 IR 321
[9] [2012] IEHC 175

disability, such as physical disability and intellectual disability, will attract different social policy considerations.

20. This theme is picked up again by Hogan J. in ***B.G. v Murphy, DPP and the Judges of Dublin Circuit Court***[10] concerning provisions of the Criminal Law (Insanity) Act, 2006 and the requirement that a person in respect of whom an issue arises in relation to fitness to plead be sent forward to the Circuit Court (where the possibility of a higher penalty arises) in circumstances where the matter might otherwise be disposed of summarily on a guilty plea in the District Court. The Court found that there was a:

> *"plain inequality of treatment with potentially far-reaching consequences between two categories of accused for which, objectively speaking, there is no possible constitutional justification. ....in making rules which permit accused persons to avail of the option of summary disposal before the District Court, the Oireachtas cannot place certain categories of accused persons (such as those who mental capacity is in doubt) at a real disadvantage as compared with other similarly situation accused persons without objective justification."*

The approach of the Court in the ***B.G.*** case (in like terms with that previously followed by the Court in the ***Carmody*** case[11] and the ***S.M. (No. 2) Case***[12]) in relation to the appropriate remedy is also of interest. Rather than find the provision unconstitutional by reason of the unjust conferring of a privilege on one category of person while withholding it from another (and not to suggest by a reliance on this case that the claimed right to end one's own life is a "benefit" or "privilege"), the Court instead declared that in the event that the Plaintiff in ***B.G.*** was found fit to plead and pleaded guilty in the Circuit Court, that it would be unconstitutional as contrary to Article 40.1 of the Constitution were the sentencing Judge to apply a maximum sentence of more than the equivalent sentence that would have been available in the District Court on a guilty plea. This approach was adopted as a "temporary" solution to *"permit a transient cure in respect of otherwise unconstitutional legislation pending a thorough review of the offending statutory provisions"*. Such crafting of solutions may be particularly appropriate in equality cases where inadvertent unlawful differentiations on the basis of one's status may occur. As we will see below, the Canadian Courts crafted a similar style of "temporary" solution in a

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[10] *B.G. v. Murphy, DPP and Judges of Dublin Circuit Court*, Mr. Justice Hogan, 8th of December, 2011
[11] [2010] 1 IR 635
[12] [2007] 4 IR 369

case involving the criminalisation of assisted suicide which may be of interest to this Court (in the ***Carter*** Case).

21. It appears clear that the Plaintiff in this case is at a disadvantage in that, in view of her disability, absent assistance she cannot give effect to her wish to end her life at a time of her choosing, but if she does so with assistance a crime is committed, when no crime is committed by the able bodied person who can take their life without assistance. The statutory provision at issue in this case has the effect of treating suicide by an able bodied person and by a disabled person differently. Given that the section provides for different treatment of disabled and able bodied persons and as such it has to be viewed as being *prima facie* discriminatory on grounds of disability, it will then be necessary for the Court to consider whether, given the lack of equality of treatment, the defendants can rely on the provisions of Article 40.1 to show that in the words of Laffoy J in ***SM v. Ireland***[13]:

> *"the differentiation is legitimated by reason of being founded on difference of capacity, whether physical or moral, or difference of social function of men and women in a manner which is not invidious, arbitrary and capricious.'"*

22. In other words, is there a legitimate legislative purpose which justifies the interference and is the interference proportionate and rationally connected with the identified purpose.

23. The decision of the Supreme Court in ***MD v. Ireland*** [14]is clearly important in assisting the Court in identifying the proper approach to the application of the equality provisions of the Constitution. Like this case, that case also concerned a criminal offence which involved a difference in treatment (in that case based on gender) and a prosecutorial discretion on the part of the Director of Public Prosecutions. In that case the DPP had elected to prosecute only the male party to acts of underage sex where both parties were underage. There are important differences between the two cases in terms of the purpose for the difference in treatment and the nature and extent of the difference in treatment, particularly as the case involved minors, but the approach of the Court to the application of Article 40.1 is of assistance.

24. The Supreme Court in considering the protection of equality under the Constitution in ***MD*** had the following to say:

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[13] *[2007] 4 I.R. 369*
[14] [2012] IESC 12

"38. The principle of equal treatment of citizens, indeed of all human persons, is implicit in the free and democratic nature of the State. It permeates the Constitution. Two explicit examples can be given. Article 40.6.2° requires that laws regulating the formation of associations and unions and the right of free assembly shall "contain no political, religious or class discrimination." Article 44.2.3° provides that, whether by its laws or otherwise, "the State shall not impose any disabilities or make any, discrimination on the grounds of religious profession, belief or status." These are but aspects of the principles of freedom, justice and human dignity, which, inter alia, *the preamble of the Constitution aims to safeguard. Equality is among the highest and noblest aspirations included in the Constitution of every modern state.*

39. Article 40.1 is both more specific and more general. It is specific insofar as it relates expressly to "the law." At the same time it prescribes the general principle that citizens are to "be held equal before the law."

40. Equality is not, in all cases, an easy principle to apply in concrete situations. People may be equal in some respects but not in others. Aristotle's oft-quoted definition illustrates the lack of precision in the notion of equality. His definition of the principle of equality is paraphrased as meaning "that things that are equal should be treated alike while things that are unalike should be treated unalike in proportion to their unalikeness." [Nicomachean Ethics 1131a]. In other words, not only must the law treat comparable situations equally, it must not treat different situations in the same way, in the absence of justification.

41. Article 40.1 provides:

"All citizens shall, as human persons, be held equal before the law. This shall not be held to mean that the State shall not in its enactments have due regard to differences of capacity, physical and moral, and of social function."

The central principle of the Article rests, firstly, on the common humanity which we all share and, secondly, on the general understanding that for the State to pass a law which treats people, who are objectively in the same situation vis-a-vis *the law, unequally, is an affront to fundamental ideas of justice and even to rationality.*

42. Thus strict equality is the norm laid down by Article 40.1. However, the Article recognises that perfectly equal treatment is not always achievable, rather the Article recognises that applying the same treatment to all human persons is not always desirable because it could lead to indirect inequality because of the different circumstances in which people find themselves.

43. The second sentence of Article 40.1 recognises that human persons have or may be perceived by the Oireachtas to have "differences of capacity, physical and moral, and of social function." Some of these differences, particularly of capacity, are inherent, most obviously in the case of the sexes. It is axiomatic that only a woman can become pregnant. Thus, the Maternity (Protection) Act 1994 and the Maternity Protection (Amendment) Act 2004 apply to women, although a father is allowed to take time where a mother has died. Laws prohibiting discrimination on the grounds of pregnancy have justifiably applied to women.

44. It follows that laws such as these are not an example of the State holding men or women respectively unequal before the law. It follows also that the first and second sentences of Article 40.1 should not be treated as if they were in separate compartments. It is not correct to look at a law to see if it offends against the first sentence before turning to the second sentence to seek justification. The second sentence is concerned with what the first sentence means."

25. The Court continued by reference to the factual and legal matrix under consideration in the ***MD*** case:

"49. The fundamental constitutional question is whether it falls to the Court or to the Oireachtas to make the judgment as to whether the risk that the female will become pregnant justifies exempting her, but not her male counterpart, from prosecution. The framing of sexual offences in such a way as to protect young people from the dangers of early sexual activity is a matter of notorious difficulty. States have, for centuries, wrestled with questions of great sensitivity concerning the appropriate age to set, whether to differentiate between males of different ages, or to differentiate on grounds of difference in age between the persons, not to mention the more recent liberation of same-sex activities from the stigma of criminality. Decisions on matters of such social sensitivity and difficulty are in essence a matter for the legislature. Courts should be

deferential to the legislative view on such matters of social policy."

26. Having considered the general approach to under age sex under the Act which did not differentiate between male and female, the limited application of section 5 and the reasons for it, the Supreme Court found the section constitutional by concluding:

> *"54. In considering s. 5 of the Act of 2006, the State justified the legislation by a social policy of protecting young girls from pregnancy, by creating a law governing anti-social behaviour, i.e. under age sexual intercourse. This was a choice of the Oireachtas. Even in a time of social change, it is a policy within the power of the legislature. The issue of under age sexual activities by young persons involves complex social issues which are appropriately determined by the Oireachtas, which makes the determination as to how to maintain social order. The Oireachtas could have applied a different social policy. But s. 5, the policy which they did adopt, was within the discretion of the Oireachtas, and it was on an objective basis, and was not arbitrary.*
> *55. The Act, as set out earlier, makes both sexes liable for breaches of the offences created. However, s. 5 excludes the girl from criminal liability when the offence is sexual intercourse, but not for other sexual acts.*
> *56. The Oireachtas made a choice, and such a legislative decision reflects a social policy on the issue. While the legislature could have enacted another social policy, it was an approach the legislature was entitled to take, it was an issue in society to which the legislature had to respond. The danger of pregnancy for the teenage girl was an objective which the Oireachtas was entitled to regard as relating to "differences of capacity, physical and moral and of social function", as provided for in Article 40.1 of the Constitution. The Court would dismiss the appeal and reject the claim that s. 5 of the Act of 2006 is invalid having regard to the Constitution."*

27. Jurisprudence emanating from other constitutional democracies where the equality principle is enshrined in the Constitution support an approach of attaching considerable weight to the equality concept in cases of this nature. The Canadian experience is worthy of particular note in this regard, both because the Court there has grappled with reconciling the sanctity of life protected under their Constitution (Section 7 of the Canadian Charter of Rights and Freedoms) and with equality rights (Section 15 of the Charter) through a

series of judgments, and because of the similarities between the equality guarantees contained in the Charter and the Constitution.

28. The 1982 Canadian Constitution enshrined the Canadian Charter of Rights and Freedoms which guarantees fundamental rights to all. Section 15 of the Charter (which entered into force in 1985) provides for a guarantee of equality in like terms to Article 40.1 of our Constitution:

> *15(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability"*

29. The Supreme Court of Canada has opted for a large, liberal and purposive interpretation of the Charter, adopting Lord Sankey's metaphor in the Person's Case (1929 Privy Council) of a Constitution as a "living tree". Similarly, our Constitution is considered a living document.

30. In the landmark decision on the interpretation of the equality provision of section 15 of the Charter, ***Andrews v. Law Society of British Columbia***[15], the Canadian Supreme Court rejected the concept of formal equality in favour of a richer and more inclusive concept of substantive equality.

> *"The promotion of equality entails the promotion of a society in which all are secure in the knowledge that they are recognized at law as human beings equally deserving of concern, respect and consideration.....the right to equality before and under the law, and the right to equal protection and benefit of the law contained in section 15 are granted with the direction contained in section 15 itself that they be without discrimination. Discrimination is unacceptable in a democratic society because it epitomizes the worst effects of the denial of equality, and discrimination reinforced by law is particularly repugnant. The worst oppression will result from discriminatory measures having the force of law. It is against this evil that section 15 provides a guarantee."*

31. In light of the growing body of Irish equality jurisprudence as developed by the Courts (most recently in the statements of the Supreme Court in ***MD***), it appears to be the case that we share with the Canadians a rich and inclusive

[15] [1989] 1 SCR 143

concept of equality. However, unlike the Irish Courts heretofore, the Canadian Supreme Court has had an opportunity to develop its thinking on the proper application of its equality provisions in the context of the criminalisation of assisted suicide.

32. In the ***Rodriquez***[16] decision in 1993 the Supreme Court of Canada found that the prohibition on assisted suicide engages the rights to security of the person and liberty. The decision left over the question of whether the right to life was infringed, did not decide on whether section 15 (equality rights) was engaged and did not decide whether the prohibition was overbroad or disproportionate or reasonable and objectively justified on a constitutional justice (or "fundamental justice") analysis. The majority in that case upheld the constitutionality of the prohibition on assisted suicide.

33. In a strong dissenting judgment which the Commission commends to this Court for the lucidity of its reasoning, Lamer C.J. found that the prohibition on assisted suicide infringed the right to equality contained in section 15(1) of the Charter. He reasoned that the prohibition created an inequality because it prevents persons physically unable to end their lives unassisted from choosing suicide when that option is in principle available to other members of the public without contravening the law. He considered that this inequality – the deprivation of the right to choose suicide – may be characterized as a burden or disadvantage, since it limits the ability of those who are subject to this inequality to take and act upon fundamental decisions regarding their lives and persons. For them, the principles of self-determination and individual autonomy have been curtailed. This inequality is imposed on persons unable to end their lives unassisted solely because of a physical disability, a personal characteristic which is amongst the grounds of discrimination listed in section 15(1) of the Charter.

34. L'Heureuz-Dube and McLachlin JJ also dissented on grounds that the legislative scheme infringes a particular person's protected interests in a way that cannot be justified having regard to the objective of this scheme. They considered that by putting into force a legislative scheme which makes suicide lawful but assisted suicide unlawful, some people are denied a choice of

[16] [1993] 3 SCR 519

ending their lives solely because they are physically unable to do so, preventing them from exercising autonomy over their bodies in a manner available to other people. They reasoned that denial in this way of the ability to end their life is arbitrary and amounts to a limit on the right to security which does not comport with the principles of fundamental justice in circumstances where safeguards exist or can be provided which meet concerns about consent which the prohibition was designed to address.

35. The slightly different reasoning developed by Lamer CJ, L'Heureux-Dube and McLachlin JJ in relation to section 15(1) and section 7 of the Charter find close echoes in the reasoning of the Irish Superior Courts in its jurisprudence on Article 40.1 of the Constitution.

36. Significantly, given the similarity between the constitutional equality guarantees in Canada with our own constitutional equality guarantee, earlier this year, the Supreme Court of British Columbia following careful consideration of the decision in ***Rodriquez*** and developments in Canadian jurisprudence since then, found the provisions of the Canadian Criminal Code which prohibited physician assisted suicide to be unconstitutional on section 15 (equality) grounds in ***Carter v. Canada.***[17]

37. In the comprehensive judgment of the Court in ***Carter*** a wide-ranging review of the available expert and empirical evidence is undertaken in which consideration is given to evidence of the relationship between lawfully available assisted suicide in "permissive jurisdictions" and the availability of palliative care and risks in relation to factors such as the patient's ability to make well-informed decisions, their freedom from coercion or undue influence and the ability to assess capacity and voluntariness. The judgment includes an impressive and helpful comparative report on the law in different jurisdictions in relation to assisted suicide which this Court should find informative. The Court concluded, following its review of the evidence and detailed consideration of the international experience, that although risks existed, they could be largely avoided through carefully-designed, carefully designed safeguards.

[17] [2012] BCSC 886

38. The Court found that the claim that the legislation infringed equality rights originated in the fact that in Canada (as in Ireland), the law does not prohibit suicide. However, persons who are physically disabled such that they cannot end their own lives without help are denied that option, because section 241(b) of the Canadian Criminal Code prohibits assisted suicide. The Court concluded that the provisions regarding assisted suicide have a more burdensome effect on persons with physical disabilities than on able-bodied persons, and thereby create, in effect, a distinction based on physical disability. The impact of the distinction is felt particularly acutely by persons who are grieviously and irremediably ill, physically disabled or soon to become so, are mentally competent, and who wish to have some control over their circumstances at the end of their lives. The Court ruled that this distinction is discriminatory because it perpetuates disadvantage.

39. The Court then went on to also find that the infringement of section 15 equality rights is not demonstrably justified. The purpose of the prohibition was identified as being to prevent "vulnerable persons from being induced to commit suicide at times of weakness" and it was acknowledged that this purpose was pressing and substantial and the absolute prohibition against assisted suicide is rationally connected to it but went on to find that a less drastic means of achieving the legislative purpose would be to keep an almost absolute prohibition in place with a stringently limited, carefully monitored system of exceptions allowing persons who are grievously and irremediably ill and who are competent and fully informed, non-ambivalent and free from coercion or duress to access assisted death (in question in that case physician assisted death). Given that the prohibition failed to impair the person's equality rights as little as possible and that it had severe adverse impact on persons in the Plaintiff's situation, the absolute prohibition was found to fall outside the bounds of constitutionality.

40. The remedy ordered by the Court in ***Carter***, in addition to the declaration of invalidity which was suspended for a year to allow Parliament to decide how to respond, was to constitute a "constitutional exemption" during

the period of suspension of the declaration of invalidity on specified conditions whereby Ms. Taylor could obtain an assisted death.[18]

41. The similarities between the approach of the two courts in ***Carter*** and in our own ***MD*** case are striking. The difference between the two cases is that in ***MD*** the Court was dealing with an interference with equality rights which it held to be for a legitimate aim and was crafted in such a manner as to impair equality rights as little as possible. Applying the same reasoning in ***Carter*** on facts closely similar to those in this case, the Canadian court found that the absolute prohibition on assisted suicide fell outside the bounds of constitutionality.

The Right to Life, Personal Autonomy and Privacy

42. The personal rights guarantee under Article 40.3 in the Constitution expressly encompasses a right to life but also encompasses unspecified rights such as the right to personal autonomy/self-determination, bodily integrity[19] and the right to privacy.[20] The right to privacy has been described as "compendiously expressed"[21] being:

> *"a complex of rights, varying in nature, purpose and range, each necessarily a facet of the citizen's core of individuality within the constitutional order....There are many other aspects of the right of privacy, some yet to be given judicial recognition. It is unnecessary for the purpose of this case to explore them. It is sufficient to say that they would all appear to fall within a secluded area of activity or non-activity which may be claimed as necessary for the expression of an individual personality, for purposes not always necessarily moral or commendable, but meriting recognition in circumstances which do not endanger*

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[18] The decision is on appeal from the Supreme Court of British Columbia to the Court of Appeal for British Columbia. Notice of appeal was lodged on 13 July 2012, and the appeal is scheduled to be heard over 5 days commencing on 4 March 2013. It is common case that regardless of the decision of the Court of Appeal, it is likely to be appealed to the Supreme Court of Canada. An application to stay the constitutional exemption permitting the plaintiff to seek a physician-assisted suicide death was refused by the Court of Appeal. An application for a stay on the declarations of invalidity was however granted.

[19] State (C) v. Frawley [1976] IR 365.

[20] Norris v. AG [1984] IR 36.

[21] Hogan & Whyte, Kelly: the Irish Constitution (4th ed) p. 1441.

considerations such as State security, public order or morality, or other essential components of the common good."[22]

In his judgment in the ***Norris*** case, McCarthy J. adopted the language of the American Supreme Court in relation to the right to privacy in terms of it being "the right to be let alone" in the private sphere.

43. The Irish Court had to consider the interplay of the State's interest in preserving life with the citizen's right to autonomy, self-determination, privacy or dignity in the case of ***In Re A Ward of Court*** [23] in its consideration of Article 40.3 of the Constitution. In ***Re A Ward of Court*** the issue was quite fundamentally different dealing as it did with issues of passive euthanasia (the withdrawal of life preserving treatment) rather than suicide (active intervention to hasten death). Clearly, however, in both cases difficult constitutional questions concerning the right to self-determination which was implicit in her right to bodily integrity and privacy arise linked with the termination of life. Tellingly, in his judgment in the High Court Lynch J. referred to the lawfulness of taking one's own life in the following terms:

> *"I would think that if the torture was cruel enough and the prospects of relief remote enough, there must come a time when in the interests of privacy, dignity or autonomy, the victim would be within his rights in ending his own life if he had the means of doing so even before the enactment of the Criminal Law (Suicide) Act, 1993."*

44. Thus, even before suicide was decriminalised, it may have been lawful in the interests of privacy, dignity or autonomy for a person to end their own life. The question arises as to why this statement of principle does not apply equally to the acts of a person assisting suicide and the answer may lie in the fact that the person assisting is sufficiently removed from the torture and cruelty of the situation as to be unable to displace the right to life in the hierarchy of rights. There may be room, however, for a more nuanced approach to this proposition by reference to the proximity of the relationship between the person wishing to take her own life and the person providing assistance because in many situations of close proximity watching the suffering

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[22] [1984] IR 36, 71.
[23] [1996] 2 IR 79.

of others (for example a loved one) may amount to torture and cruelty, the more so for the close relative who has been asked to assist in the act of suicide. Indeed, these interactions for persons in "close proximity" may arguably come within the protection for private and family life under Article 40.3 of the Constitution insofar as what is concerned is "the inner life of the person".[24]

45. In essence the Court in ***In Re Ward of Court*** found that although the State undoubtedly has an interest in preserving life, this interest is not absolute in the sense that life must be preserved and prolonged at all costs and no matter what the circumstances. As Lynch J. stated in the High Court:

> *"Death is a natural part of life. All humanity is mortal and death comes in the ordinary course of nature and this aspect of nature must be respected as well as its life-giving aspect. Not infrequently, death is welcomed and desired by the patient and there is nothing legally or morally wrong in such an attitude."*

46. He continued by reference to Article 40.3 of the Constitution:

> *"Another way of looking at Article 40, s. 3 of the Constitution is that under sub-s. 1 the right to life of the citizen is to be defended and vindicated and under sub-s. 2, the life of the citizen is to be protected from unjust attack and vindicated in the case of injustice done. It seems to me that the right to life of the citizen on the one hand and the life of the citizen on the other hand are two different concepts. The life of the citizen is to be protected and vindicated by the State pursuant to sub-s. 2 at the instance of the citizen or some appropriate person acting on his behalf pursuant to his right to life as guaranteed under sub-section 1. This reserves to the citizen within the limits required by the common good and public order and morality, autonomy over his own life. If competent, he may elect not to enforce his personal rights, including his right to life, despite an unjust attack or injustice done."*

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[24] Borrowing from the reasoning of the European Court of Human Rights in cases such as *Niemitz v. Germany* judgment of 16 December 1992, Series A no. 251-B, p. 33, § 29, *Botta v Italy* (153/1996/772/973) and *X & Y v the Netherlands* 8 EHRR 235 (1985), to inform an enunciation of the scope of privacy rights protected under Article 40.3 in this context. In the latter case, the Court cited 'the physical and moral integrity of the person' as being a key component of the right to private life.

47. It must be recalled, however, that although not dealing with the question of suicide or assisted suicide at all, the Supreme Court found that the constitutional right to self-determination which was implicit in the right to bodily integrity and privacy did not include the right to have life terminated or death accelerated, and was confined to the natural process of dying. In ***Re Ward of Court*** cannot therefore be cited as authority to support the proposition that one has "a right" to end one's own life, although there is no legal impediment to doing so. In the judgments of the Supreme Court, however, it was clear that dying was an inevitable part of life and the right to die was encompassed within the protection afforded the right to life under the Constitution. In her judgment in that case, Denham J. expressed it thus (at p. 161):

> *"in respecting a person's death, we are also respecting their life – giving to it sanctity. That concept of sanctity is an inclusive view which recognizes that in our society persons, whether members of a religion or not, all under the Constitution are protected by respect for human life. A view that life must be preserved at all costs does not sanctify life. A person, and/or her family, who have a view as to the intrinsic sanctity of the life in question are, in fact, encompassed in the constitutional mandate to protect life for the common good; what is being protected (and not denied or ignored or overruled) is the sanctity of that person's life. To care for the dying, to love and cherish them, and to free them from suffering rather than simply to postpone death, is to have fundamental respect for the sanctity of life and its end".*

Commenting on the judgments of the Supreme Court in the ***Re Ward of Court*** case, Hogan & Whyte, JM Kelly: The Irish Constitution (fourth edition), reflect on the fact that there are different philosophical understandings of the sanctity of life, resulting in different conclusions as to the extent of personal autonomy, and the authors state:

> *"Unfortunately this important philosophical debate is ignored in the majority judgments and no judge makes explicit his or her understanding of the principle of the sanctity of life in this context. Until this is clarified, the precise extent of the right to*

die and of society's power to authorise a course of action leading to death will remain unclear."[25]

48. The decision of the Court in ***Re Ward of Court*** highlights the complexity of the issues in this case which are presented on a particular set of facts, namely, the Plaintiff has been assessed as competent and is currently competent to make a decision to end her life by suicide. The reality appears to be, however, that she has not yet taken that decision but wishes to be in a position to do so in the future but in circumstances where she is likely to lose her power to communicate. The question of how the law relating to the rights to life, self-determination/personal autonomy/privacy engaged by these issues falls to be construed in light of the possibility that the Plaintiff may not remain in a position to communicate properly her intention or to demonstrate her competence and the risk that she may change her mind should she give instructions now as to the point in time when effect is to be given to her current will in the future. These issues were addressed in ***Carter*** (albeit in the equality context in terms of identifying safeguards and on a limited basis in terms of a constitutional exemption in favour of the applicant in that case) by requiring competency to be addressed in evidence at the time of the decision. It may be that the Court will conclude that if there is a right to assisted suicide as part of the right to bodily autonomy or the right to privacy (or a "right to die"), then the blanket criminalisation of assisted suicide gives rise to an undue interference with the said rights on the basis that a more nuanced approach is required which would allow for assisted suicide in limited circumstances based on the assessed wishes of the mentally competent person exercising a constitutional right.

49. If it may be lawful for a person to assist in the suicide of another in certain limited circumstances having regard to that other person's autonomy rights, then a framework is required within which these issues fall to be determined. A question arises as to whether an application to the High Court in plenary proceedings such as those brought by the Plaintiff is a sufficient mechanism, in the absence of a legislative framework, to vindicate the Plaintiff's right to a determination in accordance with law and procedural fairness as to whether she may lawfully be assisted in taking her own life (see cases of ***McFarlane v. Ireland*** (Application no. 31333/06) and ***A, B and C v.***

[25] P. 1401 (paragraph 7.3.27)

Ireland (Application no. 25579/05)). Thus in ***McFarlane,*** the European Court of Human Rights analysis included a focus on demonstrable effective remedies, concluding that the Government had "not demonstrated that the remedies proposed by them, including an action for damages for a breach of the constitutional right to reasonable expedition, constituted effective remedies available to the applicant in theory and in practice at the relevant time." Thus the question arises whether the requirement to make a complex application to the High Court by a person in the situation of the Plaintiff is a sufficiently accessible mechanism to vindicate their rights.

Legal Certainty

50. Although general guidelines exist in this jurisdiction, no specific guidelines have been developed in respect of the particular crime of assisted suicide. The Plaintiff complains that there is a lack of clarity around the factors which influence the manner in which the DPP exercises his discretion to prosecute in cases of assisted suicide. The discretion of the DPP in this regard is far from unique. The Supreme Court in ***MD***, (Denham J.) addressed the question of prosecutorial discretion in the following terms:

> *"18. Before any such prosecution is brought there is required to be a decision by the Director of Public Prosecutions, hereinafter referred to as the "DPP", to prosecute. In making a decision, the DPP will consider and apply her discretion in each situation. Such discretion will involve an evidential test: is there sufficient evidence to warrant a prosecution? Also, there would be an application of the public interest test: is such a prosecution in accordance with the public interest? The public interest will be informed by the policy of any relevant legislation.*
>
> *19. The DPP has a discretion in exercising her power to prosecute. The concept of prosecutorial discretion was addressed in Canada, where the Attorney General was the prosecuting authority. In* ***Krieger v. Law Society of Alberta*** *[2002] 3 S.C.R. 372 at paragraphs 46 to 47 the Supreme Court of Canada stated:-*
>
> *"Without being exhaustive, we believe the core elements of prosecutorial discretion encompass the following: (a) the discretion whether to bring the prosecution of a charge laid by police; (b) the discretion to enter a stay of proceedings in either a private or public prosecution, as codified in the* Criminal Code, *RS.C. 1985, c. C-46 ss. 579.1; (c) the discretion to accept a guilty plea to a lesser charge; (d) the discretion to withdraw*

from criminal proceedings altogether: R. v. Osborne *(1975), 25 C.C.C. (2d) 405 (N.B.C.A.); and (e) the discretion to take control of a private prosecution:* R. v. Osiowy *(1989), 50 C.C.C. (3d) 189 (Sask. C.A.). While there are other discretionary decisions, these are the core of the delegated sovereign authority peculiar to the office of the Attorney General."*

Significantly, what is common to the various elements of prosecutorial discretion is that they involve the ultimate decisions as to whether *a prosecution should be brought, continued or ceased, and* what *the prosecution ought to be for. Put differently, prosecutorial discretion refers to decisions regarding the nature and extent of the prosecution and the Attorney General's participation in it. Decisions that do not go to the nature and extent of the prosecution, i.e., the decisions that govern a Crown prosecutor's tactics or conduct before the court, do not fall within the scope of prosecutorial discretion. Rather, such decisions are governed by the inherent jurisdiction of the court to control its own processes once the Attorney General has elected to enter into that forum."*

This general approach described in Canada of the role of the Attorney General is mirrored in many of the aspects of the discretion of the DPP in this jurisdiction.

20. The width of the discretion of the DPP was considered by Finlay C.J., in State (McCormack) v. Curran [1987] I.L.R.M. 225 where he stated at p. 237:-

"In regard to the DPP I reject also the submission that he has only got a discretion as to whether to prosecute or not to prosecute in any particular case related exclusively to the probative value of the evidence laid before him. Again, I am satisfied that there are many other factors which may be appropriate and proper for him to take into consideration. I do not consider that it would be wise or helpful to seek to list them in any exclusive way. If, of course, it can be demonstrated that he reaches a decision mala fide *or influenced by an improper motive or improper policy then his decision would be reviewable by a court. To that extent I reject the contention again made on behalf of this respondent that his decisions were not as a matter of public policy ever reviewable by a court."*

51. The requirements of legal certainty and the rule of law have seen the emergence of guidelines in various other jurisdictions in relation to the

exercise by the DPP of his discretion to prosecute in respect of cases of assisted suicide. In ***R (Purdy) v DPP*** [2010] 1 AC 345, the House of Lords made a mandatory order requiring the DPP "to promulgate [his] policy identifying facts and circumstances which he will take into account in deciding whether to consent to prosecution under section 2(1) of the Suicide Act 1961." Before issuing a final policy statement, the DPP in the UK, Keir Starmer QC, issued an interim policy dated 23 September 2009, and conducted an extensive public consultation exercise.

52. Mr. Starmer subsequently gave evidence to the Commission on Assisted Dying (otherwise known as "the Falconer Commission"),[26] during which he was asked questions about how he approached the formulation of his policy guidelines and their operation. In the interim policy, one of the factors against prosecution was that the victim had "a terminal illness; or a severe and incurable physical disability; or a severe degenerative physical condition; from which there was no possibility of recovery". Mr Starmer said that many organisations representing disabled people or individuals with disabilities responded with concern about that factor. He summarised their concern in this way:

> *"If you have that factor in as a factor suggesting you won't prosecute, what that means is in Case A where all the facts are the same as Case B and the only difference is that the person who committed suicide had some terminal illness, severe or incurable disease, that will be the factor that tilts it. From our perspective, that suggests to us that we are less well protected because you wouldn't prosecute if I fell within category A but you would prosecute somebody else."*

53. After consideration of all the consultation responses, the DPP omitted that factor from his final policy statement, issued in February 2010. The policy statement lists 16 factors tending in favour of prosecution and 6 factors tending against prosecution. The factors identified as tending in favour of prosecution include:

> "...12. The suspect gave encouragement or assistance to more than one victim who were not known to each other.

[26] The Falconer Commission was set up in 2010 to investigate the circumstances under which it should be possible for people to be assisted to die, to recommend what system, if any, should exist to allow people to be assisted to die, to identify who should be entitled to be assisted to die, to determine what safeguards should be put in place to ensure that vulnerable people are neither abused nor pressured to choose an assisted death and to recommend what changes in the law, if any, should be introduced.

13. The suspect was paid by the victim or those close to the victim for his or her encouragement or assistance.

14. The suspect was acting in his or her capacity as a medical doctor, nurse, other healthcare professional, a professional carer (whether for payment or not), or as a person in authority, such as a prison officer, and the victim was in his or her care.

16. The suspect was acting in his or her capacity as a person involved in the management or as an employee (whether for payment or not) of an organisation or group, a purpose of which is to provide a physical environment (whether for payment or not) in which to allow another to commit suicide."

54. The factors identified as tending against prosecution are:

"1. The victim had reached a voluntary, clear, settled and informed decision to commit suicide.

2. The suspect was wholly motivated by compassion.

3. The actions of the suspect, although sufficient to come within the definition of the offence, were of only minor encouragement or assistance.

4. The suspect had sought to dissuade the victim from taking the course of action which resulted in his or her suicide.

5. The actions of the suspect may be characterised as reluctant encouragement or assistance in the face of a determined wish on the part of the victim to commit suicide.

6. The suspect reported the victim's suicide to the police and fully assisted them in their enquiries into the circumstances of the suicide or the attempt and his or her part in providing encouragement or assistance."

55. Concern has been expressed that the effect, though not the intention, of the DPP's policy in the UK has been to dispense with the law in a category of cases. The Falconer Commission expressed its concern at pages 285-286 of its report published in January, 2012 in the following terms:

"These guidelines are exceptional as they prescribe the circumstances in which the public interest test will be used, not with a view to deal with the exceptional or unexpected case, but in order to deal with the most common manifestation of the conduct that is criminalised by section 2(1) of the Suicide Act 1961. There is no doubt that the DPP has a public interest discretion not to bring a prosecution even if he is satisfied that the evidential test is satisfied. But that public interest test is normally used to deal with the exceptional individual case. By contrast, the guidelines provide a reason not to prosecute that applies equally to all. Or, to put it another way, they take a whole identifiable category of case out the ambit of the criminal justice process.

Currently, the decision about whether the law should be changed, in a contested area (contested in the sense that there are strong views for and against law change) is not being made by the law-makers (Parliament), but by the DPP. He has done his best in consulting the public and reflecting what he believes to be society's wishes in relation to prosecutions. However, the effect of being forced to issue guidelines by the judgment of the House of Lords in the Purdy case means the DPP has to decide on the extent of the law, and to whom it applies. The change is therefore piecemeal; it comes after no coherent public debate, and is driven by a response to individual cases rather than by a wider strategic consideration of the aims of the policy that society wishes to adopt.

...

Some of the evidence that was put to the Commission argued that the DPP policy has brought sufficient resolution to the issue of assisted suicide...

However, a much larger body of evidence put to the Commission highlighted the many problems with this approach of legal prohibition of assisted suicide combined with a lenient policy on prosecution, as outlined in the DPP policy. First, the question of when cases of assisted suicide should be prosecuted is now being determined by the exercise of a discretion by a well-meaning official, the DPP, applying general guidelines rather than the letter of the law, subject to a discretion not to prosecute in exceptional cases. Thus the question of whether a category of persons will be prosecuted depends on the view of one official and that view could change when the DPP changes. The essence of the rule of law is that our society is "ruled by

laws not men". The situation reached with the guidelines is that this basic tenet of the rule of law is broken."

56. These criticisms of the DPP's policy in the UK prompt a consideration of a separate constitutional issue in this jurisdiction, namely, how the issue of guidelines on a subject of this nature fits with the provisions of Article 15.2 of the Constitution under which the Oireachtas is the sole law maker. An issue for the Court to consider is whether reliance on Guidelines published by the DPP to provide a constitutionally permissible means of weighing acceptable (either by reference to the Constitution or the Convention) levels of interference with the rights of the Plaintiff as a substitute to enacting legislation in this area having regard to the requirements of Article 15.2 of the Constitution.[27] Accordingly, in addition to the absence of a constitutional equality guarantee in the UK another important difference which will require to be considered by this Court is the constitutionally embedded law making role of the Oireachtas in this jurisdiction. Given the centrality of the rule of law and the law making role of the Oireachtas under the Constitution, the Commission considers that there may be an issue as to whether Guidelines from the DPP can ever lawfully provide legal certainty because of the constitutional impediment on the DPP in so prescribing the manner in which she exercises her powers, that is that it may entail a trespass into the law making arena.

57. Mindful of the criticisms expressed in the Falconer Commission Report, the Court in the more recent ***Nicklinson***[28] case was careful to confirm that the DPP had done what was required of him in ***Purdy*** and it would be "wrong to require him to do more". Although the judgment of Toulson LJ identifies a number of factors which would make it wrong to require the DPP to do more, significantly, it was held that to require the DPP to do more would be to require him to (at paragraph 143 of the judgment):

"cross a constitutional boundary which he should not cross. For the DPP to lay down a scheme by which it could be determined in advance as a matter of probability whether an individual would or would not be prosecuted would be to do that which he had no power to do, i.e. to adopt a policy of non-prosecution

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[27] Note the decisions of the Supreme Court in cases such as *Dunne v. Donohoe* [2002] 2 IR 533, *O'Neill v. Minister for Agriculture* [1998] 1 I.R. 539 and *Laurentiu v. Minister for Justice* [1999] 4 IR 26 where the central role of the Oireachtas as law maker was emphasised and where the imposition of conditions on the exercise of a statutory discretion was found to be ultra vires.

[28] *Nicklinson v. Ministry for Justice & Ors* [2012] EWHC 2381 (16th of August, 2012)

in identified classes of case, rather than setting out factors which would guide the exercise of his discretion."

58. Toulson LJ concluded decisively at paragraph 150:

> *"To do as Martin wants, the Court would be compelling the DPP to go beyond his established legal role. These are not things the Court should do. It is not for the court to decide whether the law about assisted dying should be changed and, if so, what safeguards should be put in place. Under our system of government these are matters for Parliament to decide, representing society as a whole and not for the court on the facts of an individual case or cases."*

D. European Convention on Human Rights

The Right to Equality

59. It is recalled that unlike the Constitution, the European Convention on Human Rights does not have a standalone equality guarantee. Article 14 equality rights may only be invoked in relation to rights otherwise enjoyed under the Convention. For this reason, there is not an established jurisprudence on Article 14 in this area and in ***Pretty v. UK*** (Application No. 2346/02, 29th of April, 2002), the Court found that reasons exist under Article 14 for not seeking to distinguish between those who are able and those who are unable to commit suicide unaided such that there was no violation of Article 14 rights in that case having regard to the protection of life intended to be safeguarded by the prohibition on assisted suicide.

The Right to Life, Personal Autonomy and Privacy

60. There have been several relevant decisions of the European Court of Human Rights in which the right to end one's own life has been considered in the context of assisted suicide. Most focus has been on Article 8 of the Convention and the right to self-determination encompassed in the right to dignity protected under that Article.

61. Of the decided cases of the European Court of Human Rights, it seems true to say that the facts in ***Pretty v. UK*** (Application No. 2346/02, 29th of April, 2002) most resemble the facts in this case. The Applicant suffered from motor neurone disease which was at an advanced stage. Her life expectancy was very

poor but her intellect and capacity to make decisions was unimpaired. Fearing the loss of dignity and the suffering in the end stages of her illness, she wished with the assistance of her husband to be able to control how and when she died in circumstances where she was prevented by her diseases from ending her own life without assistance. Assurances were sought from the Director of Public Prosecutions that her husband would not be prosecuted should he assist her. These assurances were not forthcoming. The position under English law is very similar to the position in this jurisdiction. It is not a crime to end one's own life under English law but it is a crime to assist another to do so (section 2(1) Suicide Act, 1961).

62. In the ***Pretty*** judgment, the Court established that the notion of personal autonomy is an important principle underlying the guarantees of Article 8 of the Convention. Without in any way negating the principle of sanctity of life protected under the Convention, the Court considered that, in an era of growing medical sophistication combined with longer life expectancies, many people were concerned that they should not be forced to linger on in old age or in states of advanced physical or mental decrepitude which conflicted with strongly held ideas of self and personal identity. By way of conclusion, the Court was "not prepared to exclude" that preventing the applicant by law from exercising her right to choice to avoid what she considered would be an undignified and distressing end to her life constituted an interference with her right to respect of her private life as guaranteed under Article 8.1 of the Convention but that any such interference was justified as necessary in a democratic society for the protection of the rights of others and therefore there was no violation of Article 8 of the Convention.

63. In the later domestic jurisprudence of the English courts,[29] ***Pretty*** has been interpreted as authority for the propositions that:

(i) a blanket ban on assisted suicide was not disproportionate in the view of the court;

(ii) nor was it "arbitrary" to reflect the importance of life by prohibiting assisted suicide, while providing a system of enforcement which allowed due regard to be given in each

[29] *Nicklinson v. Ministry for Justice & Ors* [2012] EWHC 2381 (16th of August, 2012)

particular case, to the public interest, the requirements of deterrence and such like;

(iii) strong objection could be raised against any claim by the executive to exempt in advance any individual or classes of individuals from the operation of the law.

63. In the case of ***Haas v. Switzerland*** *(Application No. 31322/07)*, the Court further developed this case-law by acknowledging that an individual's right to decide in which way and at which time his or her life should end, provided that he or she was in a position freely to form his/her own will and to act accordingly, was one of the aspects of the right to respect for private life within the meaning of Article 8 of the Convention. Even assuming that the State was under an obligation to adopt measures facilitating a dignified suicide, however, the Court considered that the Swiss authorities had not violated this obligation in the circumstances of that specific case.

64. Most recently in the case of ***Koch v. Germany*** (Application no. 497/09),[30] a case in which the applicant alleged that the refusal to grant his late wife authorisation to acquire a lethal dose of drugs allowing her to end her life violated both her and his own right to respect for private and family life. The Court found that to the extent that the domestic courts had refused to consider the merits of the Article 8 claim on the basis that the applicant could not rely on his own rights under Article 8 to have his application examined by the courts. The Court emphasised that given the "margin of appreciation" and the lack of a consensus in this area, it is more important that a domestic remedy should be available to allow an examination of cases where it is claimed that Article 8 rights are infringed arising from restrictions placed on an individual's right to decide in which way and at which time his or her life should end.

65. In summary, the jurisprudence of the European Court of Human Rights establishes that the notion of personal autonomy is an important principle underlying the guarantees of Article 8 of the Convention and that an individual's right to decide in which way and at which time his or her life should end, provided that he or she was in a position freely to form her own

[30] Decision handed down on 19 July 2012

will and to act accordingly, was one of the aspects of the right to respect for private life within the meaning of Article 8 of the Convention. However, in deference to the wide "margin of appreciation" which applies in areas of significant lack of consensus among European Member States, such as this one, the measures taken in domestic law to facilitate a dignified death are a matter for domestic authorities. This in itself is significant insofar as domestic laws in the field of morality to limit or permit, for example, same sex marriage, abortion or euthanasia will in the main be upheld by the European Court under the not unlimited "margin of appreciation", the more so where detailed procedural safeguards are in place for affected individuals. In contrast, the absence of procedural safeguards will invariably "narrow" the margin available to States.

66. The House of Lords re-examined the compatibility of a blanket ban on assisted suicide with Article 8 of the Convention in its decision in ***R (Purdy) v. DPP*** [31] where Baroness Hale interpreted the final sentence of paragraph 76 of the judgment of the European Court of Human Rights in ***Pretty*** as contemplating that there would be cases in which the deterrent effect of a risk of prosecution would be a violation of a would be [suicide's] rights under Article 8. She ruled that on that premise, and on the premise that the justification for a blanket ban depended on the flexibility of its operation, that the prohibition could not be in accordance with the law unless there was greater clarity about the factors which the DPP would take into account. In providing the necessary clarification, the object of the exercise should be to focus upon the features which would distinguish those cases where deterrence would be disproportionate i.e. would violate a person's Article 8 rights, from those in which it would not (see paragraph 64 of the judgment).

67. Lord Brown for his part considered that it was implicit in the judgment of the European Court of Human Rights in Strasbourg (at paragraph 74 of the judgment) that:

> *"in certain cases, not merely will it be appropriate not to prosecute, but a prosecution under section 2(1) would actually be inappropriate".*

[31] [2010] 1 AC 345

68. He expanded by saying that:

> *"Strasbourg clearly appears to have recognized that in certain circumstances it will be wrong in principle to prosecute A for assisting B to commit suicide, because to do so would unjustifiably deter those in A's position from enabling those in B's position to exercise their article 8(1) right to self-determination..."*

He concluded at paragraph 86:

> *"What to my mind is needed is a custom-built policy statement indicating the various factors for and against prosecution, ..., factors designed to distinguish between those situations in which, however tempted to assist, the prospective aider and abettor should refrain from doing so, and those situations in which he or she may fairly hope to be, if not commended, at the very least be forgiven, rather than condemned, for giving assistance."*

69. What one may extrapolate from this is that it is not compatible with the Convention for the State simply to prohibit assisted suicide and a more nuanced approach which allows for the balancing of the competing interests and considerations which arise is necessary. Such a nuanced approach in the context of legalizing assisted suicide would appear to require legislation in which one would expect to see set out qualifying conditions (for example, terminal illness, competence and suffering) and procedures to be complied with before assistance might lawfully be given, along with a definition of the responsibilities, rights and immunities of the persons involved.

70. It should be noted that there have been numerous parliamentary attempts to change the law in the UK. Lord Joffe introduced Bills in the House of Lords unsuccessfully in 2003, 2004 and 2005. The Bills were similar in aim. They sought to legalise not only medical assistance with suicide but also, in cases where self-administration of lethal medication was not possible, voluntary euthanasia. Lord Joffe's 2004 Assisted Dying for the Terminally Ill Bill was considered by a Select Committee under the chairmanship of Lord Mackay of Clashfern, which reported on 4 April 2005 (Report of Select Committee appended at Appendix B hereto]. It summarised the evidence

which it had received (comprising oral evidence from 48 individuals or group representatives, written evidence from 88 individuals or groups and 14,000 letters).[32] The report recommended that consideration of the Bill should be adjourned until after the 2005 general election. It also suggested that a clear distinction should be drawn in any future Bill between assisted suicide and voluntary euthanasia in order to provide Parliament with an opportunity to consider carefully these two courses of action, and the different considerations which apply to them, and to reach a view on whether, if such a Bill were to proceed, it should be limited to the one or the other or both. After the general election Lord Joffe introduced a new Bill of the same name on 9 November 2005. The debate on the second reading of the Bill took place on 12 May 2006. The House voted to adjourn it for 6 months. It is the convention of the House of Lords not to vote against the principle of a Bill on its second reading, but the decision to adjourn the Bill was in substance a decision that it should not proceed.

71. During the passage of the Coroners and Justice Act, 2009 Lord Falconer moved an amendment in the House of Lords which would have created an exception to section 2 of the Suicide Act in the case of acts done for the purpose of enabling or assisting a person to travel to a country in which assisted dying is lawful, subject to certain conditions. The amendment was defeated. The decision of the House of Lords in ***Purdy*** was delivered 3 weeks later. On 27 March 2012 there was debate in the House of Commons on the subject of assisted dying. In the course of the debate moving accounts were given by MPs about cases of constituents or family members and widely differing views were expressed on the desirability of legislative change. The House passed a motion welcoming the DPP's policy and encouraging further development of specialist palliative care and hospice provision. It rejected an amendment calling on the Government to carry out a consultation about whether to put the DPP's guidance on a statutory basis.

[32] In *Dishonest to God* (2010, Continuum International Publishing Group), page 46, Baroness Warnock has described the Select Committee's report as giving "an exceptionally detailed insight into the legal, moral and religious arguments deployed on both sides of the debate".

Legal Certainty

72. The requirement of accessibility is part of Convention jurisprudence about what is a "law". In *Sunday Times v UK*[33], at paragraph 49, the Strasbourg court said that:

> *"...a norm cannot be regarded as a "law" unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able – if need be with appropriate advice - to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Those consequences need not be foreseeable with absolute certainty: experience shows this to be unobtainable. Again, whilst certainty is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances."*

73. The question of the need for legal certainty and assisted suicide has been visited before the English Courts who have sought to inform the application of the ***Pretty*** judgment and subsequent case-law of the European Court of Human Rights by reference to the requirements for legal certainty under the Convention. As we have seen, in ***R (Purdy) v. DPP*** [34]the House of Lords was asked to consider the refusal of the DPP to set out the factors which he would take into account in deciding whether to bring a prosecution. The House of Lords ruled that, without such clarification, the law relating to assisted suicide did not satisfy the Article 8(2) requirements of accessibility and foreseeability. As a direct consequence of this decision, the DPP made the policy statement already referred to.

74. In essence, the ratio of the decision of the House of Lords in ***Purdy*** appears to be that while the scope of the law of assisted suicide is for Parliament to decide, not the Court or the DPP, in order for the law to comply with the Convention requirements of accessibility and foreseeability it was necessary for the DPP to clarify the factors which he would take into account in giving his consent for a prosecution. How he chose to do so was a matter for the DPP.

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[33] (1979) 2 EHRR 245
[34] [2010] 1 AC 345

75. In ***Purdy*** Lord Hope said, at paragraph 41, that in this context the word "law" is to be understood "in its substantive sense, not its formal one". The law for this purpose goes beyond the mere words of the statute. He added:

> *"The requirement of foreseeability will be satisfied where the person is able to foresee, if need be with the appropriate legal advice, the consequences which a given action may entail. A law which confers a discretion is not in itself inconsistent with this requirement, provided the scope of the discretion and the manner of its exercise are indicated with sufficient clarity to give the individual protection against interference which is arbitrary."*

76. In ***Nicklinson***, the Court reflected the thinking which underlay the DPP's approach to the task which he had been set in *Purdy* by quoting from the evidence of the DPP before the Falconer Commission where Mr Starmer said:

> *"The approach we took was this: the law makes it an offence to assist suicide. It then obviously gives the prosecutor discretion. We thought that if the law remains unamended and in that form, it was important to distinguish between as it were one off acts of support or compassion and those that were engaged in the delivery of professional services or a business that would routinely...bring them into conflict with the law, because of the broad prohibition on assisted suicide. I mean, I appreciate not everyone would agree with that distinction but if you do have a broad based offence, it's one thing to say, "this is as it were, a one-off compassionate act" compared with "this is the provision of a service or a business" which inevitably involves a breach of the law and I think ...if we didn't put that factor in, Parliament might say we are really undermining the prohibition on assisted suicide."*

77. In his evidence before the Falconer Commission, Mr Starmer is stated to have also demurred at the suggestion that his policy should be seen as in some way schematic. He is quoted in ***Nicklinson*** as saying:

> *"We want to be transparent about the factors, hence the policy, and apply it on a case by case basis. We want to avoid being too schematic because it's not for me or the CPS to determine what the law should be. The law is clear and we're simply being given discretion in individual cases...What I think would be wrong, what I want to resist is saying: "schematically this is what we're trying to achieve", because that is not for me."*

78. He was asked whether setting out factors for and factors against prosecution was any different from setting out rules. His reply is described in ***Nicklinson*** as instructive and is quoted as follows (at paragraph 132 of the judgment of Toulson LJ):

> *"I think it is, because ultimately it's a discretion; this is simply saying what are the sort of factors we're likely to take into account. That is different from saying: "schematically these are the cases we are going to prosecute and these are the cases we're not going to prosecute". I appreciate that the two are not at opposite ends of the continuum by any stretch of the imagination. But they are conceptually different and I have avoided any attempt I hope to be schematic about this and insisted that every case has to be decided on its own facts. These are factors to indicate to people what is likely to be taken into account one way or the other, with the overriding proviso that no one factor outweighs others. We don't simply weigh them all up and we will decide each case on a case-by-case basis. We're trying to avoid...the schematic approach does risk, unless it's very carefully constructed, undermining Parliament's intention that this should be an offence."*

79. Commenting on this statement of the DPP in his judgment in the ***Nicklinson*** case, Lord Justice Toulson states (at paragraph 133):

> *"It is clear from his answers that the DPP was not seeking to identify types of case in which he would adopt a policy of non-prosecution based on a consideration of the rights of the victim. That would have been to introduce a de facto form of justifiable homicide. He took the view that any such exercise should be for Parliament; and that while Parliament maintained a blanket ban on assisted suicide, he should not adopt a policy which might appear to undermine the law. On the other hand, he recognised that there would be cases in which the public interest did not require prosecution, not because the homicide was justifiable or to encourage its repetition in other cases, but because it was a one off act of compassion. As Mr Starmer recognised, there is a conceptual difference between adopting the latter approach and carving out from the law a class of cases in which he would not enforce the law as a matter of general policy. The factors identified in the policy statement were intended to reflect this distinction.*
>
> *That was in my view a constitutionally proper approach for him to adopt. It was consistent with the terms of the order in Purdy, which were that he should identify facts and circumstances*

which he would take into account in deciding whether to consent to prosecution. From the DPP's policy statement, I believe that it would be clear to a person who, in the course of his profession, agreed to provide assistance to another with the intention of encouraging or assisting that person to commit suicide, that such conduct would carry with it a real risk of prosecution. Whether the risk would amount to a probability would depend on all the circumstances, but I do not believe that it would be right to require the DPP to formulate his policy in such a way as to meet the foreseeability test advocated by Mr Havers. I consider that it would be wrong for three reasons."

80. There is an obvious tension between the competing requirement for guidelines leading to predictability and consistency in decision making as part of a vindication of one's rights to fundamental justice or constitutional justice on the one hand and the need to avoid unlawful trespass into the arena of law making (which is properly the exclusive domain of the Oireachtas) on the other hand. Determining the balancing of these two competing issues may be a matter which this Court will have to consider and decide upon in the context of these proceedings.

E. Relevant International Human Rights Standards

The UN Convention on the Rights of Persons with Disabilities

81. The United Nations Convention on the Rights of Persons with Disabilities ('the CRPD') was adopted by the United Nations on 13 December 2006, following a long and detailed consultation process which was initiated in 2001. It came into force on 3 May 2008, on receiving its 20th ratification. Ireland signed the CRPD on 30th March, 2007, and intends to ratify it. 126 States have now ratified the CRPD.[35]

82. The CRPD codifies the application of a number of universally recognised human rights standards in the context of persons with disabilities, such as the right to equality, the right to liberty and security of the person and the right to privacy. Thus the rights protected by the CRPD are easily recognisable as domestic legal norms. However, the CRPD explicitly clarifies how existing human rights apply in a disability specific context.

[35] The EU has ratified the CRPD, the first time an international body has acceded to a human rights treaty. It is also noted that Article 21 and 26 of the Charter of Fundamental Rights includes a reference to the rights of persons with disabilities in terms of equality and independent living..

> *While the CRPD does not set out any 'new' rights, it clarifies the obligations of States Parties to promote and ensure the rights of persons with disabilities and sets out the steps that should be taken to ensure equality of treatment. It goes into much more detail than previous general human rights conventions concerning what action needs to be taken to prohibit discrimination.*[36]

83. Turning to the specific application of the CRPD in the context of the present case, it is accepted that Ireland, although a signatory, has not yet ratified the CRPD, and the *amicus* is mindful of the application of international legal standards under the Constitution where those standards have not been directly incorporated by the Oireachtas. However, the CRPD has already been called in aid by this Court. ***MX [APUM] v The Health Services Executive & Ors***[37] concerned a constitutional challenge to section 57 of the Mental Health Act 2001, which allows for the treatment of a person with a mental disorder without consent. Although the challenge was not upheld in substance, nonetheless the Court in considering how to give a constitutional interpretation to the legislation concerned placed reliance on the CRPD as a guiding principle:

> "Should this Court then have reference to the UNCRPD if not as a rule, then at least as a guiding principle? The values in question here are in no sense contrary to any provision of the Constitution. The UN Convention affirms the contemporary existence of fundamental rights for persons with a mental disorder. Although the UN Convention itself is not part of our law, it can form a helpful reference point for the identification of 'prevailing ideas and concepts', which are to be assessed in harmony with the constitutional requirements of what is 'practicable' in mind."

MacMenamim J, went on to state that:

> "As in the Irish and ECtHR authorities identified, I believe the broader range of constitutional "personal capacity rights" identified earlier, now fall to be informed by the United Nations Convention on the Rights of Persons with

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[36] *International Trends in Mental Health Laws, 2008,* The Federation Press, ed. Bernadette McSherry, "Protecting the Integrity of the Person: Developing Limitations on Involuntary Treatment", at p.111.

[37] *M.X.[APUM] v The Health Services Executive and The Attorney General*, MacMenanim J. 23 November 2012, at para. 61.

Disabilities, as well as the principles enunciated in the judgment of the European Court of Human Rights."[38]

Thus, the CRPD may provide considerable assistance to this Honourable Court by informing its approach to the interpretation of the fundamental rights invoked by the Plaintiff, namely; the right to life, autonomy, and the right to equality.

84. The CRPD is formed around four principal themes, which are captured as general principles under Article 3 of the Convention; equality, autonomy, participation and solidarity, all of which are interlinked:

> *"Notions of equality, autonomy, participation and solidarity are central to the purpose of the Convention in reinforcing the rights of people with disabilities. Quinn and Degener have noted this in their seminal report on human rights and disability, which states that "[a human rights perspective on disability] is underpinned by the values that inspire human rights: the inestimable dignity of each and every human being, the concept of autonomy or self-determination that demands that the person be placed at the centre of all decisions affecting him/her, the inherent quality of all regardless of difference, and the ethic of solidarity that requires society to sustain the freedom of the person with appropriate supports.""*[39]

85. For present purposes the principles of equality and autonomy are of central importance (which is not to indicate that the principles of solidarity and participation are not also relevant).

86. Article 5 is a stand-alone equality guarantee and provides that all persons "are equal before and under the law", and that such persons are entitled "without any discrimination to the equal protection and equal benefit of the law". Discrimination on the basis of disability is defined in the Convention (Article 2) as "any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural,

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[38] *Ibid.*, at para 72.

[39] *From Rhetoric to Action; Implementing the UN Convention on the Rights of Persons with Disabilities*, Dr Eilionóir Flynn, Cambridge University Press, 2011.

civil or any other field. It includes all forms of discrimination, including denial of reasonable accommodation."[40]

87. Thus a measure in legislation that on the one hand confers a benefit on persons, in this case, persons without a significant physical disability who may attempt to end their lives without fear or anxiety of suffering criminal consequences if they fail, and persons with certain significant disabilities who are effectively excluded from that benefit of legal certainty by reason of a criminal penalty that will likely result in relation to anyone who assists them. While it may not seem particularly sensitive or appropriate to categorise the de-criminalisation of suicide as some form of benefit, in practice the measure, while not intended to condone suicide is an acknowledgment that the State cannot force a person to live in circumstances where they make a determined decision that they do not want to, and more fundamentally accepts that the State should not interfere with the ultimate expression of autonomy, the choice to end one's life. However, the State did not confer even the possibility of such restraint on the part of the State on persons such as the Plaintiff who by reasons of her worsening disability is unable to exercise the same autonomy as a person without a disability. There is thus a difference in treatment and the Court is called upon to assess whether this difference is justified and proportionate to the legitimate aim (presumably preservation of life) which it is sought to achieve. This balancing exercise must, it is suggested, be informed by the particular approach to autonomy rights present under the Convention.

88. The autonomy rights under the Convention centre on Article 12 which is perhaps the most pivotal autonomy right, and is drafted in disability specific terms. It is appropriate to set out the text of the Article in full:

> *1. States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law.*
>
> *2. States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.*

[40] This formulation is similar to those under other international conventions: see the International Covenant on Civil and Political Rights, International Convention on the Elimination of all forms of Discrimination, and the International Covenant Economic and Social and Cultural Rights. and so on..

3. States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.

4. States Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person's rights and interests.

5. Subject to the provisions of this article, States Parties shall take all appropriate and effective measures to ensure the equal right of persons with disabilities to own or inherit property, to control their own financial affairs and to have equal access to bank loans, mortgages and other forms of financial credit, and shall ensure that persons with disabilities are not arbitrarily deprived of their property.

89. There is much academic commentary in relation to the finer implications of Article 12, for instance whether it completely prohibits any form of substituted decision making, or whether it allows for guardianship type arrangements. Some of these questions will no doubt be resolved over time; however, Article 12 does establish a number of core principles that may guide this Court in determining where the boundaries of personal autonomy should be set in the present case.

90. One leading commentator has explained the significance of the recognition of legal capacity under Article 12 in the following terms:

"Let me suggest that legal capacity is the epiphenomenon. It provides the legal shell through which to advance personhood in the lifeworld. Primarily, it enables persons to sculpt their own legal universe – a web of mutual rights and obligations voluntarily entered into with others. So it allows for an expression of the will in the lifeworld. That is the primary positive role of legal capacity. Let me emphasise this. Legal capacity opens up zones of personal freedom. It facilitates

uncoerced interactions. It does so primarily through contract law. ... opening and maintaining a bank account, going to the doctor without hassle, buying and selling in the open market, renting accommodation, etc. This is how we positively express our freedom. This is how we can see legal capacity as a sword to forge our own way. And this has been largely denied to persons with disabilities throughout the world. It follows to me that this is the primary added value of Article 12 – to bulldoze away barriers to the lifeworld in the form of outdated legal incapacity laws.

There is another side to the concept of legal capacity. Viewed as a shield, it also helps persons fend off decision made against them or otherwise 'for' them by third parties. This is an important element of legal capacity. But it doesn't do all the heavy lifting with respect to coercive intrusions. Certain intrusions are put beyond the pale as being not subject to negotiation or even consent. We do not, and cannot, be allowed to consent to torture, inhuman or degrading treatment. That's why there is an Article on violence, exploitation and abuse.

Now the universe of what could be enforced against the will of persons with disabilities in the past was too large – probably on an assumption that such persons were not true subjects but objects with correspondingly more leeway for intervention. This is no longer possible because of the CRPD. But my larger point is that the liberating potential of Article 12 lies in its promise to open up zones of affirmative choice for persons with disabilities and not just to foreclose the depradations of third parties or of the State itself."[41]

91. This statement usefully sets out the broad imperative of Article 12 in terms of establishing zones of personal freedom for persons with disabilities and protecting them from over-paternalistic intrusions into their personal autonomy. While Article 12 is most often invoked when considering the mental capacity of persons with an intellectual disability, by its terms it has equal applicability to persons with a physical disability. It is notable in MX, that MacMenamin J., affirmed that the obligation on the State to facilitate assisted

[41] *Personhood & Legal Capacity, Perspectives on the Paradigm Shift of Article 12 CRPD*, Paper delivered by Professor Gerard Quinn, Harvard law School, 20 February 2010.

decision making as derived under Article 12, also enjoys the status of a constitutional right.

92. In applying the principles set out in Article 12 to the issues presently before the Court, the question must be asked whether section 2(2) of the Act, impermissibly deprives a person with a significant physical disability, from exercising their legal capacity, or life choices, as an autonomous being. It is submitted that in addressing whether in fact the State has encroached too far into the zone of personal autonomy that is protected under Article 12 (if this is accepted as expressing the appropriate legal standard), the following are the types of factors, derived from Article 12 that might be taken into account:

(i) recognition of persons with disabilities as equal to others before the law;
(ii) in particular to (i), recognition that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life;
(iii) appropriate supports in order to enable persons with disabilities to exercise their legal capacity;
(iv) effective safeguards for the exercise of legal capacity to ensure that decisions are made free of conflicts of interest or undue pressure;
(v) proportionate and "tailored" decisions relating to the exercise, or restriction, of a person's legal capacity;
(vi) that any restriction on the exercise of legal capacity be of the least restrictive nature possible and for the shortest time possible;
(vii) regular review of decisions and measures impinging on the exercise of legal capacity.

93. Measured against these factors, the blanket prohibition on assisted suicide for those in the circumstances of the Plaintiff may be open to question.

94. In addition to Article 12, other rights which are enshrined in the CRPD and which reinforce the right to autonomy of persons with a disability are; the right of access to justice (Article 13); the right to liberty and security of the person (Article 14); the right to physical and mental integrity (Article 17) and the right to respect for privacy (Article 22). While no one would dispute that all persons, irrespective of having a disability are entitled to such rights, the important added qualifier to these rights under the CRPD, is that they are enjoyed "on an equal basis" with others. Thus paternalism is firmly rejected.

CRPD and the ECHR

95. In ***Glor v. Switzerland,***[42] the European Court of Human Rights Court found a violation of Article 14 when read in conjunction with Article 8 on the basis of the Applicant's physical disability. The Court stated that the Convention's provisions fell to be considered, *inter alia*, in light of European and universal norms, noting the international evidence of the prohibition of discrimination on the grounds of disability, and specifically citing the CRPD.[43]

96. The CRPD is now routinely drawn on by the European Court of Human Rights in cases where the rights of a person with a disability are invoked.[44] This is a strong indication that the CRPD is considered a best practice standard in the context of determining the rights of persons with disabilities and as such informs the interpretation of the ECHR. This creates a legal bridge between the requirements of the CRPD and domestic law. It is also of note in the context of the present case that the CRPD had not been adopted or come into force when the decision in ***Pretty*** was delivered. It is therefore not clear how the issues raised in ***Pretty*** might be determined by the European Court of Human Rights in light of the further developments in relation to disability rights represented by the CRPD.

Charter of Fundamental Rights

97. It is submitted that the Court is entitled to give due regard to relevant provisions of the Charter of Fundamental Rights of the European Union (2000/C 364/01, hereinafter 'the Charter'), as one of the principal sources of human rights law within the EU legal order, pursuant to Article 6 of the Treaty on European Union ('TEU'). Although the Charter is of binding force since the Lisbon Treaty was passed, it is recognised that the provisions of the Charter do not extend in any way the competences of the EU as defined in the Treaties (Article 6, TEU), and moreover that its provisions are addressed to EU Member States only when implementing Union law (Article 51, Charter). As such, it is acknowledged that the State in prosecuting an offence under the 1993 Act is

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[42] *Glor v. Switzerland (App. 13444/04)*, Judgment 30 April 2009.
[43] *Op. cit.*at para 54.
[44] See for instance *Stanev v Bulgaria*, Grand Chamber Judgment, 17 January 2012, *Jasinskis v Latvia*, Judgment 21 December 2010, *Pleso v Hungary*, Judgment 2 February 2012, *D.D. v Lithuania*, Judgment, 14 February 2012.

not acting within the scope of Union law, and as such is not bound by the Charter in this regard.

98. Notwithstanding this, however, it is important to note that the Charter enumerates a number of rights which would otherwise be engaged in the within proceedings, namely that of human dignity (Article 1), the right to life (Article 2), the right to integrity of the person (Article 3), prohibition of torture and inhuman or degrading treatment or punishment (Article 4), respect for private and family life (Article 7), equality before the law (Article 20), non-discrimination (Article 21), and the integration of persons with disabilities (Article 26). Insofar as these rights are reflected in our domestic constitutional legal order and to the extent that the Constitution and the Charter will fall to be harmoniously interpreted where possible, having regard to the requirements of EC law, the supremacy of EC law and the principle of loyal cooperation laid down in Article 4.3 of the Treaty on European Union, the manner in which these rights are protected under the Charter, and the breadth and nature of the protection afforded, is potentially of the first significance in the development of our constitutional jurisprudence in this area. Where Charter rights correspond to rights guaranteed by the ECHR, then they shall have the same scope and meaning (Article 52(3)), subject to the caveat that Union Law can provide more extensive protection. There are instances where the Charter Article is based on more than one source and modifies the relevant ECHR right. This is so for the important right to equality and non-discrimination which are relevant to this case. Although the protections afforded by the Charter of Fundamental Rights are informed by the European Convention on Human Rights, in some areas jurisprudential developments under the Charter have surpassed the Convention in the development of minimum standards of protection.

99. More generally, it is to be noted that the dignity of the human person is recognised by the Charter as not only a fundamental right in and of itself, but also as constituting the basis and substance of the rights laid down in the Charter (Explanations relating to the Charter of Fundamental Rights, OJ [2007] C 303/17, given interpretative force by Article 6(1) TEU).

F. Conclusion

100. On the basis of international jurisprudence and available comparative research, the Commission submits that the facts of this case require a consideration of the implications of the right to life, equality, privacy, autonomy and dignity as protected under Irish law in the context of the criminalisation under Irish law of assisted suicide. An issue the Court must resolve is whether the criminalisation in absolute terms of assisted suicide is justified having regard to the extent of interference with the personal rights of the Plaintiff thereby occasioned. In this context it is submitted that the Court should have regard to the purpose of the provision and question whether this purpose could be achieved in other, less absolute terms.

101. The experience elsewhere shows that courts internationally consider the absolute terms of a ban on assisted suicide and the exposure to prosecution for same at the discretion of the Prosecutor to be unlawful and have required the development of a more nuanced approach. As we have seen, in the UK this has led to the publication of prosecution guidelines by the DPP whilst in Canada, the Courts have crafted a "constitutional exemption" for a class of case in which prescribed conditions are met pending the introduction of legislation.

102. In the Irish context, the Commission submits that it is far preferable having regard to our constitutional order and the separation of powers doctrine which is fundamental to the democratic nature of the State, that legislation should be introduced prescribing safeguards and the circumstances in which assisted suicide will not result in criminal sanction in a measured and proportionate reconciliation of the right to life (reflecting the sanctity of life) with the personal (right to privacy and personal autonomy) and equality rights of persons such as the Plaintiff.

November 28th, 2012

Siobhan Phelan BL

Frank Callanan SC