

## Joint Oireachtas Committee on Assisted Dying

20<sup>th</sup> June 2023

### Assisted Dying and the Constitution

#### Opening Statement

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Cathaoirleach, Members of the Committee, I am grateful for the opportunity to speak to you this morning.

Almost everything about whether to and how to regulate assisted dying is complex. The one matter that is quite simple is the primary constitutional question: is the Oireachtas permitted to legalise and regulate assisted dying? In the case of *Fleming v Ireland* [2013] 2 IR 417 the Supreme Court concluded definitively that the answer is yes. In the view of the Court the Constitution does not protect a right to terminate life or a right to have life terminated, but neither does it prohibit the State from legalising assisted dying. Therefore, the Oireachtas is free to make the decision as to whether to legalise and regulate assisted dying.

#### **I. Constitutional Rights Concerning Death and Dying**

Flowing from *Fleming* it seems that there is no constitutional protection for the right to decide to take active steps to end one's life. This means, therefore, that the State is entitled to attempt to prevent people from ending their lives by suicide.

However, while there is no right to terminate life/to engage in suicide, there are other constitutional rights that I think are useful to understand and bear in mind.

#### **The Right to Dignity in Death, the Right to Die a Natural Death**

Under the Irish Constitution there is a sophisticated body of case law on rights at the end of life. In the seminal case of *In re a Ward of Court (withholding medical treatment)* [1996] 2 IR 79 the Supreme Court recognised that as long as a person is alive, he or she enjoys a right to dignity, extending to a right to dignity in death (Denham J, O Flaherty J). Invasive life prolonging medicine may interfere with that right. Other members of the Court identified the 'right to die a natural death' (Hamilton CJ).

So, even though the Supreme Court has rejected the proposition of constitutional protection for a right to die, it is important to remember that there remains a right to dignity in death, albeit one very much based around “letting nature take its course”. The Irish Constitution is unusual in recognising such a right.

### **The Right to Refuse Treatment**

The Constitution protects a right to refuse treatment, even where that refusal will result in death (*In re a Ward of Court (withholding medical treatment)* [1996] 2 IR 79, *Fitzpatrick v FK* [2009] 2 IR 7). Notably, this is also regarded as a fundamental right at common law (*Secretary of State for the Home Department v. Robb* [1995] Fam 127), so it probably exists in Irish law independently of the Constitution.

The right to refuse treatment extends to the right to refuse nutrition and water. It also underpins the validity of a decision to refuse treatment in the future, at a point when one has lost consciousness and lacks capacity. These aspects of the right were recognised by the High Court in the context of a prisoner on hunger strike in *Governor of X Prison v PMcD* [2015] IEHC 259.

Therefore, it is important to recognise that according to the Courts’ interpretation of the Constitution the right to dignity in death and the right to refuse treatment, even where that refusal will lead to death, are protected, but the right to terminate life is not.

## **II. Lawful Medical Practices Concerning Death and Dying**

There are a number of medical practices that have death as a consequence that are lawful, and it may be useful to the Committee to consider these. First, it is lawful to cease or withdraw medical treatment where that treatment is futile. This has been acknowledged in many cases, including *In re a Ward of Court (withholding medical treatment)* [1996] 2 IR 79. Importantly, the Supreme Court in that case accepted that there was a crucial distinction between ending life through a positive act (as would be involved in euthanasia/assisted dying) and withdrawing treatment in order to allow nature take its course. This was endorsed by the High and Supreme Courts in *Fleming v Ireland*.

Second, it is lawful to decide not to resuscitate a person who suffers cardiac or respiratory arrest. In practice, this is implemented through decisions known as DNAR or DNACPR decisions or orders, an abbreviation of “*Do not attempt (cardiopulmonary) resuscitation*”. These constitute a medical judgment that cardiopulmonary resuscitation will not be

administered if the person goes into cardiac arrest. These orders are standard in Irish hospitals and they are addressed in Part Three of the HSE National Consent Policy.<sup>1</sup>

Third, it is lawful to provide pain relief to a dying person where it is understood and foreseen that this will hasten that person's death. Typically, this may involve the administration of morphine. It is regarded as lawful because the intention is to relieve pain, not to end the life of the person. This is something of a departure from the ordinary position in criminal law.

### **III. Balancing Interests in Assisted Dying**

Fundamentally, deciding whether to legalise assisted dying, and if so, how to regulate it, comes down to a balancing of the interests of the various persons. For some assistance in considering that balance, I would suggest that the Committee looks to the judgment of the High Court in ***Fleming v Ireland*** [2013] IEHC 2. On the key question of whether there is constitutional protection for the decision to end one's life, the Supreme Court and the High Court disagreed, and so the High Court judgment is not binding. The High Court found that there was constitutional protection for the decision to end one's life as part of the right to autonomy, but that there were powerful countervailing considerations that justified the Oireachtas in enacting legislation to criminalise assisted suicide. Undoubtedly the Court had great sympathy for Ms Fleming, but found that it was unable to vindicate her right without creating significant risks for others. It stated:

*If this Court could be satisfied that it would be possible to tailor-make a solution which would address the needs of Ms. Fleming alone without any possible implications for third parties or society at large, there might be a good deal to be said in favour of her case. (Paragraph 52)*

The primary reason that the Court could not grant Ms Fleming's wishes without injuring third parties was because Courts, unlike the legislature, are not able to craft detailed regulatory frameworks. In addition to that, the Court expressed concerns that it may be impossible even for the legislature to put in place sufficient safeguards.

As I said, the Oireachtas is not bound by the High Court in *Fleming*. But the judgment presents the legislative challenge in very clear terms. I suggest that it raises the following questions:

1. Should certain people be entitled to assistance in ending their own lives?
2. If so, who are those people and what are the key characteristics that mean they are entitled to seek assistance in dying?

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<sup>1</sup> <https://www.hse.ie/eng/about/who/national-office-human-rights-equality-policy/consent/hse-national-consent-policy.pdf>

3. Does the existence of a regime permitting assisted suicide for one cohort of people pose risks or dangers?

3. If it does, can those risks be adequately mitigated by the regulatory safeguards to be put in place, such that it is right to legalise assisted suicide?

I will be very happy to answer any questions the Committee members may have.