DYING WITH ASSISTANCE: THE CALL FOR AN INQUIRY, THE POWER OF A DECLARATION, THE ROLE OF EVIDENCE

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ABSTRACT
The article analyses recent legal challenges of the prohibition of assisted suicide in England and Wales to review where we are in the debate for reform, and where we can go. The article, principally, advocates for an evidence-based new governmental inquiry. Aside the fact that this is widely-supported by various interested parties, this argument stems from the approach recently attempted by claimants in English courts in challenging the prohibition of assisted suicide, and that is, an evidence-based approach to judicial review. As this article discusses, the review of ‘the available evidence’ is unlikely to be done by English courts, but what this new legal strategy does is to send a strong message to Parliament and the government that there is a need to identify and examine the evidence. The findings of a fresh governmental inquiry, will allow Parliament to engage in a careful, informed review of the law and practice on assisted suicide and decide whether there is another way to protect the vulnerable, while respecting individual choice. The benefits of this inquiry go beyond England and Wales; an English (or indeed UK-wide) inquiry will inform discussions currently taking place elsewhere, and vice versa.

KEYWORDS: assisted suicide, Carter, Conway, inquiry, Nicklinson, Omid

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I. INTRODUCTION

Those of us who attempt to retain control over periods of incapacity and decline by means of available control mechanisms, have reflected, at least at some point in our lives, on one of these mechanisms - assisted suicide. In England and Wales, this is prohibited by section 2(1) of the Suicide Act 1961 (hereafter, the prohibition or section 2(1)). Several statutory attempts failed to lead to reform, and legal challenges of the prohibition have reached the highest courts on multiple occasions. The article focuses on these legal challenges, what they tell us about assisted suicide in England and Wales today, and what they may mean for the future.

Significant developments have taken place since 1961 and as a result of legal challenges of the prohibition. To date, however, section 2(1) remains in place. Individuals continue to travel to Switzerland to receive assistance with dying, some are forced to commit suicide alone and earlier than if regulated assisted suicide at home was permissible, others refuse food with the intention of dying, or engage in dangerous, unregulated practices with the same intention. Calls for reform have proved not led to

1 Do-Not-Attempt-Resuscitation orders, Lasting Powers of Attorney, and Advance Decisions to Refuse Treatment are some examples.
2 'Assisted suicide' describes the process by which individuals receive assistance in ending their own lives. I prefer the term 'assisted dying' as it better reflects the situation of these individuals and, for me, it also includes voluntary euthanasia. However, here, I refer to assisted dying to mean only assisted suicide as it describes the prohibition in England and Wales, and because it has been the focus (mostly) of litigation and parliamentary debates, as opposed to also voluntary euthanasia. On euthanasia see, for example, Law Commission, Murder, Manslaughter and Infanticide (Law Com No 304, 2006).
3 The consent of the Director of Public Prosecutions for a prosecution is required, and an offence-specific policy has been in place since 2010. If convicted, the maximum sentence is 14 years imprisonment. Prosecution are rare.
4 Two failed amendments to the Coroners and Justice Bill 2008–09, and the Patient (Assisted Dying) HL Bill (2002–03) 37; the Assisted Dying for the Terminally Ill HL Bill (2003–04) 17; the Assisted Dying for the Terminally Ill HL Bill (2005–06) 36; the Assisted Dying HL Bill (2013–14) 24; the Assisted Dying (No.2) HC Bill (2015–16) 7; the Assisted Dying HL Bill (2016–17) 42; and the Assisted Dying HL Bill (2019–21) 69.
5 Britons hold second place in the number of ‘accompanied suicides’ for 1998–2019 in Dignitas: <http://www.dignitas.ch/images/stories/pdf/statistik-fb-jahr-wohnsitz-1998-2019.pdf> accessed 5 October 2021. See also: ‘The True Cost’ (Dignity in Dying, November 2017) <https://features.dignityindying.org.uk/true-cost-dignitas/> accessed 5 October 2021. Estimated costs to travel to Dignitas come to £6,500–£15,000.
6 In Carter v Canada (Attorney General) 2015 SCC 5 [15], one witness described the traditional mode of suicide as ‘too repugnant’: ‘I was going to blow my head off. [...] I decided that I could not do that to my family. It would be horrible to put them through something like that [...] I want a better choice than that’.
7 S Jenkins, ‘Let’s mark Debbie Purdy’s Death by Legalising Assisted Dying’ (The Guardian, 30 December 2014) <https://www.theguardian.com/commentisfree/2014/dec/30/debbie-purdy-death-legalise-assisted-dying-lord-falconer-bill/>; ‘Right-to-die man Tony Nicklinson dead after refusing food’ (BBC News, 22 August 2012) <https://www.bbc.co.uk/news/uk-england-19341722> both accessed 5 October 2021. Debby Purdy and Tony Nicklinson died from self-starvation. The UKSC described self-starvation as ‘a protracted exercise, involving considerable pain and distress’: R (on the application of Nicklinson and another) v Ministry of Justice; R (on the application of AM) (AP) v DPP [2014] UKSC 38, [4].
8 S Morris, ‘Woman who Imported “euthanasia kit” Took Her Own Life, Rules Inquest’ (The Guardian, 20 October 2016) <https://www.theguardian.com/uk-news/2016/oct/20/woman-who-imported-euthanasia-kit-took-her-own-life-inquest-rules> accessed 5 October 2021. These cases can be distinguished from ‘conventional suicides’ as there are indications that third-party involvement was needed from the individual, here, the deceased’s membership of an euthanasia organisation. Also, ‘Northwood Pensioner Ended his Own life in Garage’ (Dignity in Dying, 9 March 2017) <https://www.dignityindying.org.uk/news/northwood-pensioner-ended-life-garage/> accessed 5 October 2021.
change in England, and respective governments have failed to appreciate that assisted suicide takes place anyway and away from the safety and transparency a legal framework can offer. Other jurisdictions have responded more promptly to calls for change in the law on assisted dying.\(^9\) One example is Canada, which has played a key role in how recent legal challenges in England have taken shape. In Section II I provide a brief overview of the factual and legal context of the *Carter* litigation, which led to law reform in Canada, and from Section III, the article begins to tell the story of how claimants and the judiciary in England have been influenced by the decision in *Carter*. The role of evidence, and specifically ‘primary evidence’, is key to these legal challenges and is a clear sign of the *Carter*-effect.\(^10\) Primary evidence is first-hand evidence, which in the context may include data on how the law works domestically and data on how it works abroad. I call this ‘the available evidence’. In Section III, *Nicklinson* is discussed, as this was the first case in England that discussed the potential role primary evidence can have in assessing the compatibility of the prohibition with human rights legislation.\(^11\) A majority in *Nicklinson* was openly critical of the law and practice on assisted suicide, with two dissenting judgments, for the first time, supporting a declaration of incompatibility (section 4(2) of the Human Rights Act 1998 (HRA)) with Article 8 of the European Convention of Human Rights (ECHR), the right to private and family life.

Section IV continues to review how post-*Nicklinson* case law has responded to the ground-breaking judgment of the United Kingdom Supreme Court (UKSC) in 2014. In one sense, the next legal challenge, *Conway*,\(^12\) took the debate some steps back compared to *Nicklinson*, especially if one considers the widening of the government’s justification for the prohibition, and the quick dismissal for an appeal to the UKSC. On a different level, *Conway* positively established that courts have the jurisdiction to consider the compatibility of section 2(1), even if Parliament has already expressed an opinion on that matter. This was not as clear in *Nicklinson*, and will allow judges in the future to deal with the substantive matters in question, rather than with matters of jurisdiction. It is also encouraging that the High Court (HC) in *Conway* engaged in a compatibility assessment of Article 8, for the first time since the dissenting judgments in *Nicklinson*. Another positive element of *Conway* was that the Court of Appeal (CA) relied on some speeches in *Nicklinson* to note that, although the evidence in *Conway* was more extensive, it was still not ‘primary evidence’.\(^13\) But why is this important?

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9 For the US ‘death with dignity’ laws: [https://www.deathwithdignity.org/]; Germany: ‘Criminalisation of assisted suicide services unconstitutional’ (Press Release No.12/2020, 26 February 2020); [https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2020/bvg20-012.html]; New Zealand: ‘Assisted dying in New Zealand and 2019 developments’ (17 December 2019); [https://www.parliament.nz/en/pb/library-research-papers/research-papers/assisted-dying-in-new-zealand-and-2019-developments/]; Australia: ‘Euthanasia and Assisted Dying’ [https://end-of-life.qut.edu.au/euthanasia] all accessed 5 October 2021.

10 A ‘premature death’ argument used in *Carter* has also been seen in the recent English legal challenges of the prohibition: that, as a result of the prohibition, some individuals may choose to die earlier than planned had the option for assisted suicide been available at home. This argument has not been given much attention in English courts to date.

11 [R (on the application of Nicklinson and another) v Ministry of Justice; R (on the application of AM) (AP) v DPP [2014] UKSC 38.]

12 [R (on the application of Conway) v The Secretary of State for Justice [2017] EWHC 2447 (Admin).]

13 [R (on the application of Conway) v The Secretary of State for Justice [2018] EWCA Civ 1431 [189].]
It is important because \textsuperscript{14} and \textsuperscript{15} relied on this CA comment in Conway, and on the discussion of primary evidence and its role in Nicklinson to ask the HC to permit the use of primary evidence with cross-examination. The two cases are discussed in Section V. In that section I advocate for more involvement by the judiciary, and note what this new approach to the legal challenge of the prohibition signifies. Although this request was rejected by the HC as unnecessary, I argue that it is a message to Parliament that ‘the available evidence’ must be identified and examined by Parliament. A positive reading of all these judgments may even show a subtle message from the judiciary itself to Parliament to this effect.

I argue that this re-assessment by Parliament should take the form of a fresh governmental inquiry. This must include, as a minimum, a review of domestic practice (to include a comparison of prosecutions under section 2(1) and the numbers traveling to Dignitas, data and impact of police investigations, number of suicides by terminally ill patients, a review of unregulated and dangerous alternative practices and their impact on those concerned), as well as regulation abroad (especially in relation to eligibility standards, and legal and procedural safeguards). An inquiry by the UK government will be instructive for other jurisdictions currently having these discussions, while discussions and inquiries in other jurisdictions will equally be instructive on any domestic inquiries.\textsuperscript{16}

Although the power of English courts is limited compared to the power of the Supreme Court of Canada (SCC) to strike down legislation as it happened in Carter, English courts still have a key role to play in ensuring that the rights of individuals and society are equally considered. Although, as it is argued later, it is highly unlikely that an English court will allow primary evidence to be heard alongside cross-examination, a compatibility assessment and a declaration \textit{do not need} primary evidence, as evident by the dissenting judgments in Nicklinson, and by Conway. The message for reform from the courts by means of a declaration is crucial to demonstrate that it is possible to create a framework that will ensure that the concerns of the government are met, while individual choice is respected. The urgency of reform is highlighted time and again with every new legal challenge that reaches the courts, with every new Bill in Parliament, and with every media report on another assisted

\begin{thebibliography}{9}
\bibitem{14} R (on the application of T) v Ministry of Justice [2018] EWHC 2615 (Admin).
\bibitem{15} R (on the application of Newby) v Secretary of State for Justice [2019] EWHC 3118 (Admin).
\bibitem{16} See, for instance, the Committee on Justice in Ireland reviewing the Dying with Dignity Bill 2020: Oireachtas, ‘Dying with Dignity Bill 2020’ <https://www.oireachtas.ie/en/bills/bill/2020/24/?highlight%5B0%5D=dignity&highlight%5B1%5D=dignity&tab=debates>; Canada announcing changes to their medical assistance in dying (‘MAID’) law: Government of Canada, ‘Medical Assistance in dying’ <https://www.canada.ca/en/health-canada/services/medical-assistance-dying.html>; Spain introducing euthanasia legislation: E de Benito, ‘Spain Approves Euthanasia Law, becoming the Fifth Country in the World to Regulate the Practice’ (El País, 18 March 2021) <https://english.elpais.com/society/2021-03-18/spain-approves-euthanasia-law-becoming-the-fifth-country-in-the-world-to-regulate-the-practice.html> all accessed 6 October 2021. N.B. In September 2021, the Jersey Citizens’ Jury recommended legislation permitting assisted dying: <https://www.gov.je/Government/Pages/StatesReports.aspx?ReportID=5452> accessed 4 October 2021.
\bibitem{17} See, just one example in Queensland, Australia: The Queensland Law Reform Commission, ‘A legal framework for voluntary assisted dying’ (QLRC Report No. 79, May 2021), which led to The Voluntary Assisted Dying Bill 2021 introduced to the Queensland Parliament on 25 May 2021: <https://www.health.qld.gov.au/system-governance/legislation/voluntary-assisted-dying-bill/background> accessed 6 October 2021.
\end{thebibliography}
II. CARTER

The SCC in Carter struck down those provisions of the Criminal Code\(^\text{18}\) prohibiting physician-assisted dying for competent adults who are suffering intolerably as a result of a grievous and irremediable medical condition.\(^\text{19}\) In an unanimous judgment on 6 February 2016, the SCC declared the provisions void for breaching key aspects of the Canadian Charter of Rights and Freedoms of 1982 (the Charter).\(^\text{20}\) The Federal Government passed legislation in response. Before Carter, Canada had seen many statutory reform attempts\(^\text{21}\) and legal challenges on assisted dying,\(^\text{22}\) so change was not unexpected and was the result of various factors.\(^\text{23}\) For the SCC in 2015, the key factors were the evolving ‘legislative landscape’ in ‘permissive jurisdictions’.\(^\text{24}\) Aspects of the case have influenced how the legal challenges have been presented before English courts, and how Carter was litigated also highlights the need for the UK government to organise a fresh inquiry on the law and practice on assisted suicide.

A. Carter: Factual Background

Katherine ‘Kay’ Carter was diagnosed with spinal stenosis in 2008. She expressed a wish to end her life as she did not want to live out her life lying flat in bed as an ‘ironing board’.\(^\text{25}\) She could either take her own life or wait for natural death while enduring intolerable suffering. Finding neither ‘option’ satisfactory, Kay asked her daughter, Lee Carter, and her daughter’s partner, Hollis Johnson, to assist her to travel to Switzerland for an assisted death. Neither were prosecuted for assisting Kay to die in Dignitas in 2010. Gloria Taylor, another Canadian citizen, who was diagnosed with Amyotrophic Lateral Sclerosis (‘ALS’) in 2009 did not have the means to die in Switzerland. Gloria feared dependency on others and days ‘wracked with pain’, which she described as assaults to her privacy, dignity, and self-esteem.\(^\text{26}\) Her ‘options’ were to either prematurely take her own life, or live dependent on others and in pain.

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\(^\text{18}\) Criminal Code, R.S.C. 1985, c. C-46.
\(^\text{19}\) For definitions, see Carter v Canada (Attorney General) 2012 BCSC 886 [37]–[39]; Carter v Canada (Attorney General) 2015 SCC 5 [40]; Special Joint Committee on Physician-Assisted Dying, ‘Medical Assistance in Dying: A Patient-Centred Approach Report’ (February 2016, 42nd Parliament, 1st Session).
\(^\text{20}\) The Charter was added to Canada’s Constitution in 1982 allowing challenges to the Criminal Code.
\(^\text{21}\) A useful table can be found in B Chan and M Somerville, ‘Converting the “right to life” to the “right to physician-assisted suicide and euthanasia”: An Analysis of Carter v Canada (Attorney General), Supreme Court of Canada’ (2016) 24 Medical Law Review 2, 143–75, 152–54. This article, as well as J Keown, ‘A Right to Voluntary Euthanasia? Confusion in Canada in Carter’ (2014) 28 Notre Dame Journal of Law, Ethics & Public Policy 1, 1–46, provide critical accounts of the case.
\(^\text{22}\) RM Carter and B Rodgerson, ‘Medical Assistance in Dying: Journey to Medical Self-Determination’ (2018) 55 Alberta Law Review 777–803, 785.
\(^\text{23}\) For developments up to Carter, see: Library of Parliament, Euthanasia and Assisted Suicide in Canada (Background Paper, Publication No 2015-139-E, 15 December 2016); Carter and Rodgerson, ibid 777–803, 783–86.
\(^\text{24}\) Carter v Canada (Attorney General) 2015 SCC 5 [8].
\(^\text{25}\) ibid [17].
\(^\text{26}\) ibid [11]–[12].
challenged the constitutionality of section 14\textsuperscript{27} and section 241(b)\textsuperscript{28} of the Criminal Code, the Canadian prohibition of voluntary euthanasia and assisted suicide respectively,\textsuperscript{29} by means of the Charter’s section 7 (the right to life, liberty, and security of the person)\textsuperscript{30} and section 15 (the right to equal treatment by and under the law).\textsuperscript{31} Gloria was joined by Lee Carter and Hollis Johnson who thought that Kay ought to have had a physician-assisted suicide at home and not go through a stressful and expensive procedure in Switzerland.\textsuperscript{32} There were two more claimants: Dr William Shoichet, a British Columbia physician (who would be involved in physician-assisted suicide if this was regulated), and the British Columbia Civil Liberties Association.\textsuperscript{33}

\textbf{B. Carter: Judicial History}

In 2012, in a ground-breaking summary trial in the British Columbia Supreme Court, Smith J found in favour of Gloria Taylor.\textsuperscript{34} The assessment of ‘the impressive record’ of the available evidence by the trial judge was key to her decision. The ‘record was voluminous’ and concerned end-of-life practice in Canada, and the law and practice in ‘permissive jurisdictions’.\textsuperscript{35} Smith J’s judgment has been praised for its depth.\textsuperscript{36}

Smith J said that she was not bound by the SCC’s decision in \textit{Rodriguez},\textsuperscript{37} the leading authority in Canada before \textit{Carter}, so she could review the constitutionality of the provisions again because of changes in the law, and the different social and factual landscape since 1993 and \textit{Rodriguez}.\textsuperscript{38} Although the doctrine of \textit{stare decisis} is fundamental, Smith J said that ‘respect for the law will diminish if it fails to adapt and change in response to changed circumstances’.\textsuperscript{39}

Thus, an assessment of the available evidence allowed the trial judge to conclude that the prohibition breached section 7 and section 15 of the Charter.\textsuperscript{40} The prohibition was found first to engage all three aspects of section 7: life, liberty, and security of

\textsuperscript{27} No person is entitled to consent to have death inflicted on them, and such consent does not affect the criminal responsibility of any person who inflicts death on the person who gave consent.

\textsuperscript{28} Every one who (a) counsels a person to commit suicide, or (b) aids or abets a person to commit suicide, whether suicide ensues or not, is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years.

\textsuperscript{29} The claimants challenged ss 14, 21, 22, 222, 241, but only the two were deemed relevant for the case [10].

\textsuperscript{30} Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

\textsuperscript{31} 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. s 15 is not discussed in this article.

\textsuperscript{32} \textit{Carter v Canada (Attorney General)} 2015 SCC 5 [18].

\textsuperscript{33} ibid [11].

\textsuperscript{34} \textit{Carter v Canada (Attorney General)} 2012 BCSC 886.

\textsuperscript{35} \textit{Carter v Canada (Attorney General)} 2015 SCC 5 [22].

\textsuperscript{36} See, for instance, \textit{Fleming v Ireland} (2013) IESC 19 [74]: an ‘enormously detailed and comprehensive’ judgment.

\textsuperscript{37} \textit{Rodriguez v British Columbia (Attorney General)} [1993] SCR 519.

\textsuperscript{38} \textit{Carter v Canada (Attorney General)} 2012 BCSC 886 [985]. The trial judge said that the majority in \textit{Rodriguez} did not address the right to life, that the principles of overbreadth and gross disproportionality had not been identified at the time, that the majority only ‘assumed’ a section 15 breach, and that the section 1 analysis had changed substantially [998].

\textsuperscript{39} \textit{Carter v Canada (Attorney General)} 2012 BCSC 886 [900].

\textsuperscript{40} Section 15 is not discussed in this article.
the person. The right to life was engaged insofar as the prohibition could force Gloria
Taylor to take her life earlier than she otherwise would if she had access to a
physician-assisted death in Canada.41 Gloria Taylor was deprived of her liberty, which
encompasses ‘the right to non-interference by the state with fundamentally important
and personal medical decision-making’, while on security, it was found that the prohi-
bition restricted her control over her bodily integrity, ‘free from state interference and
free from state-imposed psychological and emotional stress’.42 This interference was
incompatible with the principles of fundamental justice (especially overbreadth and
gross disproportionality), and was broader than necessary.43 The trial judge found
that it was possible to create a framework to achieve the same object (to protect the
vulnerable), but not restrict individual rights: ‘the evidence shows that risks exist, but
that they can be very largely avoided through carefully-designed, well-monitored safe-
guards’.44 The Criminal Code provisions in question were therefore struck down as
unconstitutional, the federal government was granted a one-year suspension of inval-
idity to legislate, and Gloria Taylor, the only claimant directly affected by this suspen-
sion, was granted a constitutional exemption to access assisted death in Canada. In
fact, she eventually died in hospital as a result of complications from an infection.

Smith J’s judgment was overturned by the British Columbia Court of Appeal in
2013.45 Newbury J, writing for the majority, stressed that Rodriguez still applied.46 Sue
Rodriguez, who like Gloria Taylor suffered from ALS, had challenged the constitu-
tionality of section 241(b) by means of various Charter provisions, including section
7.47 Nothing short of a blanket prohibition, the majority in Rodriguez held, would pro-
tect the vulnerable from abuse; there was ‘no halfway measure that could be relied
upon’ to protect the vulnerable and maintain respect for human life.48 It is noteworthy
that Rodriguez was decided on a slim majority (5:4); even in 1993 Canada, four dis-
senting judges took a critical stance to the prohibition.49

On 6 February 2015, the SCC published its judgment in response to Gloria
Taylor’s appeal. It set aside any last doubts about the constitutionality of the prohibi-
tion. Rodriguez was overruled. The SCC unanimously (9:0) declared section 14 and
section 241(b) unconstitutional.50

The absence of any dissent in the SCC’s decision is striking. The SCC signed
the judgment as ‘the Court’, sending a strong message to the Federal Government

41 Carter v Canada (Attorney General) 2012 BCSC 886 [1048], [1058], [1277], [1309]. See further, Chan and
Somerville (n 21) 2, 143–75, 157. The authors call this ‘an unassisted suicide’.
42 Carter v Canada (Attorney General) 2012 BCSC 886 [918], [1302].
43 Section 1 allows restrictions of Charter rights ‘subject only to such reasonable limits prescribed by law as
can be demonstrably justified in a free and democratic society’.
44 Carter v Canada (Attorney General) 2012 BCSC 886 [10], [883].
45 Carter v Canada (Attorney General) 2013 BCCA 435.
46 On Rodriguez, see I Dundas, ‘Rodriguez and Assisted Suicide in Canada’ (1994) 32 Alberta LR 4, 811–24;
LH Bimie and S Rodriguez, Uncommon Will: The Death and Life of Sue Rodriguez (Macmillan 1994);
“Death Talk” in Canada: The Rodriguez Case” in M Somerville (ed), Death Talk: The Case Against
Euthanasia and Physician-Assisted Suicide (McGill-Queen’s University Press 2014).
47 Rodriguez v British Columbia (Attorney General) [1993] SCR 519.
48 ibid [614].
49 McLachlin J and L’Heureux-Dubé J (s 7); Lamer CJ (s 15); Cory J (ss 7 and 15). No interference was
found justified by the dissenting judges.
50 Carter v Canada (Attorney General) 2015 SCC 5 [56].
that the law needed to change. The SCC confirmed that Smith J was not bound by Rodriguez.\textsuperscript{51} Trial courts may revisit rulings of higher courts if a new legal issue is raised and where there is change in the circumstances or evidence that ‘fundamentally shifts the parameters of the debate’.\textsuperscript{52} Both conditions were met; the legal framework on section 7 had changed with regards to the principles of overbreadth and gross disproportionality, and there was fresh evidence on the risks associated with physician-assisted dying.\textsuperscript{53} The SCC agreed with Smith J that the prohibition engaged all three aspects of section 7.\textsuperscript{54}

Finding all aspects of section 7 engaged by the prohibition, the SCC had to identify the object of the prohibition.\textsuperscript{55} It found that this was not ‘to preserve life, whatever the circumstances’, but to protect the vulnerable from being induced to commit suicide at a time of weakness.\textsuperscript{56} This distinction is crucial. The ‘protection of the vulnerable’ was a much narrower, practical justification compared to the preservation and protection of life used in Rodriguez. Then, in relation to ‘the principles of fundamental justice’, an interference is not justified if it is arbitrary, overbroad, and grossly disproportionate to its object. The SCC did not find the prohibition arbitrary as it achieved its object, as noted above. There was also a rational connection between the object and the restriction to life, liberty, and security of the person.\textsuperscript{57} A blanket prohibition, the SCC said, clearly achieved this object.\textsuperscript{58} But, crucially, the SCC found the prohibition overly broad (‘overbreadth’). While the prohibition aimed to protect the vulnerable, it also caught individuals beyond those needing protection, like Gloria Taylor, who were competent, fully informed, and free from coercion or duress.\textsuperscript{59} The prohibition, therefore, went too far in achieving its object.

The SCC also agreed with Smith J that section 1 did not save the prohibition either. Section 1 allowed Canada to reasonably limit constitutional rights if the law had a pressing and substantial object, and the means chosen were proportional to that object.\textsuperscript{60} Although meeting the former requirement, the prohibition was disproportionate.\textsuperscript{61} The SCC concluded, based on the evidence reviewed by Smith J, that the prohibition went beyond what was necessary to achieve its object.\textsuperscript{62} In other words, the blanket prohibition was not the only way to protect the vulnerable.

Ultimately, the SCC declared the prohibition invalid, but suspended the declaration of invalidity for one year to allow the federal government and the provincial

\begin{itemize}
\item \textsuperscript{51} ibid [44].
\item \textsuperscript{52} Canada (Attorney General) v Bedford 2013 SCC 72 [2013] 3 SCR 1101 [42].
\item \textsuperscript{53} Carter v Canada (Attorney General) 2015 SCC 5 [45]–[47] [my emphasis].
\item \textsuperscript{54} On life: ibid [57], [61]; on liberty: Blencoe v British Columbia (Human Rights Commission) 2000 SCC 44, [2000] 2 SCR 307 [54]; on security: R v Morgentaler [1988] 1 SCR 30. See further, Carter v Canada (n 24) [64]–[68].
\item \textsuperscript{55} Carter v Canada (Attorney General) 2015 SCC 5 [73].
\item \textsuperscript{56} ibid [74]–[78].
\item \textsuperscript{57} Canada (Attorney General) v Bedford 2013 SCC 72 [2013] 3 SCR 1101 [111].
\item \textsuperscript{58} Carter v Canada (Attorney General) 2015 SCC 5 [84].
\item \textsuperscript{59} ibid [86].
\item \textsuperscript{60} ibid [94].
\item \textsuperscript{61} ibid [3], [96].
\item \textsuperscript{62} ibid [104]–[119].
\end{itemize}
legislatures time to respond. Sections 14 and 241(b) were void and of no legal effect insofar as they prohibited physician-assisted dying for adults who consented to it and suffered intolerably by a grievous and irremediable medical condition. Bill C-14 was subsequently enacted by the federal government in 2016. I will now examine the impact of *Carter* on the legal challenges of the prohibition before English courts. I argue that, primarily, *Carter* serves to remind the UK Parliament and government of the need to look at ‘the available evidence’, and to reflect on whether there is another way to protect the vulnerable, while respecting individual choice.

### III Nicklinson: Changing Judicial Attitudes, the Declaration of Incompatibility, and a First Look at the Role of Evidence in Challenging the Prohibition

The message from Canada is powerful. The prohibition of physician-assisted dying was incompatible with fundamental rights. Smith J (with whom the SCC agreed) found that, based on the available evidence, physician-assisted dying could be regulated to respect individual choice, while addressing the government’s concerns of protecting the vulnerable too. But what has been the response of English courts to the legal challenges of the domestic prohibition? What has been the engagement, so far, with the question of finding the right balance between respecting individual choice and reducing risks?

English courts have dealt with challenges to the prohibition on several occasions. In fact, the most significant developments have been judicially generated. In 2009, the House of Lords (as it then was) accepted for the first time what the European Court of Human Rights (ECtHR) had held already. The prohibition in section 2(1) prima facie engages (or interferes with) Article 8(1), the right to private and family life, and, specifically, the right to control the manner and timing of one’s death. The onus is thus on each member state to justify the interference in each case. It was the same legal challenge that led to the publication of an offence-specific prosecutorial policy for assisted suicide cases. Though the policy does not decriminalise assisted suicide, and, indeed, creates no right to one, it does recognise the harshness of the prohibition by providing prosecutors with the means to mitigate an absolute rule.

In 2012, Mr Tony Nicklinson, paralysed and unable to speak following a stroke (locked-in-syndrome), picked up the task of challenging section 2(1), and, for the first

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63 ibid [125]–[127].
64 ibid [4], [127].
65 The federal law has been amended and has been in force since 17 March 2021: <https://www.parl.ca/LegisInfo/BillDetails.aspx?Language=E&billId=10875380> accessed 4 October 2021.
66 *R (on the application of Purdy) v DPP* [2009] UKHL 45.
67 *Pretty v the UK* (2002) 35 EHRR 1 [62]–[64], [67]. The ECtHR confirmed that the prohibition interferes with Article 8 in *Haas v Switzerland* (2011) 53 EHRR 33 [51]; *Koch v Germany* (2013) 56 EHRR 6 [46] [51]; *Gross v Switzerland* (2013) ECHR 429 [60].
68 *R (on the application of Purdy) v DPP* [2009] UKHL 45 [56], [69], [83]–[86], [88], [101]–[102].
69 There is an extensive literature on the subject matter of the policy. See, just one example, A Mullock, ‘Overlooking the Criminally Compassionate: What are the Implications of Prosecutorial Policy on Encouraging or Assisting Suicide?’ (2010) 18 Medical Law Review 442.
time, the prohibition of voluntary euthanasia. Similar to Carter, the UKSC in 2014 was called to examine the human rights compatibility of the prohibition. Unlike the SCC in Carter, though, it did not rule in favour of the claimants, with the majority refusing to declare section 2(1) incompatible with Article 8(1). The nine Justices were concerned with several constitutional and institutional matters noted below.

Most of these matters are arguably uncontroversial. For instance, that the majority of the Council of Europe’s member states choose to justify the interference by means of Article 8(2) and are afforded a wide margin of appreciation in doing so. The Justices in Nicklinson were also in agreement that even a blanket prohibition is not incompatible with the ECHR. Relatedly, it was also not disputed that the UK can go beyond the ECtHR, similar to four other member states, and regulate assisted suicide in compliance with ECHR obligations. The ‘constitutional competence’ of the UKSC to assess the human rights compatibility of section 2(1) was also not strongly challenged in Nicklinson. It is crystal clear that the HRA constitutional settlement allows judges to form their own views on the compatibility of domestic legislation.

What was problematic in Nicklinson was the reluctance of the majority to engage in an assessment of the compatibility of section 2(1). For some, this was down to the idea of ‘usurping’ or interfering with the role of Parliament, the timing of the case, and also the lack of primary evidence which some Justices said was necessary to assess section 2(1)’s compatibility. This reluctance, I argue, is based on a misconceived idea of the power and role of section 4(2) HRA. The power of senior courts to issue a declaration of incompatibility if they are satisfied that primary legislation is incompatible with a Convention right, is a power entrusted to courts by Parliament itself. This power does not ‘usurp’ its role; on the contrary, it is respectful of it. It respects the separation of powers and Parliament’s law-making responsibilities, as it directs a matter back to Parliament for review. By issuing a declaration in Nicklinson, the UKSC would have explained why it found the law incompatible and maybe made some
suggestions on how assisted suicide could be safely regulated. The latter exercise was, indeed, undertaken by several Justices, as seen below, but without a declaration. The power under section 4(2) is, in any case, discretionary (section 4(4)), while under section 4(6), ‘the validity, continuing operation or enforcement’ of the ‘incompatible’ provision is not affected, unlike the SCC’s power to strike down incompatible legislation. In actual fact, section 4(2)’s power is so limited that it really does not explain the reluctance of the majority to issue it, especially considering the critical stance many adopted to the current law and practice. A unique opportunity was missed in Nicklinson to send a message to Parliament that courts consider the law to be incompatible and in need of review.

Against this backdrop, I summarise the approaches the Justices adopted to a declaration, as well as to the role evidence can or should have in the compatibility assessment. The latter was likely influenced by Smith J’s judgment in Carter two years prior. At the outset, it should be noted that Nicklinson was never intended as a case that would present primary evidence to challenge section 2(1), as T and Newby were, and also, relatedly, that a declaration is not dependent on such evidence.

A ‘hidden (5:4) majority’ argument was put forward by commentators following the UKSC’s judgment, to include the two dissenters, and Lords Neuberger, Mance and Wilson, who were openly critical towards the current law and practice, but fell short of issuing a declaration of incompatibility. The speeches of the five Justices showed clear support for reform, ‘signifying judicial unease’ with the prohibition.

Lords Neuberger, Mance, and Wilson all implied that the prohibition is incompatible with Article 8. Lord Neuberger admitted that it is unusual for a court to hold a provision (that cannot be construed accordingly to cure the incompatibility) as infringing human rights, but not declare it incompatible. His Lordship talked about the grave interference with the appellants’ rights, the fairly weak connection between the aim and effect of the prohibition, and the uncompelling reasons to simply defer to Parliament. The second observation speaks directly to the compatibility assessment under Article 8(2). His Lordship, however, did not substantially engage in one. This reluctance becomes even more troubling when Lord Neuberger talked about a potential framework for assisted suicide, agreeing with Lady Hale’s suggestion, at [314]--
Lord Mance also supported a system of prior review, and said that a system that does not allow individuals in the position of the appellants access to assistance may be unnecessary or disproportionate. Again, these are considerations relevant to the compatibility assessment that his Lordship, as with Lord Neuberger, seem reluctant to substantially engage with. Lord Mance agreed with Lord Neuberger, at [92]–[97], that ‘assisting a suicide could be seen not only as promoting the autonomy of the person committing suicide, but also as involving a less drastic interference in life than some interferences already authorised by law, and conceivably also as enabling some people to postpone suicide.’ Lord Wilson agreed with the HC’s involvement and went further to suggest 18 factors for the HC to investigate. Though Lord Neuberger, at [118], and Lady Hale, at [321], criticised these ‘factors’, I believe that such proposals could accompany a declaration, if this was issued, to assist Parliament with its inquiry, highlighting the important contribution of the judiciary in the debate. Lord Wilson is thus absolutely right that courts can be of ‘maximum assistance’ to Parliament if suggestions are put forward, and that a declaration is a ‘unique opportunity’ for collaboration with Parliament. All this goes to show that the three Justices were not just unhappy with the current law and practice but actively reflected on how it can change.

Lord Neuberger also talked about Parliament’s, then, opportunity to address section 2(1), ‘in the knowledge that, if it is not satisfactorily addressed, there is a real prospect that a further, and successful, application for a declaration of incompatibility may be made.’ This ‘warning’, unclear as to whether it requires a mere review of the law or its reform, is also supported by Lord Wilson, at [197], Lord Clarke, at [292], and, in more reserved terms, by Lord Mance, at [190]. Even so, the three Justices found it ‘institutionally inappropriate’ to issue a declaration because of the difficult and sensitive nature of assisted suicide, its moral and religious dimensions required a ‘relatively’ cautious judicial approach, and the courts ought to give Parliament the opportunity to consider the matter first. Furthermore, a declaration would be ‘an unheralded volte-face’ from Pretty. In that case, in 2001, the House of Lords were clear that Article 8 was not engaged or interfered with by section 2(1), and that, even if it was, this was justified by the need to protect the weak and the vulnerable.

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86 ibid [123]–[124]. Lord Sumption at [228] challenges whether the HC will be effective.
87 ibid [186].
88 ibid [my emphasis] N.B. the right to life argument in Carter and in T/Newby.
89 R (on the application of Nicklinson and another) v Ministry of Justice; R (on the application of AM) (AP) v DPP [2014] UKSC 38 [197], [205].
90 ibid [205].
91 ibid [204].
92 The Assisted Dying Bill 2013 was before the House of Lords.
93 R (on the application of Nicklinson and another) v Ministry of Justice; R (on the application of AM) (AP) v DPP [2014] UKSC 38 [118].
94 ibid [116].
95 R (on the application of Pretty) v DPP [2001] UKHL 61 [26] per Lord Bingham; [61] per Lord Steyn; [99]–[101] per Lord Hope; [112] per Lord Hobhouse; [124] per Lord Scott.
96 ibid [26]–[30] per Lord Bingham; [62] per Lord Steyn; [102] per Lord Hope; [112] per Lord Hobhouse; [124] per Lord Scott.
Lord Neuberger’s first consideration is certainly true. Assisted suicide is a difficult matter. However, the difficult and sensitive nature of certain matters has not prevented courts from developing the law, including in *Bland*,97 and *Re A*;98 yet, in *Nicklinson* the suggestion was merely the assessment of section 2(1)’s compatibility with the ECHR. In fact, Lord Neuberger noted that ‘difficult or unpopular decisions’ are sometimes ‘more easily grasped by judges than the legislature’.99 But this is certainly not about deciding between courts or Parliament as the preferable forum to review assisted suicide. Rather, it is about both working together.

The second concern expressed is easily answered. Parliament is sovereign. There is no doubt that assisted suicide is to be decriminalised and regulated by Parliament when the time comes. But Parliament has already reviewed several Bills, all failing to include individuals in the appellants’ position. Additionally, it is questionable whether appropriate consideration to the particulars of proposed legislation can be given without sufficient parliamentary time. The ‘anxious consideration’ envisaged by Lord Neuberger in *Nicklinson* can only be given if government sets aside meaningful time for a debate; however, that does not mean that courts do not have a role to play as well.

The final concern by Lord Neuberger is most interesting. Issuing a declaration would indeed be a deviation from *Pretty*; this is to be expected. A declaration reflects the current views of the judiciary, informed by current knowledge of domestic and international practice (what one may call ‘the available evidence’). A compatibility assessment ought to reflect this current knowledge. *Pretty* was decided 13 years before *Nicklinson*, and at present, 20 years ago. There are many developments, not least abroad, but also regarding how the judiciary, parliamentarians, and professional organisations now perceive assisted suicide. In *Carter*, Smith J was influenced by changing factual and social facts since *Rodriguez* in striking down the prohibition. So, if ‘the available evidence’ has changed, the compatibility assessment ought to be ‘a deviation’ from *Pretty*. Overall, if the three Justices were more confident to use section 4(2), a declaration would seem inevitable considering their judgments.

Lords Sumption and Clarke took a more conservative approach, compared to Lords Neuberger, Mance and Wilson, and they would only engage in a compatibility assessment if Parliament ‘abdicated’ its responsibility to examine the matter.100 The complexity of assisted suicide was again an issue, with Lord Sumption reasoning that there is a choice between moral values for which there is no consensus, while Parliament’s position is abundantly clear and the parliamentary process deemed more appropriate.101 Their Justices’ approach is cautious, particularly evident in Lord Sumption’s judgment where he noted that judges should not express personal opinions on matters of ‘social policy’ and ‘moral value judgment’.102 The imposition of such

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97 *Airedale NHS Trust v Bland* ([1993] AC 789).
98 *In re A (Children) (Conjoined Twins: Surgical Separation)* ([2001] Fam 147).
99 *R (on the application of Nicklinson and another) v Ministry of Justice; R (on the application of AM) (AP) v DPP* ([2014] UKSC 38 [104].
100 *ibid* [293] per Lord Clarke; [233] per Lord Sumption.
101 *ibid* [230]–[233]. Lord Clarke agrees at [293].
102 *ibid* [229]–[230] [my emphasis]. Lord Clarke agrees at [293].
opinions lacks ‘all constitutional legitimacy’. This misinterprets section 4(2). In fact, the majority’s reluctance to use it denied Parliament judicial assistance, such as that envisaged by the ‘hidden majority’. An optimistic reading of their Justices’ judgments may imply that they expect a debate (or an inquiry) in Parliament, but such a reading does not go as far as to place them in the ‘hidden majority’ camp.

Clearly in the most conservative of the Nicklinson judicial ‘camps’, Lords Reed and Hughes were absolutely clear that the matter was strictly for Parliament. The controversial, morally complex, lacking consensus, social policy character of assisted suicide was the key justifications for their position. Lord Hughes commented that Parliament’s intention by enacting the 1961 Act, and updating it in 2009, was clear, while Lord Reed said that Parliament’s procedure, expertise, accountability, and legitimacy was more appropriate to consider assisted suicide compared to the courts. Lord Reed was clear that although courts can determine compatibility, they usually place ‘considerable weight’ on a ‘considered assessment’ by Parliament. Elizabeth Wicks notes, with optimism, that this statement allows for judicial intervention in the absence of a ‘considered assessment’, which is similar to the argument by Lords Sumption and Clarke. However, what ‘considered assessment’ means remains unclear. What is certain is that none of the Bills which have come before Parliament so far, would have covered the appellants, and it is highly unlikely that any such ‘expansionist’ approach would feature in future Bills. Moreover, as noted earlier, a ‘considered assessment’ is not possible without Parliament setting aside some meaningful time to consider assisted suicide, perhaps in the form of an inquiry.

Lady Hale and Lord Kerr dissented and found the prohibition incompatible with Article 8. Lady Hale said that there was ‘little to be gained, and much to be lost’ in not making a declaration, and Lord Kerr talked about ‘the duty’ of a court ‘to say so’ if a provision is incompatible. Certainty, his Lordship continued, the exercise of this duty does not ‘usurp the role of Parliament’, as Lord Hughes, at [259], and Lord Neuberger, at [145], had noted. There is ‘much to be lost’ (valuable judicial assistance), if courts are reluctant to express a view on incompatible legislation. Responding to Lords Sumption and Clarke, at [229]–[230], [293], Lady Hale said that a judicial finding of incompatibility did not mean that judges ‘impose’ their ‘personal opinion’. Noting the misinterpretation of section 4(2) by the majority, Lady Hale said that courts do not have the power to impose anything on Parliament, what they have is jurisdiction, and sometimes an obligation to ‘form a professional opinion, as judges’ on the compatibility of domestic provisions. Lady Hale is again correct that only Parliament can make the law compatible, and so could not explain the majority’s
reluctance to present Parliament with options to ‘cure’ the incompatibility. Similarly, Elizabeth Wicks is right to note that it was ‘misguided and unnecessary’ for the Justices to agonise over the ‘courts or Parliament’ question as the constitutional settlement in the UK promotes collaboration between them. One can only wonder why it was even necessary for the two dissenters to remind the UKSC of its judicial powers under the HRA.

The next question is how the dissenters concluded that the law is incompatible. Were they, as Smith J in Carter was, influenced by the changing factual and social facts domestically and internationally (‘the available evidence’)? I discuss the potential role primary evidence may have in the debate on assisted dying by dividing their Justices’ approach in three categories. In the first category, Lady Hale found the compatibility assessment a matter of principle not evidence. The absence of primary evidence in Nicklinson was not so significant as to prevent her Ladyship from finding the law incompatible. This was an issue for Lords Neuberger, Mance and Wilson, as discussed below. Lady Hale’s approach to the role of evidence in the legal challenge of the prohibition may be seen as respecting Parliament’s sovereignty, underlining that it is Parliament that is to eventually decide whether to regulate, what format the law should take, and how much risk is acceptable. This, however, did not prevent her Ladyship from suggesting a possible regulatory framework. The proposed model by Lady Hale and other Justices is to be welcomed. Along with a declaration, this is the kind of collaboration and judicial involvement envisaged in this article. Lady Hale’s approach to the compatibility assessment and Lord Kerr’s approach, discussed below, are reminders that a declaration is not dependent on primary evidence in a case.

Having said that, Lord Kerr placed more emphasis on the importance of primary evidence compared to Lady Hale (placing him in the second category on his own). Even so, he was not so concerned as the Justices in the third category, and was comfortable to engage in the compatibility assessment and declare the law incompatible on the basis of evidence already available to him. Although Lord Kerr accepted the concerns of the judges in the third category, that, in Nicklinson, there was insufficient evidence to establish how a balance could be struck between the different interests, his Lordship noted that the government had not produced evidence to justify their assertion that the prohibition is the only way to protect the vulnerable, either. Lady Hale agreed that the government’s justification was as much an ‘assertion’ based on ‘solid evidence’, as the contrary assertion. Put simply, in the same way that the

113 ibid [300].
114 Wicks (n 73) 1–13, 10.
115 R (on the application of Nicklinson and another) v Ministry of Justice; R (on the application of AM) (AP) v DPP [2014] UKSC 38 [320].
116 ibid [314], [317].
117 ibid [351]: ‘In so far as the evidence goes [ . . . ]’ This phrase implies that his decision was made on evidence already available in the case. N.B. In R (on the application of Tony Nicklinson) v Ministry of Justice, DPP, Jane Nicklinson, and R (on the application of AM) v DPP and others [2012] EWHC 2381 (Admin) [25], Toulson LJ highlighted that Mr Nicklinson’s counsel applied for leave to introduce the Carter evidence in the proceedings. This would require a new hearing in the Divisional Court to hear from witnesses.
118 R (on the application of Nicklinson and another) v Ministry of Justice; R (on the application of AM) (AP) v DPP [2014] UKSC 38 [351]–[352].
119 ibid [319].
government argued that there are risks to the vulnerable justifying the prohibition, those that find the law incompatible, like Lady Hale and Lord Kerr, can likewise argue that there is a way to reduce this risk even without primary evidence.\(^{120}\) So, both dissenters assessed section 2(1)’s compatibility by adopting different approaches to the role evidence has or should have in the judicial review of the prohibition.

In the third category, Lords Neuberger, Mance, Wilson, alongside the reasons noted earlier, claimed that they needed primary evidence to assess section 2(1)’s compatibility.\(^{121}\) The Justices challenged the type and quality of evidence available in Nicklinson, and, unlike the dissenters, were unwilling to engage in a compatibility assessment in the absence of stronger evidence. Lord Neuberger, for example, did not accept the appellants’ ‘heavy reliance’ on the 2012 Report of the Commission on Assisted Dying and Smith J’s analysis in Carter, as this was secondary evidence.\(^{122}\) Lord Mance agreed: it is ‘an invitation to short-cut potentially sensitive and difficult issues of fact and expertise, by relying on secondary material’.\(^{123}\) Lord Mance could not have been clearer: it is ‘impossible’ to arrive at ‘any reliable conclusion’ ‘without detailed examination of first-hand evidence, accompanied by cross-examination’.\(^{124}\) In one sense, it is sensible for Lord Mance to point out that such a difficult decision cannot be made on the basis of secondary material alone; however, it is problematic to make a declaration dependent on such evidence. His Lordship also said that a reassessment of section 2(1)’s compatibility must be done ‘in light of fresh and significantly different evidence’.\(^{125}\) Thus, Lord Mance was not only concerned about departing from precedent (Pretty) without first reviewing primary evidence, but also challenged whether there was fresh evidence justifying a re-assessment. Legislation abroad, changes in the positions adopted by medical associations, an ever-increasing number of those travelling abroad to die, are only a sample of the ‘fresh and significant evidence’ that can be reviewed and challenged in court (as primary evidence), or by means of a governmental inquiry.

Lord Neuberger also, controversially, argued that before a declaration was issued, the court needed to be confident to suggest an alternative to the prohibition. The court would ‘owe a duty, not least to Parliament’ not to grant a declaration ‘without having reached and expressed some idea of how the incompatibility could be remedied’; for instance, what ‘scheme could replace it’.\(^{126}\) The court would have to be satisfied that ‘a physically and administratively feasible and robust system’ would allow assisted suicide, while addressing the government’s concerns.\(^{127}\) Lord Wilson used the strictest terms to agree that evidence is a ‘pre-requisite’ to making a declaration, and his Lordship expressed the hope that a new case would start in the HC and that that

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120 ibid.
121 Lords Sumption and Hughes also said that evidence in the case was ‘untested, incomplete and second-hand’ [224]–[225], [267].
122 ibid [119]–[122], [127].
123 ibid [177], [182].
124 ibid [182].
125 ibid [173]–[174], [178].
126 ibid [112], [120], [127].
127 ibid [120].
court would receive ‘the focussed evidence and submissions which this court has lacked’.128

Lord Kerr rightly disagreed with the argument of requiring an alternative before issuing a declaration: it is not necessary to come up with ‘a fully-formed, guaranteed-to-function, less intrusive’ scheme before deciding on incompatibility.129 Elizabeth Wicks characterises this reluctance as a ‘worrying new approach to the courts’ powers under the HRA’.130 A statutory provision cannot only be held incompatible without an alternative, but also without primary evidence, as evident by the approach of the two dissenters. This is respectful of Parliament’s sovereignty as the lawmaker. Now, if the judiciary takes a more proactive role in actively assisting Parliament by making suggestions with or without access to primary evidence, that is a different story, and a welcome scenario. Lord Wilson was absolutely right in this regard, that a declaration is a ‘unique opportunity’ for courts to collaborate with Parliament and be of ‘maximum assistance’.131

Summarising the discussion on the role of evidence in Nicklinson, Lady Hale was right that judges can engage in a compatibility assessment without primary evidence. Lords Neuberger, Mance and Wilson adopted a more careful approach. While they correctly noted the importance of such evidence, it was wrong to make the declaration dependent on this. It is argued that this, alongside the misconceived idea of the power and role of section 4(2), prevented the ‘hidden majority’ from becoming the majority that could have issued a declaration, bypassing a unique opportunity to send a strong message to Parliament. All in all, Lord Kerr’s approach, which recognised the limitations of the evidence in Nicklinson but supported a declaration nonetheless, seems to be the most sensible one. It recognised the importance of considering primary evidence, without making a declaration contingent on its existence.

An additional problem remains with regards to how primary evidence is perceived in these legal challenges. As Stevie Martin has identified, the problem is the inappropriate burden indirectly placed on claimants to gather such evidence to challenge the government’s justification.132 The onus is on the government to justify any interference. This has influenced how post-Nicklinson cases have been presented before the courts. The focus of the legal challenges is now on the potential use of primary evidence to challenge the prohibition. This fact-finding exercise is, however, expensive, time-consuming, and undertaken by the appellants and not courts, in a desperate attempt to get judges’ attention (and assistance).

IV. A FIRST STEP TOWARDS AN EVIDENCE-BASED COMPATIBILITY ASSESSMENT, A STEP BACK FOR THE ‘LEGITIMATE AIMS’ FOR THE PROHIBITION: CONWAY

Notwithstanding the unsuccessful outcome for the claimants in Nicklinson, the case allowed others to rely on it to support their own legal challenge of the prohibition. In

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128 ibid [201]–[202].
129 ibid [353]–[354]. If an alternative is needed, Lord Kerr agrees with the HC involvement [355].
130 Wicks (n 73) 1–13, 11.
131 R (on the application of Nicklinson and another) v Ministry of Justice; R (on the application of AM) (AP) v DPP [2014] UKSC 38 [204].
132 Martin (n 79) 209–23.
this section, I discuss the reasoning of judges in Conway, highlighting the expansion of the ‘legitimate aims’ used to justify the prohibition and the role of evidence, and noting that a compatibility assessment was actually carried out by the HC.133

Mr Noel Conway lived with motor neurone disease; when he had six months or less to live he wished to receive medical assistance in ending his life.134 Like Mr Nicklinson, he asked for a declaration that section 2(1) was incompatible with Article 8, and proposed an alternative statutory scheme to cover individuals in his situation.135 In October 2017, the HC unanimously dismissed his claim. The interference with Article 8 was found to be justifiable not only for the justification confirmed in Nicklinson, to protect the vulnerable, but also to respect the sanctity of life and to promote trust between doctors and patients.136

This is a worrying expansion of the legitimate aims for the prohibition. On the sanctity of life, this is a return to the judicial reasoning in Pretty that reflected morals and values of a different time.137 As can be recalled, in Nicklinson, some Justices referred to the morally and ethically complex character of assisted suicide, yet none directly used the sanctity of life as a ‘legitimate aim’ justifying the interference.138 The addition of this obstinate principle as a ‘legitimate aim’ is a step back for the debate.

There is also something to be said about the language shifting back to that used in Pretty in the context of the sanctity of life principle. A shifting, but not re-shifting as in Conway, in language is also noted in Canada if one compares the SCC decisions in Rodriguez and Carter.139 In Rodriguez, the prohibition was deemed necessary to protect the vulnerable and to preserve the value of life.140 The sanctity of life principle was extensively used in Rodriguez; for example, the guiding principle for society’s approach to assisted suicide ‘had always been, and continued to be, the sanctity of life’,141 and ‘the generally held and deeply rooted belief in our society that human life is sacred or inviolable’.142 Onwards to 2015, the SCC in Carter noted that ‘[Sopinka J’s] in Rodriguez remarks about the “preservation of life” are best understood as a reference to an animating social value rather than as a description of the specific object of the

133 The Divisional Court denied permission in March 2017: R (on the application of Conway) v Secretary of State for Justice [2017] EWHC 640 (Admin) (2:1). In April 2017, the CA overturned the decision and granted permission for a full hearing as, mainly, ‘the matter [was] no longer under active consideration’ in Parliament: R (Conway) v The Secretary of State for Justice [2017] EWCA Civ 275 [38].
134 R (on the application of Conway) v The Secretary of State for Justice [2017] EWHC 2447 (Admin) [4]–[6].
135 ibid [7]–[8], [14], [59].
136 ibid [13], [47].
137 The principle featured prominently in their Lordships’ speeches: R (on the application of Pretty) v DPP [2001] UKHL 61 [4]–[6], [26]–[30] per Lord Bingham; [59], [62] per Lord Steyn; [109], [111]–[112] per Lord Hobhouse; [124] per Lord Scott.
138 R (on the application of Conway) v The Secretary of State for Justice [2017] EWCA 2447 (Admin) [92]. The HC placed considerable emphasis on Lord Sumption’s speech in Nicklinson [207], [209], [213]–[215], [229], who talked about morality and assisted suicide. Yet, his Lordship did not use morality as a justification for the prohibition. See also, Lord Wilson [199]; Lady Hale [311].
139 K Stevens, ‘On the Puzzling Death of the Sanctity of Life Argument’ (2020) 34 Argumentation 1, 55–81. Stevens explains in more detail why the sanctity-of-life argument ‘lost is validity’ between 1993 and 2015.
140 Rodriguez v British Columbia (Attorney General) [1993] SCR 519 [521].
141 ibid [542].
142 ibid [585]. See further: Somerville (n 46) 86–100, 92–98.
prohibition'. What does this show? In *Carter*, the SCC focused on a narrower justification for the prohibition compared to *Rodriguez*. The government, the SCC in *Carter* said, considers the object of the prohibition to be the preservation of life ‘whatever the circumstances’; yet this formulation ‘goes beyond the ambit of the provision itself’, the direct target of which ‘is the narrow goal of preventing vulnerable persons from being induced to commit suicide at a time of weakness’. It is this narrow justification that Smith J in *Carter* found could be replaced with a system that was less restrictive of individual rights, and it is the expansion of the justifications in *Conway* beyond the protection of the vulnerable that reveals that the judicial reasoning in *Conway* is conservative.

*Conway* also introduced a second new justification for the prohibition: the impact legalisation may have for the trust between doctors and patients. Although a narrower justification compared to the sanctity of life, it does not immediately fall under any of Article 8(2)’s ‘legitimate aims’. Chahal QC, leading most of these legal challenges, writes that there is no legal basis for ‘importing this consideration and elevating it into a ground’, and characterised this move as ‘a new and unwarranted intervention by the court’. It is a worrying expansion of the justifications aiming to keep in place a human-rights-interfering provision, although, unlike the sanctity of life, its basis can be investigated, and possibly refuted, based on evidence before the courts and/or Parliament. For instance, primary evidence before the courts, or a governmental inquiry, could look into the impact decriminalisation and regulation may have for healthcare professionals and their relationship with their patients.

*Conway* thus reveals a conservative approach by the government but also by the judiciary, that may well be a response to a progressive, ‘activist’ UKSC in *Nicklinson*. The HC in *Conway* found the rational connection between section 2(1) and its legitimate aims clear, the interference was ‘necessary in a democratic society’ and proportionate to protect the vulnerable, the case was even ‘stronger when the other legitimate aims are brought into account’, and the balance between individual and community interests was fair. The HC emphasised that Parliament found the prohibition justified, necessary and proportionate, and that, in any case, Parliament was

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143 *Carter v Canada (Attorney General)* 2015 SCC [76].
144 K Stevens, ‘On the Puzzling Death of the Sanctity of Life Argument’ (2020) 34 Argumentation 1, 55–81.
145 *Carter v Canada (Attorney General)* 2015 SCC [78] [my emphasis]. Also: [29], [74], [90], [101].
146 S Chahal, ‘Assisted Dying: A Right to Autonomy and Dignity’ (*Gazette*, 6 November 2017) <https://www.lawgazette.co.uk/legal-updates/assisted-dying-a-right-to-autonomy-and-dignity/5063512.article> accessed 5 October 2021.
147 A recent development is the British Medical Association’s (‘BMA’) change of approach towards assisted dying: A Gregory, ‘BMA Drops Opposition to Assisted Dying and Adopts Neutral Stance’ (*The Guardian*, 14 September 2021) <https://www.theguardian.com/society/2021/sep/14/bma-drops-opposition-assisted-dying-adopts-neutral-stance> accessed 4 October 2021.
148 N.B: In the matter of an application by the Northern Ireland Human Rights Commission for Judicial Review (Northern Ireland) [2018] UKSC 2. Note in particular [118] ‘The balancing of autonomy and suffering against the risks to others was and is a particularly sensitive matter [in Nicklinson]. The legislature had chosen an absolute protection against the latter risks, with which the courts should not, at least at that juncture, interfere’.
149 *R (on the application of Conway) v The Secretary of State for Justice* [2017] EWHC 2447 (Admin) [13], [47], [95]–[97], [112], [114].
the more appropriate forum to decide on this matter. This sentiment was also echoed in the CA decision. Even so, the HC’s compatibility exercise was refreshing and one of the positive aspects of Conway.

Several matters influenced the outcome of the HC’s compatibility assessment. In this article, some of these are challenged as being untested and requiring further investigation before being used to conclude that the law is compatible. The HC, for instance, rejected Mr Conway’s proposed scheme as inadequate to protect the vulnerable. The scheme, amongst other things, proposed a judicial safeguard - a safeguard first suggested by Justices in Nicklinson. The HC placed considerable emphasis on Lord Sumption’s speech in Nicklinson in dismissing the judicial safeguard. This, unfortunately, does not accurately represent his Lordship’s sentiments. Lord Sumption did not actually reject the judicial safeguard, what he noted was that the matter had not been considered in detail in Nicklinson. This was the case in Conway too, and the HC rejected this safeguard as inadequate without further investigation. The safeguard is certainly one for further review by Parliament as it has featured in recent Bills, and is likely to be seen in future versions too.

Another matter that influenced the HC’s compatibility assessment was that Mr Conway could legally ask for the withdrawal of his non-invasive ventilation in bringing about his death instead. This ‘not so very bleak’ option was something that Mr Conway himself found to be undignified and distressing, but what he eventually was forced to do. A governmental inquiry could provide a holistic image of what patients themselves consider to be appropriate, human-rights respecting options, as well as exploring their needs and worries.

The last governmental inquiry on assisted suicide was in 2005, and the last ‘substantive’ discussion in the context of proposed legislation in Parliament was in 2015 at Committee stage and lasted only two days. It was the first time that such a Bill proceeded beyond the Second Reading, yet it is questionable whether any proposal can be given sufficient attention without being given appropriate governmental time.

150 ibid [50]–[52], [106]–[107]. The HC talked extensively about Parliament’s previous engagement with assisted suicide.
151 R (on the application of Conway) v The Secretary of State for Justice [2018] EWCA Civ 1431 [179]–[180].
152 R (on the application of Conway) v The Secretary of State for Justice [2017] EWHC 2447 (Admin) [99]–[101].
153 R (on the application of Nicklinson and another) v Ministry of Justice; R (on the application of AM) (AP) v DPP [2014] UKSC 38 [228]. On this point, see also the CA judgment: R (on the application of Conway) v The Secretary of State for Justice [2018] EWCA Civ 1431 [103]–[104].
154 R (on the application of Conway) v The Secretary of State for Justice [2017] EWHC 2447 (Admin) [24]–[29].
155 ibid [30]–[32]. Sadly, the NIV withdrawal ‘option’ was repeated in: R (on the application of Conway) v Secretary of State for Justice [2018] UKSC [2]–[4].
156 H Sherwood, ‘Noel Conway, Assisted Dying Campaigner, Dies at Home Aged 71’ (The Guardian, 11 June 2021) <https://www.theguardian.com/society/2021/jun/11/noel-conway-assisted-dying-campaigner-dies-at-home-aged-71> accessed 4 October 2021.
157 This was in response to the Second Reading of the Assisted Dying for the Terminally Ill HL Bill (2003–04) 17; HL Deb 10 March 2004, vol658, cols1317–1324.
158 HL Deb 7 November 2014, vol756, cols1851–1956; HL Deb 16 January 2015, vol758, cols1001–1070.
159 Assisted Dying HL Bill (2013–14) 24.
160 N.B. The Assisted Dying [HL] Bill (2021–2022) 13 due to have its Second Reading on the 22nd of October 2021.
There are significant developments and new evidence is available that must also be considered in an inquiry, and by courts.

The HC’s judgment in Conway reveals, yet again, a misconceived idea of the role and power of section 4(2), and this is a narrative present in all these cases preventing judges from making their own assessments of compatibility. It is certainly open to discussion whether anything has actually been decided by Parliament considering the limited time spent in reviewing some of these proposals.

In June 2018, the CA, expressing ‘deep sympathy’ and ‘profound respect for the dignified and resolute way’ with which Mr Conway has been dealing with his disease, agreed with the HC. In November 2018, Lady Hale, Lords Reed and Kerr found the prospects of success low to grant an appeal to the UKSC. It is disappointing that two of the three Justices sitting in that case were the Nicklinson dissenters. The Justices said that the matter was of ‘transcendent public importance’ and noted that their decision was made with ‘some reluctance’.

The litigation was unhelpful for Mr Conway. It was a sad reminder of the judicial approach to section 4(2) and an expansion of the reasons used by the government to justify the prohibition. In many ways, Conway was a significant blow for the debate on assisted suicide. Yet, it is also positive for two key reasons. First, the HC carried out a fresh compatibility assessment - the last one carried out by the dissenters in Nicklinson. It allowed judges to consider whether there was another way to strike the right balance between individual and societal interests. Moreover, the HC (the CA agreeing at [179]) accepted that courts have the jurisdiction to consider section 2(1)’s compatibility with the ECHR. As I have already noted, judges can in the future, hopefully, deal with the substantive questions, without much concern about institutional competency matters. On this, the HC described the halting of the compatibility assessment in Nicklinson as an ‘unusual course of postponement’. It is troubling that a lower court had to remind the UKSC of the courts’ role to ‘protect the rule of law’, by deciding a ‘properly arguable claim’ before it, irrespective of Parliament’s activity.

Conway is also significant because the evidence used in the case was more extensive than in Nicklinson, partly addressing concerns expressed in the latter case. Even so, the CA in Conway acknowledged that the evidence in the HC was ‘necessarily limited’ to what each party sought to rely on, and that matters were made more difficult by the court’s limited power to conduct any independent consultations ‘on its own account’. So, although the evidence used was more extensive than Nicklinson, this ‘necessarily limited’ evidence left issues untested; for instance, the judicial safeguard.

161 R (on the application of Conway) v The Secretary of State for Justice [2018] EWCA Civ 1431 [3], [201]. Permission for the CA hearing was granted in January 2018: Conway v The Secretary of State for Justice [2018] EWCA Civ 16.
162 R (on the application of Conway) v Secretary of State for Justice [2018] UKSC.
163 ibid [5]–[6].
164 R (on the application of Conway) v The Secretary of State for Justice [2017] EWHC 2447 (Admin) [88]–[90].
165 ibid [89].
166 ibid.
167 Noted by the CA in granting permission for a full hearing in the HC: R (Conway) v The Secretary of State for Justice [2017] EWCA Civ 275 [40]–[41].
168 R (on the application of Conway) v The Secretary of State for Justice [2018] EWCA Civ 1431 [189].
On this particular safeguard, Stevie Martin has argued that the HC dismissed it on ‘speculations’.  

The court in Conway did, to some extent, respond to the concerns of Lord Kerr and, to a greater extent, those of Lords Neuberger, Mance and Wilson, by drawing on a more extensive set of evidence, and this was, perhaps, what encouraged the HC to engage in a compatibility assessment. Conway is a stepping stone between Nicklinson and cases like T and Newby, which attempted to introduce primary evidence in challenging the prohibition. An inquiry is, however, still preferred because it will alleviate the financial burden on claimants and also save them precious time. A fact-finding exercise is not claimants’ responsibility but that of the government seeking to justify the interference with Article 8. An inquiry is more likely to represent the views of society as a whole, by ensuring that all groups are represented and that all directly concerned parties have their views heard. With regards to what the courts can do, as exemplified by the two dissenters in Nicklinson and confirmed by the HC in Conway, a compatibility assessment does not require evidence. Any judge that considers that the prohibition to be incompatible with the ECHR should not be hesitant to issue a declaration; thereby, offering precious assistance to Parliament in considering law reform.

V. AN EVIDENCE-BASED APPROACH FOR OMID T AND PHIL NEWBY

Post-Conway, the legal challenges of the prohibition have attempted a rare approach to judicial review by using primary, oral evidence with cross-examination. Although not approved by the courts, I argue that this strategy underlined several crucial matters. First, that claimants are now trying every possible legal tactic to attract the attention of judges and Parliament, looking at what was done and said in previous cases. The new strategy was inspired by concerns expressed in Nicklinson on the lack of primary evidence, by the CA’s comments in Conway on the limited evidence available, and by the decision in Carter. Crucially, the new tactic is a plea to Parliament. Before I advocate for more judicial involvement by means of section 4(2) and detail the need for an inquiry, I briefly look at the legal strategy attempted and rejected in T and in Newby.

In 2014, Mr Omid T was diagnosed with Multiple System Atrophy, a neurodegenerative (but not terminal) disease. He attempted, but failed, to commit suicide in 2015. Subsequently confined to bed in a nursing home, he needed help with almost all daily needs, his muscles and speech gradually deteriorated. He sought a declaration that section 2(1) was incompatible with Articles 8 and 2 of the ECHR. It was

169 Martin (n 79) 209–23, 221.
170 The two latter cases are discussed in Section V below.
171 R (on the application of Conway) v The Secretary of State for Justice [2017] EWHC 2447 (Admin) [76]. The HC acknowledged that the declaration does not depend on cross-examination of any of the witnesses.
172 It should be noted, however, that the HC in Conway heard from several interveners. Nevertheless, evidence that can be heard and reviewed during legal proceedings are unlikely to compare to what would be available to Parliament in an inquiry.
173 Claimant’s detailed statement of Facts and Grounds [1]–[2], [11]–[25]: <https://www.bindmans.com/uploads/files/documents/REDACTED_Claimants_Detailed_Statement_of_Facts_and_Grounds.pdf> accessed 5 October 2021.
the first time that Article 2 was used since Pretty, except for a quick dismissal by the Divisional Court in Nicklinson. On Article 2, Mr T, as Gloria Taylor did, argued that section 2(1) created a real risk of his life being shortened, as he would be forced to die earlier (when still physically able to travel) compared to if the option was available at home. Sadly, this argument has not been given much attention by the courts.

Mr T argued that his case required this ‘unusual course’ of adducing primary evidence accompanied by cross-examination of the government’s witness, and the government argued that there was no valid justification for it. In November 2017, the HC decided that this ‘preliminary issue’ should be decided on a further hearing. While the court accepted Mr T’s argument that without cross-examination it would have to rely on written, unchallenged submissions, it did not find the comparisons to Carter useful. In deciding to order the further hearing, the HC found Lord Mance’s comments in Nicklinson more convincing. As will be recalled, his Lordship argued that it would be ‘impossible’ to reach ‘any reliable conclusion’ on any risks and the necessary safeguards ‘without detailed examination of first-hand evidence, accompanied by cross-examination’.

The ‘preliminary issue’ hearing took place over two days in March 2018 to decide whether it was appropriate and necessary for the HC to hear primary evidence with cross-examination to determine the ethical, moral, and social policy issues, and thus determine section 2(1)’s compatibility. The HC said that not much would be gained by hearing primary evidence and cross-examination, and Irwin LJ and Phillips J dismissed the claimant’s request saying that expert views were either already clear or could be clarified in writing during trial. The request for a ‘leapfrog appeal’ to the UKSC on the basis that the issue was of ‘general public importance’, was rejected as ‘premature’, perhaps rightly so at that stage as the ‘preliminary issue’ decision was pending and a full trial was not yet scheduled.

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174 The House of Lords dismissed ‘a right to die’ under art 2.
175 Mr Nicklinson argued that ‘existing domestic law and practice fail adequately to regulate the practice of active euthanasia (both voluntary and involuntary)’ in breach of Article 2: Tony Nicklinson v Ministry of Justice [2012] EWHC 304 (QB) [5]. He argued that the absence of legislation meant that covert, unregulated euthanasia takes place without safeguards risking the lives of the vulnerable in breach of Article 2: R (on the application of Nicklinson) v Ministry of Justice; R (on the application of AM) v DPP [2012] EWHC 2381 (Admin) [46]–[51]. The argument was rejected as it did not apply to the claimant himself. The matter was one for Parliament.
176 See also, Seales v Attorney General [2015] NZHC 1239 [166]. A fascinating analysis of Nicklinson, Carter, and Seales is found here: S Martin, ‘A Human Rights Perspective of Assisted Suicide: Accounting for Disparate Jurisprudence’ (2018) 26 Medical Law Review 1, 98–116.
177 T v Secretary of State for Justice [2017] EWHC 3181 (Admin) [6]–[7], [27].
178 ibid [43].
179 ibid [38], [41]. During the preliminary issue hearing, Irwin LJ said that Carter is ‘instructive’ but not ‘determinative’ to the approach the Court should take in this case [19].
180 R (on the application of Nicklinson and another) v Ministry of Justice; R (on the application of AM) (AP) v DPP [2014] UKSC 38 [182].
181 R (on the application of T) v Ministry of Justice [2018] EWHC 2615 (Admin) [4]. See some element of confusion of what the ‘preliminary issue’ involved at [5], [14].
182 ibid [17]–[18].
183 ibid [8], [25]–[26].
Although caught up in procedural complexities, the case remains important. Irwin LJ left the door open for the claimant to proceed with no oral evidence or cross examination, and said that 'speedy hearings for any further applications' could be facilitated.184 Although litigation ceased due to the assisted death of Mr T in Switzerland,185 the very nature of the request for an evidence-based approach by his legal team, in itself rare, significantly lowered the chances of success in the case. But what is this evidence-based approach to judicial review, and how rare is it?

Civil Procedure Rules 8.6(2) and (3), which apply to judicial review, establish that courts may permit or require a party to give oral evidence in a hearing and give directions for the attendance for cross-examination of a witness who has given written evidence.186 The HC has an inherent jurisdiction to hear orally from witnesses in a judicial review.187 Permission, however, will be given only where oral evidence is necessary to dispose of the claim fairly and justly,188 or, in the words of Lord Diplock in 1983, when 'the justice of the particular case so requires'.189 The power is very exceptionally used.190 So, although judicial reviews are not typically concerned with the merits of a decision,191 primary evidence with cross-examination may be allowed if

184 R (on the application of T) v Ministry of Justice [2018] EWHC 2615 (Admin) [25], [27].
185 Before the release of the judgment, Mr T ended his life at the Swiss clinic LifeCircle: ‘Omid Ends his life at Lifecircle in Switzerland’ (MDMD, 5 October 2018) <https://www.mydeath-mydecision.org.uk/omid-ends-his-life-at-lifecircle-in-switzerland/> accessed 6 October 2021.
186 Civil Procedure Rules—Rules & Practice Direction—Part 8 Alternative Procedure for Claims—Evidence—general: Rule 8.6 (2) and (3). See further: ‘The Administrative Court Judicial Review Guide 2020’ (July 2020): <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/913526/HMCTS_Admin_Court_JRG_2020_Final_Web.pdf> accessed 6 October 2021.
187 R (PG) v London Borough of Ealing [2002] A.C.D. 48 [20]–[21] per Munby J (as he then was). Also, Lord Reed in R (on the application of Bourgass) v Secretary of State for Justice [2015] UKSC 54; [2016] A.C. 384 [126] said that the judicial review process is flexible to allow cross-examination where appropriate.
188 R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs [2012] EWHC 2115 [14]. See also, Trim v North Dorset District Council [2010] EWCA Civ 1446, [2011] 1 WLR 1901 [24]: ‘The permission stage gives the court full control of the proceedings. It may give any necessary directions for the attendance of witnesses and cross-examination’.
189 O’Reilly v Mackman [1983] 2 AC 237 [282]–[283]. Lord Diplock in O’Reilly explained the reasons that this practice is rare. See an example of permission granted in Jedwell v Denbighshire County Council [2015] EWCA Civ 1232.
190 O’Reilly v Mackman [1983] 2 AC 237 [282]–[283]. Lord Diplock in O’Reilly explained the reasons that this practice is rare. See an example of permission granted in Jedwell v Denbighshire County Council [2015] EWCA Civ 1232.
191 Judicial review allows an individual affected by a decision, action, or failure of a public authority to apply to the HC which will determine whether the public authority has acted unlawfully: s 6 HRA 1998. One of the ways that a public authority may act unlawfully is to be in breach of the HRA. This is what is alleged in all the legal challenges of the prohibition of assisted suicide. If the HC decides that the public authority is acting unlawfully, it may offer a remedy. One of these remedies is a declaration of incompatibility by means of section 4(2). For practical guidance on the procedural aspects of bringing judicial review claims, see C Brasted and J Marlow, ‘Judicial Review Procedure: a Practical Guide’ <https://uk.practicallaw.thomsonreuters.com/9-376-4010?__lrTS=20210426155919744&transitionType=Default&contextData=(sc.Default)&firstPage=true> accessed 6 October 2021.
the court considers it necessary. Mr T’s request was, therefore, within the Court’s power.

In T, allowing the request would have meant that primary, oral evidence on the ethical, moral, and policy issues relating to assisted suicide could have been heard and tested before the HC. This would have given the court the benefit of hearing directly from witnesses, especially those of the government, and assessing whether the justification for keeping in place the prohibition could still be respected if assisted suicide were to be regulated. Moreover, this review of the evidence could have allowed courts to be of ‘maximum assistance’ to Parliament, similar to what Lord Wilson envisaged in Nicklinson, and could have focused on key conflicts, including the effectiveness of safeguards and the role of palliative care. While this is a matter for extensive discussion elsewhere, there is definitely credit to Lady Arden’s argument that a ‘special role’ for the UKSC and a ‘special type of judgment’ may be required in assisted suicide cases to assist the debate in Parliament. What form this judicial role or judicial assistance may take is not made clear in her Ladyship’s speech. In its most ‘radical’ form, it could be allowing this unusual course of action; in its most minor form, it could be a declaration of incompatibility by means of section 4(2). The judiciary, undoubtedly, has a role to play in assessing the impact of the prohibition on individuals and on society. In addition, a declaration of incompatibility by the court based on evidence would have sent an even stronger message to Parliament that the law needs reform, and could have convinced more Members of Parliament to favour legalisation. It is worth stressing again that courts do not need primary evidence to engage in a compatibility assessment, which is evident from the decisions in both Nicklinson and Conway. To a certain extent, though, the HC’s decision to reject Mr Omid T’s request is understandable for reasons explained below.

Typically, cross-examination takes place to resolve conflicts of evidence. Of course, the assisted suicide debate is full of conflicts of evidence as there are strong arguments on both sides. On this basis, one could argue that this complex matter should be the subject of this exceptional judicial power; that ‘justice’ demands it. Even so, is the HC the right place to solve this conflict? There is definitely the expertise, but is that enough to effect a change if this is restrained by other factors? One such factor is Parliament’s reluctance to substantially engage with the matter primarily because assisted suicide is clearly not on the government’s agenda.

I argue that this lack of enthusiasm, primarily by the government (as there are many Members of Parliament clearly in favour of assisted suicide), actually justified the cautious approach by the HC when it came to primary evidence. On this

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192 R (on the application of Nicklinson and another) v Ministry of Justice; R (on the application of AM) (AP) v DPP [2014] UKSC 38 [204].

193 Transcript of the memorial lecture can be found here: <https://www.judiciary.uk/wp-content/uploads/2017/12/arden-lj-medicine-and-the-law-oct-2017.pdf> accessed 4 October 2021, p 34.

194 See further, De Smith’s Judicial Review (Sweet & Maxwell, 8th edn, 2018), Part III - Procedures and Remedies, Chapter 16 - Civil Procedure Rules Pt 54 Claims for Judicial Review 16-080. The authors note that, other than conflict of evidence, ‘justice’ may demand this approach if: ‘the claimant alleges that a precedent fact to the making of a decision did not exist’, or ‘where the court must reach its own view on the merits’. 

Challenging the Prohibition of Assisted Suicide • 105
basis, therefore, the HC’s decision in T was expected. What the new legal strategy adopted by legal counsel for Mr T does, however, and I argue has been successful in doing, is to send a message to Parliament of the benefits of reviewing and considering ‘the available evidence’. Even if the HC in T allowed primary evidence with cross-examination to resolve some of the factual disputes between what the government asserted and what the claimant sought, Parliament would still need to make its own inquiries. It is also doubtful whether primary evidence would have made the court confident enough to issue a declaration, considering the position of the government. Moreover, the courts do not have the power to take down section 2(1); Parliament would still need to get involved. Irwin LJ’s remarks in T may be interpreted to confirm this argument. He noted that ‘a range of questions’ relating to assisted suicide cannot be determined by reviewing evidence alone, and this review involved a ‘judgement about the future’ perhaps beyond the expertise of experts that could appear before the court.

My interpretation of this is that, beyond the review of ‘the available evidence’ (and what it may show), there are various ‘judgements’ on assisted suicide to be made; judgements that will need to be made by Parliament, despite, or in addition to any judgments by the judiciary. Parliament has the resources, the time, and, most importantly, the responsibility to look at ‘the available evidence’.

Mr Phil Newby took over the task of challenging the prohibition following Mr T’s death in Switzerland. In November 2019, the HC refused to grant him permission to challenge the compatibility of section 2(1) with Articles 2 and 8. While Mr Newby’s condition was similar to Mr Conway’s (motor neurone disease, no specific prognosis) and involved a proposed ‘scheme’, his legal strategy was that of Mr T’s. Sadly, elements from Conway re-emerged. In refusing to grant permission, Irwin LJ noted that even if the request for primary evidence was allowed, the court ‘is not an appropriate forum for the discussion of the sanctity of life’. There are a few things to be noted. First, the matter of primary evidence and cross-examination was not discussed in any detail. Considering the dismissive approach of the courts to this request by claimants, it is unlikely that future cases will attempt the same tactic. Relatedly, this evidence-based tactic seems to be outshone by, yet again, reference to the sanctity of life principle, and, yet again, the fact that courts are not, institutionally, an appropriate forum for the discussion of the sanctity of life.

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195 Keiron McCabe writing on the T decision commented that assisted suicide has proven challenging even for more senior courts in the country (this likely refers to the UKSC’s decision in Nicklinson): K McCabe, ‘The Omid T Judicial Review: “Bound to be Dismissed”? ‘<https://www.mydeath-mydecision.org.uk/the-omid-t-judicial-review-bound-to-be-dismissed/> accessed 5 October 2021.

196 It is even doubtful whether factual disputes in relation to decriminalising and regulating assisted suicide are easy to determine, as there are strong arguments on both sides. cf, for instance, the HC’s decision in R (Save Britain’s Heritage) v Liverpool City Council [2015] EWHC 48 (Admin) to allow the cross-examination of the witness and the admission of oral evidence in a judicial review in the context of a dispute about the implications of re-developing an area in Liverpool which was easily resolved by testimony, and R(on the application of Bancoult) v Secretary of State for Foreign and Commonwealth Affairs [2012] EWHC 2115 (Admin) [14]–[17] where cross-examination was permitted as there was no other way to determine the allegations in question.

197 R (on the application of T) v Ministry of Justice [2018] EWHC 2615 (Admin) [16].

198 The case was supported by public funding. The CrowdJustice page is available here: <https://www.crowdjustice.com/case/right-to-die-test-case/> accessed 5 October 2021.

199 R (on the application of Newby) v Secretary of State for Justice [2019] EWHC 3118 (Admin) [41], [48], [50].
forum to discuss the matter of assisted suicide. As noted earlier, reference to this ‘animated social value’ according to the SCC, seems to be an effort to shut the door firmly to any meaningful discussion of the compatibility of section 2(1). Irwin LJ made another disappointing observation in Newby; although the Courts are ‘empowered to act’ under the HRA, judges should be ‘hesitant to do so’. This is proof that although judges recognise the misconceived idea behind the power and role of section 4(2), they nevertheless defer to Parliament and so bypass the opportunity for collaboration with Parliament. The HC’s argument that courts lack ’legitimacy and expertise’ to decide ethical and moral issues is, therefore, hard to accept. Judges in the HC, daily rule on life and death matters. A declaration does not change the law, nor it will decriminalise assisted suicide. It simply marks an issue worthy of Parliament’s review. In January 2020, the CA refused Mr Newby’s application for permission to appeal the HC’s decision.

So, as seen both in T and Newby, English courts are not in favour of an evidence-based approach to judicial review of the prohibition. They consider it unnecessary and not adding anything to evidence already available. This may be down to the very nature of the request and its rarity. But the judicial reluctance may also be down to judicial unease with engaging with the evidence while Parliament, so far, has taken a very reserved approach to the matter. The assumption I make here, and it can only be an assumption without a complete analysis of ‘the available evidence’, is that primary evidence and cross-examination in T and Newby would have shown that there is another way to protect the vulnerable while respecting individual choice, and that the law is incompatible with the ECHR. So, with or without judicial involvement and with or without a declaration of incompatibility, to build a strong foundation for Parliament debating the intricacies of regulating assisted dying, an inquiry is needed.

Such inquiries are not new. Back in 1994, the House of Lords Select Committee (HLSC) on Medical Ethics, for example, unanimously determined that the deliberate taking of life should remain illegal, rejecting the case for both euthanasia and assisted suicide. Ten years later, another HLSC carried out an investigation in response to the Second Reading of the Assisted Dying for the Terminally Ill Bill. Three reports were produced, and several important recommendations made. Importantly, the case for reform was not immediately dismissed as in 1994. The most recent inquiry for England and Wales came from the non-governmental, privately-funded Commission on Assisted Dying (‘CAD’). In 2012, the CAD reported that the law and practice on assisted suicide

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200 Carter v Canada (Attorney General) 2015 SCC [76].
201 ibid [38].
202 ibid [38], [50].
203 House of Lords, Report of the Select Committee on Medical Ethics HL Paper No 21-I (1994), paras 237, 278, 295. The Government agreed: Government Response to the Report of the Select Committee on Medical Ethics’ (London: HMSO, May 1994) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/272006/2553.pdf> accessed 7 October 2021.
204 Assisted Dying for the Terminally Ill HL Bill (2003-04) 17; HL Deb 10 March 2004, vol658, cols1317–1324.
205 Available here: <http://www.publications.parliament.uk/pa/ld/ldasdy.htm> accessed 7 October 2021.
206 Select Committee, Assisted Dying for the Terminally Ill Bill, Vol. I: Report (HL 2005 Paper 86-I), para 269. See also the debate that followed: HL Deb 10 October 2005, vol674, cols13–32, cols46–150.
in England and Wales is ‘inadequate and incoherent and should not continue’. The CAD was heavily criticised for its lack of independence, and on gaps relating to evidence it collected.

Today, calls for a fresh inquiry are strongly supported. One example is the claimants and their families. Paul Lamb, for instance, following the rejection of his case in November 2020, joined the call for an inquiry. In an open letter to Justice Secretary Robert Buckland, he urged the Justice Secretary ‘to take notice of this decision and launch an inquiry into assisted dying’. The call is also supported by the biggest assisted dying campaign groups in the country - Dignity in Dying and My Death My Decision (MDMD). MDMD and Humanists UK have gathered support from many MPs and peers in another open letter to the Justice Secretary urging an inquiry. The letter notes that since Parliament’s last consideration of assisted suicide, ‘the evidence has materially changed, and [...] new evidence necessitates a fresh review’. Support for a government inquiry has also come from 18 Police and Crime Commissioners, the CAD’s Report: <https://www.demos.co.uk/files/476_CoAD_FinalReport_158x240_I_web_single-NEW_.pdf?1328113363> accessed 6 October 2021 pp 1, 19, 416.

See, for instance, N Baines, ‘Assisted dying’ (WordPress, 5 January 2012) <https://nickbaines.wordpress.com/2012/01/05/assisted-dying/>; J Wilson, ‘Bishop of Burnley: Assisted Suicide Report “flawed”’ (BBC, 9 January 2012) <https://www.bbc.co.uk/news/uk-england-lancashire-16473822>; and P Saunders, ‘“Biased” Assisted Suicide Report under Fire from Critics’ (Christian.org, 5 January 2012) <https://www.christian.org.uk/news/biased-assisted-suicide-report-under-fire-from-critics/> all accessed 6 October 2021. N.B. Similar criticism expressed for the Commission on the Bill of Rights, formed around the same time.

CAD’s Report, (n 207) p 39; also, R (on the application of Nicklinson and another) v Ministry of Justice; R (on the application of AM) v The Director of Public Prosecutions; R (on the application of AM) v The Director of Public Prosecutions [2014] UKSC 38 [175] per Lord Mance; [224] per Lord Sumption.

H Sherwood, ‘Call for Parliament to Review Assisted Dying Law in England and Wales’ (The Guardian, 25 August 2020) <https://www.theguardian.com/society/2020/aug/25/parliament-review-law-assisted-dying-england-wales> accessed 4 October 2021.

Paul Lamb (one of the Nicklinson claimants), made a separate application for permission to bring a judicial review of section 2(1), this time using Article 14 (discrimination) and Article 8. It was rejected in December 2019: R (on the application of Paul Lamb) v Secretary of State for Justice [2019] EWHC 3606 (Admin). The CA refused to allow an appeal of the HC’s decision in November 2020.

‘Paul Lamb: Paralysed Leeds man urges government inquiry’ (BBC News, 25 November 2020) <https://www.bbc.co.uk/news/uk-england-leeds-55076452> accessed 6 October 2021. N.B. Paul Lamb has now died: H Wilkinson, ‘Paul Lamb: Assisted Suicide Campaigner Dies Aged 65’ (BBC News, 18 June 2021) <https://www.bbc.co.uk/news/uk-england-leeds-57516431> accessed 6 October 2021.

His letter is available on the website of My Death, My Decision.

‘Ann Whaley, Joy Munns lead new campaign for inquiry into cruel assisted dying laws’ (Dignity in Dying, 14 January 2020) <https://www.dignityindying.org.uk/news/ann-whaley-joy-munns-lead-new-campaign-for-inquiry-into-cruel-assisted-dying-laws/> accessed 6 October 2021.

‘50+ MPs and peers and MDMD patron Henry Marsh, after cancer diagnosis, call for assisted dying inquiry’ (MDMD, 1 April 2021) <https://www.mydeath-mydecision.org.uk/2021/04/01/50-mps-and-peers-and-mdmd-patron-henry-marsh-after-cancer-diagnosis-call-for-assisted-dying-inquiry/> accessed 6 October 2021.

Open Letter to the Justice Secretary (MDMD, March 2021) <https://www.mydeath-mydecision.org.uk/wp-content/uploads/2021/04/210331-Robert-Buckland-QC-inquiry-into-UK-s-laws-on-assisted-dying-1.pdf?utm_medium=email&hsmi=1191246998&utm_source=hs_email> accessed 6 October 2021.

ibid.

‘18 Police and Crime Commissioners call for inquiry into current law on assisted dying’ (Dignity in Dying, 15 October 2019) <https://www.dignityindying.org.uk/news/18-police-and-crime-commissioners-call-for-inquiry-into-current-law-on-assisted-dying/> accessed 4 October 2021.
debates in Parliament,\textsuperscript{219} and some individual MPs.\textsuperscript{220} Matt Hancock, then Health Secretary, in early 2020 said that the government ‘would consider collecting data on assisted dying if it was felt that that would improve and contribute to a sensitive debate in parliament’.\textsuperscript{221} A few months later, he requested more data on the number of terminally ill patients who commit suicide, and the effect of the prohibition, if any, on these numbers.\textsuperscript{222} These statements can only be seen as small wins considering Parliament’s unwillingness to set aside meaningful time for a debate.

\textbf{VI. CONCLUDING REMARKS}

This article advocates for an evidence-based \textit{inquiry} of ‘the available evidence’; that is, evidence or data on how the law and practice work domestically, and how it works abroad. The review of this type of evidence is unlikely to be undertaken by the courts, as seen in \textit{T} and \textit{Newby}, and, sadly, it is hard to imagine what the next legal challenge may look like, if it ever reaches the courts. A careful reading of \textit{Nicklinson} and \textit{Conway}, but also how \textit{T} and \textit{Newby} have responded to them, underlines the need for Parliament to act, and, a generous reading of these cases may even show a gentle, subtle message from the judiciary to the government in this regard. An inquiry will alleviate the burden from the courts, but also from the claimants and their legal teams from needing to gather funds to support the gathering of primary evidence, and getting witnesses to testify. Parliament must look at the evidence and engage in a careful, informed review of the law on assisted suicide. This is to ensure that the right balance is achieved between individual and societal interests, but also to contribute to wider debates currently taking place around the world. With or without judicial assistance, with or without a declaration, the time is now for a review of the law.

\textbf{CONFLICT OF INTEREST STATEMENT}

None declared.

\textsuperscript{219} A majority of MPs backed an inquiry during a House of Commons debate: HC Deb, 23 Jan 2020, vol.670, cols186-210 (see in particular, cols191, 196, 199, 200, 202). The same call was echoed in: HC Deb, 4 July 2019, vol662, cols1412–1451; and during Justice Questions: HC Deb, 8 October 2019, vol664, cols1622–1623.

\textsuperscript{220} B Johnson, ‘Assisted Dying could be Legalised in the UK within Four Years, Leading MP Predicts’ (Sky News, 24 August 2020) <https://news.sky.com/story/assisted-dying-could-be-legalised-in-the-uk-within-four-years-leading-mp-predicts-12055523> accessed 4 October 2021; APPG for Choice at the End of Life (15 July 2020) <https://www.youtube.com/watch?v=E-hmT3rK_OA> accessed 4 October 2021; ‘Assisted dying laws are in need of review’ (Letters, The Guardian, 30 October 2019) <https://www.theguardian.com/society/2019/oct/30/assisted-dying-laws-are-in-need-of-review> accessed 4 October 2021.

\textsuperscript{221} I Torjesen, ‘Assisted Dying: UK Government Hints at Review as it Confirms that Travel to Clinics Abroad is Permitted under Lockdown’ (2020) BMJ 371:m4316.

\textsuperscript{222} G Iacobucci, ‘Assisted Dying: Hancock Asks for more data on suicides of terminally ill people’ (2021) BMJ 373:n1107.