T R A N S C R I P T

STANDING COMMITTEE ON LEGAL AND SOCIAL ISSUES

Inquiry into end-of-life choices

Melbourne — 24 February 2016

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Professor John Tobin, Co-Director of Studies, Human Rights Law, Melbourne Law School, University of Melbourne.

The CHAIR — I welcome Professor John Tobin, co-director of studies, human rights law, Melbourne Law School, at the University of Melbourne. Professor, thank you very much for joining us this evening. Before I invite you to make some opening remarks I caution you that all evidence taken at this hearing is protected by parliamentary privilege as provided by the Constitution Act 1975 and further subject to the provisions of the Legislative Council standing orders. Therefore you are protected against any action for what you say here today, but any comments made outside the hearing are not afforded such privilege. Today's evidence is being recorded, and you will be provided with a proof version of the transcript in the next week. Transcripts will ultimately be made public and posted on the committee's website.

Thanks very much for joining us at this hour of the evening. We have allowed about 45 minutes or so for our session tonight, so I invite you to make an opening submission, and thereafter we will have questions.

Visual presentation.

Prof. TOBIN — Thank you, and thank you for having me as well. I have prepared a PowerPoint presentation, given the hour of the day, to assist us all in the following conversation. What I intend to do is really to try to cover some very complex issues in a fairly short period of time. So I am hoping this will give you some background, and hopefully question time will allow me to elaborate on and clarify any issues that you may have as well.

In terms of a starting point, really there are two key arguments I will be making to you this evening. The first is that human rights are a relevant framework for considering the issues under your terms of reference for this inquiry. The second argument, which might be more controversial but certainly I think is worth putting on the table, is that a proper substantive application or rights-based approach actually favours amendment of the law to allow for physician-assisted dying in certain circumstances — this is draft 1 rather than draft 2.

So moving forward, trying to then establish why you should think about human rights. This is a complex area. I will try to do it very briefly, and you can ask questions afterwards. Essentially there are two considerations to be thinking about: one international and one domestic. International law obviously binds the Australian government, not the Victorian government, and imposes obligations to comply with international rights standards. The most relevant treaties for our purposes here are the International Covenant on Civil and Political Rights and the Convention on the Rights of Persons with Disabilities, and I will come back to those in a moment. As I said, they are not binding on you specifically, but certainly relevant in a number of respects, which I will come to as well.

The second source of human rights is the Victorian charter, which I am sure you are familiar with, a very complex piece of legislation. Again it is probably not binding on you in this context here, but I what I want to say to you this evening is that there are at least three reasons why you should be thinking about rights.

The first is legal, and I will be arguing that there are potentially legal implications that flow from both international and domestic law. But more importantly perhaps is the moral framework that these instruments offer to you. So putting aside the legal debate, which we could haggle about all night, I would actually argue that the framework provided under these instruments provides a very strong ethical and moral framework to address these issues. I have been listening to the conversations this evening about autonomy and privacy. All of these principles are actually embedded in international treaties and also in the Victorian charter. So it is that ethical framework that I think becomes extremely relevant.

The third one that I think is really important again is that in fact my argument always is that human rights provide a very instrumental framework to address really complex issues. So putting aside what you think about rights, my argument this evening will be that if we take a rights-based approach, it gives you a framework to balance competing considerations and arrive at a reasonable and a reasoned outcome, which I think is what we are trying to achieve with this inquiry.

Moving forward then, how do you actually apply a rights-based approach to this particular issue or the issues arising out of this context? Again, it is a complex conversation, but reducing it quite quickly in a way which, as I do with my students, is to really ask two questions: we turn our whole gaze towards the issue of rights rather than other considerations, which you have been discussing this evening, and say that whenever we have an issue around, for example at the moment, prohibiting physician-assisted dying or advance care directives, which rights are engaged with that particular prohibition or permissible act as well; and, secondly, the more important

question becomes: can that interference be justified? So we are reorientating the debate. We are taking away, perhaps some medicos might say, from their discussion around ethics and morals to a rights-based approach, although I would say they are both quite strongly aligned, and I have made that argument elsewhere.

Moving forward, which rights are engaged? The list is long, but for our purposes these three are the most significant: different jurisdictions have different approaches, but I want to flag life, privacy and inhuman and degrading treatment, and I have given the references here to the Victorian charter. They also appear in international treaties as well. Every person has a right to life, but note — not to be tried arbitrarily. Secondly, everyone has a right to respect to his or her privacy. Privacy now is understood not just to mean you cannot see my notes or you cannot look at my mail but in fact bodily integrity — autonomy. It goes to the very core of human rights and the idea of self-determination and personal bodily integrity. So anything that infringes on my privacy then will be interference, prima facie, with that right. You will see here, under the Victorian charter, that again is not absolute and can be subject to interference where that interference is either unlawful or arbitrary.

The last one, which has dropped off the radar in international conversation because it is often too hard, is inhuman and degrading treatment, but I raise it here because it is very relevant in Victoria given the specific inclusion, unlike under the ICCPR — international covenant — that prohibits or rather protects people against any scientific or medical treatment without his or her full, free and informed consent. So this obviously going to issues that are right before you this evening.

Ms FITZHERBERT — I just have a question about that.

Prof. TOBIN — Please come back, yes.

Ms FITZHERBERT — What is the connection between treatment and consent? It seems to me they are two separate concepts?

Prof. TOBIN — Yes. So under this model here, anything that you want to do to me as a patient, if you are a doctor, must be subject to my consent. We have not got to the point now of your views being subject to mine. But if I am competent, then nothing you can do to me is without my consent, and that is what we are saying here as well. So there is a very strong keep-you-away-from-me approach here, both to the state and to anyone else about what they can and cannot do. This has historical origins and emerged out of what happened in Nazi Germany but more broadly around the whole idea of bodily integrity and what we have always seen to be the law, which is that consent becomes the primary vehicle to allow for anything to take place. I will come to the issue of substitution perhaps later on as well. Does that clarify — —

Ms FITZHERBERT — Not completely.

Prof. TOBIN — Not completely. Keep going with other questions if that would help now.

Ms FITZHERBERT — No, I might just keep watching.

Prof. TOBIN — Keep going? Okay. I will come back to that as well. So these are the rights engaged, and we can come back to those as well, particularly what does ‘arbitrarily’ mean and what does ‘unlawfully’ mean.

The next question really is: can the interference be justified? This is where the debate gets more complex and where opinions will differ. The first point, as I said, is that rights are not absolute, so the right to life is not absolute despite what others would claim. International law and the Victorian charter allow for it to be subject to interference provided it is not arbitrary. The question becomes: how do we justify an interference? I do not know if you have had any experience with the Victorian charter, but section 7(2) is a very complex beast, and I am going to put it to one side, just because it is easier. What I will do is adopt the approach that really reflects a distillation of all of the principles that are used globally and domestically to address when an interference with a right can be justified, and it is quite a simple test. It says: does interference or engagement pursue a legitimate aim or a pressing social need? What is the purpose that underlies it? Why are we doing this? The onus is on the person or the state or the doctor intervening. They have to provide justification. It is very important in terms of issues around medical treatment historically as well, but certainly: is the aim legitimate?

The second question, where more debate occurs, is: if so, are the measures used to pursue the aim proportionate? Simply speaking, you cannot use a sledgehammer to crack a walnut. A complex conversation; the simplest way to describe it is this: if you want to adopt measures to achieve your aim, there are really two

broad considerations. One, is there a rational connection? Are the measures you are using designed to achieve that objective, and is there evidence to suggest they will achieve that outcome — is it rational, non-arbitrary, objective? Normally speaking, you want to see some evidence that it actually will work. That is not enough. The second then says: okay, even if the evidence is there, have we minimally impaired the right? Are the measures we have adopted minimising interference with a right? This is where the issue of end-of-life choices and physician-assisted dying becomes critical, and there are debates about what this actually means in practice.

Is this making sense so far? We are doing a speed course at 9 o'clock on a Wednesday night, when people are tired.

So the legitimacy of the aim. Let us just go with the issue of the prohibition against anyone assisting anyone with suicide, which has been, as I will show in a moment, subject to critique around the world. The aim here — we will have debates around what that actually might be, but for our purposes the Canadian courts have said it is not just preservation of life; it is actually more specific. When we say we should not allow for assisted-physician dying, we are saying we need to protect people who are especially vulnerable and would possibly subject themselves to procedures that should not be undertaken. So it has a very specific purpose, a very valid aim. The Canadian courts and the European courts have all said that is a legitimate purpose, but they have not said that the broader preservation of life is in fact an appropriate justification. That is the first point.

The second point, and this is where we get into debate is: is the prohibition on assisted-physician dying necessary to achieve that aim of protecting vulnerable people who might otherwise be encouraged, cajoled — for whatever reason — pushed into taking their lives in circumstances where they should not be doing so? The first point: in the European context, the European court has said this is a matter for a state's margin of appreciation. In other words, this is a space for let states decide individually. So if you said to me, 'We think as Victoria it is appropriate that we maintain the prohibition', that would be consistent with the approach adopted by the European court. There is a bigger conversation there, which I can explain, but essentially they are trying to work out how we evolve these standards and if only a handful of states are allowing this procedure — as is the case now — and the majority of states are prohibiting it, then they are likely to leave it within a margin of appreciation. So it is for the state to determine. It is certainly relevant for your committee and the conclusion that you would come to.

Let us go a bit more local. The UK courts determined this in 2014. It is an extremely interesting decision. If you have time, it is worth reading. It is very long. I would focus on the judgement of the Chief Justice there. But essentially the court again decided: a bit too hard for us; this is a matter for Parliament to decide, because of the ethical, social dilemma involved in resolving this issue. But within that conversation we see a major shift in the trajectory of this discussion, which is why I think it is important for you.

Ten years ago there was no discussion within the European context or within the UK that anyone would even question a blanket prohibition on assisted-physician dying. It just was not something that was thought about. In this decision you see very strong decisions from a number of judges saying in fact, 'We think it is both, (a), an interference, and, (b), an unjustified interference'. Lady Hale and other judges articulate very strong views as to why this is in fact not a justified interference with primarily the right to life but also the right to privacy. So we are seeing an evolution in the thinking that is happening now in other jurisdictions around this issue, through a rights prism. But for technical reasons the court here was not prepared to make that finding, and they decided they would leave it to the Parliament to decide. So you can see this is really a thorny issue, and the courts are reluctant to step into a church which they think belongs to the Parliament, which is of course your role.

But the Canadian course, which you may have seen and heard about, is the course which I see as being where we will all end up going long term. Why? Because again 10 years ago, 20 years ago, the Canadian court said, 'No question about legitimacy of an absolute prohibition on assisted-physician dying'. It was not up for debate. In 2015 a majority, nine, judges all say with clarity that there is a rational connection. Yes, clearly putting a prohibition in place will assist many people who otherwise might feel compelled to take their lives when in fact they should not be, but they said the measures are what is called overbreadth or, for our purposes, violate the principle of minimal impairment — they go too far.

This is where it gets interesting; okay? So why did they do that? I am going to skip this and come back to that in a moment. They say essentially that you do not need to have that absolute ban to achieve your purpose. This is the critical point. This is why I think we have misused the rights-based analysis many times. You have got to think, 'We can do it but only insofar as it achieves a purpose and does not go beyond that purpose'. So they

said, 'You can't have a blanket prohibition where the consequence is not just to protect the vulnerable but also to harm the competent'. Does that make sense? What we are doing now in the law is we are saying, 'We want to make sure people who are vulnerable are protected', absolutely ticking the box. But what we are doing at the same time is saying, 'If you are competent and you consent, and your condition is grievous and irremediable, then in those circumstances your right to life is being compromised because you're being forced to suffer in ways you shouldn't be forced to suffer. Your competency should allow you to get the assistance of a doctor to enable you to take your life at a time of your own choosing'.

This I think is an enormous watermark in terms of both Canadian jurisprudence but also in terms of global jurisprudence in this area. My sort of estimation is that over the next 10 years we will see more and more states adopting this approach because it does what we want to try to achieve. We want to protect the vulnerable but also respect the autonomy of the competent, if that makes sense.

Just to also flag Lady Hale's dissent. You see here that she is also very critical of a universal ban in her dissent. It is worth reading. It is a very articulate and strong reasoned decision. The last point is around feelings and experience. What she is saying there is historically when we have examined these questions it has been in the abstract, and she is saying we cannot have that discussion. We have focused too much on the value of life in the abstract, and we have neglected to consider the actual experience of those who are suffering and dying in ways that compromise their dignity. To wrap up, you will see here she has a test, which I will not go through. Suffice to say you should see similarities between this approach here and what happens in the Canadian case: consent, fully informed, full knowledge, lack of capacity et cetera.

So then my argument is this: under a proper application of a rights-based approach, we accept that this will guide and inform our thinking about these issues. We can accept and allow for a general ban but not an absolute prohibition. The exceptions — and this is for debate of course at court — would be then, (a), there is consent, fully informed, no undue influence, no coercion, fully aware of the consequences. The Canadian case puts in place an irremediable medical condition, including the requirement that you should not force someone to take treatment they do not want to accept. The last criteria is of course you cannot end your life without the assistance of another as well.

So my submission would be that this approach no doubt will be controversial. There will be different views about how it is applied. The Canadian model, certainly for me, aligns most simply with what a proper application model requires in practice and, most importantly, strikes the balance that you as legislators are trying to achieve, to say, 'We must protect the vulnerable, their right to life, their right to physical integrity, but at the same time respect the autonomy and life of those who are competent and but for their physical disability would be able to take their own lives themselves without assistance'.

We have covered a lot in a very brief period of time. I am open to your questions to clarify or to respond, as you see fit.

The CHAIR — Can I just ask, John, if you take your rights-based analysis and you take it back to the Victorian charter — and you have identified life, privacy and inhumane and degrading treatment — if you apply the 7(2) test to that, do you think you would come out with something similar to the Canadian test?

Prof. TOBIN — My argument would be yes — and a number of reasons, and there will be different views, so I want to explain there will be different views about how you apply and interpret rights. If you look at section 7(2), the history of that is actually influenced by the Canadian equivalent. So our section 7(2) mirrors in not exact language, but it builds on, the approach adopted in Canada with respect to when we determine whether an interference can be justified.

So my argument would be that this is a very justifiable outcome, and I would say in fact it is the most appropriate outcome. But I also, as I indicated, say that if you were in Europe, they would say, 'Look, it's a little bit up in the air still, and we are going to defer to Parliament and we are going to defer to the states'. That is largely for political reasons, to be brutally honest. The margin of appreciation doctrine is a political concept. It does not necessarily align with a proper application of a rights-based approach.

So if you were to do that, and my argument would be that you should, because even though you are not bound as members of Parliament, certainly if you make any recommendations about legislative review, the minister responsible will have to prepare a statement of compatibility. So in some respects it does not make any sense

not to consider the charter, because at some point in the line somebody will be doing this, and it would be nice to have it debated at length in Parliament, but it will be done by, certainly, the minister across any recommendations you make for legislative reform as well.

So my argument would be that you need to think about it. But even if you do not leave in the charter, the methodology does allow you to do that very delicate balancing act between vulnerability and respect for autonomy as well.

The CHAIR — Just one other question. The CEO of Right to Life, when she gave evidence to the committee, cited the ICCPR and obviously the right to life. I would appreciate your response to her focus or her — —

Prof. TOBIN — Yes. You would know from your experience that human rights can be used in many ways to make many arguments. If you were to go to Europe and make the right to life argument in the European context, then you would get quite a bit of sympathy for that argument because that was certainly a strong view, and still is a dominant view in some states over there, that the right to life holds sway and primacy over the right to life of the individual who is experiencing threats to their life and dignity.

My argument is, and this happens in most areas concerning human rights, that that is a misplaced application of the right to life. Why I say that is because if you trace the history of this issue within the English context, in their early case, a case called *Pretty v. United Kingdom*, that was very much the focus, that narrow right to life, absolute prohibition, supremacy of life — the state can take every measure it deems appropriate to preserve life. That was the approach taken.

Go forward 10 years to the Nicklinson case and we are seeing a shift in the thinking of most of the Supreme Court judges saying, 'Hang on a second, life is really important and we must preserve it, but we can't preserve life at the expense of the dignity of a real life'. That is why the Canadian case is so important. It says preservation of life is not the aim of these actual prohibitions; it is the protection of particularly vulnerable people. So you can see that evolution in the thinking. My argument is: this is a logical progression of that thinking.

So her argument would certainly be valid and would hold sway in some quarters, but in my submission a detailed proper application of this model — it is very difficult, if not impossible, to get to the conclusion that you have to be able to balance both competing interests, in that the absolute prohibition essentially is what is called overreach or overbreadth — in doing more than you need to to achieve your objective. That is what many judges in the UK courts are saying, that is what the Canadian courts are saying, and I have got no doubt that in the next 10 years we will see more and more courts adopting this approach.

So my argument would be to you that Victoria, as you know, is often a real leader in areas around medical ethics and procedures. Despite the fact that this is a very complex issue, I think there are opportunities to adopt this more progressive and deeper analytical approach to how we balance those competing rights, with appropriate safeguards. This is an important point. Why I make this point here is that if we go back, a large concern of the Canadian government was it being a slippery slope. If we say some can do it, then they all can do it. We are opening it up. The Canadian court gave evidence from experience in Belgium about what was happening over there, and, really importantly, the trial judge and the Supreme Court also said, 'The evidence does not support that concern'. You mentioned before, 'Is there any evidence of that?'. You need to inform your decisions based on what the evidence tells us rather than on speculation, assumption or what may or may not happen, and the evidence says that we have the capacity to assess competence and we have the evidence to say that this has not led to a slippery slope in other jurisdictions. So if we model ourselves on those jurisdictions, then the concerns we might otherwise have are in fact allayed.

I should say that Canada is struggling with this, and they have just sought an exemption to extend the time frame required, so there is no question that it is not easy, but it will happen there. They are being forced to adopt this approach. Otherwise they will be back before the Canadian Supreme Court as well.

Mr MULINO — Thanks for the presentation. It was very interesting. I wanted to start with a very overarching question and then a couple of more specific questions around the application of the framework in this instance. I think personally that a rights-based approach has a lot of merit and it is a really important framework. But for me, when I have tried to think about this in a range of complex policy matters, one of the

challenges or limitations of this approach is that you end up almost inevitably, in complex policy matters, with competing rights. Here you can easily imagine all sorts of ways in which you might, through a rights-based approach, justify autonomy, and you can also imagine a range of ways in which you might formulate rights which would justify the protection of vulnerable individuals. It is not necessary to go into the particular circumstances in which that may or may not make sense.

I guess the challenge for me is that you end up with competing rights, and I think most of us would agree that no rights are absolute in a sensible policy world, but then you end up having to revert to empirical questions of balance, and it is almost like it has not really gotten you that far and you are kind of reverting to empirical questions of balance and appropriateness that you could have probably gotten to in the first place. At an overarching level, I am just wondering: do we end up with a kind of sensible policy debate around empirically what makes sense, when we have really important competing rights?

Prof. TOBIN — So you raise a really good question. The first point I will make is that Victoria is still very young in the development of its rights-based culture. That is the first point to make. So your point about how to reconcile competing rights is inevitable in a jurisdiction where we have not done it historically. So that requires people like me to educate and engage with people on how it can be done to generate outcomes that will be principled and reasoned as well. The Canadian court does the exact same thing, and it looks at that very dilemma. The right to life at large, as opposed to the real right to life of someone who is saying, 'I want to end my life with assistance now because I can't do it myself', and it says, 'Well, how do we balance that?'. It uses that test, which actually does draw on empirical evidence: what is the evidence to say, 'There is the risk that if we gave this person the right to end their life now, that would lead to others who are more vulnerable being open to the possibility of their lives being taken'. If the evidence is not there, you cannot justify that prohibition.

The onus is on the state to say, 'If you want to restrict my right, you must justify to me why'. So that is actually very important. It means that if there is evidence, then you can say, 'This ban is justifiable'. But if there is no evidence, then you cannot justify it, and more importantly, if the evidence is that the person was dying without dignity and it is there before you, then you have to respond to that. That is a real person, as opposed to the abstract value of life.

I should add I have lived this experience. My mother had Parkinson's. I saw her die in ways that you do not want anyone to die. It is not an abstract concept for me. She had no choice about how she ended her life. She lost every faculty she had, and when she finally lost the capacity to speak, she effectively took her own life by actually spitting her tablets to the side of the carpet. That was a real life. She had no choice about how she would end that life with dignity. It was not a life of dignity. Her body was writhing in pain and lacked capacity and bodily function.

So your point is right. Competing rights are very difficult to resolve. What you do is you identify them, and you then start a dicing exercise, which is exactly what the Canadian court did. They said, 'After we balance those rights, this is what we come to, this point where we are saying, "You can protect the right to life but only to the extent required to protect the preservation of the lives of those who are particularly vulnerable". When you go beyond that, you cannot justify it. The evidence is not there to support that excessive prohibition'. Does that make sense?

So it is really finely tuned, but that is what you want to try to achieve, a finely tuned policy outcome. I do not shy away from it being complex and it being contentious. It certainly is. This is where the analysis is going, though, no question.

Mr MULINO — Yes, and, look, I do not mean to be at all dismissive of this framework in the sense that I think I personally was headed towards a somewhat empirical approach in any case, so in that sense it has been very useful.

Prof. TOBIN — And it is a legitimate line.

Mr MULINO — Yes. The two very specific questions were this overbreadth test and exceptions to an absolute ban being justified by an appropriate balance. I mean, that is really then getting down to questions of to the extent that you can justify a determinism correctly — how many people are going to have severe suffering ameliorated or removed versus what do we think is the likelihood of abuse occurring, of safeguards failing, of a

slippery slope, for example. That case came to the conclusion that it was not a real risk, but it is clearly a contentious point empirically.

Prof. TOBIN — Yes, you are right. Let us do that point again.

Mr MULINO — That then becomes the judgement. We have to make the very best effort we can to revert to empirics to determine where that appropriate balance is.

Prof. TOBIN — So using a rights-based approach, what you do there is say, 'What evidence do we have before us?'. And you have the evidence that people are dying without dignity. That is real, that is tangible. Only one person is all that is required to say, 'That's affecting me and my rights'. It does not have to be 10; it is one person. The question is: can I say to that person sitting next to me right now who can't take their own life because they are physically incapable of doing so, that 'I can justify that interference with your life because I want to protect potential abstract numbers who otherwise might be taken, which goes to this evidence there'? Then you have to say: if I want to justify that, I have got to get the evidence to say that allowing him or her to take their life would lead to these people over here taking their life. What we hear and know is that there is no evidence to support that. So on this model once the evidence is not there the absence of evidence means you cannot justify the prohibition.

Mr MULINO — As an aside, I do not think we know for sure that the slippery slope does exist. Look, I think the empirics are still a bit out on that.

Prof. TOBIN — Well, it is certainly relevant.

Mr MULINO — Just the last question is really on this point of one person dying without dignity being enough to overcome a lot of other potential harm. I guess that then to me gets down to questions of: how do you make policy in the real world? I certainly do not ascribe to utilitarianism, which would be a very different approach, where you basically sum the numbers and balance them equally. A strict rights-based approach might say: if you believe this right is paramount, then one person having a right impinged here justifies all sorts of harm over here. But in the real policy world, we generally have to make judgements which are a bit more balanced. You go to the law, for example, and it says, 'I'd rather 10 guilty people go free than one innocent person go to jail', but the courts probably do not want to have 1 in 1000, so we do make balancing judgements.

Prof. TOBIN — Sure. That becomes much more complex in terms of resource allocation in a different area of rights, which I have not spoken about as well. I take your point, but again you still have to be able to justify why you are giving up that right as well. It is actually not about the volume of those who do not. I mean, you have got an abstract, theoretical conception of those who are being denied their right to life, so it is actually not real at all. Resource issues can come into play, for sure, but in this context here it is actually not that issue we are discussing. It is really: what is the rational connection; where is the evidence to say that I have to have the absolute ban? If you have not got it under a rights-based approach, my argument would be you cannot justify the interference. That debate gets more complex. Even reasonable evidence might suffice, but what we know is that there is no evidence that says it will happen. Does that make sense?

The CHAIR — Yes.

Mr MULINO — The last comment I would make is I am not talking about resourcing necessarily. I think there are competing rights, and so I think you are exactly right, we are potentially impinging upon — or we are, under a ban, impinging upon the autonomous rights of some people. But on the other hand I think rights are being impinged when vulnerable people make mistakes or are pressured or abused in some circumstances. I do not think is a pure resourcing issue. I think it is actually a balancing of rights.

Prof. TOBIN — Yes. You certainly want to protect those who are vulnerable, no question — no question at all. But that is not in dispute under the Canadian model, I think. That is certainly allowable. The question is: how do you get the right formula to achieve and ensure that protection, which means that the rights of both groups are protected? If your concern is those who are vulnerable, what do we do to make sure their rights are protected? We do not want people who are vulnerable taking their lives unnecessarily, but at the same time we want to make sure those who are competent are given the right to make decisions about their own condition and their death as well. I think you can do both. I hear your point. It is difficult, and it is contentious, but I think it

can be done. The Canadian court has demanded that the Canadian legislature adopt this approach, a bit like micro Marxism.

Ms PATTEN — It is so interesting and refreshing. I just wondered what you thought if a case came up today in Victoria where a doctor provided some assistance to a person who was of sound mind. What would happen? Would the charter provide any — —

Prof. TOBIN — It is a very, very good question. The answer is that the charter would give that person no protection at the moment. That may change. It would make for an interesting situation. But the criminal law is very clear: you cannot aid or assist another in their death. There is no room for ambiguity there. The best the court could do could be to issue a declaration of incompatibility, which would then come back to you, and you would be forced to respond. But again, you are not bound to respond in a way which is compatible with that. Would the court in Victoria come to my same conclusion? It is a very interesting question. I could not tell you. It would depend on how the arguments are put, but my guess is they would want to get it back to you, at this point in time. So the answer is the charter does not give us anything in terms of protection that is effective at this point in time.

Ms PATTEN — Are there any previous cases where charter incompatibility has come from the court to the Parliament?

Prof. TOBIN — There has been just the one, and that was a complex issue concerning rules of evidence and things that confuse not just people like me but also the High Court of Australia as well. It is not a thing that happens regularly. To be honest the courts really are not in this space, and I do not think it is a great place to take it. I think the UK approach in some respects is understandable — that is, to defer it back to the Parliament to try to resolve via a process such as this to work out the appropriate balance.

Ms PATTEN — And that did not work in the UK.

Prof. TOBIN — No, it does not work. My guess is that in the UK at some point in time they will try again, and eventually they will see declarations of incompatibility, and possibly long term we will see the European context change, as it has in many areas — it will shift and change — and in 10 or 15 years there will be more than a handful of states that allow for it; there will be dozens of states.

Ms PATTEN — Going back to the UK, from what I understand there are jurisdictional guidelines there around this. I think they have been formulated, and in some ways the bill that was put forward to the UK Parliament reflected those judges' guidelines, or whatever they are called. Those guidelines are still in place in the UK even though, when tested in Parliament, they were not accepted. Is that right?

Prof. TOBIN — I am not familiar with the exact position of the law over there. It gets complex around the discretion of prosecutors as well, and that will tie another area around when you should or should not prosecute. You heard before concern about doctors taking actions — will they be found guilty of this offence? — and there is discretion as to whether you prosecute or not. There have been cases around that saying that the UK must provide guidance to people to know when a prosecutor will not prosecute somebody for assisting someone to suicide. That is as far as it has got in the UK.

If you were to say, 'We're going to maintain this ban', you would not be alone in terms of your position, even if you used a rights-based approach, but I am encouraging you to think beyond what has happened and get a sense of what will be happening in the future and see the Canadian case and the dissents and even some of the other judges in the Nicklinson case and see that that is where the discussion is going. I am trying to indicate to you that I think that is the future direction of this conversation, but you are entirely free to disagree with that, and I think it is really important to make that point.

Ms FITZHERBERT — I had a question just on the Carter decision that was referred to earlier. Can you go back to that slide?

Prof. TOBIN — Yes, sure. The test, or this one — the slippery slope?

Ms FITZHERBERT — There is a reference here to the slippery slope argument on that page, and it says 'leading to the casual termination of life', which I imagine is something that was sort of carefully defined within the decision. But I think when others have spoken about the slippery slope here and in things that we have read,

they have been referring not so much to that scenario but to a situation that you referred to earlier, where we say, 'This is how it would work in these tightly confined ways', but they would argue that ultimately you end up moving from that and making it a more liberal approach and that that is what is being referred to. How does that sort of scenario, which arguably we have seen in the Netherlands, sit with these decisions?

Prof. TOBIN — You are right. It is a separate point, isn't it? If we allow any assisted end-of-life decisions, then we open up the possibility of some sort of creepage as well. The answer is that it is about enforcement of the law. You would not not change a law because of the fear that someone would break that law. If you are putting in place very clear guidelines and regulations and protocols and systems to ensure and vet and monitor how it is applied in practice, then anyone who steps outside that will face the fear of prosecution, so it is about a really strict system of confining it so that whatever you decide, or whoever decides, are the exceptions. Does that make sense?

Ms FITZHERBERT — I am not talking about people who are breaking the law or seeking to test how it is effected; I am talking about people who are seeking to change the law in the way that some people have, coming before this committee — a scenario where you start off by saying, 'This is what we're having, it's tightly confined and it's for these almost exceptional circumstances', when people are quite desperate in ways that fit with our very narrow definition, and then 10 years down the track you have someone who says, 'We need to broaden this. More people need access to this'.

Prof. TOBIN — Yes, that is what your job as parliamentarians is, though — you respond to changing standards. So I would not be saying, 'Let's not change the law for fear that in 10 years time someone might make a claim to expand that'; you would have that conversation in 10 years time. If you can justify this and you create a regime which is very, very rigid, then you should not be worrying about what will happen in 10 years time. That is another conversation. If they want to push that debate, let them push it as well and respond to those claims as well. The next debate, which I have not raised, is: what about young children? What about 16-year-olds?

Ms FITZHERBERT — Well, that was exactly what I was thinking.

Prof. TOBIN — I would make the argument, as somebody who specialises in that area and having read the experiences of some children, that in some cases they may be able to consent to the ending their life before they turn 18. That is a separate issue. That will be the conversation I would expect to evolve in time as well. So your concern is correct, but I do not think it addresses the concern you have today. If you create and suggest a regime which is very, very careful in the way in which it creates protocols to ensure that when we assess consent, do we have to have one or two doctors? How do we then verify that? Through a proceduralist outside the medical profession? VCAT? A court? Whatever it might be, you are making sure that this is not a space where people can just creep out of sight and do what they like without the guidance of some sort of regulatory oversight.

But your concern is a different concern — that people might then say, 'Let's start asking for more'. Well, they can ask — it is a democracy — but they might not get it. That is what you then respond to them in 10 years time. But I would not let that fear detract you from the role of saying: 'Is this the most appropriate balance to strike today, now, when we know what is happening to people in this country who are dying in situations that none of us would like to experience?' — and having seen that myself. So I think they are different issues, would be my respectful response to that question. Does that make sense?

Ms FITZHERBERT — Yes.

The CHAIR — Can I ask just a follow-up on that, perhaps from a different context? From what you have said tonight, if you apply a rights-based analysis, if you look at the jurisprudence out of the UK and Europe, clearly it has changed quite significantly, quite quickly.

Prof. TOBIN — Correct. I think so, yes.

The CHAIR — So if you applied a human rights approach to the right to life — to go back to that example before, in post-war Europe — that would be seen as absolute, even if you applied a rights-based competing rights analysis.

Prof. TOBIN — Correct.

The CHAIR — So I suppose, to sort of tease this out in a different context, rights are fluid and evolving and have a hierarchy?

Prof. TOBIN — Yes, that is a really good observation to make. Rights are not static; they are dynamic. They are historically contingent. They are culturally influenced and formed as well. So what we are seeing in this space particularly is that over the last 10 years or so we have seen a massive shift in awareness around the rights of persons with disabilities. You need to stand beside this conversation as well, saying, 'Historically we have said that if you lack capacity, then we will substitute your decision for you in a whole range of contexts as well'. Now what we are seeing is that we are saying, 'Hang on, we can't just do that. That has been the wrong approach'. We have objectified a range of people and said, 'We know what is best for you. We will do what we want, irrespective of what you want'. Now we are saying, 'Hang on a second'. There is this greater awareness of the fact that people with disabilities have rights, have capacity and have autonomy, which is now shifting the conversation in these spaces as well.

We are realising that, hang on, what we did historically was perhaps not the right approach, and in fact when we get a different perspective we can see that we can still achieve a better balance and change the shape and scope of these rights as well. So you are quite right — the right to life is sacred, supreme, no. 1, and that is exactly what is still influencing a number of debates in this space in a number of jurisdictions. But what I am saying is that we are seeing evolution. It is moving forward, as you have quite rightly indicated. These rights are dynamic. They shift, they change, they are fluid and they respond to changing conceptions of individuals, and particularly the right of those with disabilities as being autonomous. They should be given the capacity to exercise choice. But we want to make sure we do not force them to do things that they otherwise would not be doing. So it is: how do we get that balance? That is the really difficult question you are faced with, but I think you can do it in ways which will minimise the concerns.

What Canada is doing right now, it will be fascinating to see what is happening internally over there. I imagine your colleagues are contacting them as well to say, 'What are you doing and how are you doing it?'. You could easily do nothing, and people would not say that you are violating a rights-based approach. You could make the claim that human rights support doing that — absolutely. But I would argue that in fact if you were to undertake a genuine rights-based approach which reflects the dynamic nature of these rights and the recognition of the dignity of the individual with disabilities and the competency, we have to think of ways we can actually realise and recognise that dignity and competency and autonomy, while still protecting the vulnerable.

The CHAIR — I think the challenge and the job for us legislators is that if you ask the person in the street what a rights-based approach would deliver, it would be a static outcome that would be consistent in time. What you have just told us I think potentially — to follow up Margaret's question — feeds in to the slippery slope concerns, particularly as the jurisprudence is moving so rapidly.

Prof. TOBIN — Yes, and this is the great challenge. I do not shy away from that — that rights are designed to create just outcomes largely for groups that have been historically oppressed or marginalised. So if we took that view about the rights of gays, lesbians, those who identify as transgender, they would not have been able to make these claims without a rights discourse. Civil rights, people of colour, women — all these groups have used rights to make claims to advance their cause. I do not shy away from the fact that that is an evolving and dynamic process, but our society and democracy, I think, must be dynamic. It must respond in ways that say that where a harm is being caused — and we go back to, I think, Lady Hale's comment here — a harm that has been invisible, a harm that has been overlooked because of the prohibition, and we say, 'How do we accommodate and respond and prevent that harm?', then we have an obligation to respond. For me, that is what rights do. They say, 'I will give a voice to that voice that is voiceless and elevate their views to you so you can take them into consideration'.

As I said, women, children, race, disability — all those groups have used rights to elevate their citizen claims in a democracy. And yes, it changes things, but I would say for the better. It will challenge, for sure, but it is meant to. It is a democracy. We do not want to have things the same, otherwise this room would be very different in its composition right now. Being static, I think, is not what we want. What we want is certainty and clarity and fairness as well.

The CHAIR — Sure, and I do not think that anyone is suggesting that static is —

Prof. TOBIN — Is necessarily a good thing.

The CHAIR — the outcome we are seeking to achieve. Can I just clarify: so with Lady Hale's dissenting judgement, what were the numbers in the court?

Prof. TOBIN — It is a funny split, because some decided against the government on the basis of, 'I don't want to issue a declaration'. Three take her strong view, three take a very different view and another three take a different view again. So it is not a particularly useful decision in terms of stacking the numbers up. The bottom line is that the majority did not want to issue a declaration of incompatibility. They wanted to send it back to the Parliament as well.

The point I want to make is that there is a shift — so zero, to some in favour. Similarly in Canada — zero Rodriguez, all in favour 20 years later. So that is that shift I am talking about; that is that changing culture, which I think is worth noting. I suppose you as a committee are in that space right now. I have got no doubt that you will have different views on this, but that is the role you have, is it not, I suppose? Do you shift it or do you keep it as it is? It is entirely up to you to decide, but I am giving you a model which I think allows you to go forward if you wanted it to.

The CHAIR — Any further questions?

Ms FITZHERBERT — Just one out of sheer curiosity. The reference in this to evidence of no coercion — —

Prof. TOBIN — Yes.

Ms FITZHERBERT — How does that work?

Prof. TOBIN — In what sense?

Ms FITZHERBERT — How would you demonstrate no coercion?

Prof. TOBIN — In terms of people being forced to take their lives when they did not want to?

Ms FITZHERBERT — Yes.

Prof. TOBIN — I did not gather the evidence. I did not go through what they did in Canadian jurisdiction, but it was rigorous. The Canadian court and the Canadian government were resisting this decision, and they went and found whatever evidence they could find globally to say, 'We shouldn't do this', including bringing in fresh evidence in a Supreme Court of Appeal from, I think it was, a Belgian expert to say, 'There are risks that might be in play'. So I cannot answer your question, I am afraid, but I can say that we can rest assured that Canada and its government would have done their utmost to identify any evidence they could find — so we need this absolute ban to prevent harm to those who are vulnerable — and they could not convince that court or the trial court that in fact that evidence was there. Now of course you should look at that evidence as well to assess it for its veracity. That is all I can say on that point, I think.

The CHAIR — Thank you so much for your evidence tonight and for giving us a very different perspective from others that we have received. We appreciate your evidence and your being here at this hour of the evening. Thanks very much.

Prof. TOBIN — It is a pleasure. Thank you.

Committee adjourned.