



# Assisted suicide: 'COMPASSIONATE' KILLING?

## key points

Cases in the media spotlight and the publication by the Director of Public Prosecutions of new prosecution guidelines have intensified the debate about assisted suicide.

While much improved, the definitive guidelines remain fundamentally flawed. By seeming to endorse assistance that is 'wholly motivated by compassion', they have confused *intention* with *motivation*. British law is based on the biblical prohibition of the intentional killing of the legally innocent.

This legal sanction in the DPP guidance may fix the idea in the public mind that there is such a thing as justifiable 'compassionate' killing. Imminent cases and forthcoming legislation will test this.

Assisted suicide is once again in the media spotlight thanks to the high profile prosecutions of Kay Gilderdale and Frances Inglis, continuing controversy around the activities of Philip Nitschke (*Exit*) and Ludwig Minelli (*Dignitas*), and celebrity endorsement by authors Terry Pratchett and Martin Amis. So much so that both MPs and Peers have recently made allegations of BBC bias on the issue.<sup>1,2</sup> But among all these, the key event recently has been the publication of new prosecution guidelines by the Director of Public Prosecutions (DPP).

The Law Lords, ruling in July 2009 on the case of MS sufferer Debbie Purdy, required the DPP for England and Wales, Keir Starmer, to produce an 'offence specific policy' making public the factors he would take into account when deciding whether or not to prosecute for assisted suicide. He produced his interim guidance on 23 September and this was out for public consultation until 16 December. A parallel consultation took place in Northern Ireland.

The DPP's draft (interim) guidance listed 16 factors that made prosecution more likely and 13 that made it less likely. It was widely criticised as 'discriminatory' in making prosecutions less likely when the 'victim' was sick, disabled or had a history of past suicide attempts, and 'naïve' in making prosecutions less likely for 'loved ones' (close relatives or friends) acting as 'assisters'. A significant proportion of abuse of elderly and disabled people occurs in the context of so-called 'loving families'! CMF with others<sup>3</sup> lobbied hard to have these provisions amended and many individual members made personal submissions.

## Definitive guidance much improved

The DPP published his definitive guidance on 25 February<sup>4</sup> and we were pleasantly surprised to see how much improved it was. Almost 5,000 submissions<sup>5</sup> had been received from individuals and organisations and in response to these the DPP had made several key changes. The updated guidelines first emphasise that assisting with suicide remains a criminal offence, and that only Parliament can create exceptions to it. Over 1,200 submissions had requested removal of the factors on 'sick or disabled' and 'loved ones' and over 1,000 had requested removal of 'past suicide attempts'. The DPP has therefore removed all 'victim'-related factors from the 'less likely to prosecute' list, leaving just six relating to the 'suspect' alone.

In addition new factors have been added, most notably one making prosecution more likely if 'the suspect was acting in his or her capacity as a medical doctor, nurse, other healthcare professional, a professional carer (whether for payment or not), or as a person in authority, such as a prison officer, and the victim was in his or her care'. Other factors in the definitive guidance effectively rule out internet promotion of suicide and Swiss-style suicide 'clinics'.

When the new guidelines were published the pro-euthanasia lobby group Dignity in Dying posted a notice<sup>6</sup> that it did not 'provide any information on how to end life or on how to arrange an assisted death', and the Medical Defence Union underlined its previous advice to members that 'doctors approached by patients for advice about suicide should not engage in discussion which assists the patient to that end'.<sup>7</sup>

## Still fundamentally flawed

However despite these improvements, the guidelines remain fundamentally flawed, both in principle and in their detail. The Law Lords' judgment which led to them has been criticised by a leading lawyer as being 'unprecedented and unsound, if not unconstitutional'.<sup>8</sup> The Lord Chief Justice had wisely observed, in the Court of Appeal decision on Purdy, that granting her application would in effect create exceptions to the crime. Creating exceptions was something only Parliament could do, and it had chosen specifically not to do so twice in the last four years. The Law Lords ruling, by contrast, seemed to 'think it a proper function of the judiciary to help someone evade prosecution for the future commission of a serious crime'.

The ruling looked even stranger when seen against Parliament's recent move in the Coroners and Justice Act 2009 to expand the crime of assisting suicide to include 'encouragement' or 'assistance' by way of media or internet. Commentators have even referred to the guidance as providing a 'tick box get out of jail free card' for would-be assisters or even, in the case of crime-writer PD James, a 'murderer's charter'.<sup>9</sup>

Specifically, the mitigating factor 'wholly motivated by compassion' attracted most concern. This was defined in part to exclude actions where 'the suspect was motivated by the prospect that he or she or a person closely connected to him or her stood to gain in some way from the death of the victim', but still left many questions.

How was compassion to be defined? Given that motives are often mixed, how would the DPP interpret the word 'wholly', and was there any legal precedent? Given that the key witness, the 'victim', was dead, how would the DPP determine whether the act was 'wholly compassionate'? To what extent could one reliably trust the testimony of the 'suspect' about what really happened and what motivated him, given that the answers to these questions might make the difference between no prosecution on the one hand or a conviction for assisted suicide (up to 14 years' imprisonment) or mercy killing (mandatory life sentence) on the other? How is the DPP to determine from the evidence available in most cases that the action to 'help' was not at least in part motivated by a desire to be rid of an economic, emotional or care burden, or whether the 'suspect' was being subtly coerced or emotionally blackmailed by the 'victim' ('if you love me you will help me end it all')?

## 'Intention' not 'motivation'

Both the Suicide Act 1961 (which decriminalised attempting suicide itself but kept assisting suicide as a crime) and the Murder Act 1965 were based on the principle that the key issue legally was not 'motivation' but rather 'intention'. This concept – that it is wrong intentionally to end the life of any innocent human being regardless of one's motivation – has its origin in the Bible and is the basis of the sixth commandment: 'You shall not murder'.<sup>10</sup> Suicide, biblically speaking, is 'self-murder'. This in turn is consistent with the Bible's teaching that our lives do not belong to ourselves but to God.<sup>11</sup> It is clear from the biblical passages that

expound the sixth commandment that it is the 'intentional killing of an innocent human being' that is being prohibited.<sup>12</sup>

As commentator Kevin Yuill has recently argued, 'The motivation for decriminalising suicide in England and Wales in the 1961 Suicide Act, as its authors clearly pointed out, was not toleration of suicide but a desire to be understanding, helpful and sympathetic towards the *failed* suicide and also the families of successful suicides... It is the disapproval of suicide – and, more importantly, its concurrent assumption that human life is valuable – which is now threatened.'

Quite apart from the clear scriptural perspective, suicide has been viewed by most societies as a deeply anti-social act that destroys possibilities, not just for the suicide victim, but for others too.

## 'Compassionate' killing?

However, the carefully orchestrated, powerfully funded campaign we have seen from the pro-euthanasia lobby – fuelled by celebrity endorsement and media hype around hard cases – has given credence to the idea in the public mind that there is such a thing as justifiable compassionate killing, and this has now been given legal sanction in the DPP guidance, along with the concept that there is such a thing as 'a life not worth living'. Suicide has shifted in the public consciousness from being a preventable tragedy (hence national suicide prevention strategies and suicide watches) to a choice that in some circumstances society is obliged to endorse and facilitate.

On 10 February, the Scottish Parliament established the End of Life Assistance (Scotland) Bill Committee with the remit to consider the general principles of Margo MacDonald MSP's bill which attempts to legalise both assisted suicide and voluntary euthanasia in Scotland for terminally ill, chronically ill and disabled people. The Committee launched its public call for evidence on the bill on 3 March and is expected to take oral evidence in May and June and publish its report during the summer, with a Stage 1 debate in September/October.<sup>13</sup>

I write this a few days prior to an adjournment debate in the House of Commons on 10 March on 'assisted suicide and the law' called by former Health Secretary Patricia Hewitt, now a patron of Dignity in Dying. This will further raise the temperature as we move into a new parliament after the election, when a private member's bill attempting to legalise assisted suicide is expected.

In coming weeks we will also see a barrage of cases which are going to test the new DPP guidelines, including those of two doctors (Michael Irwin<sup>14</sup> and Libby Wilson<sup>15</sup>); two husbands who allegedly 'helped' their wives kill themselves (Michael Bateman<sup>16</sup> and William Stanton<sup>17</sup>); and one elderly BBC journalist who confessed on national television to a 'mercy killing' (Ray Gosling<sup>18</sup>).

The pressure to change the law will be ongoing and relentless. We must continue to resist it.

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Terry Pratchett



Kay Gilderdale

the mitigating factor 'wholly motivated by compassion' attracted most concern

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