Dignity in dying

your life, your choice

Prosecuting policy: encouraging or assisting suicide

A victory for common sense and compassion

Overview

The Director of Public Prosecutions (DPP) published the *Policy for Prosecutors in Respect of Cases of Encouraging or Assisting Suicide* on the 25th February 2010.

The policy is the result of the Law Lords' ruling in the Debbie Purdy case. Lord Brown's judgement set out the need for a

"...custom-built policy statement indicating the various factors for and against prosecution, ... factors designed to distinguish between those situations in which, however tempted to assist, the prospective aider and abettor should refrain from doing so, and those situations in which he or she may fairly hope to be, ... forgiven, rather than condemned, for giving assistance." [1]

Dignity in Dying believes that the prosecuting policy marks a significant step forward for patient choice and control at the end of life, giving individuals a much clearer indication of how they are likely to be treated by police and prosecutors. For the first time it gives formal recognition that in certain circumstances, people should not be prosecuted for helping someone to die. At its core the policy distinguishes between compassionate and malicious acts of assistance in order that they can be treated differently by law.

In this sense the policy is a victory for common sense and compassion, and a milestone in the campaign for patient choice at the end of life.

Where next for public policy?

The prosecuting policy raises serious public policy questions. The policy effectively acknowledges that in certain circumstances assisted suicide is acceptable, and it is public knowledge that well over a hundred British citizens have been assisted to commit suicide overseas, and that approximately 700 British citizens are members of Dignitas in Switzerland.[2]

The policy also reflects the huge shift in society's view on end-of-life choice since the 1961 Suicide Act. The public do not want to see the prosecution of those who assist loved ones to die out of compassionate motives, and on the whole, these people have not been prosecuted for decades. Society must now ask if this acceptance of the principle of compassionate assistance, but unwillingness to deal with the reality, (instead relying on Switzerland manage the consequences of our law), is reasonable. Dignity in Dying's position is that it is not.

The final version of the policy was broadly welcomed by both supporters and opponents of a change in the law on assisted dying. It seems that almost everyone accepts that those who assist a death from wholly compassionate motives should not be prosecuted. But if we accept this, we must surely also accept the need to protect the public. And if we want to protect people, up-front safeguards, rather than the retrospective checks offered by the prosecuting policy, must be the answer.

The prosecuting policy clarifies the law, but it cannot change the law – and a change in the law is essential if people are to have both choice and protection.

Dignity in Dying will continue to campaign for a change in the law to allow terminally ill, mentally competent adults the option of an assisted death, within strict legal safeguards.

The law on assisted suicide

The Suicide Act 1961, updated by the Coroners and Justice Act 2009, makes encouraging or assisting a suicide a crime punishable by up to 14 years imprisonment. The law explicitly gives the DPP discretion over whether to prosecute cases of encouraging or assisting suicide.

Content of the policy

The public interest factors set out in the policy are listed below.[3]

Public interest factors tending in favour of prosecution

A prosecution is more likely to be required if:

(1) the victim was under 18 years of age;
(2) the victim did not have the capacity (as defined by the Mental Capacity Act 2005) to reach an informed decision to commit suicide;
(3) the victim had not reached a voluntary, clear, settled and informed decision to commit suicide;
(4) the victim had not clearly and unequivocally communicated his or her decision to commit suicide to the suspect;
(5) the victim did not seek the encouragement or assistance of the suspect personally or on his or her own initiative;
(6) the suspect was not wholly motivated by compassion; for example, 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;
(7) the suspect pressured the victim to commit suicide;
(8) the suspect did not take reasonable steps to ensure that any other person had not pressured the victim to commit suicide;
(9) the suspect had a history of violence or abuse against the victim;
(10) the victim was physically able to undertake the act that constituted the assistance him or herself;
(11) the suspect was unknown to the victim and encouraged or assisted the victim to commit or attempt to commit suicide by providing specific information via, for example, a website or publication;
(12) the suspect gave encouragement or assistance to more than one victim who were not known to each other;
(13) the suspect was paid by the victim or those close to the victim for his or her encouragement or assistance;
(14) the suspect was acting in his or her capacity as a medical doctor, nurse, other healthcare professional, a professional carer [whether for payment or not], or as a person in authority, such as a prison officer, and the victim was in his or her care;
(15) the suspect was aware that the victim intended to commit suicide in a public place where it was reasonable to think that members of the public may be present;
(16) the suspect was acting in his or her capacity as a person involved in the management or as an employee (whether for payment or not) of an organisation or group, a purpose of which is to provide a physical environment (whether for payment or not) in which to allow another to commit suicide.

Public interest factors tending against prosecution

A prosecution is less likely to be required if:

(1) the victim had reached a voluntary, clear, settled and informed decision to commit suicide;
(2) the suspect was wholly motivated by compassion;
(3) the actions of the suspect, although sufficient to come within the definition of the offence, were of only minor encouragement or assistance;
(4) the suspect had sought to dissuade the victim from taking the course of action which resulted in his or her suicide;
(5) the actions of the suspect may be characterised as reluctant encouragement or assistance in the face of a determined wish on the part of the victim to commit suicide;
(6) the suspect reported the victim's suicide to the police and fully assisted them in their enquiries into the circumstances of the suicide or the attempt and his or her part in providing encouragement or assistance.

A personal perspective

This letter, published in a national newspaper in March 2010, demonstrates the need both for a prosecuting policy on assisted suicide, and for a change in the law on assisted dying:[4]

"As I read yet another news piece about someone travelling to Dignitas to die... I am consumed by sadness... Nearly five years ago, my grandfather travelled to Zurich to die. Unable to face months of pain, coupled with physical and mental degradation, he elected to end his life while he could still make the journey. Alone.

Ever the gentleman, my grandfather declined the offer of companionship from my father, for fear of his son's potential prosecution. There were no updated guidelines from the director of public prosecutions – to have such clarity would have been a luxury. Instead, my grandfather took his final journey abroad, alone. He ate his last meal, alone. And his last words were uttered to medical staff. I have no idea what those words may have been, or, indeed, how he felt.

Too often I hear talk of dignity at work or dignity in life generally, but where is our right to dignity in death? In the eyes of Westminster, my grandfather is simply one of 100; another statistic lost in the reams of data that fills the corridors of Whitehall. But to me, he was a brave man forced to leave his homeland in order to die with dignity.

I appreciate the issue is complex, and would be naive to state otherwise, but a sensible resolution is required. How many more Britons have to voyage to Switzerland, before the Government seeks a solution? In criminalising assisted suicide are we not overlooking – undermining? – the right to articulate our own views on life?..."

Name and address supplied

Implications of the policy

The policy provides a much-needed formal acknowledgement of prosecuting practice in cases of assisted suicide: that in certain circumstances compassionately motivated assisters will not be prosecuted. Its overall approach is compassionate and sensible, and read as a whole it gives a sense of the kind of factors that will be taken into account around decisions about prosecutions for assisted suicide.

By also reiterating that there can be no immunity from prosecution before the event, and making clear that decision-making in these cases is not a 'tick box' exercise but a case by case analysis, the DPP has outlined the decision-making process encompassed within his prosecutorial discretion without overstepping its limits.

A) Removal of factors concerning the assisted person's condition

The policy has changed in emphasis from the decisions and experience of the assisted person (in the interim version) to focus more heavily on the motivation of the person who assists. Factors relating to terminal illness and disability have been removed, in response to fears that these were potentially discriminatory.

It is very important that the law and prosecuting policy are not discriminatory. But the complete removal of factors regarding the assisted person's condition and experience raises problems. Without this, the policy fails to distinguish between, for example, a person with a terminal illness who is experiencing unbearable suffering, and a person who is simply 'tired of life'. One leading legal academic has observed

"Without any restriction based on the victim's condition or experience, the policy is more liberal in this respect than most assisted-dying regimes."[5]

Prosecutions are still more likely if the assisted person was "physically able to undertake the act that constituted the assistance him or herself". This implicitly recognises that assistance is more likely to be compassionately motivated when a person needs help to commit suicide. However, Dignity in Dying's response to the consultation on the interim policy outlined the ethical difference between assistance in different situations – our strong preference was to see a distinction made between assisting a person who is dying, and a person who is not (who may or may not be disabled)[6].

B) The role of doctors

The factor in favour of prosecution regarding health professionals has been broadened compared to the interim version: "the suspect was acting in his or her capacity as a medical doctor, nurse, other healthcare professional... and the victim was in his or her care".

It is likely that a doctor assisting a friend or family member (i.e. not a patient in their care) would not be prosecuted. However, it is unclear how the policy would apply to doctors who provide a patient with their medical records, suspecting that they want these in order to go to Switzerland to be assisted to commit suicide (patients have a right to access their medical records under the Data Protection Act 1998). One factor states that acts "although sufficient to come within the definition of the offence,

were of only minor encouragement or assistance" will weigh against prosecution. However the corresponding factor in the interim version covered acts "only of minor assistance…or assistance which the suspect provided …as a consequence of his or her usual lawful employment".

This could affect doctors' willingness not only to provide patients with their medical records, but also, to engage in discussions about patient's desire to end their life, with three serious consequences. Firstly, patient's trust in their doctors may be damaged. This is clearly a concern for the Medical Protection Society, which has commented

"Healthcare professionals want to be able to respond to the needs of patients and their families in a sensitive and confidential way… However, healthcare professionals may be forced to refuse to provide advice or medical reports to patients in a vulnerable position because they fear criminal prosecution…This could undermine the quality of the doctor-patient relationship at a time when patients are most in need and surely runs counter to the Department of Health's End of Life Care Strategy, which seeks to improve the support and care given to people at the end of their lives."[7]

Secondly, unable to speak openly to their doctors, patients may turn to far more hazardous sources of information. As the MS Society has acknowledged, if people can't talk to medical professionals about assisted suicide

"their only likely resource is Google."[8]

Thirdly assistance in suicide will remain an amateur activity carried out by inexperienced individuals, with potentially dangerous consequences for the person being assisted to attempt suicide, and placing a terrible burden on those who assist them from compassionate motives.

C) No safe means of assisted suicide

The policy means that in some circumstances, a person who wants to choose the manner and timing of their death may feel that they can ask someone for help without condemning them to up to 14 years in prison. However, they are very unlikely to have access to information about a means of safely ending their life, particularly given the wording of the policy around health professionals.

The DPP's policy recognises the dangers of this situation – making it clear that provision of information on assisting suicide to several people unknown to each other, through books or over the internet, is very likely to result in prosecution. We agree with this approach. Without the ability to independently investigate a request to die, he clearly has to ensure that those providing information on how to end life indiscriminately are prosecuted.

This lack of information means that the policy will be most useful to people who are either in the fortunate position of having a doctor who is a close friend or relative and who is willing to assist them, or those considering being assisted to die in Switzerland. So few cases of either come before the DPP,[9] it is clear that a person who can be assisted in either of these ways, and their loved ones, will probably face less stress and fear of prosecution than those who do not have these options open to them.

The policy could be seen as discriminatory towards those who cannot afford, or who are not physically able to get to Switzerland by leaving them facing the prospect of a far more drawn out, uncertain and painful suicide, and by continuing to deny them clarity in how the law will treat their loved ones.

D) Emphasis on the assister rather than the assisted person

The person being assisted having reached a "voluntary, clear, settled and informed decision to commit suicide" is now the only factor weighing against prosecution that is about the person assisted to die rather than the assister.

Dignity in Dying strongly believes that in order to allow patient choice, whilst protecting vulnerable people, the focus must be on the decisions and choices of the person asking to be assisted to die – they must be at the heart of all decision-making. However, the standards of evidence needed to base the policy on the assisted person rather than the assister could take the DPP beyond clarification of the law and into creation of law. The summary of consultation responses published alongside the final version of the policy states in relation to calls for written evidence of the assisted person's decision, that this kind of factor would be

"within the scope of processes and procedures that, in effect, create a regime for encouraging or assisting suicide. Only Parliament can determine the legality of such a regime – not the DPP."[10]

This problem brings us back to the need for assisted dying legislation, which, unlike the prosecuting policy, would ensure this patient-centred approach could be taken, with strong safeguards in place before a person can be assisted to die.

The need for a change in the law

Dignity in Dying welcomes the prosecuting policy as an important step forward for patient choice. However, there is a need for access to assisted dying that will not go away: over 130 British people have been assisted to die in Switzerland[2], and research shows that 2,500 deaths are accelerated by doctors in the UK each year[11] and that 9.8% of patients at the end of life ask their doctors to hasten their death.[12] Experience in Oregon in the USA, where assisted dying has been legal since 1997, demonstrates that whilst small numbers of people actually use assisted dying legislation (less than 0.2% of all deaths each year are assisted) many more benefit from knowing the choice is there: 40% of those who receive a prescription for assisted dying never use it.[13]

In contrast, in England and Wales at present, assisted dying is only really an option for those who can afford to pay the travel costs and Dignitas fees. Others attempt suicide at home in secret, ask loved ones to help them directly ('mercy killing'), or starve themselves to death.

Paragraph 41 of the prosecuting policy states

"It may sometimes be the case that the only source of information about the circumstances of the suicide and the state of mind of the victim is the suspect."[3]

This is the inherent difficulty of after the event investigation and one reason why Dignity in Dying advocates a safeguarded assisted dying law where cases are considered when someone asks for help to die, rather than *after* they have died. This would allow dying adults to make informed decisions after discussions with loved ones and doctors, and would offer better protection against abuse than the current law and prosecuting policy.

Clearly this is beyond the remit of the DPP. But whilst the prosecuting policy gives some clarity on the law, it also serves to highlight the inability of the current law to respond appropriately to the needs of dying adults who want choice and control at the end of life.

The prosecuting policy clarifies the law, but it cannot change the law – and a change in the law is essential if people are to have both choice and protection.

Endnotes

1 R (on the application of Purdy) v DPP, [2008] EWHC 2565; [2009] EWCA Civ 92; [2009] UKHL 44

2 The Guardian, www.guardian.co.uk/news/datablog/2010/feb/25/assisted-suicide-dignitas-statistics 25 February 2010

3 Policy for Prosecutors in Respect of Cases of Encouraging or Assisting Suicide, www.cps.gov.uk.

4 The Guardian, http://www.guardian.co.uk/society/2010/mar/13/dying-alone-and-without-dignity, 13 March 2010

5 Lewis, P Out of Focus, Solicitor's Journal, 9 March 2010

6 Dignity in Dying's response to the consultation on the Interim Policy for Prosecutors in Respect of Cases of Assisted Suicide is available at www.dignityindying.org.uk/about/publications.html

7 Medical Protection Society, Law on Assisted Suicide – role of doctors, 9 March 2010

8 MS Society, www.mssociety.org.uk/news_events/news/press_releases/dpp_guidance.html, 23 September 2009

9 Evidence to High Court, R (on the application of Purdy) v DPP, witness statement of Daniel Llewelyan Jones of the Crown Prosecution Service, 24 July 2008

10 Public Consultation Exercise on the Interim Policy for Prosecutors in respect of Cases of Assisted Suicide Issued by The Director of Public Prosecutions, Summary of Responses, paragraph 7.6, www.cps.gov.uk

11 Seale C (2009) End-of-life decisions in the UK involving medical practitioners, Palliative Medicine 23: 198-204

12 Seale C (2009) Hastening death in end-of-life care: A survey of doctors, Social Science & Medicine 69: 1659-1666

13 Oregon Department of Human Services, www.oregon.gov/DHS/ph/pas/

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