

**Dignity in Dying response to the
Ministry of Justice consultation paper**

**Murder, manslaughter and infanticide
(CP18/08)**

October 2008

Section 1 - Introduction

1. Dignity in Dying is the leading organisation campaigning for greater choice at the end of life. Our campaigns focus on giving people choice, control and access to high quality end-of-life care services. We represent 100,000 members and supporters.

2. Dignity in Dying's response to the consultation paper focuses on the recommendations around the partial defence of diminished responsibility.

3. In summary, we are very concerned that the revised definition of diminished responsibility will have negative effects for people that might be termed genuine 'mercy killers': those who have actively helped a seriously ill loved one to die, in response to persistent requests for help to end their life. By changing the definition of diminished responsibility it is likely that 'mercy killers' who have acted rationally in response to persistent requests from a seriously ill loved one, will face custodial sentences.

4. This outcome would certainly contradict the wider spirit of the proposed revisions: to make the law fair, just, and effective. Indeed the Ministry of Justice consultation paper on the proposed changes states: *Our aim is to ensure that the law in this area is just, effective and up-to-date, and produces outcomes which command public confidence*¹.

5. Dignity in Dying does not endorse 'mercy killing', nor do we endorse the existing 'benign conspiracy'² in the handling of 'mercy killing' cases by the courts. However, 'mercy killings' are taking place, and it is necessary that the law addresses these cases appropriately. We recognise that this is a complex issue that needs investigation and we are not making specific recommendations about how 'mercy killers' should be treated by the courts. Instead we are recommending that there is a separate public consultation on whether and, if so, to what extent the law should recognise either an offence of 'mercy' killing or a partial defence of 'mercy' killing. This is in line with the Law Commission's recommendation to the Ministry of Justice: *We recommend that the Government should undertake a public consultation on whether and, if so, to what extent the law should recognise either an offence of 'mercy' killing or a partial defence of 'mercy' killing*³.

¹ Murder, Manslaughter and Infanticide, Ministry of Justice CP19/08, July 2008, page 6.

² The Law Commission Report No. 290, Partial Defences to Murder, August 2004, page 17.

³ The Law Commission paper 304, Murder, Manslaughter and Infanticide, November 2006, page 155.

Section 2 - The current situation

6. Under the current law, anybody who ends the life of another can be convicted of murder and receive a life sentence - even if the act is a compassionate response to a dying person's request for help to die (a 'mercy killing'). At the request of the Home Secretary in 2004, the Law Commission undertook a review of the partial defences to murder, and concluded, "*The present law of murder in England and Wales is a mess*"⁴.

7. On 'mercy killing', the report stated, "*at present, in such cases, a conviction for murder, with consequent mandatory life sentence, can only be avoided by a 'benign conspiracy' between psychiatrists, defence, prosecution and the court, to bring them within diminished responsibility...It is however a blight on our law that such an outcome has to be connived at rather than arising openly and directly from the law*"⁵.

8. However, whilst the benign conspiracy identified by the Law Commission allows the courts to treat individual, genuine 'mercy killers' with compassion, the wider implications of this legal fudge are not necessarily benign and do not necessarily protect the vulnerable.

9. Undoubtedly, many cases of 'mercy killing' are genuine responses to persistent requests from a terminally ill person – for example the David March case (October 2006) cited extensive quotes from Gillian March's diary over a period of years⁶. Gillian suffered from Multiple Sclerosis (MS), and made several attempts to take her own life before finally succeeding (with assistance from David). However, the lack of formal guidance or specific recognition of cases that might be defined as 'mercy killing' in the structure of offences and partial defences means that it is very unclear, both for terminally or seriously ill people and their loved ones, how a 'mercy killing' (or an assisted suicide) will be treated by the courts.

10. Dignity in Dying is committed to securing greater choice at the end of life, including the option of assisted dying for terminally ill patients as a last resort. We believe that if there was a change in the law on assisted dying, incidences of 'mercy killing' cases would be significantly reduced. However, in the meantime 'mercy killing' is a genuine problem which warrants further investigation.

⁴ The Law Commission Report No. 290, Partial Defences to Murder, August 2004, page 29.

⁵ The Law Commission Report No. 290, Partial Defences to Murder, August 2004, page 17.

⁶ BBC, 19 November 2006, http://news.bbc.co.uk/1/hi/england/southern_counties/6065836.stm.

11. Further to these broad concerns about what might be termed *genuine* cases of 'mercy killing', there is also a risk that with no clear policy people may claim to have committed a 'mercy killing' or assisted a suicide for compassionate reasons, when in fact their motives are more sinister or selfish.

12. In addition to concerns over the safety of vulnerable people as the subject of 'mercy killings', the current situation has very negative effects on the lives of 'mercy killers', or those who assist a suicide. In practice the 'benign conspiracy' is not so benign, with many of those awaiting trial suffering very negative consequences:

- Imprisonment – Brian Blackburn, a retired policeman who helped his wife who had terminal cancer to die at her request, and then tried to commit suicide himself, spent three months in prison before he was given a suspended sentence, having pleaded guilty to manslaughter (January 2005). Mr Blackburn had the complete support of his wife's two sons. Mrs Blackburn, a former nurse had asked her husband to cut her wrists, as "*the last loving thing you could do for me*"⁷.
- Long-drawn out trials and public labeling – Although not imprisoned while awaiting trial, David March spent thirteen months waiting to know if he would be convicted of murdering his wife Gillian. During this time his life was effectively on hold and he was unable to grieve and come to terms with his loss in peace. He also received several intrusive calls and visits from journalists who had heard about his case. David called the police of his own volition when Gillian died, but still found that he was treated with little compassion or discretion – several police cars drove to the house with sirens blaring, his house was cordoned off with police tape, and in his initial police interviews he was not allowed home, or to have a wash or shave for several days. David March had the support of his wife's family and friends, and of the staff and Board of the MS Therapy Centre they had set up together after she was diagnosed⁸.
- Suicide – Home Office statistics show an alarmingly high incidence of suicide in homicide cases defined as mercy killing or suicide pact. From 1990/1991 to 2004/2005, Home Office records show that of 57 suspects, 21 committed suicide⁹.

⁷ The Independent, 15 January 2005, <http://www.independent.co.uk/news/uk/crime/expoliceman-walks-free-after-mercy-killing-of-wife-486726.html>.

⁸ BBC, 19 November 2006, http://news.bbc.co.uk/1/hi/england/southern_counties/6065836.stm.

⁹ Home Office, Homicide victims where the circumstances were described as a mercy killing defined as mercy killing, 2005.

13. The lack of clarity around the legal response to ‘mercy killings’ in itself causes problems that can have a deep impact on people’s lives, leaving the threat of prosecution and other problems hanging over them for long periods of time:

- Cause of death – Heather Pratten helped her son Nigel to die at his request. Nigel had Huntingdon’s Disease, and had seen his father suffer terribly with the same condition (October 2000)¹⁰. Heather stayed with Nigel as he took a heroin overdose; they hugged, and fell asleep. Several hours later Heather woke and Nigel was still breathing, but barely. She held a pillow over his head until he stopped breathing. A medical report showed that Nigel was so near the point of death that Heather’s action made no consequence and he would have died anyway. Heather was given a suspended sentence, partly as a result of the medical report.
- Being there when someone commits suicide – Roger Carr stayed with his wife Alison, who had terminal cancer, when she committed suicide (November 2002)¹¹. He told the police what had happened and was arrested and locked in a police cell within four hours of Alison’s death. The case against Roger was eventually dropped, but he had to wait eight months before this happened.
- Effect on family members – In a similar case, Graham Lawson sat with his sister Sue for 26 hours whilst she attempted to commit suicide (January 2005)¹². Sue had a severe form of MS. Graham was arrested on suspicion of assisting Sue’s suicide, and it was the police who told his parents that their daughter had died, not Graham. The family had to wait five months before they could have a funeral for Sue, because the police would not release her body until they decided whether or not to charge Graham. The whole experience had a terrible effect on Graham and Sue’s parents, who became ill due to the stress of the investigation.

Section 3 - The effects of the proposed changes to the partial defence of diminished responsibility

14. The draft clauses around diminished responsibility require that to use the defence, the defendant must have a “*recognised medical condition*”¹³. Whilst in the wider sense it is sensible to revise the definition of diminished responsibility in line with recommendations from the Royal College of Psychiatrists Dignity in Dying is concerned about how these

¹⁰ BBC, 26 October 2000, <http://news.bbc.co.uk/1/hi/uk/992673.stm>.

¹¹ <http://www.dignityindying.org.uk/peoplesstories/stories.asp?region=&id=94&q=&submit.x=27&submit.y=4>.

¹² BBC, 21 January 2005, <http://news.bbc.co.uk/1/hi/england/4196811.stm>.

¹³ Murder, Manslaughter and Infanticide, Ministry of Justice CP19/08, July 2008, page 35.

changes will apply to 'mercy killers' who genuinely act in compassionate response to requests for help to die.

15. The inclusion of the term "*recognised medical condition*" in the new definition implies that a formal diagnosis and treatment plan is likely to be expected. Quite possibly some defence lawyers would be able to mount a defence to the effect that the defendant was undiagnosed and untreated and that this fact alone could account for their actions, but it is impossible to say if this would be accepted.

16. Further, the new definition clearly calls for the "*recognised medical condition*" to be evidenced "*at the time*" of the killing. It would not be impossible for a good prosecutor to argue that the depression has arisen subsequent to the killing, or perhaps in response to it, especially in cases where doubt about the motivation of the 'mercy killer' has been raised by the family etc.

17. In addition, for the defence to apply, the recognised medical condition would need to be shown to have substantially impaired "*the defendant's ability to understand the nature of their conduct, to form a rational judgment, or to exercise self-control*". The new definition would not help the person who eventually concedes to persistent requests from a terminally ill loved one to help them die, if their help can be shown to be rational – eg they understood the consequences of their action, and do not suffer from depression or some other mental abnormality. Clearly such a person will have acted rationally, in a controlled fashion and in the full knowledge and understanding of the implications of her/his conduct, which will make it extremely difficult to apply the defence.

18. The likely effect therefore, is that many genuine 'mercy killers' will be given custodial sentences. This would seem to go against the wider spirit of the proposed changes, which are intended to make the Law of Murder more just. It is particularly surprising, and deeply concerning, that the impact that changes to diminished responsibility will have on the practice of the law in 'mercy killing' cases was not considered in the consultation document, given the Law Commission's recommendation of a review of the law around 'mercy killing'. While the current law may allow the courts to connive to treat genuine 'mercy killers' compassionately, it is clear that the revised definition will put a stop to this. What little protection 'mercy killers' currently have against harsh sentencing (and potentially, mandatory life sentencing) will be completely removed. As such, the proposed change to diminished responsibility will have a significant and potentially damaging impact on a particular group of

offenders: Government has a responsibility to thoroughly investigate this before making any changes.

19. Furthermore, the statement in the impact assessment published alongside CP19/08: *We do not think...that there will be an impact on the courts or prison population as a result of these changes*¹⁴ does not fit with the fact that there on average four ‘mercy killing’ cases are going through the courts each year¹⁵. As the new definition of diminished responsibility will remove the possibility of a partial defence from many mercy killers, it seems very likely that this will in turn have an impact on the courts and prison population.

20. Dignity in Dying is in the process of commissioning research that will explore the potential consequences of the change to diminished responsibility for ‘mercy killers’ in more detail. This will involve analysing law reports to find examples of how often and with what degree of success diminished responsibility was used in reported ‘mercy killing’ cases, with the core aim of determining whether the proposed new definition of diminished responsibility would have had an impact on these cases, specifically in terms of whether the outcome might have been different. Dignity in Dying would be very happy to share this research with the Ministry of Justice once it is completed.

21. Dignity in Dying does not endorse the ‘benign conspiracy’ – people need greater legal clarity than this provides, but we would be very concerned about changes to the law which would result in harsher treatment of those who have acted in genuine response to persistent requests for help to die from a terminally ill or seriously ill loved one, particularly as we feel many cases of mercy killing would be prevented if we had an assisted dying law.

22. Without the separate review of ‘mercy killing’, as also recommended by the Law Commission, it is difficult to see how the suggested changes to the partial defence of diminished responsibility would work in ‘mercy killing’ cases. Dignity in Dying strongly recommends that the Ministry of Justice set up a review on ‘mercy killing’ and/or further research into this issue.

23. As a supplementary point, in light of the revised definition, we note with concern the proposals to tighten the circumstances in which the partial defences of both provocation and diminished responsibility are left to a jury¹⁶. In an area as sensitive as ‘mercy killing’ it is an

¹⁴ Murder, Manslaughter and Infanticide, Impact Assessment, Ministry of Justice, July 2008, page 4.

¹⁵ Home Office, Homicide victims where the circumstances were described as a mercy killing defined as mercy killing, 2005.

¹⁶ Murder, Manslaughter and Infanticide, Ministry of Justice CP19/08, July 2008, page 13.

important safeguard that a jury, representing the views of society, has the opportunity to decide whether a just outcome in a particular case would be acquittal.

Section 4 - The case for a review

24. The Ministry of Justice impact assessment published alongside CP19/08 states:

This review has not considered the issue of “mercy” killings. The question of whether there should be a partial defence of “mercy” killing raises many of the same issues raised by the debate as to whether assisted dying should be legalised. The Government has made it clear that assisted dying is a matter of conscience and for Parliament to decide. Parliament has considered this on several recent occasions¹⁷.

25. Dignity in Dying agree that ‘mercy killings’ are linked to assisted dying, in the sense that we believe many cases of ‘mercy killing’ arise because there is no assisted dying law in this country, which causes some terminally ill people to ask their loved ones to help them die.

26. However, the fact is that ‘mercy killings’ are happening and that they are not satisfactorily dealt with by the law at present. Whether or not Parliament decides to debate assisted dying and euthanasia, (and particularly if it does not do so), the Government and the Ministry of Justice have a responsibility to ensure that the law is operating correctly and fairly. The current situation of the ‘benign conspiracy’ around ‘mercy killing’ cases leads to a legal fudge in order to treat genuine ‘mercy killers’ with compassion. The proposed changes to diminished responsibility are likely to lead to genuine ‘mercy killers’, receiving much harsher sentencing than at present, including time in prison.

27. Dignity in Dying is not advocating the decriminalisation of ‘mercy killing’ or the introduction of a specific offence or partial defence of ‘mercy killing’. However we are calling for the Law Commission’s recommendation of a specific review of ‘mercy killing’ to take place, in order that different possibilities for the treatment of ‘mercy killers’ under the law can be investigated and consulted on.

28. There is a clear need for a review for the following reasons:

29. As outlined in Section 2 of this report, the lack of formal guidance or specific recognition of cases that might be defined as ‘mercy killing’ in the structure of offences and partial

¹⁷ Murder, Manslaughter and Infanticide, Impact Assessment, Ministry of Justice, July 2008, page 14

defences means that it is very unclear, both for terminally or seriously ill people and their loved ones, how a 'mercy killing' will be treated by the courts. In addition to these broad concerns about what might be termed *genuine* cases of 'mercy killing', there is also a risk that with no clear policy people may claim to have committed a 'mercy killing' or assisted a suicide for compassionate reasons, when in fact their motives are more sinister or selfish. And as well as concerns over the safety of vulnerable people as the subject of 'mercy killings', the current situation has very negative effects on the lives of 'mercy killers', such as long drawn out trials, imprisonment, and risk of suicide.

30. In addition, the Law Commission's consultation paper rightly raised a concern that that suicide pacts and consensual killings usually involve male carers killing their spouses and that this raised important gender issues¹⁸. Further research and a review could investigate this trend to see if it is coincidental and, if it is significant, if it is maleficent.

31. Negative effects on individuals even when there is no prosecution - It is clear from media reports and from anecdotal evidence that many acts of mercy killing and assisted suicide are happening in private, and 'under the radar'. In itself, this justifies further research into the reality of how people are dying. But these stories also demonstrate other negative effects on 'mercy killers' and demonstrate that the law does not always stop people from helping loved ones to die. What it does do is lead to untold misery and self-harm in those who do, illegally, help a loved one to die:

- Alcohol and drug abuse - In 1994, Mark Sanderson helped his partner Drew Morgan to die. Drew was in severe and unrelenting pain, and was terminally ill with skin cancer. When Drew told Mark that he was ready Mark smothered him. In the months following Drew's death, Mark's life fell to pieces. He became reliant on alcohol and drugs, and made several attempts to take his own life. He longed to talk about what he had done but told no one. He could not live with himself. In 2002, Mark published 'Wrong Rooms: A Memoir', telling the story of his experience¹⁹. He has never been arrested or charged for his part in Drew's death.
- Self harm - In July 1996, Mr David Hainsworth attempted to smother his 82-year-old father, who was suffering from cancer. However, he survived and died a week later for reasons unconnected with the assault. David suffered considerable guilt as a result of his actions and punished himself by cutting off one of his testicles. He was

¹⁸ The Law Commission Consultation Paper 177, A New Homicide Act for England and Wales, November 2005, pages 212 to 215.

¹⁹ Wrong Rooms: A Memoir, Mark Sanderson, 2002.

charged with manslaughter and put on probation for two years on the condition that he sought medical advice and counselling²⁰.

- Long-term effects on mental health - In 1978, Douglas Graham killed his 75-year-old father, who was suffering from terminal heart disease. The cause of the death was thought to be a heart attack, and the incident remained a secret for fourteen years during which time Mr Graham was 'tormented with guilt'. The guilt he experienced led to a suicide attempt in 1992. He confessed his crime to the policeman who found him unconscious in a car, within which he was attempting to gas himself with exhaust fumes. He was charged with manslaughter on the grounds of diminished responsibility and sentenced to three years probation on the condition that he underwent psychiatric care²¹.

32. Furthermore, it could be argued that by changing the definition of diminished responsibility without adequately considering the impact on a small but significant group of offenders, the human rights of this group are being infringed.

Section 5 - Public opinion

33. In addition to the patent need for the issues around 'mercy killing' and the way it is treated by the law to be reviewed, it is clear that the public is sympathetic to genuine mercy killers.

34. The proposed changes to diminished responsibility create a genuine possibility of 'mercy killers' facing long prison sentences. However, public opinion does not support punitive sentences for genuine mercy killers.

35. Professor Barry Mitchell, Professor of Criminal Law and Criminal Justice, Coventry University, conducted research for the Law Commission on public perception of different types of homicide in 2003²². He conducted 62 interviews with members of the public in which he invited them to comment on 10 scenarios, grading the scenarios in terms of their seriousness. One of the scenarios was entitled 'The Mercy Killing' in which a man had nursed his terminally-ill wife for several years. Eventually, he gives in to her regular requests that he should 'put her out of it' and he smothers her with a pillow²³.

²⁰ Aberdeen Press and Journal, 7 June 1997

²¹ The Daily Telegraph, 16 January 1993

²² The Law Commission Report 290, Partial Defences to Murder, Appendix C: Brief Empirical Survey of Public Opinion relating to Partial Defences to Murder, August 2004.

²³ The Law Commission Report 290, Partial Defences to Murder, Appendix C: Brief Empirical Survey of Public Opinion relating to Partial Defences to Murder, August 2004.

36. Interviewees generally regarded this scenario as the least serious. 58 of the 62 interviewees placed it in the three least serious scenarios, with 47 interviewees treating it as the least serious. 35 (56%) of the interviewees thought that the husband should not be prosecuted at all. Only 14 interviewees favoured a prison sentence.

37. 41 interviewees identified the wife's request to die as an important factor and, of those, 26 thought that there should be no prosecution. 24 interviewees mentioned the husband's good motive as a significant consideration and 13 referred to the wife's poor quality of life. Interviewees also said that they would be even more sympathetic to the husband if he had become mentally ill, for example clinically depressed. Three interviewees were concerned that the law would be open to abuse if there was to be no prosecution in the case of a 'mercy' killing. These findings suggest that the public see the need for a more flexible way of judging mercy killing cases based on the complexities involved.

38. In 2005 Professor Mitchell conducted another survey for the Law Commission²⁴. The survey was conducted by bringing together five groups of people with each group meeting on two separate occasions. In total, 56 people attended both meetings. The first meetings concentrated on discussing different kinds of homicides with a view to identifying variations in the seriousness of homicides. Discussions in the second meetings focused on the sentencing of convicted killers.

39. In his report, Professor Mitchell devoted a section to what he termed "the perennial problem of mercy killing". He said this:

In both meetings the groups considered the familiar question of how the criminal justice system should regard and respond to mercy killing. It was invariably accepted that provided there is clear evidence of the victim's desire to die, such cases are amongst the least serious of homicides. Where there is no such evidence, opinions were less clear, and that meant that where the victim is unable to indicate a desire to die participants found it more difficult to express a view on the gravity of the killing, even assuming the killer was motivated solely by compassion. In general, they thought that the homicide would be more serious, though not necessarily amongst the most serious. Participants said it would obviously be vital to know whether the case was a "genuine mercy killing" – had the victim truly and freely wanted to die,

²⁴ The Law Commission Consultation Paper 177, A New Homicide Act for England and Wales, November 2005, Appendix A: Report on Public Survey of Murder and Mandatory Sentencing in Criminal Homicides

and was the killer's motive a "good" one? It was this that concentrated participants' minds most of all. Virtually all suggested that there ought to be some form of official enquiry into what had happened, and that a formal prosecution or police investigation might serve this purpose. Where the case was one of genuine mercy killing, the most punitive suggestion was for a short period of imprisonment, and many participants felt that a community-based disposal, with the emphasis on counselling for the killer, would be appropriate²⁵.

40. As well as the clear legal and public protection arguments for a review of the law as it operates around 'mercy killing', the public does seem to be opposed to the sort of harsh sentencing of genuine 'mercy killers' that the proposed change to diminished responsibility is likely to bring about.

41. This disparity between the proposals' likely effects and public opinion once again suggests that the Ministry of Justice will struggle to meet its own aim: *to ensure that the law in this area is just, effective and up-to-date, and produces outcomes which command public confidence*. The public will not be confident in a law that treats genuine 'mercy killers' harshly.

Section 6 - Conclusion

42. In 2004 the Law Commission identified a '*just and humane...benign conspiracy*' around the partial defence of diminished responsibility, as the process by which 'mercy killers' are treated with leniency and compassion by the courts. The Law Commission stated: *It is, however, a blight on our law that such an outcome has to be connived at rather than arising openly and directly from the law²⁶.*

43. If the Ministry of Justice is to achieve its stated aim: *to ensure that the law in this area is just, effective and up-to-date, and produces outcomes which command public confidence²⁷*, it must address the fact that the proposed changes to the partial defence of diminished responsibility will remove the legal fudge identified by the Law Commission, without even investigating the impact on genuine 'mercy killers', or exploring other alternatives to the 'benign conspiracy'.

²⁵ The Law Commission Consultation Paper 177, A New Homicide Act for England and Wales, November 2005, Appendix A: Report on Public Survey of Murder and Mandatory Sentencing in Criminal Homicides, page 273.

²⁶ The Law Commission Report No. 290, Partial Defences to Murder, 6th Aug 2004 page 17

²⁷ Murder, Manslaughter and Infanticide, Ministry of Justice CP19/08, July 2008, page 6.

44. Dignity in Dying believes the changed definition for diminished responsibility could have extremely negative effects for genuine 'mercy killers' and reduce public confidence in the law.

45. Therefore we urge the Government and the Ministry of Justice to take up the Law Commission's 2006 recommendation to: *undertake a public consultation on whether and, if so, to what extent the law should recognise either an offence of 'mercy' killing or a partial defence of 'mercy' killing*²⁸.

²⁸ The Law Commission paper 304, Murder, Manslaughter and Infanticide, November 2006, page 155.