

## **SPUC Briefing: Consultation on Assisted Suicide**

### **DPP's (Director of Public Prosecutions) interim policy for prosecutors on assisted suicide**

#### **Appeal for action**

The Director of Public Prosecutions is holding a public consultation on assisting suicide. This is your chance to have a say in how **the law protecting suicidal people from being helped or persuaded to kill themselves should be upheld.**

Please don't miss this opportunity to speak up for those at risk from suicide. This briefing paper explains what you can do. Whether you feel able to send just a short, simple letter – or to write a detailed response to the proposals – please do whatever you can. Lives depend on it.

Submissions must reach the DPP by 16 December 2009.

#### **How to respond to the consultation**

This briefing aims to help you understand what the DPP's newly-published policy on assisted suicide will mean in practice. It will give ideas on how to make a submission – whether you wish to write a simple letter expressing one or two points of concern, or a longer, detailed response raising many issues.

#### **How to make a submission**

Both written and electronic responses to the consultation are acceptable.

If you wish, you can send your responses to the policy on a pro-forma consultation document, which you can download from the Crown Prosecution Service website. We would urge caution if you use this pro-forma. Please read section 3 below carefully first – which explains important pitfalls to avoid on the pro-forma document.

#### **A note about the documents issued**

The DPP has published two versions of the “**DPP's interim policy for prosecutors on assisted suicide**” (or *Interim Policy*, as we refer to it for short). One version is a pro-forma consultation version, which incorporates questions about the policy interspersed throughout the document; the other is just the plain *Interim Policy* by itself, consisting of 27 numbered paragraphs. For your reference, we include the plain version of the policy as an appendix with this briefing.

### **Sending your submission**

Please include your name, postal address and email address if available.

Closing date for responses: **16 December 2009**

Responses can be sent by post to:

Assisted Suicide Policy Team

Crown Prosecution Service Headquarters - 6th floor

50 Ludgate Hill

London

EC4M 7EX

or by email to: [assistedsuicide.consultation@cps.gsi.gov.uk](mailto:assistedsuicide.consultation@cps.gsi.gov.uk)

### **Send a copy to your MP**

Your submission will have wider impact if you also send a copy to your Member of Parliament – saying that you are sending him a copy because you want him to be aware of your feelings on this important issue.

Send a copy of your submission to your MP at:

House of Commons

London SW1A 0AA

### **Points to make in your submission**

#### **1) Main points**

The **DPP's interim policy for prosecutors on assisted suicide** (which we call the *Interim Policy* for short) is not acceptable.

- It is morally unsound;
- It fails to uphold the right to life;
- It is legally questionable.

This *Interim Policy* needs to be radically re-written – and tightened up.

In your submission, you might wish to include one or more of these key points, in your own words:

- The law against assisted suicide should be enforced
- The *Interim Policy* should reflect the strong legal presumption in favour of upholding the right to life – instead of ignoring this basic right
- The policy discriminates against disabled people, those with degenerative diseases and others
- The *Interim Policy* is inadequate for upholding the law
- “The victim was willing” is a very dangerous argument for not prosecuting fatal or potentially fatal crimes
- Where there is strong evidence of a *serious* crime, like assisting a suicide, a prosecution should be the norm

- Judges have discretion in all the circumstances of a case to impose a heavier or a lighter penalty as appropriate

You could also refer to some of the following more detailed concerns.

**2) The *Interim Policy* assumes that serious crimes should routinely go unpunished.**

The *Interim Policy* is based on the assumption that certain types of assisted suicides are acceptable to the community. This is not a proper assumption to make. By failing to enforce the law in such cases, it virtually amounts to changing the law.

The fact that not all suspected criminal acts lead to prosecutions is a fairly obvious point. But here the DPP is reversing the usual assumption, that when a serious crime is committed (assisting suicide entails a fatality, and carries a maximum penalty of 14 years imprisonment), and there is enough evidence to prosecute, a prosecution should normally be brought. The *Interim Policy* rejects this assumption.

This is implied in the “list-of-factors” approach in the *Interim Policy*. The two lists of factors (one list giving factors in favour of a prosecution, another giving factors against a prosecution) suggest that the decision as to whether to prosecute or not is a finely balanced question, where the prosecutors exercise wide discretion.

**3) The pro-forma consultation version of the *Interim Policy* document makes unacceptable assumptions.**

The lists of tick-boxes in the pro-forma consultation document requesting ‘yes’ or ‘no’ answers also place respondents in a very difficult position. If you simply state ‘yes’ or ‘no’ to certain of the factors, you are drawn into the presumption that assisting some suicides is acceptable.

The pro-forma consultation document therefore could force the hand of people who do not agree with the premise that some suicides are acceptable. If you use the pro-forma without adding particular caveats, your responses could be read as supporting assisted suicide in specified circumstances, even though you don’t mean them to. This is unacceptable.

For this reason, we recommend making written submissions on paper, rather than electronically. Your submission could be either a letter or similar freely written document, or you could use a copy of the pro-forma *Interim Policy* consultation document, which can be down-loaded from the CPS website at: [http://www.cps.gov.uk/consultations/as\\_consultation.pdf](http://www.cps.gov.uk/consultations/as_consultation.pdf) If you use the pro-forma we suggest adding specific comments, not simply ‘yes’ and ‘no’, when responding to the lists of factors.

If you use the pro-forma, please refer to appendix 1, which has notes relating to the nine numbered questions in the pro-forma.

#### **4) Your personal experience**

If you or your family have been affected by suicide or suicide attempts it would be helpful to write about this, if you feel able to. Relevant experiences might be:

- the death of a relative or friend by suicide
- counselling or supporting a person/family who have lost a relative by suicide
- suffering yourself from suicidal tendencies or suicide attempts

If you do mention such an experience, it is very important to say how the DPP's *Interim Policy* might have made things different.

For example, by enabling suicide assistance to be given, it might have led to a failed attempt being successful. Or it might mean that an elderly friend in need of expensive care over a number of years would feel under pressure from hard-up relatives. The lack of will to prosecute, evident in the policy, and the specific factors listed, could prompt family members to raise the issue of suicide in such a case.

#### **5) The principle of “public interest” is misrepresented in the *Interim Policy*.**

When deciding whether to bring a prosecution, Crown Prosecutors have to ask first whether there is enough evidence to get a conviction, and then whether it is in the *public interest* to prosecute. This “public interest” test is of great importance. It is on the basis of distorting the meaning and content of the public interest that *Interim Policy* seeks to justify non-prosecution.

You can point out in your submission that the *Interim Policy's* approach to public interest, although purporting (in paragraphs 3, 7 & 14) to be compatible with the overarching Crown Prosecution Service general “Code”, is not compatible with it and even contradicts it in places.

The Crown Prosecution Service's general “Code” for prosecutors makes clear that the normal presumption is that a prosecution should be pursued unless there are reasons not to:

“A prosecution will usually take place unless there are public interest factors tending against prosecution which clearly outweigh those tending in favour, or it appears more appropriate in all the circumstances of the case to divert the person from prosecution” (CPS, *The Code for Crown Prosecutors*, para 5.7)

In contrast, the assisted suicide *Interim Policy* does not require that the public interest against prosecution “clearly outweighs” the factors requiring prosecution. The policy suggests that the crime of assisting suicide would only be prosecuted if some other harm or evil, besides the victim's death, is involved.

#### **6) “Public interest” is treated as if it meant “public opinion”**

The notion of the public interest is not easy to define. It cannot simply be reduced to public opinion, one reason being that the public may not have had the opportunity to become fully and properly informed. Another reason is that the opinion of the public is often manipulated by the media. And public opinion is not required to observe principles of justice and non-discrimination.

Yet the DPP's *Interim Policy* suggests that the public interest is determined by public opinion – since it suggests that suffering or disabled people who commit suicide, or those who have repeatedly attempted suicide in the past are less deserving of legal protection than able-bodied people who haven't tried to kill themselves before.

You may wish to point out that our legal system must uphold sound law, not popular opinion, which may be ill-informed and driven by the media.

### **7) Important issues that have been omitted**

In your submission you may wish to note that a number of important issues have not been addressed in the *Interim Policy*.

a) The means of committing suicide have not been addressed. In other areas of prosecuting policy, such as the general *Code for Crown Prosecutors*, the means of committing the crime this is rightly a matter of serious concern. For instance, suicide by firearm or jumping in front of a train or using poison can put others at risk, and assisting this is more serious.

b) Role of medical professionals in assisting suicide is addressed only obliquely (in paragraph 21(7) of the *Interim Policy*), which says that it should count against a prosecution if the suspect was acting in the course of his "lawful employment." This could apply to a doctor giving a person lethal drugs for suicide. This is entirely unacceptable and it runs contrary to the general *Code for Crown Prosecutors* which says that it should weigh in favour of bringing a prosecution if "the defendant was in a position of authority or trust" (CPS, *The Code for Crown Prosecutors*, para 5.9e)

Professional and calculated action should be very strong factors *in favour* of a prosecution. The action of such a person damages the public interest by harming confidence in the medical profession.

c) Moral recklessness is associated with suicide in some instances. Even without acknowledging the moral wrongness of suicide itself, policy makers should recognise that the decision to commit suicide can be associate with gravely anti-social moral recklessness. This may be seen in various degrees. Unexpected suicides causing profound emotional hurt to relatives; disaffected fathers sometimes murder their children when committing suicide, and suicide bombers may kill strangers for a cause while escaping the judicial consequences by killing themselves.

Promoting a weak prosecuting policy for assisted suicide may encourage the false concept of a right to commit suicide, and so advance these serious anti-social aspects.

### **8) The law is being changed**

On the face of it, this consultation is not meant to change the law. It is simply spelling out a pre-existing approach. The document itself states that "only Parliament can change the law on assisted suicide." However, the reality is that it will very likely change the way the law is interpreted and may pave the way for a change in the law.

For example, if as a result of the consultation, the decision were made not to prosecute an individual for assisting the suicide of a severely disabled, mentally capable person, the law safeguarding the right to life of disabled people would be substantially weakened. The DPP has made it clear that any changes in policy would not just affect so-called 'suicide tourists' who travel abroad to commit suicide, but those who seek assistance to end their lives in Britain. Media reports from both sides of the political spectrum have described the Purdy Judgement as “a turning point for the law on assisted suicide” (The Guardian, 30 July 2009), have said it “increased pressure on Parliament to draw up a law on assisted suicide.” (The Daily Telegraph, 31 July 2009)

You may wish to point out that the DPP's assertions that he is not changing the law are not convincing.

### **9) The right to life must be upheld**

Given the near universal endorsement of the inviolable and inalienable right to life, as expressed in numerous human rights instruments, any action by a legal official which further erodes the basic right to life of all members of the human family is an undermining of the common good and an attack on basic shared human values. Some may not regard the *Interim Policy* as an attack on the inherent right to life. However, by implicitly condoning the suicide of certain people, the *Interim Policy* does in fact contribute to the idea that the right to life is neither basic nor inherent.

Once this key right is set aside for one group of people it becomes more difficult to maintain respect for it where other groups of people are concerned.

Inevitably, any action which contributes to lives being ended upon request will gradually expand to include the taking of lives without request. The tacit acceptance of suicide as an *in principle* appropriate response to disability will create a new cultural norm in which an expectation is generated for others in similar circumstances to seek a similar exit. When that occurs, those who are disabled yet unable to request assistance with suicide, will be assumed to harbour such a wish and be assisted anyway. In an essay in the Hastings Center Report, the authors of the Dutch Rummelink study made the following concession:

“But is it not true that once one accepts [voluntary] euthanasia and assisted suicide, the principle of universalizability forces one to accept termination of life without explicit request, at least in some circumstances, as well? *In our view the answer to this question must be affirmative.*” [Emphasis added]

### **10) Giving offence to disabled people**

The scenarios listed in the consultation are offensive to people with disabilities and confirm recent decisions discriminating against disability. Listing “a terminal illness”, “a severe and incurable physical disability” or “a severe degenerative physical condition” as factors counting against prosecution is in itself a discriminatory act, as it separates them from non-disabled people and suggests that their lives may be less worthy of legal protection than others. Why should people with a severe disability or terminal illness be singled out in this way if not to suggest that their lives are less valuable than non-disabled people?

## Appendix 1

### Comments on specific questions on the pro-forma *Interim Policy* consultation document

Note: the questions in the pro-forma *Interim Policy* consultation document are styled thus: “QUESTION 1”, “QUESTION 2”, etc, and start on page 7. Don’t confuse the questions with the numbered paragraphs of the policy itself, which begin on page 1, and don’t have the word “question” in front of them.

#### Question 1:

From a pro-life perspective, answering simply yes or no to any of the “factors in favour of a prosecution” could be misinterpreted.

For example, if you answer “yes” to the first factor (that a prosecution should be more likely if the victim is under 18) it implies that it is not so bad to help someone aged over 18 to kill him or herself. On the other hand, if you answer “no” to this point, it suggests lack of concern for vulnerable younger people. The same argument applies to nearly all the factors in the list: yes or no answers are not satisfactory.

So we suggest that you don’t give yes or no answers to these points. You might simply want to note that some of them are discriminatory, or otherwise flawed.

#### Question 2:

This simply gives a blank page allowing you to suggest other factors in favour of a prosecution.

Rather than listing factors here, we suggest you might refer to the point that, for a serious crime, if the police have sufficient evidence, a prosecution normally should take place unless there are public interest factors against it. You might also wish to include reference to other points too, but more general points are probably best left to question 9, which invites general comments.

#### Questions 3 & 4:

These ask about whether some of the factors listed in question 1 should be given more weight than others. We suggest that such detailed weighting of factors is not likely to have much influence, since paragraph 15 of the *Interim Policy* states:

“Prosecutors must decide the importance of each public interest factor in the circumstances of each case and go on to make an overall assessment. It is quite possible that one factor alone may outweigh a number of other factors which tend in the opposite direction.”

#### Question 5:

Regarding the factors against a prosecution, we suggest it is feasible to answer “no” to some of these factors, particularly the factors numbered:

- (4) – which targets those with terminal or degenerative illness, or disability;
- (7) – which implies, among other things, that a chemist or a doctor can provide poison drugs with impunity;
- (8) – which undermines the lives of those unable to commit suicide unaided;
- and
- (11) – which targets people with a history of attempted suicide – extremely vulnerable people in this context

Questions 6:

This asks if there are further factors that should count against prosecution. You might say that there were too many such factors already.

Questions 7 & 8:

Like questions 3 & 4, these ask about giving more weight to some factors than others. We suggest demanding that those factors which tend to victimise people, e.g. (4), (8) and (11) should be excluded altogether, not simply given less weight. It is clear from paragraph 15 of the document (cited above) that prosecutors will rebalance the factors in any given case. We can therefore assume that will use any factor included in the final policy as they see fit.

Question 9:

This simply allows any other comments to be submitted. It might be easiest to include all your comments in this section.

## **Appendix 2**

### **The legal background to the consultation**

For over a decade, the Voluntary Euthanasia Society (now known as Dignity in Dying) has been waging an aggressive campaign in the media to change public opinion on assisted suicide. Prior to the Debbie Purdy Case, Diane Pretty, who suffered from Motor Neurone Disease, was supported by the VES in her campaign to gain an immunity from prosecution for her husband so that he could help her commit suicide. Her case failed in the English courts and was also rejected by the European Court of Human Rights, but the media campaign has continued unabated. In 2008, Debbie Purdy demanded that the Director of Public Prosecution should issue a “prosecuting policy” saying how he decided whether or not to bring a prosecution in such cases. This was something that had been pursued for a number of years by the VES/DiD.

At the same time, euthanasia supporters have tried to change the law on assisted suicide in Parliament. Attempted amendments (to the current Coroners' and Justice Bill) have failed, but the Mental Capacity Act 2005 has weakened the law against euthanasia and assisted suicide, and gave statute force to “living wills” in some cases.

The dangers of this law have been highlighted in the case of Kerrie Woollorton, a disturbed young woman who was left to die in hospital after a suicide attempt. She

gave doctors a living will and they withheld any attempt to save her life. The Coroner at the inquest into her death said that the doctors had not acted wrongly.

### **The Purdy Judgement<sup>1</sup>**

Debbie Purdy launched a successful legal case against the Director of Public Prosecutions, demanding that he issue a policy statement on the circumstances when a person assisting a relative to travel to Switzerland for assisted suicide should face prosecution. The case was fought by Ms Purdy on the grounds that she required information about whether or not her husband would face prosecution if he accompanied her to Switzerland. But Ms Purdy's right-to-die campaign is clearly related to the much broader campaign to change the law against assisted suicide.

The Law Lords went much further in their written judgement of the Debbie Purdy case than either side anticipated. They departed from the position taken in the Diane Pretty case and ruled that Article 8 of the Human Rights Act was engaged, meaning that the right to private life could include the right to choose how one dies.

Not one of the Law Lords condemned assisted suicide outright and individuals expressed sympathy and support for assisted suicide as part of their judgement.

Baroness Hale of Richmond wrote:

“If we are serious about protecting autonomy we have to accept that autonomous individuals have different views about what makes their lives worth living. There are many, many people who can live with terminal illness; there are many, many people who can live with a permanent disability at least as grave as that which afflicted Daniel James; but those same people might find it impossible to live with the loss of a much-loved partner or child, or with permanent disgrace, or even with financial ruin.”

The implication is that assisted suicide should be available 'on demand' with no specific grounds necessary as this would interfere with individual autonomy. Such an interpretation would allow assisted suicide for a banker who loses his job or a bereaved person struggling to come to terms with their loss. It is difficult to see how any policy to prevent suicide could be justified if such a broad interpretation of the law were to be allowed. Public policy loses coherence when on the one hand, we train negotiators to talk individuals out of jumping to their deaths, or insist that paracetamol is sold only in small packets, but on the other hand, interpret the law so widely as to give sanction to assisted suicide for many, including the most vulnerable?

Lord Brown of Eaton-Under-Heywood suggested that assisting a suicide might be regarded as 'commendable' and gives his clear support for assisted suicide under certain circumstances:

“Of course it is wrong—often terribly wrong—to assist in the suicide of someone who is not mentally competent or not clearly fixed in their intention or who may feel under pressure to end their life for the benefit of others or whose condition may not be extreme or may perhaps be curable rather than deteriorating. Assistance in those kind of situations is clearly to be condemned. But suppose, say, a loved one, in desperate and deteriorating circumstances, who regards the future with dread and has made a fully informed, voluntary and fixed decision to die, needing another's compassionate help and support to accomplish that end (or at any rate to

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<sup>1</sup><http://www.publications.parliament.uk/pa/ld200809/ldjudgmt/id090730/rvpurd-6.htm>

achieve it in the least distressing way), is assistance in *those* circumstances necessarily to be deprecated? Are there not cases in which (although no actual defence of necessity could ever arise) many might regard such conduct as if anything to be commended rather than condemned? In short, as it seems to me, there will on occasion be situations where, contrary to the assumptions underlying the Code, it would be possible to regard the conduct of the aider and abettor as altruistic rather than criminal, conduct rather to be understood out of respect for an intending suicide's rights under article 8 than discouraged so as to safeguard the right to life of others under article 2."

## Appendix 3

### Critique of public interest "factors" in the *Interim Policy*

Prior to the publication of this Interim Policy, the DPP had three points of reference for cases of assisted suicide:

1. The Suicide Act of 1961 states that "a person who aids, abets, counsels or procures the suicide of another, or an attempt by another to commit suicide, shall be liable on conviction on indictment to imprisonment for a term not exceeding fourteen years.
2. Common law.
3. The Code for Crown Prosecutors offers general principles on prosecution in consideration of the public interest.

It is important to note that when the Suicide Act changed in 1961 so that those who attempted suicide were no longer themselves at risk of prosecution, it was not because the community considered suicide acceptable, but rather it was a recognition that people who made such attempts needed genuine care to deal with the factors that drove them there, and because suicide was often the result of pathology. To put those who had attempted suicide through criminal proceedings was deemed unfruitful and counterproductive.

#### ***The Interim Policy is founded upon an unacceptable premise.***

The Interim Policy is founded upon the premise that certain types of assisted suicides are acceptable to the community. The submission process therefore places respondents in a very difficult position. Being required to 'tick the boxes' to indicate whether or not a public interest factor should be considered draws people into commenting, on the presumption that the primary premise is acceptable. The submission style therefore has the potential to force the hand of those who do not agree with the premise. If they follow the submission process as outlined, their responses could be read as supporting assisted suicide in specified circumstances, even though they do not. This is unacceptable. Instead, the submission process should invite comment on the substantive issue of the acceptability or otherwise of assisted suicide.

It is ironic that the submission process involves a style that utilises tick boxes to indicate approval or otherwise of various public interest factors for or against prosecution, since the *actual effect* of the factors themselves would be to allow potential offenders to tick the boxes in an attempt to avoid prosecution.

## Public Interest

The legal notion of a public interest test is found in many countries within the commonwealth tradition. In New South Wales, a public official described it as “referring to considerations affecting the good order and functioning of the community and government affairs, for the well-being of citizens”.<sup>2</sup> More broadly, it is about fundamental shared values that enable human beings and communities to flourish. It is therefore about the common good.

The Government protects the common good when laws are made to maximise the opportunities for every individual to participate in the basic human values, of which human life is one. Therefore, laws which attack basic human values attack the common good.<sup>3</sup>

### ***The Interim Policy conflicts with the existing code and represents a dangerous precedent***

Another problem with the Interim Policy is that rather than simply referring to the Code for Crown Prosecutors, it produces a new and very specific set of criteria that emphasise characteristics of the crime, rather than public interest factors *per se*. As a result, the Interim Policy includes ‘public interest’ factors that could by no means be derived from either the Suicide Act, or the Code for Crown Prosecutors. For example, at 21(4) the Interim Policy lists as a factor against prosecution that:

*The victim had:*

*A terminal illness; or*

*A severe and incurable physical disability; or*

*A severe degenerative physical condition;*

*From which there was no possibility of recovery.*

Where have these ‘public interest’ factors come from? How can they be derived from either the Suicide Act or the Code for Crown Prosecutors? In fact, the section quoted above is in *direct conflict* with the Code, sections 5.9(i) and (k), which state as factors in favour of prosecution:

*“the victim of the offence was vulnerable, has been put in considerable fear, or suffered personal attack, damage or disturbance;”*

*“the offence was motivated by any form of discrimination against the victim’s ethnic or national origin, disability, sex, religious beliefs, political views or sexual orientation, or the suspect demonstrated hostility towards the victim based on any of those characteristics;”*

How is it possible for the prosecution of an assisted suicide case *not* to be in the public interest on account of the victim having a severe and incurable physical disability (Interim Policy), and at the same time be *in* the public interest due to the clear discrimination against the victim on account of their disability (Code)? To put the question more bluntly, how can this Interim Policy discriminate against the disabled in direct contradiction of the Code for Crown Prosecutors?

There are more of these disturbing conflicts to be teased out. At 21(6) of the Interim Policy another ‘public interest’ factor against prosecution states:

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<sup>2</sup> Public Interest, NSW Ombudsman, public sector agencies fact sheet No 16, June 2005. See [http://www.ombo.nsw.gov.au/publication/PDF/factsheets/FS\\_PublicSector\\_16\\_Public\\_Interest.pdf](http://www.ombo.nsw.gov.au/publication/PDF/factsheets/FS_PublicSector_16_Public_Interest.pdf)

<sup>3</sup> John I Fleming, *Natural Rights and Natural Law. An analysis of the Consensus Gentium and its implications for bioethics*. PhD Thesis, Griffith University, Queensland, Australia, 1992, p108

*“The suspect was the spouse, partner or a close relative or a close personal friend of the victim, within the context of a long-term and supportive relationship.”*

Yet this surely contradicts the Code for Crown Prosecutors section 5.9(e), which states that a factor in favour of prosecution is that:

*“the defendant was in a position of authority or trust;”*

It is in fact exactly spouses, partners, close relatives and personal friends who are in a position of trust and potential authority over the victim.

Not only are the Interim Policy ‘public interest’ factors at odds with the Code for Crown Prosecutors, but the very notion of seeking to give clarity to the public as to when they are or are not likely to be prosecuted for breaking the law is beyond the powers of the DPP. The law is firmly against assisted suicide. To offer reassurance and guidance to those considering breaking the law is nonsensical. If the decision not to prosecute cannot be justified with reference to the Code for Crown Prosecutors, then it cannot be justified at all under the auspices of the DPP. This attempt to free a class of assisted suicides from threat of prosecution does not bring clarity to past decisions, rather, it further confuses the relationship between the DPP and the law in relation to assisted suicide.

***What will be the likely effect of the Interim Policy issued as it currently stands?***

The factors for and against prosecution act as a checklist of criteria to assist a suspect to avoid prosecution. This is how the Interim Policy has been interpreted by those who have sought immunity from prosecution for these sorts of assisted suicide cases.<sup>4</sup> It is of little comfort that the Policy contains within it the statement, “The DPP cannot assure a person in advance of committing a crime that a prosecution will not be brought, and nothing in this policy can be taken to amount to such an assurance.” On the contrary, the document tacitly approves of a set of circumstances in which the DPP will effectively turn a blind eye and not uphold the law, which in a clear and unequivocal fashion prohibits anyone from assisting in the suicide of another. Therefore, this Policy subverts the law by creating an exemption contrary to the law, contrary to the lawmakers and therefore contrary to the will of the people.

Even though people have in mind certain types of assistance, *viz.* utilising the services of an organisation like Dignitas in Switzerland, it is important to carefully consider what might be the breadth of circumstances seemingly permitted by adherence to the criteria (expressed as factors). Whereas the circumstances which prompted the issuance of the Interim Policy involved spouses and family members accompanying their disabled loved ones to Switzerland, the guidelines for and against prosecution permit much wider and more varied forms of assistance. For example, assistance may take the form of the actual provision of the means of suicide, whether that be a suffocation bag, poison, overdose, or car exhaust fumes. The assistance may even involve help to undertake suicide by violent means; for example, provision of a firearm, drowning, falling from a height, and so on. There is no factor in the Interim Policy that deals with violent means, or for that matter, any means. However, it is rather more likely that as suicide becomes more common, sanctioned as it appears to

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<sup>4</sup> Alexandra Topping, New assisted suicide guidelines to give ‘clear advice’ to relatives, *The Guardian*, 23 Sept 2009, See <http://www.guardian.co.uk/society/2009/sep/23/assisted-suicide-guidelines-legal>

be by this Policy, the more ‘refined’ and ‘acceptable’ methods will become better known as they are shared amongst people in informal networks. Moreover, the most obvious effect of the Policy will be that the UK itself will be the site of assisted suicides and even attract those from overseas. At least one assisted suicide activist has said as much.<sup>5</sup>

*Specific comments in relation to some of the public interest factors in favour of prosecution.*

*(1) The victim was under 18 years of age.*

Clearly it is in the public interest to protect those who are vulnerable and not able to make a genuine informed decision. However, the implication here is that just as 18 marks the age at which someone may vote, drive a car or be served alcoholic drinks, so it also marks the age at which they are able to commit suicide with someone’s assistance. Drawing such an equivalence is unacceptable. The implication is also that suicide is a rational decision that adults can make. There are good grounds for recognising that a decision to take one’s life is inherently irrational.<sup>6</sup> For example, no-one knows what exists after death therefore the suicidal person does not have the necessary information to make a judgment in comparison with their present experience.

*(2) The victim’s capacity to reach an informed decision was adversely affected by a recognised mental illness or learning difficulty.*

The link between depression and suicidal ideation is well established. It is therefore in the public interest to protect people who suffer from depression or other mental illness from taking their lives. However, mental illnesses are complex, diagnosis not straightforward, and treatment success highly variable. This factor may sound good in theory, but when it comes to real world circumstances its inclusion here merely becomes another component of a checklist which carves out the acceptability of a certain form of suicide. Much depression in the community goes unrecognised. Therefore it is quite possible that at the time a decision is made to suicide, depression will be a factor, even though hard evidence for it does not exist. Furthermore, the “capacity to reach an informed decision” can be adversely affected by physical pain, in which case decisions become focused on short term relief rather than the critical importance of the longer term.

*(3) The victim did not have a clear, settled and informed wish to commit suicide; for example, the victim’s history suggests that his or her wish to commit suicide was temporary or subject to change.*

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<sup>5</sup> *Could Britain become the suicide capital of the world? Doctors can help patients end their lives.* Mail Online 24 Sept 2009. In this article, prominent Australian euthanasia advocate Dr Philip Nitschke said “his countrymen who wanted to die were unwilling to travel to Switzerland, where assisted suicide is legal, because they found it an alien country. Now Britain would be an easy choice for families, he said, and ‘these issues will be resolved by the decision of the UK public prosecutor’.” See <http://www.dailymail.co.uk/news/article-1215451/Family-members-help-non-terminally-ill-relatives-die-likely-charged-new-guidelines-assisted-suicide.html>

<sup>6</sup> See for example <http://plato.stanford.edu/entries/suicide/#AutRatRes>

This factor is premised upon the notion of a rational suicide, which is inherently problematic. Unclear and unsettled wishes are the norm when thoughts become suicidal. It would be relatively easy for a suspect to convince others that the victim had a clear and settled wish. The US case of George Delury, who assisted the suicide of his wife Myrna Lebov in 1995 is pertinent. It only became apparent that Lebov *did not* have a clear and settled wish to commit suicide *after* Delury's diary was discovered. Delury had claimed all along that Lebov was unwavering in her decision. However, as his diary revealed, she equivocated right up to the last minute. Furthermore, the compassion he proclaimed all along was clearly not borne out by his diary entries, some of which made it clear he wanted her out of his life because he felt restricted. It would not be hard for suspects in the UK to make sure that no evidence that might similarly show the lack of a clear and settled wish, such as a diary, exists.

*(4) The victim did not indicate unequivocally to the suspect that he or she wished to commit suicide.*

How will this factor be explored? Simply on the say so of the suspect?

*(5) The victim did not ask personally on his or her own initiative for the assistance of the suspect.*

See (4) above.

*(6) The victim did not have:  
a terminal illness; or  
a severe and incurable physical disability; or  
a severe degenerative physical condition;*

*from which there was no possibility of recovery.*

The mere fact that this appears as a factor at all is deeply discriminatory. It means that only the vulnerable are at risk of assistance with a suicide. That this factor is considered as an issue of public interest is a clear statement by the drafters of this Interim Policy that the public have an interest in enabling those who assist with suicide to avoid prosecution *only* if the victim is terminally ill or disabled. Assisting the suicide of an able-bodied person is considered bad enough to prosecute, but not so for a disabled person. This adds weight to the notion that the lives of the terminally ill or disabled are of less value than the able-bodied. This is abhorrent.

*(7) The suspect was not wholly motivated by compassion; for example, the suspect was motivated by the prospect that they or a person closely connected to them stood to gain in some way from the death of the victim.*

Motivations are almost as impossible to divine as are potential gains. A spouse or close family member – itself a factor, see (10) – may gain considerable freedom (for example, by no longer having to care for the victim) by acting out of self-professed compassion. How would such a gain be measured? Likewise, family members are most often the ones who would financially gain upon the death of the victim, making this factor and number 10 potentially mutually exclusive.

*(8) The suspect persuaded, pressured or maliciously encouraged the victim to commit suicide, or exercised improper influence in the victim's decision to do so; and did not take reasonable steps to ensure that any other person did not do so.*

Since the victim is now deceased, they cannot testify to such pressure or persuasion. This factor does recognise the reality that persuasion and pressure are possible or even likely in the relationship between a suspect and a vulnerable person considering suicide. However, any suspect who is in such a relationship with a vulnerable person will be aware that subtle coercion can be very effective and undetectable after the fact. Hence, while at one level this factor makes sense, against the backdrop of a Policy providing tacit approval for a certain class of suicides, it is toothless. All it will achieve is an alert to suspects to ensure no actual evidence of coercion can be traced. The phrase "maliciously encouraged" may be intended to create the presumption that encouragement to commit suicide is not wrong unless there is a some ulterior motive.

*(9) The victim was physically able to undertake the act that constituted the assistance him or herself.*

This factor relates to a perceived need for assistance. Its effect is to shore up the idea that it is only the disabled who are the subjects of permission for assisted suicide. The majority of the public interest factors cited as *against* prosecution are the opposite of those cited as *in favour* of prosecution. However, some are not. For example, item 21(7) states, "*The actions of the suspect, although sufficient to come within the definition of the offence, were of only minor assistance or influence, or the assistance which the subject provided was a consequence of his or her usual employment.*" The latter element of this factor may be intended by the drafters of the Interim Policy to provide immunity from prosecution for those who, simply in the course of their normal employment, become involved with assisting a suicide, yet do not formally agree with it (for example, a pilot of a chartered flight who transports someone to Switzerland, or perhaps a pharmacist who provides substances that may be used for suicide). However, a very significant alternative outcome could be that medical professionals, who in the course of their usual employment provide assistance by means of overdose or lethal injection, would be somewhat more immune from prosecution. That is, a medical professional would be less likely to face prosecution if he or she assisted a suicide by provision of an opiate overdose in a clinic or hospital setting where he or she was normally employed. This paves the way for more general acceptance of physician-assisted suicide, with all its attendant problems. Since it is known that a certain amount of illegal provision of euthanasia already occurs in hospital settings<sup>7</sup>, this factor will provide some relief to those medical professionals in the UK who currently break the law by assisting some patients to end their lives.

### **Conclusion**

There are several reasons why this Interim Policy and the process of seeking submissions are badly flawed. First, respondents are at risk of being seriously misinterpreted by being drawn into a tick-box approach to consultation that misses the substantive issue of assisted suicide itself. Second, the Interim Policy acts to

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<sup>7</sup> A survey of Victorian doctors "found that 29 % of respondents had taken active steps to bring about the death of a patient who had asked for death to be hastened" (Peter Singer, *The last rights*, *The Age*, Mar 6, 1992, 11).

undermine the law on assisted suicide by creating a class of ‘acceptable suicides’. In this sense the Interim Policy undermines the democratic process by which laws are made. It could be argued that the Interim Policy is operating *ultra vires*<sup>8</sup>. And third, the Interim Policy undermines the inherent right to life of every member of the community, and in doing so exposes the vulnerable to serious harm.

## Appendix 4

Note: This is the Interim Policy without the “consultation questions.” If you required the version with the consultation questions, please visit the CPS website [http://www.cps.gov.uk/consultations/as\\_index.html](http://www.cps.gov.uk/consultations/as_index.html) , for various versions available.

# INTERIM POLICY FOR PROSECUTORS IN RESPECT OF CASES OF ASSISTED SUICIDE

## INTRODUCTION

1 A person commits an offence if he or she aids, abets, counsels or procures [referred to in this policy as “assists”] the suicide of another, or the attempt by another to commit suicide. The consent of the Director of Public Prosecutions [DPP] is required before an individual may be prosecuted.

2 While the DPP can issue a policy which sets out the factors he will take into account in deciding whether to prosecute in individual cases, only Parliament can change the law on assisted suicide. The DPP cannot assure a person in advance of committing a crime that a prosecution will not be brought, and nothing in this policy can be taken to amount to such an assurance.

3 It has never been the rule that a prosecution will automatically follow whenever an offence is believed to have been committed. The way in which prosecutors make their decisions in all cases whether or not to prosecute is set out in the Code for Crown Prosecutors. However, the courts have decided that prosecutors should have further guidance setting out additional factors that may be relevant when deciding whether a prosecution for assisted suicide is needed in the public interest in a particular case.

4 For the purposes of this policy, the term “victim” is used to describe the person who may have committed or attempted to commit suicide. Not everyone may agree that this is an appropriate description but in the context of the criminal law it is probably the most suitable term to use.

5 This policy applies when the acts that allegedly constitute the assistance are committed in England and Wales; the suicide or attempted suicide may occur anywhere in the world, including in England and Wales.

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<sup>8</sup> The latin term *ultra vires* means “beyond power or authority”. In this context the Interim Policy is arguably constructed in such a way as to suggest the DPP is acting beyond his statutory power or authority by producing public policy in conflict with the law. This has the potential to bring the law into disrepute.

## **THE INVESTIGATION**

6 The police are responsible for investigating all cases of assisted suicide and they are encouraged to ask for the advice of prosecutors at an early stage and throughout their enquiries to ensure that all appropriate lines of investigation have been undertaken. Prosecutors should only make a decision when they have all the relevant material that is reasonably capable of being obtained after a full and thorough investigation.

## **THE DECISION-MAKING PROCESS**

7 Prosecutors will apply the Code for Crown Prosecutors in making their decisions: there must be sufficient evidence to provide a realistic prospect of conviction in respect of an offence of assisted suicide. If there is sufficient evidence, prosecutors should consider whether a prosecution is needed in the public interest.

8 The factors taken into account in deciding whether a prosecution is needed in the public interest also determine whether or not the DPP will consent to a prosecution.

## **THE EVIDENTIAL STAGE**

9 A person commits the offence of assisted suicide if he or she aids, abets, counsels or procures the suicide of another, or an attempt by another to commit suicide.

10 For the evidential stage to be satisfied, the prosecution must prove that:

- the victim committed or attempted to commit suicide; and
- the suspect assisted them in doing so.

11 The prosecution also has to prove that the suspect intended to assist the victim to commit or attempt to commit suicide and that the suspect knew that those acts were capable of assisting the victim to commit suicide.

12 The act of suicide requires the victim to take his or her own life. It remains murder or manslaughter to cause the death of someone who wishes to commit suicide but is unable to do so for him or herself. Even genuine and clear expressions of intent from someone who wishes to end his or her life do not entitle another person, even acting wholly out of compassion, to carry out those wishes if the person who wishes to commit suicide is asleep or is not conscious.

13 It is possible in law to attempt to assist a suicide. This means that there may be an offence committed even where a suicide does not occur or where there is not an attempt to commit suicide. Whether there is sufficient evidence of an attempt to assist suicide will depend on the factual circumstances of the case.

## **THE PUBLIC INTEREST STAGE**

14 Prosecutors must consider the public interest factors set out in the Code for Crown Prosecutors and the factors set out in this policy.

15 Deciding on the public interest is not simply a matter of adding up the number of factors on each side and seeing which side has the greater number. Each case must be considered on its own facts and on its own merits. Prosecutors must decide the importance of each public interest factor in the circumstances of each case and go on to make an overall assessment. It is quite possible that one factor alone may outweigh a number of other factors which tend in the opposite direction.

16 Some public interest factors set out below appear in both lists, because their presence or absence is either a factor in favour of or against prosecution, to be taken into consideration in each case. Others are only either a factor in favour of or against prosecution and they therefore only appear in the appropriate list.

17 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. Prosecutors and investigators should make sure that they pursue all reasonable lines of further enquiry in order to obtain, wherever possible, independent verification of the suspect's account.

18 Once all reasonable enquiries are completed, if prosecutors are doubtful about the suspect's account of the circumstances of the suicide and the state of mind of the victim which are relevant to any factor set out below, they should conclude that they do not have sufficient information in support of that factor.

### **Public interest factors in favour of prosecution**

19 The public interest factors in favour of prosecution are set out below.

- (1) The victim was under 18 years of age.
- (2) The victim's capacity to reach an informed decision was adversely affected by a recognised mental illness or learning difficulty.
- (3) The victim did not have a clear, settled and informed wish to commit suicide; for example, the victim's history suggests that his or her wish to commit suicide was temporary or subject to change.
- (4) The victim did not indicate unequivocally to the suspect that he or she wished to commit suicide.
- (5) The victim did not ask personally on his or her own initiative for the assistance of the suspect.
- (6) The victim did not have:
  - a terminal illness; or
  - a severe and incurable physical disability; or
  - a severe degenerative physical condition;from which there was no possibility of recovery.
- (7) The suspect was not wholly motivated by compassion; for example, the suspect was motivated by the prospect that they or a person closely connected to them stood to gain in some way from the death of the victim.
- (8) The suspect persuaded, pressured or maliciously encouraged the victim to commit suicide, or exercised improper influence in the victim's decision to do so; and did not take reasonable steps to ensure that any other person did not do so.
- (9) The victim was physically able to undertake the act that constituted the assistance him or herself.
- (10) The suspect was not the spouse, partner or a close relative or a close personal friend of the victim.
- (11) The suspect was unknown to the victim and assisted by providing specific information via, for example, a website or publication, to the victim to assist him or her in committing suicide.
- (12) The suspect gave 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 their assistance.
- (14) The suspect was paid to care for the victim in a care/nursing home environment
- (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 a member of an organisation or group, the principal purpose of which is to provide a physical environment [whether for payment or not] in which to allow another to commit suicide.

20 In most cases, factors (1) to (8) above will carry more weight than the other factors in deciding that a prosecution is needed in the public interest.

### **Public interest factors against prosecution**

21 The public interest factors against prosecution are set out below.

(1) The victim had a clear, settled and informed wish to commit suicide.

(2) The victim indicated unequivocally to the suspect that he or she wished to commit suicide.

(3) The victim asked personally on his or her own initiative for the assistance of the suspect.

(4) The victim had:

- a terminal illness; or
  - a severe and incurable physical disability; or
  - a severe degenerative physical condition;
- from which there was no possibility of recovery.

(5) The suspect was wholly motivated by compassion.

(6) The suspect was the spouse, partner or a close relative or a close personal friend of the victim, within the context of a long-term and supportive relationship.

(7) The actions of the suspect, although sufficient to come within the definition of the offence, were of only minor assistance or influence, or the assistance which the suspect provided was as a consequence of his or her usual lawful employment.

(8) The victim was physically unable to undertake the act that constituted the assistance him or herself.

(9) The suspect had sought to dissuade the victim from taking the course of action which resulted in his or her suicide.

(10) The victim has considered and pursued to a reasonable extent recognised treatment and care options.

(11) The victim had previously attempted to commit suicide and was likely to try to do so again.

(12) The actions of the suspect may be characterised as reluctant assistance in the face of a determined wish on the part of the victim to commit suicide.

(13) The suspect fully assisted the police in their enquiries into the circumstances of the suicide or the attempt and his or her part in providing assistance.

22 In most cases, factors (1) to (7) above will carry more weight than the other factors in deciding that a prosecution is not needed in the public interest.

23 The evidence to support these factors must be sufficiently close in time to the assistance to allow the prosecutor reasonably to infer that the factors remained operative at that time. This is particularly important at the start of the specific chain of events that immediately lead to the suicide or the attempt.

24 These lists of public interest factors are not exhaustive and each case must be considered on its own facts and on its own merits.

## **HANDLING ARRANGEMENTS**

25 Cases of assisted suicide are dealt with in Special Crime Division in CPS Headquarters. The Head of that Division reports directly to the DPP.

26 Any prosecutor outside Special Crime Division of Headquarters therefore who receives any enquiry or case involving an allegation of assisted suicide should ensure that the Head of Special Crime Division is notified.

27 This interim policy comes into effect on the day of its publication and is to be applied in all current and future cases. It will be reviewed in the light of the public consultation exercise currently being undertaken.