

Assisted suicide: where are we now?

Lord Brennan Q.C. considers the latest developments

The Director of Public Prosecutions has published his keenly anticipated guidelines on assisted suicide. He did so in response to a ruling by the Law Lords that he must produce guidelines indicating issues and circumstances to which he will have regard in deciding whether or not to prosecute in cases where there is evidence of criminal behaviour by way of assisting suicide. The DPP has said that, though his guidelines will take effect immediately, they are of an interim nature and will be reviewed at the end of this year in the light of a public consultation. Mr Starmer was at pains to point out in introducing his guidelines that they did not change the law on this controversial issue. He reminded all that assisting suicide remains a crime, and that only Parliament can change substantive law. He made clear that the guidelines should not be construed as offering freedom from prosecution to anyone contemplating giving assistance with suicide.

Some have argued that the Suicide Act and the way it is administered are clear enough and that it is misguided to attempt to turn the Crown Prosecution Service into a consultancy for intending law-breakers. The Court of Appeal echoed these sentiments earlier this year when, in its rejection of Debbie Purdy's case, it observed that, if at some time she should wish to have her husband assist her suicide, she must take legal advice but must not expect the DPP to be her adviser.

However, we are where we are: the Law Lords have allowed Ms Purdy's appeal and have required the DPP to publish his criteria. Therefore it is important that the guidelines that emerge from the present consultation process should be robust and fit for purpose. I regret that the interim version fails on both robustness and fitness.

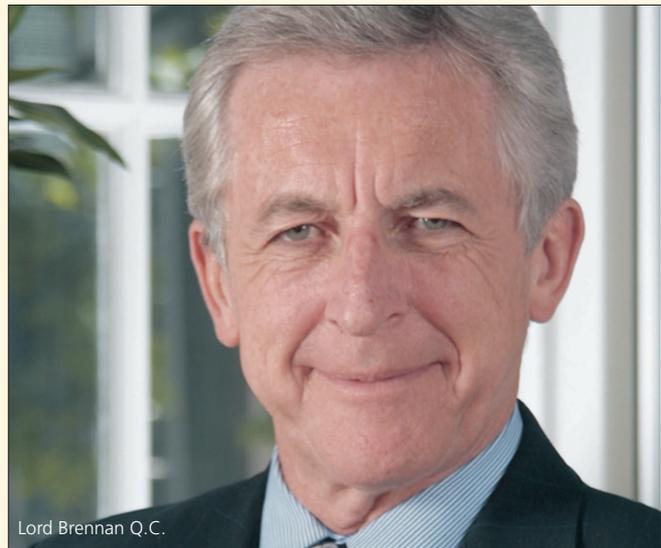
Are the guidelines fit for purpose?

The guidelines comprise essentially 16 hypothetical circumstances which may incline the DPP to prosecute an assister of a suicide (described as the "suspect") and 13 where he may be inclined to take a more lenient view. It is not my intention to go through these here seriatim but rather to focus on two or three of them which stand out as posing some particularly difficult questions.

Terminal illness

The one circumstance that stands out especially is that a factor in favour of leniency will be that the deceased (described as the "victim") has "a terminal illness or a severe and incurable physical disability or a severe degenerative physical condition". This criterion is different in kind from the other hypothetical circumstances listed in the guidelines in that it singles out people who have certain clinical but not necessarily imminently fatal conditions and states that helping them to die may be regarded by the CPS more leniently. This is a group of people which could include, for example, those suffering from chronic heart disease, poorly controlled diabetes and stroke.

We have to ask ourselves whether the concept that underlies this criterion is acceptable. It is one thing for the DPP to say that a prosecution may not follow if, for example, there is evidence that the victim was of sound mind, "had a clear, settled and informed wish to commit suicide" and "asked personally and on his or her own initiative for the assistance of the suspect": it may be legitimate for the CPS to draw a distinction in this way between what it sees as malicious encouragement



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to suicide and reluctant assistance with the act in the face of a persistent demand on the part of the victim. But many people will take the view that it is unacceptable to suggest, as this item in the DPP's list does, that helping someone to commit suicide may be regarded more leniently if the circumstance relied upon was that the deceased was seriously ill.

The will of Parliament

So why has the DPP included among his guidelines a criterion that could be read as implying value judgements about the lives of sick people? It is, I would think, a reflection of the political debate which has been taking place in recent years about assisted suicide and which has focused on the terminally ill. However, the question whether certain categories of people should be considered more eligible than others for assistance with suicide is surely a matter for Parliament rather than the CPS, and in this context it should be noted that twice in the last four years Parliament has declined to legalise or decriminalise assisted suicide for the terminally ill, let alone for all the other categories of sick people which have been included in the "less inclined to prosecute" category. It is surely arguable therefore that in including a criterion for prosecution which focuses on the presence or absence of specified medical conditions, the guidelines as they stand are flying in the face of the expressed will of Parliament to date. Whatever happens to the other hypothetical circumstances in the DPP's list, this one needs to be looked at especially closely. My own view is that it should be deleted.

Spouse, partner or close relative

Let us now move on to two other circumstances listed in the guidelines—that the DPP will take a more lenient view of assistance with suicide where “the suspect was the spouse, partner or close relative or a close personal friend of the victim within the context of a long-term and supportive relationship” and where “the suspect was wholly motivated by compassion”. These circumstances are also listed negatively in the reciprocal list of those that will incline to DPP to undertake a prosecution, and the second is qualified there by the example that “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”.

There is an underlying assumption here that spouses and family members are invariably what the media like to call “loved ones”. Often they are; but love is sometimes equivocal, and nowhere is this more true than in relationships with relatives who make tiring and tiresome demands. It is dangerously naïve to overlook the fact that most murders and physical violence occur within families and that relationships that can look supportive to the outside world frequently turn out to be something else. These guidelines, moreover, ignore the fact that spouses and close relatives are usually precisely the people who stand to gain financially from someone’s death.

Gaining from death

The guidelines do not say that the DPP will take a dim view of assistance with suicide if you stand to gain from the other person’s death, only that you might be prosecuted if you were “motivated by the prospect” of financial gain. But this begs a number of questions. How does the DPP propose to go about establishing the motivation of a suspect so that he can decide whether or not he or she was “wholly motivated” by compassion? What about genuinely mixed motives—such as compassion and a desire to inherit? Very few of us might consider giving someone assistance with suicide, but many who have cared for a seriously ill spouse or relative will have experienced a wish that the end would come sooner rather than later, partly—perhaps even largely—out of compassion but partly also for other less altruistic reasons, such as exhaustion with caring or growing concern

that a much-needed inheritance is being eaten away by nursing costs. Presumably the DPP will prosecute an assister of someone’s suicide if evidence should emerge of motives other than compassion. But one cannot help wondering how realistic it is to expect such evidence to come to light. The most reliable source, the victim, is dead and very few suspects are likely to own up to less-than-compassionate motivation, so everything is going to hinge on what, if anything, third parties might have to say, and occasionally circumstantial evidence.

While I see what the DPP is driving at in listing these criteria, I believe that, as drafted, they are likely to offer a good deal of scope for unscrupulous exploitation. What is needed, I would suggest, is removal of the “special category” status that is accorded in the guidelines to spouses, close family members and personal friends and inclusion of a stipulation that any assister who *stood to gain*—rather than was motivated by the prospect of gain—will be investigated especially closely.

Healthcare professionals

There is yet another issue which the guidelines as they stand address only implicitly but which is of considerable importance if we are not to see a de facto change in the law result from them—namely, the position of healthcare professionals generally and physicians in particular. The guidelines make no specific reference to how the actions of physicians will be regarded by the DPP. The guidelines need, as far as possible, to be universal in their application and not limited to specific groups of people. But the plain fact is that any physician who wished to assist a suicide would be better placed to do so than just about anyone else and that the political debate so far on this issue has revolved entirely around the concept of *physician*-assisted suicide.

It is therefore surprising that the guidelines touch on the position of doctors only obliquely. We are told that, among the

circumstances that will incline the DPP to prosecute, is a situation where “the suspect gave assistance to more than one victim”—which would seem to rule out multiple lethal prescriptions but would presumably enable each doctor to write just one; and another where “the suspect was paid to care for the victim in a care/nursing home environment”—which appears to discour-



age the giving of assistance with suicide in such establishments but not, perhaps, by physicians in hospitals or in the home. And there is also a strange circumstance listed among those which might incline the DPP not to prosecute—namely, a situation in which “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 of a consequence of his or her lawful employment*” (my italics). It is difficult to fathom what situations this latter clause is intended to cover. I feel sure it cannot be physician-assisted suicide, but it seems to me there is a very real risk that it could be exploited for that purpose. Further explanation is needed: it is to be hoped that the Director will be available to explain this during the period of consultation.

It is crucially important that these guidelines should not give, or be thought to give, a green light to the involvement of doctors, qua doctors, in assisting suicides. As citizens they should be treated just like the rest of us. Indeed, only the medical profession swear an oath excluding the deliberate causing of death. As I have observed above, Parliament has rejected proposals for assistance with suicide to be given by doctors to terminally ill people. For guidelines to be published that

enable the DPP to take a more lenient view of assistance with suicide that is given in just those circumstances could be said to be usurping the role of Parliament in making and amending the law. To avoid this clearly unintended situation arising, the guidelines must make clear that, unless and until Parliament alters its position that assisted suicide is not an acceptable practice between doctors and patients, the DPP cannot regard himself as being at liberty to allow any special latitude to those who assist a suicide in such circumstances.

A stepping stone

Euthanasia lobbyists have made no secret of their view of and pleasure in these

guidelines as a convenient stepping stone to legalisation of assisted suicide. They may well be planning to bring in a Private Member's bill that mirrors closely what the guidelines say and to argue that all they are seeking to achieve is to bring the law into line with declared prosecution policy. That is why it is vital that the guidelines that emerge from the present consultation should be tautly drafted, clearly focused and fit for purpose.

Unfortunately, the first draft fails in these respects. It confers respectability on notions that have been propagated by euthanasia campaigners, such as that seriously ill people should be considered especially eligible for assistance with suicide on

grounds of compassion and that relatives who might be inclined to give them such assistance are necessarily compassionate "loved ones". We need a more objective approach based on the primary need to protect the vulnerable and to uphold the integrity of the law. The guidelines must take as their starting point that assisted suicide is illegal and they should set out the wholly exceptional circumstances in which it might not trigger a prosecution rather than create a "tick in the box" culture to help those who may be contemplating such acts.

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Policing Protest In the 21st Century in England and Wales

Sally Ireland grapples with this topical problem

In the months following the G20 protests in central London in April 2009 police tactics at demonstrations have moved out of the pages of *The Guardian* into the forefront of public debate across the political spectrum. This is in part due to the proliferation of imagery resulting from mobile phone cameras and video, which appeared almost immediately on the internet through sites such as Youtube and was available at the touch of a button on national news sites to provide hard-hitting accompaniment to stories. These often disturbing images brought to the attention of a mainstream audience problems that had been known to those in the "protest community" and to the veterans of protests in the 1970s and 1980s for many years: the use of confrontational tactics against non-violent protests and the overuse/abuse of police powers, often not designed to deal with protest at all. While large numbers of protests go on up and down the country without incident, these problems have no doubt changed the perception of protest and had a chilling effect on law-abiding citizens who do not wish to be injured by police, crushed in a contained crowd or "kettled" for hours without water or toilets. Arguably such perception is likely to become a self-fulfilling prophecy as older people, families and those of a more cautious disposition stay at home precisely for these reasons, leaving demonstrations—without their calming influence—in the hands of the resolute and the radical.

Much journalism, and the subsequent work of the Independent Police Complaints Commission (IPCC), has naturally enough focused upon individual allegations of violence. The cases of both Ian Tomlinson and Nicola Fisher are the subject of ongoing investigation/proceedings and therefore no more will be said about them here. Other work, including the report of HM Inspectorate of

Constabulary, has looked into operational changes that may be required to avoid unnecessary confrontation with protestors in future. This article will deal with two areas in which reform is needed. The first is the way in which protest is regarded in our political culture.

The second deals with specific powers that could be amended or repealed to prevent their inappropriate use.

Respect for protest: changing the culture

During the Parliamentary Joint Committee on Human Rights' (JCHR) 2009 inquiry "Demonstrating Respect For Rights", on policing and protest, an illuminating exchange took place between members of the Committee and the Policing Minister Vernon Coaker during his evidence to the inquiry¹:

"Q303 Dr Harris: To what extent should the concerns of businesses and bystanders about a peaceful protest affect the policing of a protest? In other words, if a protest is otherwise



¹ Joint Committee on Human Rights, Seventh Report session 2008–2009, *Demonstrating respect for rights? A human rights approach to policing protest*, Minutes of Evidence Volume II (HL 47-II/ HC 320-II).