

On the wrong track

The House of Lords in *Purdy* forced the DPP to issue offence-specific guidance on assisted suicide, but **Jacqueline Laing** argues that the resulting interim policy adopted last September is unconstitutional, discriminatory and illegal

IN JULY 2009, the law lords in *R (on the application of Purdy) v Director of Public Prosecutions* [2009] All ER (D) 335 required that the DPP publish guidelines for those contemplating assisting another to commit suicide. The DPP produced a consultation paper (23 September 2009) seeking to achieve a public consensus, albeit outside Parliament, on the factors to be taken into account in determining when not to prosecute assisted suicide.

Although the consultation exercise is hailed by proponents of legislative change as a democratic, consensus-building and autonomy-enhancing initiative, there is much to suggest that, on the contrary, the guidance is unconstitutional, arbitrary and at odds with human rights law, properly understood.

Unconstitutional

The House of Lords has twice rejected, by a clear majority, attempts to alter the law on assisted suicide. Lord Joffe's Assisted Dying for the Terminally Ill Bill was defeated 148 to 100 in 2006 and, again this year, amendments to the Coroners and Justice Bill were defeated by 191 votes to 141.

It is the function of Parliament, not an unelected judiciary or executive, to make and amend legislation. The material contained in the interim guidance makes plain that an alteration in the substance of the law is precisely what is envisaged by the guidance. Commenting on the guidance, Lord Carlile of Berriew recently pointed out that before prosecution for theft or grievous bodily harm, "we are not told how much we can steal... or how much injury we can inflict..." (*The Daily Telegraph*, 14 November 2009). To do so would effectively alter the law and *de facto* undermine its purpose. Yet this is apparently what the DPP appears to propose in his consultation paper.

That non-prosecution operates to change the law is borne out by the Dutch experience. The Netherlands did not legalise euthanasia until 2002. Yet it was well known that the Netherlands permitted assisted suicide and euthanasia in the 21 years that preceded that date. It was precisely the failure to prosecute that gave the Netherlands its status as a progressive state permissive of euthanasia decades ago. This

inevitably led to its legalisation.

It cannot be assumed that the distinction between guidance and legislation makes the DPP's guidance anything other than an ad hoc effort to alter practice without reference to Parliament. Philip Nitschke, the Australian euthanasia advocate who offers suicide kits for \$30 US, is advising people internationally to visit the UK because of the non-prosecution implications of the guidance (*Daily Mail*, 24 September 2009).

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Human rights incompatibilities

Of the factors outlined against prosecution, many – for example, that the victim had a severe and incurable physical disability – are observably at odds with the demands of non-discrimination (articles 2 and 14) and the equal dignity principle. Other criteria, such as that the victim was assisted by a close relative to commit suicide, do nothing to assuage the concern that proper protection is being denied the disabled, depressed, elderly and vulnerable. Some of the choicest crimes are committed by members of the family.

The inclusion of the factor that the suspect had previously attempted suicide also prompts the suspicion that the most vulnerable and depressed are being discriminated against. Contrary to common belief, those who are terminally ill constitute only a small percentage (two to four per cent) of those who commit suicide (DC Clark, 'Rational Suicide and People with Terminal Conditions or Disabilities', *Issues in Law and Medicine* (1992):147-66)). Reference to 'compassion' as a factor militating against prosecution highlights the ad hoc nature of the DPP's criteria. Nowhere else in the criminal law does the motive of 'compassion' as distinct from involuntariness, a defence which affects

human control, operate to exculpate (Jacqueline A Laing, 'Assisting Suicide', *Journal of Criminal Law*, 54 (1990) 106-116).

Finally, leaving it to prosecutors to determine these matters suggests that the legal process, with its transparency and accountability, is being usurped by the hidden machinations of bureaucrats, thus triggering further articles 6, 13, 14, 17 and 18 concerns.

When rights become duties

The Dutch experience, where widespread non-voluntary euthanasia has been observed in numerous studies (Rommelink Report, see more generally: John Keown, *Euthanasia, Ethics and Public Policy: An Argument Against Legalisation* (CUP, 2002)), where euthanasia of children is now legal, where palliative care services have been decimated, average longevity reduced, and, above all, where fear of being killed by medical practitioners is endemic (to such an extent that folk carry opt-out euthanasia cards), is instructive. The British judiciary and executive appear to be forcing a 1981 Dutch approach with little regard for any factual update. Former health minister and medic, Dr Els Borst, who guided Dutch euthanasia laws through Parliament, now acknowledges the damaging impact of euthanasia and assisted suicide on palliative care services (*Daily Mail*, 9 December 2009).

More general concerns that euthanasia, whether *de jure* or *de facto*, erodes respect for the value of human life, undermines the goals of medicine, endangers the vulnerable and imperils those who may indeed be a burden to others, suggest the consequences of starting down this lethal path have been fundamentally misapprehended. Once this unconstitutional and illegal guidance becomes normalised, financial, scientific and medical interests will incentivise what can only be described as homicidal practice.

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