Website: www.francisbennion.com
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Introductory Note by FB

The article below is a further addition to my writings on assisted suicide. Others are included within the Topic 'Suicide Act 1961'. The Topic can be found on this website at *www.francisbennion.com/topic/suicideact1961.htm*

Article in Criminal Law & Justice Weekly

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Assisted Suicide: A Constitutional Change

Francis Bennion discusses the current furore

In my open letter addressed to the Director of Public Prosecutions, Mr Keir Starmer QC[1], I sought Mr Starmer's view on prosecution decisions relating to the offence of assisting suicide under the Suicide Act 1961, s.2. My letter was overtaken by the House of Lords decision in *R (on the application of Purdy) v. Director of Public Prosecutions* [2009] UKHL 45 (*Purdy 3*), which came too late for it to be withdrawn.

My letter referred to the leading cases on this matter as *Regina (Pretty) v. Director of Public Prosecutions (Secretary of State for the Home Department intervening)* [2001] UKHL 61 (*Pretty*) and *R (on the application of Purdy) v. Director of Public Prosecutions & Ors* [2009] EWCA Civ 92 (*Purdy 2*). In *Purdy 2*, where the court was asked to require the DPP to say whether in a specified case of alleged assisted suicide the person assisting would or would not be prosecuted, the Court of Appeal said of s.2 of the Suicide Act 1961[2]:

> 'We cannot suspend or dispense with the law. That would contradict an elementary constitutional principle, the Bill of Rights itself. Parliament alone has the authority to amend this law and identify the circumstances, if any, in which the conduct of the individual who assists or attempts to assist another to commit suicide should be de-criminalized.'

The Court of Appeal also said[3]:

> 'Like this court the DPP cannot dispense with or suspend the operation of s.2(l) of the 1961 Act, and he cannot promulgate a case-specific policy in the kind of certain terms sought by Ms Purdy which would, in effect, recognize *exceptional defences* to this offence which Parliament has not chosen to enact.'[4]

My open letter said that the uncertainty seemed to relate to the following. Parliament decided to enact s.2 of the Suicide Act 1961 and chose the language in which to do so. That Parliamentary language may in effect be substantially varied by the way the DPP chooses to enforce (or not enforce) the section. In other words Parliament intended by s.2 that, despite the abolition of the offence of suicide by s.l, the criminal liability of a person who 'aids, abets,

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[1] Page.492 *ante*; reply p.511 *ante*, for texts of both letters see www.francisbennion.com/2009/027.htm.
[2] At [2].
[3] At [79].
[4] Emphasis added.

counsels or procures' the actual or attempted suicide of another should continue to exist unimpaired.

The letter remarked that it is said that for the DPP by his prosecution policy to exclude from this operative effect the normal case where the accessory has no improper motive is for him in effect to legislate by reducing the range of s.2 (1) in a major way. This, so the argument goes, is an improper interference with the anti-euthanasia policy of the 1961 Act. There have been many attempts since 1961 to persuade Parliament to authorize euthanasia, but all have failed. The argument is that it is not for the DPP to step in and carry into effect what Parliament itself has consistently refused to do.

My letter ended by saying that it would be very helpful if Mr Starmer could clarify the position. Strangely, this is exactly what the House of Lords also said in more forceful terms in *Purdy 3*.

The Suicide Act 1961

This whole matter turns on a careful examination of the wording of the Suicide Act 1961, which extends to England and Wales only, with a view to determining its legal meaning. The rule is:

> 'The interpreter's duty is to arrive at the legal meaning of the enactment, which is not necessarily the same as its grammatical meaning. This must be done in accordance with the rules, principles, presumptions and canons which govern statutory interpretation (in this Code referred to as the interpretative criteria, or guides to legislative intention).'[5]

The long title of the Suicide Act 1961 says it is an Act to amend the law of suicide in England and Wales. Section 1, with the sidenote, 'Suicide to cease to be a crime' says the rule of law whereby it is a crime for a person to commit suicide, 'is hereby abrogated'. Section 2 with the sidenote 'Criminal liability for complicity in another's suicide' has four subsections. Section 2(1) says 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 14 years. Section 2(2) says that if on the trial of an indictment for murder or manslaughter it is proved that the accused aided, abetted, counselled or procured the suicide of the person in question, the jury may find him guilty of 'that

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offence', ie, murder or manslaughter[6]. Section 2(3) amends various enactments to bring them into line with subs.(l). Section 2(4) says that no proceedings shall be instituted for an offence under s.2 except by or with the consent of the Director of Public Prosecutions (DPP).

The key enactment here is s.2(l). Apart from *Purdy 3* it seems that this should be interpreted according to the plain meaning rule:

> 'It is a rule of law (in this Code called the plain meaning rule) that where, in relation to the facts of the instant case:
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> (a) the enactment under inquiry is grammatically capable of one meaning only, and
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> (b) on an *informed* interpretation of that enactment the interpretative criteria raise no real doubt as to whether that grammatical meaning is the one intended by the legislator, the legal meaning of the enactment corresponds to that grammatical meaning, and is to be applied accordingly.'[7]

This means that if, in a trial on indictment of contravening s.2(l), or of murder or manslaughter, facts are proved which show beyond reasonable doubt that *for any reason* the defendant did aid, abet, counsel or procure the suicide or attempted suicide of another person

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[5] *Bennion on Statutory Interpretation*, 5th edn, 2008 (Bennion Code), p.24.
[6] See *Purdy 3* at [5]-[8].
[7] Bennion Code, s.195.

the defendant is guilty of an offence and liable on conviction to imprisonment for a term not exceeding 14 years. In concluding that this is the legal meaning of s.2(l) we extract from the wording of s.2 as a whole, *and that alone*, that the intention of Parliament was as follows.

It was desired to remove from a person achieving or attempting suicide the longstanding stigma of having it treated by the law as a grave offence, condemned in the days of felony as

felo de se or felony on the self. At common law an adult who committed suicide was a felon; and the heinous crime was punishable by forfeiture of property and a shameful burial, typically at a crossroads with a stake through the heart.

At the same time, we infer, Parliament, concerned to preserve the sanctity of human life and not wishing to encourage euthanasia, intended to discourage suicide and in particular penalize anyone who encouraged or helped a person to commit suicide. This was indicated by s.2(l), in particular by the very severe penalty imposed by it. A well-known commentator recently said: 'By establishing certain acts as crimes, the law sends out a powerful message that these are activities a society deems to be beyond the pale.'[8]. The message is made the more powerful when a swingeing penalty is attached.

Role of the DPP

As stated above, s.2(4) says that no proceedings shall be instituted for an offence under s.2 except by or with the consent of the DPP. This brings in the provisions of the Prosecution of Offences Act 1985, under which the DPP and Crown Prosecution Service (CPS) are established. Section 10(1) of the Act says that the DPP shall issue a Code for Crown Prosecutors giving guidance on *general principles* to be applied by them in determining, among other matters, whether proceedings for an offence should be instituted[9]. Lord Hope of Craighead said regarding the possible prosecution of Ms Purdy's husband[10]:

> 'As with any other crime, the test that will be applied is that which the Crown Prosecution Service code lays down. He may be prosecuted if there is enough evidence to sustain a prosecution and it is in the public interest that this step should be taken.'

The 1985 Act makes no other provision whereby the DPP may issue guidance on the exercise of his functions, though it does not rule this out. Such additional guidance is from time to time issued by the DPP[11]. This happened in the case of Daniel James, described in this way by Lord Hope of Craighead[12]:

> '... on December 9, 2008 the [DPP] decided not to prosecute the parents and a family friend of Daniel James, who had sustained a serious spinal injury in a rugby accident and had travelled with his parents to Switzerland to end his life, on the ground that a prosecution was not needed in the public interest. He took this decision personally, he gave his reasons in writing for having done so and he made those reasons available to the public. This was an exception, as the public have not been told what the reasons were in the other cases that have so far been referred to the Director which include one other case which on public interest grounds was not prosecuted. Other cases appear to have been discontinued by the police on public interest grounds. Here too no reasons for the decisions that have been taken are available.'

Section 3(1) of the 1985 Act says that the DPP shall discharge his functions under the superintendence of the Attorney General. This confirms the common law constitutional position under which the Attorney General administers the prosecutive power of the state, to which independent quasi-judicial functions attach. It is independent of the executive, which preserves it, or should preserve it, from Government interference. This is a fact that seems to

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[8] Melanie Phillips, *Daily Mail*, 3 Aug 2009.
[9] Emphasis added.
[10] *Purdy 3* at [27].
[11] As to the issuing of such guidance by public authorities see Bennion Code, s.232.
[12] *Purdy 3* at [30].

be little known, even among the judiciary, despite attempts to publicize it[13]. Scott Baker LJ fell into this error in *R (on the application of Purdy) v. Director of Public Prosecutions & Anor* [2008] EWHC 2565 (Admin) (*Purdy 1*) at [72].

The Purdy Case

The facts in *Purdy* were stated by Lord Hope[14]:

> 'The position in which Ms Purdy finds herself can be stated very simply. She suffers from primary progressive multiple sclerosis for which there is no known cure. It

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> was diagnosed in 1995, and it is progressing ... Further deterioration in her condition is inevitable. She expects that there will come a time when her continuing existence will become unbearable. When that happens she will wish to end her life while she is still physically able to do so. But by that stage she will be unable to do this without assistance. So she will want to travel to a country where assisted suicide is lawful, probably Switzerland. Her husband, Mr Omar Puente, is willing to help her to make this journey.'

Later Lord Hope added[15]:

> 'It is the risk that the [DDP] will consent to her husband's prosecution under s.2(l) of the 1961 Act that deters Ms Purdy from taking the course that she wishes to take. That is sufficient in itself to give rise to the issue which she now asks your Lordships to resolve.'

Lord Hope expressed the view of the entire Appellate Committee when he said[16]:

> 'It must be emphasized at the outset that it is no part of our function to change the law in order to decriminalize assisted suicide. If changes are to be made, as to which I express no opinion, this must be a matter for Parliament. No one who listened to the recent debate in the House of Lords on Lord Falconer of Thoroton's amendment to the Coroners and Justice Bill, in which he sought to define in law acts which were not capable of encouraging or assisting suicide ... can be in any doubt as to the strength of feeling on either side or the difficulties that such a change in the law might give rise to. We do not venture into that arena, nor would it be right for us to do so. Our function as Judges is to say what the law is and, if it is uncertain, to do what we can to clarify it.'

Lord Hope said that counsel for Ms Purdy relied on her right to respect for her private life under art.8(l) of the European Convention on Human Rights[17]:

> 'He submits, first, that the prohibition in s.2(l) of the 1961 Act constitutes an interference with Ms Purdy's right to respect for her private life under art.8(1) ... and, second, that this interference is not "in accordance with the law" as required by art.8(2), in the absence of an offence-specific policy by the [DPP] which sets out the factors that will be taken into account by him and Crown Prosecutors acting on his behalf in deciding under s.2(4) of the 1961 Act whether or not it is in the public interest to bring a prosecution under that section.'[18]

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[13] See, eg. F. A. R. Bennion, "*Jones v. Whalley: Constitutional Errors by the Appellate Committee*"(2006) 170 JPN 847, www.francisbennion.com/2006/039.htm.
[14] *Purdy 3* at [17].
[15] *Purdy 3* at [25].
[16] *Purdy 3* at [26].
[17] Art.8.
[18] *Purdy 3* at [28].

Lord Hope[19] said that the DPP accepted that he is a public authority within the meaning of art.8(2), adding:

> 'He is also a public authority for the purposes of s.6(l)
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> [lawfulness of acts of public authorities] of the Human Rights Act 1998. It is unlawful for him to act in a way which is incompatible with a Convention right.'

The Decision in Purdy

Lord Hope[20] said:

> 'Ms Purdy does not ask that her husband be given a guarantee of immunity from prosecution ... Instead she wants to be able to make an informed decision as to whether or not to ask for her husband's assistance. She is not willing to expose him to the risk of being prosecuted if he assists her. But the [DPP] has declined to say what factors he will take into consideration in deciding whether or not it is in the public interest to prosecute those who assist people to end their lives in countries where assisted suicide is lawful.'

Lord Hope went on to say that this presented Ms Purdy with a dilemma. If the risk of prosecution was sufficiently low, she could wait until the very last moment before she made the journey. If the risk was too high she would have to make the journey unaided to end her life before she would otherwise wish to do so. Moreover she was not alone in finding herself in this predicament. Statements had been produced showing that others in her situation have chosen to travel without close family members to avoid the risk of their being prosecuted. Others have given up the idea of an assisted suicide altogether and have been left to die what has been described as a distressing and undignified death. 'It is patently obvious that the issue is not going to go away.'

Lord Hope[21] cited an opinion of his in *Pretty* favouring the view that art.8's requirement of respect for a person's private life covered Ms Purdy's situation. This opinion was cited by the European Court of Human Rights in *Pretty v. United Kingdom* (2002) 35 EHRR 1, para.67[22], where the court said:

> 'The applicant in this case is prevented by law from exercising her choice to avoid what she considers will be an undignified and distressing end to her life. The Court is not prepared to exclude that this constitutes an interference with her right to respect for private life as guaranteed under art.8(l) of the Convention.'

Lord Hope held, with the concurrence of the other Law Lords in *Purdy 3*, that, applying Practice Statement (Judicial Precedent)[23], they should depart from the House of Lords decision in *Pretty* 'and hold that the right to respect for private life in art. 8(1) is engaged in this case'[24].

With regard to the application of article 8(2), Lord Hope said that the Convention principle of legality requires a court to address itself to three distinct questions: whether there is a legal basis in domestic law for the restriction, whether the law or rule in question is sufficiently *accessible* to the individual who is affected by the restriction and sufficiently

precise to enable him to understand its scope and *foresee* the consequences of his actions so that he can regulate his conduct without breaking the law, and whether, assuming that these

[19] *Purdy 3* at [29].
[20] *Purdy 3* at [31].
[21] *Purdy 3* at [36].
[22] See *Purdy 3* at [32].
[23] July 26, 1966.
[24] *Purdy 3* at [39].

two requirements are satisfied, it is nevertheless open to the criticism that it is being applied in a way that is arbitrary because, for example, it has been resorted to in bad faith or in a way that is not proportionate. He derived these principles from cases which he went on to specify[25].

Lord Hope said[26] that law for this purpose goes beyond the wording of a statute and is to be understood in its substantive sense, not its formal one. This means for example that the current Code for Crown Prosecutors is to be taken as part of the relevant law[27]. Lord Hope added[28]:

> '*Accessibility* means that an individual must know from the wording of the relevant provision and, if need be, with the assistance of the court's interpretation of it what acts and omissions will make him criminally liable ... The requirement of *foreseeability* will be satisfied where the person concerned is able to foresee, if need be with appropriate legal advice, the consequences which a given action may entail. A law which confers a *discretion* is not in itself inconsistent with this requirement, provided the scope of the discretion and the manner of its exercise are indicated with sufficient clarity to give the individual protection against interference which is arbitrary.'[29]

Lord Hope said that the part of the Suicide Act 1961 which caused difficulty in this respect was s.2(4). He cited[30] *Hasan and Chaush v. Bulgar*ia (2002) 34 EHRR 55, para. 84, where the court said:

> 'For domestic law to meet these requirements [that is, of accessibility and foreseeability] it must afford a measure of legal protection against arbitrary interferences by public authorities with the rights safeguarded by the Convention. In matters affecting fundamental rights it would be contrary to the rule of law, one of the basic principles of a democratic society enshrined in the Convention, for a legal discretion granted to the executive to be expressed in terms of an unfettered power. Consequently, the law must indicate with sufficient clarity the scope of any such discretion conferred on the competent authorities and the manner of its exercise.'

I have pointed out above that the DPP is not a part of the executive, but has quasi-judicial functions. It is also incorrect to say that s.2(4) confers on him a discretion when it is in fact a duty to exercise judgment.[31]

The Public Interest

Assuming there is sufficient evidence to provide a 'realistic prospect of conviction' the other question for the prosecutor is whether a prosecution is in the public interest. Sections 5.6 to 5.13 of the current Code for Prosecutors deal at length with this.

Section 5.7 says:

> 'Although there may be public interest factors against prosecution in a particular case, often the prosecution should go ahead and those factors should be put to the court for consideration when sentence is being passed. 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 (see s.8 below).'[32]

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[25] See *Purdy 3* at [40].
[26] *Purdy 3* at [41].
[27] *Purdy 3* at [47].
[28] *Purdy 3* at [41].
[29] Emphasis added.
[30] *Purdy 3* at [43].
[31] For the important distinction between discretion and judgment see Bennion Code, pp.123-129.
[32] Section 5.7. Section 8 deals with rehabilitative, reparative or restorative justice alternatives.

Lord Hope said of the remaining provisions[33]:

> 'Paragraph 5.8 tells Crown Prosecutors that they must balance factors for and against prosecution carefully and fairly and that the factors that apply will depend on the facts in each case. Paragraph 5.9 then sets out what it describes as some common public interest factors in favour of prosecution. There are 17 factors in this list, subparas. (a) to (q). Paragraph 5.10 sets out what it describes as some common public interest factors against prosecution. There are nine factors in this list, subparas.(a) to (i). I shall not set them out. The details are given in [*Purdy 2* at [16]].'

Lord Hope then went on to describe the details of the published decision of the DPP in the case of Daniel James[34], which are too long to be given here. This is one instance where the DPP has gone beyond the Code for Crown Prosecutors in giving information about the considerations employed in arriving at prosecution decisions. Other examples relate to domestic violence, antisocial behaviour, and hate crime. Lord Hope held that this was not enough, however. He said[35]:

> 'But it seems to me that, for anyone seeking to identify the factors that are likely to be taken into account in the case of a person with a severe and incurable disability who is likely to need assistance in travelling to a country where assisted suicide is lawful, these developments fall short of what is needed to satisfy the Convention tests of accessibility and foreseeability. The [DPP's] own analysis shows that, in a highly unusual and extremely sensitive case of this kind, the Code offers almost no guidance at all. The question whether a prosecution is in the public interest can only be answered by bringing into account factors that are not mentioned there. Furthermore, the further factors that were taken into account in the case of Daniel James were designed to fit the facts of that case. There could be others just as unsuitable for prosecution where, for example, it could be said that those who offered assistance stood to gain an advantage,

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> financial or otherwise, by the death. An assistant who was not a relative or a family friend might have to be paid, for example, and a relative might derive some benefit under the deceased's will or on intestacy. The issue whether the acts of assistance were undertaken for an improper motive will, of course, be highly relevant. But the mere fact that some benefit might accrue is unlikely, on its own, to be significant.'

Lord Hope concluded that while the Code for Crown Prosecutors will normally provide sufficient guidance as to how decisions should or are likely to be taken whether or not, in a given case, it will be in the public interest to prosecute this did not apply where the offence in contemplation is aiding or abetting the suicide of a person who is terminally ill or severely and incurably disabled, who wishes to be helped to travel to a country where assisted suicide is lawful and who, having the capacity to take such a decision, does so freely and with a full understanding of the consequences. He said there is already an obvious gulf between what s.2(l) says and the way it is being applied in practice in compassionate cases.

Lord Hope ended by saying that it ought to be possible to confine the class that requires special treatment to a very narrow band of cases with the result that the Code for Crown Prosecutors will continue to apply to all those cases that fall outside it, adding:

> 'I would therefore allow the appeal and require the [DPP] to promulgate an offence-specific policy identifying the facts and circumstances which he will take into account in deciding, in a case such as that which Ms Purdy's case exemplifies, whether or not to consent to a prosecution under s.2(l) of the 1961 Act.'

The other Law Lords concurred.

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[33] *Purdy 3* at [48].
[34] *Purdy 3* at [49]-[51].
[35] *Purdy 3* at [53].

The Future

On July 30, the day the judgment in *Purdy 3* was released, the DPP issued the following statement:

> 'This is a difficult and sensitive subject and a complex area of the law. However, I fully accept the judgment of the House of Lords ... We will endeavour to produce an interim policy as quickly as possible which outlines the principal factors for and against prosecution. To that end, I have already set up a team to work through the summer with a view to producing an interim policy for prosecutors by the end of September. In the absence of a legislative framework, cases of this sensitive nature present a significant challenge for prosecutors. I have therefore decided that once our interim policy is published, we will undertake a public consultation exercise in order to take account of the full range of views on this subject. In the continuing absence of any legislative framework by then, I will publish my finalized policy in the Spring of 2010.'

The discussion at pp.519-520 *ante* of the legal meaning of the Suicide Act 1961 still holds good. The decision in *Purdy 3* cannot alter the historical fact of the intention Parliament held when it passed the Act nearly half a century ago. We must look elsewhere for the change made by *Purdy 3*.

What that decision operates on is the function of the DPP. Under the 1961 Act as originally passed, coupled with the Prosecution of Offences Act 1985 and the common law, the judgment of the DPP when arriving at prosecution decisions was unfettered except by the usual criteria of bad faith, *Wednesbury* unreasonableness etc. *Purdy 3* has changed matters by ruling that art.8 applies, that it requires clarity and certainty where a public authority exercises a statutory judgment or discretion in the art.8 field, and that the DPP must supply this clarity and certainty in *Purdy*-type cases. This infringes the independent exercise of the prosecutive power of the state, and so has grave constitutional implications. But the DPP is obliged to comply.

This exposes the DPP's dilemma rather than resolving it. When specifying 'the principal factors for and against prosecution' in the cases with which the interim policy is concerned is he to honour Parliament's 1961 intentions or is he to do something different, and if so what?

Here the DPP may be assisted by one of the interpretative criteria now accepted by the courts, namely the need for updating construction[36]. As the Bennion Code says[37]:

> 'Where relevant social conditions have changed since the date of enactment, what was then classed as a social mischief may not be so regarded today. It is very difficult for the court to apply an enactment so as to "remedy" what is no longer regarded as a mischief. The consequence is an interpretation that minimizes the coercive effect of the enactment...'[38]

An updating construction would not require a changed interpretation of the Suicide Act 1961 except that s.2(4) would be treated as giving the DPP, in his decisions on whether or not to prosecute in any case, authority to have regard to changed public attitudes on matters such as assisted suicide. Another factor is that the practice is stated by the Code for Prosecutors to be that a prosecution is less likely if 'the court is likely to impose a nominal penalty'[39]. Under current conditions this might happen in a s.2(l) case if the defendant were morally blameless apart from having committed the contravention, which in those circumstances would be treated as merely technical. This would liken it to the case of David James mentioned above.

So the question comes down to this. Have social attitudes in England and Wales changed so much since 1961 that it can be said that the majority favour a no-prosecution policy regarding

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[36] For details see Bennion Code, pp.889-914 (s.288).
[37] Footnotes omitted.
[38] See p.901.
[39] Section.5.10a

s.2(l) where the potential defendant is morally blameless apart from having committed the contravention? That is the judgment the DPP is called on to make, and few will envy him.