Website: www.francisbennion.com
173 CL&J (5 Dec 2009) 773-777
Any footnotes are shown at the bottom of each page
For full version of abbreviations click 'Abbreviations' on FB's website

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

Page 773

An Abortive Consultation on Assisted Suicide

Francis Bennion writes about an unfortunate accident of timing

Introductory

I wrote in August about the vexed question of assisted suicide.[1] In September Mr Keir Starmer QC, Director of Public Prosecutions ('the DPP'), acting under the direction of the Appellate Committee of the House of Lords in the Purdy Case[2], issued a document titled *Interim Policy for Prosecutors in respect of Cases of Assisted Suicide* (the '*Interim Policy*') together with a consultation document. The *Interim Policy* and the consultation on it (to which I shall contribute[*]) came into effect immediately, the consultation period being stated to end on 16 December. Meanwhile, on 12 November, Royal Assent was given to the Coroners and Justice Act 2009. This contains substantial amendments to the Suicide Act 1961[3], which are to come into force on such date as the Secretary of State may by order appoint[4].

On 25 November I had a courteous interchange about all this with the DPP's office. I wrote:

> 'The consultation documentation and *Interim Policy* are in terms of the Suicide Act 1961 s. 2 as enacted. They do not seem to fit the Act as amended by the Coroners and Justice Act 2009. I do not know whether I am supposed to take these amendments into account in my response. It seems the *Interim Policy* needs altering to take account of the amendments when they are brought into force.'

The reply was that the consultation documentation was published before the Coroners and Justice Act received Royal Assent, so it would have been premature to assume any change to the law. It was recognised that there may need to be amendments following the bringing into force of the relevant provisions of the Act. Meanwhile I was requested to complete the Consultation Paper as it stands, which I will do. So I am dividing this article into two parts. In the first part I ignore the amendments made by the Coroners and Justice Act 2009. In the

---

[1] See 'Assisted suicide: an open letter to the DPP and his reply', p. 494 *ante*, *www.francisbennion.com/2009/027.htm*; 'Assisted Suicide: A Constitutional Change', p. 519, *ante*, *www.francisbennion.com/2009/028;* 'DPP and Suicide Act: Distinction between discretion and judgment', p. 560, *ante*, *www.francisbennion.com/2009/029*.

[2] *R (on the application of Purdy) v. Director of Public Prosecutions* [2009] UKHL 45.

[*] My reply to the consultation, submitted on 8 December 2009, can be accessed at www.francisbennion.com/2009/039.htm. (Footnote added after publication.)

[3] Coroners and Justice Act 2009, ss. 59-61.

[4] Ibid, s. 182.

second part I consider the effect those amendments will have when they are brought into force.

Part 1

The Suicide Offences

As enacted, the Suicide Act 1961 s. 2(1) reads:

> 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.

This may be called the substantive offence. The Suicide Act 1961 s. 2(4) says that no proceedings shall be instituted for the substantive offence except by or with the consent of the DPP. By virtue of the Criminal Attempts Act 1981 s. 1 it is also an offence (the attempt offence) to attempt to aid, abet, counsel or procure the suicide or attempted suicide of another person (the attempt offence).[5]

Position of the DPP

Section 2(4) has been overtaken by the Prosecution of Offences Act 1985, by virtue of which the only operative effect of s. 2(4) is to require a private prosecutor to obtain consent. The 1985 Act set up the Crown Prosecution Service (the 'CPS') for England and Wales, and constituted the DPP the Head of it. The Act requires the DPP to discharge his statutory functions under the superintendence of the Attorney General. It modifies s. 2(4) by enabling a Crown Prosecutor to act in place of the DPP as regards prosecuting, or giving or withholding consent.

Section 6 of the 1985 Act operates on the right to bring a private prosecution. Section 6(1) preserves the right, while s. 6(2) takes it away again if the DPP so decides.

Section 10 of the 1985 Act says that the DPP shall issue, and may from time to time alter, a *Code for Crown Prosecutors* giving guidance on general principles to be applied in determining whether proceedings for an offence should be instituted or discontinued; or what charges should be preferred.[6] The current version of this (the '*Code*') is the fifth. The DPP may also publish additional guidance, and may indeed be directed by the court to do so as happened in the Purdy Case.

The Suicide Act 1961 s. 2(4) gave no indication of how the DPP should exercise the power it bestowed on him, but the 1985 Act s. 10 came along to fill that gap. As the *Interim Policy* says (para. 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. In addition we now have the additional factors specified in the *Interim Policy*.

The Public Interest

The DPP says that in a particular case a prosecutor needs to decide 'whether a prosecution for assisted suicide is needed in the public interest'.[7] Strangely, the phrase 'public interest' does not occur in the basic Act on which our prosecution system is based, the Prosecution of Offences Act 1985. One finds it in the *Code*; for example para. 5.1 of this says:

---

[5] For the effect of the 2009 amendments on the substantive offence and the attempt offence see Part 2 of this article.

[6] As mentioned above, the *Code* is to be drawn up and modified under the superintendence of the Attorney General, which makes that officer ultimately responsible for what it contains.

[7] *Interim Policy*, para. 3.

> 'If the case does pass the evidential stage, Crown Prosecutors must proceed to the second stage and decide if a prosecution is needed in the public interest.'

For the origin of these references to the public interest it is necessary to trace back to the historic role of the Attorney General, under whose superintendence the DPP acts (see above) and who is thus in ultimate (and independent) charge of the prosecution process. Among several roles, the Attorney General historically acts as the guardian of the public interest.[8] J. Ll. J. Edwards explained this in detail.[9] The opposite of public benefit is public detriment. As Sellers LJ said in a famous case: 'It cannot, in my opinion, be anything but a public detriment for the law to be defied . . .'[10] In the same case Pearce LJ referred to 'the community's general right to have the laws obeyed'.[11] After mentioning the role of the Attorney General as 'the appointed servant of the Sovereign and guardian of the Crown's interest' Edwards continues:

> 'That role remains, but the passage of time has seen increasing emphasis on the other facet of the office of Attorney General, in which the holder is viewed, and views himself, as the great officer of state to whom the responsibility of safeguarding and representing the public interest is entrusted.'[12]

The *Code* reminds us (para. 5.6) that:

> 'In 1951, Lord Shawcross, who was Attorney General, made the classic statement on public interest, which has been supported by Attorneys General ever since: "It has never been the rule in this country — I hope it never will be — that suspected criminal offences must automatically be the subject of prosecution". (House of Commons Debates, volume 483, column 681, 29 January 1951.)'

The *Code* continues (para. 5.7):

> 'The public interest must be considered in each case where there is enough evidence to provide a realistic prospect of conviction. 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 . . .'

The *Interim Policy* says (para. 14) that, in considering whether or not to prosecute in a particular assisted suicide case, prosecutors must consider the factors for and against prosecution set out in the *Code* and the *Interim Policy*. It adds (para. 15) that 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. It is quite possible that one factor alone may outweigh a number of other factors which tend in the opposite direction.

Factors Favouring Prosecution

The *Code* lists (para. 5.9) some common factors favouring prosecution. Those which appear relevant to assisted suicide are as follows.

a a conviction is likely to result in a significant sentence;

c a weapon was used or violence was threatened during the commission of the offence;

e the defendant was in a position of authority or trust;

f the defendant was a ringleader or an organiser of the offence;

---

[8] *Brookes v DPP of Jamaica* [1994] 1 AC 568 at 569.
[9] See J. Ll. J. Edwards, *The Law Officers of the Crown* (Sweet & Maxwell, 1964) ch. 14.
[10] *Attorney General v Harris* [1961] 1 QB 74 at 86.
[11] *Ibid.* at 92.
[12] *Op. cit.*, p. 295.

g the offence was premeditated;

h the offence was carried out by a group;

i the victim was vulnerable, has been put in considerable fear, or suffered personal attack, damage or disturbance;

j the offence was committed in the presence of, or in close proximity to, a child;

k the offence was motivated by any form of discrimination;

l there is a marked difference between the actual or mental ages of the defendant and the victim, or there is any element of corruption;

m the defendant's previous convictions or cautions are relevant;

o the offence is likely to be continued or repeated.

The *Interim Policy* says (para. 19) that the public interest factors in favour of prosecution in an assisted suicide case are as follows. It adds (para. 24) that they are not exhaustive and each case must be considered on its own facts and on its own merits.

(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;

(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.

Page 775

(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.

The *Interim Policy* adds (para. 20) that 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.

Factors Against Prosecution

The *Code* lists (para. 5.10) some common factors against prosecution. Those which appear relevant to assisted suicide are listed as a, c, f and g, as follows.

a the court is likely to impose a nominal penalty;

c the offence was committed as a result of a genuine mistake or misunderstanding (these factors must be balanced against the seriousness of the offence);

f a prosecution is likely to have a bad effect on the victim's physical or mental health, always bearing in mind the seriousness of the offence;

g the defendant is elderly or is, or was at the time of the offence, suffering from significant mental or physical ill health, unless the offence is serious or there is real possibility that it may be repeated.

The *Interim Policy* says (para. 21) that the public interest factors against prosecution are as follows. It adds (para. 24) that they are not exhaustive and each case must be considered on its own facts and on its own merits.

(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.

The *Interim Policy* adds (para. 20) that 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.

An Acutely Difficult Problem

The DPP is wrestling here with an acutely difficult problem. My own position was publicly disclosed when in 1993 I told the House of Lords Select Committee on Medical Ethics:

> 'I support the present law against deliberate intervention to end life, whether or not the patient gives consent. Euthanasia is open to too many openings for abuse to be tolerable in a civilised society.'[13]

Suicide can be regarded as a form of self-induced euthanasia. In the Suicide Act 1961 Parliament humanely desired to remove the stigma and penalties of suicide while not in any way encouraging anyone to commit suicide or help them do so. It is an anti-euthanasia Act, which has inevitably meant that those who support euthanasia have endeavoured to undermine it. The Voluntary Euthanasia Society changed its name to Dignity in Dying when its chairman was arrested in 2003 after admitting he had planned to help a dying man kill himself.[14] Now Dignity in Dying openly seeks the repeal of the Suicide Act 1961 s. 2. Under the heading Why change the law on assisted dying? it says on its website: 'People want choice and control at the end-of-life'.[15] On the other hand the Care Not Killing Alliance ('CNKA') seeks to attract support among those in the medical profession and allied health services, and in society at large, who are opposed to the *Interim Policy*.[16]

Page 776

The British Medical Association commented on the DPP's *Interim Policy* in this way:

> 'Helping or encouraging another person to end his or her life remains a criminal offence and all cases are referred to the Crown Prosecution Service. Parliament has also made explicit that an offence occurs when individuals disseminate information via media, such as the internet, which would be likely to encourage other people to end their lives. The [DPP] has warned health professionals that they need to be particularly cautious and not take the new guidance lightly. In an interview with the BMJ he said that doctors "need to be . . . very, very careful" as there are "a number of factors . . . that would indicate that they are more likely to be prosecuted than, say, family members". The BMA has long advised doctors - for moral as well as legal reasons - to avoid actions that might be interpreted as assisting, facilitating or encouraging a suicide attempt . . . The BMA remains opposed to doctors taking a role in any form of assisted dying.'[17]

Also relevant are the views of Lord Carlile of Berriew QC, the Government's Independent Reviewer of Terrorism Legislation and President of the Howard League for Penal Reform. He said the provisions of the *Interim Policy* are 'flawed' and run 'directly counter to Parliament's explicit rejection of such proposals twice in the last four years'. He added:

---

[13] See *www.francisbennion.com/1993/009.htm*.

[14] See *The Independent*, 16 December 2003. [The following was added after publication of this article.] I am informed by Dr Peter Saunders of the Christian Medical Fellowship that the name change was not in fact made until 2006: see http://www.cmf.org.uk/publicpolicy/press_release/?id=79.

[15] See *www.dignityindying.org.uk/about/faq.html*.

[16] For CNKA's detailed reply to the DPP's consultation see *www.carenotkilling.org.uk/?show=858*.

[17] Statement dated 29 September 2009.

> 'Anyone who has followed the political debate on "assisted dying" in this country will recognise many of the stereotypes that make an appearance in the guidelines – from the families who are invariably seen as "loved ones" who are "wholly motivated by compassion" to the victims with a "settled" – and therefore (it is assumed) rational – wish to end their lives. It comes as no surprise therefore that Dignity in Dying, formerly the Voluntary Euthanasia Society, has hailed the guidelines as "a significant breakthrough" and as a stepping stone to a euthanasia law. Mr Starmer was set an impossible task by the Law Lords . . . But the result is simply not fit for purpose. It accepts many of the false assumptions of the euthanasia lobby and it trespasses in a number of places on the political debate on assisted suicide. The finished article will have to contain many changes . . .'[18]

I should also mention the DPP's decision in the case of Daniel James, which paved the way for the *Interim Policy*. Daniel committed suicide, with his parents at his side, at a Dignitas clinic in Switzerland on 12 September 2008 aged 23 years. He had been diagnosed as tetraplegic, paralysed from the chest down with no independent hand or finger movement, following an injury during a training session at his rugby club. His medical consultant concluded that it was unlikely that there would ever be any significant improvement in Daniel's neurological status and that there was "no treatment available to either aid or produce recovery". On 9 December 2008 the DPP announced that, while there was sufficient evidence for a realistic prospect of conviction of Mark and Julie James in relation to the death by suicide of their son Daniel, such a prosecution was not in the public interest and no further action should be taken either against them or against a family friend who assisted them.

The Daniel James decision is the acme of the 'compassionate' approach, whereby exclusively compassionate grounds are held to justify failure to prosecute.

My Conclusions (disregarding the 2009 amendments)

I have spent sixty years in the law, as a practising barrister, legislative draftsman, academic lawyer and textbook writer. I have found that a useful short cut in situations like this is to ask oneself: What would the Parliament that passed the enactment in question have said about factors regarding prosecutions, bearing in mind the wording it employed? Having considered that question in the present context, and subject to the final section of Part 1 of this article, I conclude as follows.

It seems that factors for or against prosecution in the *Interim Policy* should be rejected if they are based on an unlawful policy that contravenes the legislative intention by encouraging or tolerating the 'compassionate' assisting of suicide. Many of the paragraphs are objectionable on this ground because they imply that the opposite of what they postulate would be acceptable, when in fact it ought not to be.

An Updating Construction of the 1961 Act?

It seems that the only possible argument against the above is that there should be what is called an updating construction of the Suicide Act 1961. It is presumed that, unless it has indicated otherwise, Parliament intends the court to apply to an ongoing Act such as the Suicide Act 1961 a construction that continuously updates its wording to allow for changes since the Act was initially framed (an updating construction). While it remains law, it is to be treated as always speaking. This means that in its application on any date, the language of the Act, though necessarily embedded in its own time, is nevertheless to be construed in accordance with the need to treat it as current law.[19] This statement in my textbook has often been approved by the courts.[20]

---

[18] *Daily Telegraph*, 14 November 2009.
[19] F. A. R. Bennion, *Bennion on Statutory Interpretation* (5th edn, 2008), s. 288(2).
[20] See cases cited in Ibid, footnote 3 on p. 890.

The changes in question here are changes in social conditions and outlook. They are discussed at length in my book.[21] My own view is that the Suicide Act 1961 should not be given an updating construction to accommodate the views of those who would adopt the modern 'compassionate' approach to assisted suicide. I believe the wording of the Act is too strongly against it. Also, there is no general agreement on such a move - indeed there is widespread feeling against it. Parliament itself has shown itself opposed to it.

Part 2

Redrafting the Suicide Offences

The object of the Coroners and Justice Act 2009 s. 59(2) is to modernise the drafting of the substantive offence and the attempt offence. As stated above, the Suicide Act 1961 s. 2(1) currently provides that a person who 'aids, abets, counsels or procures' the suicide or attempted suicide of another person commits an offence (the substantive offence). By virtue of the Criminal Attempts Act 1981 s. 1 it is also an offence to *attempt* to aid,

Page 777

abet, counsel or procure the suicide or attempted suicide of another person (the attempt offence). Section 59(2) replaces the substantive and attempt offences with a single offence expressed in terms of 'encouraging or assisting' the suicide or attempted suicide of another person. An official explanatory note says that s. 59(2) modernises the language of the current law with the aim of improving understanding of this area of the law, is in line with the case law relating to the existing substantive and attempt offences, and does not change the scope of the current law.

Section 59(2) replaces section 2(1) of the Suicide Act 1961. It provides that a person ('D') commits an offence if D does an act which is capable of encouraging or assisting another person to commit or attempt to commit suicide, and if D intends the act to encourage or assist suicide or an attempt at suicide. D need not know, or even be able to identify, the other person. So, for example, the author of a website promoting suicide who intends that one or more of his or her readers will commit or attempt to commit suicide will be guilty of an offence, even though he or she may never know the identity of those who access the website. D may commit an offence whether or not a suicide, or an attempt at suicide, occurs. As before, an offence under s. 59(2) is triable on indictment and a person convicted is liable to imprisonment for a term not exceeding 14 years.

Section 59(4) inserts new ss. 2A and 2B into the Suicide Act 1961. The new s. 2A elaborates on what constitutes an act capable of encouraging or assisting suicide. The new s. 2A(1) provides that if D arranges for someone else to do an act capable of encouraging or assisting the suicide or attempted suicide of another person D will be liable for the offence if the other person does that act. It says that if D arranges for a person ('D2') to do an act that is capable of encouraging or assisting the suicide or attempted suicide of another person and D2 does that act, both D and D2 are to be treated as having done it.

The new s. 2A(2) has the effect that an act can be capable of encouraging or assisting suicide even if the circumstances are such that it was impossible for the act to actually encourage or assist suicide. An act is therefore treated as capable of encouraging and assisting suicide if it would have been so capable had the facts been as D believed them to be at the time of the act (for example, if pills provided with the intention that they will assist a person to commit suicide are thought to be lethal but are in fact harmless) or had subsequent events happened as the defendant believed they would happen (for example, if lethal pills which were sent to a person with the intention that the person would use them to commit or attempt to commit suicide get lost in the post).

[21] See pp. 901-904.

The new s. 2A(3) says that references to doing an act capable of encouraging or assisting another to commit or attempt suicide include doing so by threatening another person or otherwise putting pressure on another person to commit or attempt suicide. The new s. 2B provides that references to an act include a course of conduct. *There is no mention of compassion*.

The Coroners and Justice Act 2009 s. 61 and Sch. 12 make special provision in connection with the operation of the Suicide Act 1961 s. 2 in relation to persons providing 'information society services' within the meaning of Article 2(a) of Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce). It appears that this is directed at what Baroness Emerton called 'the predatory internet sites'.[22]

The Falconer Amendment

Lord Falconer of Thoroton moved a new clause to the Bill for the Coroners and Justice Act 2009 which provided that, as he put it, '[i]t should not be a crime if you accompany someone to a country where assisted dying is lawful if the sole purpose of your accompanying them is to assist them in going to the place where assisted dying is lawful'.[23] This was in line with the DPP's *Interim Policy*, but was defeated by 194 votes to 141.

Answering for the Government the debate on Lord Falconer's new clause, Lord Bach said of the Government's clause 49 (which became s. 59 of the Act):

> ' . . . the provisions in clause 49 do not change the scope of the current law. Our aim is to simplify the law by bringing together two existing offences and to modernise the language to add clarity and understanding. Assisting or attempting to assist suicide would remain illegal.'[24]

Lord Bach did not mention compassion.

Regarding the DPP's practice, Lord Bach said there was not 'a long line of cases where the CPS has decided that there was prima facie evidence of an offence but decided not to prosecute'.[25]

Conclusions

In its 2009 treatment of the 1961 Act Parliament clearly intended to keep the Act's philosophy unchanged and merely clarify and modernise its provisions. Anyone who encourages or assists suicide or an attempt at suicide continues to be triable in the Crown Court rather than a magistrates' court and to be liable to the severe punishment of imprisonment for fourteen years. It is no longer necessary that suicide, or an attempt at suicide, should actually have occurred. No mention is added of the 'compassionate' assistant being absolved.

The 2009 Act has thus strengthened, rather than weakened, the force of my reference above to an unlawful prosecution policy 'that contravenes the legislative intention by encouraging or tolerating the 'compassionate' assisting of suicide'. With respect, it might be thought inappropriate for the DPP to launch a consultation concerning the pre-2009 Act *Interim Policy* at a time when it was known that the Bill for the 2009 Act contained provisions which would necessitate alterations in the *Interim Policy*.

The 2009 Act provisions (including what is *not* included in it) appear to have rendered abortive the DPP's current consultation. He will presumably need to hold a further consultation when the 2009 Act provisions come into force.

---

[22] HL Deb. 7 July 2009, col. 622.
[23] Ibid., col. 597.
[24] Ibid., col. 631.
[25] Ibid., cols. 631-632.