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Crossing the Natural Frontier: Has Assisted Dying Been *De Facto* Decriminalised in the UK?

James E. Hurford

Solicitor, London

1. Assisted Dying ("AD")[1] remains one of society's hot-button issues. While several countries now permit AD, or are considering doing so, the UK has maintained a firm stance against any legalisation. AD remains illegal under s. 2(1) of the Suicide Act 1961:

> (1) A person ("D") commits an offence if –
> (a) D does an act capable of encouraging or assisting the suicide or attempted suicide of another person, and
> (b) D's act was intended to encourage or assist suicide or an attempt at suicide.

2. Courts have repeatedly rejected challenges to this prohibition, making it clear that it is for Parliament, and not courts, to make changes. However, there are signs that, notwithstanding these clear signals, the UK is moving towards a position where AD is de facto, if not de jure, decriminalised by way of the offence not being prosecuted in many cases.

Background

3. The offence under s. 2(1) is unusual, in that it creates criminal liability for assisting a third party to undertake an act which is not itself criminal.[2] However, its purpose is obvious:

> Parliament had in mind the potential scope for disaster and malpractice in circumstances where elderly, infirm and easily suggestible people are sometimes minded to wish themselves dead[3]

4. The law applies regardless of the suspect's motivation, creating a blanket prohibition on providing assistance to another wishing to end their life.

5. Numerous challenges have been brought by seriously ill individuals, arguing that s. 2(1) violates their rights under the European Convention on Human Rights ("ECHR"). In *R (Pretty) v Director of Public Prosecutions* [2001] UKHL 61, [2002] 1 AC 800 the House of Lords held that rights to life (Art. 2), prohibition of inhumane or degrading treatment

[1]Both assisted suicide and voluntary euthanasia are referred to hereafter as "AD".
[2]*R (Purdy) v Director of Public Prosecutions* [2009] UKHL 45, [2010] 1 AC 345 at [102].
[3]*R v Hough* (1984) 6 Cr App R (S) 406 at 409.

(Art. 3), and private and family life (Art. 8) were not engaged. The European Court of Human Rights ("ECtHR") disagreed to the extent that it found that Art. 8 applied, but that Mrs Pretty's rights had not been infringed,[4] a position adopted by their Lordships in *R (Purdy) v Director of Public Prosecutions* [2009] UKHL 45, [2010] 2 AC 345. Subsequently, courts at all levels have upheld this position, most significantly in *R (Nicklinson) v Ministry of Justice* [2014] UKSC 38, [2015] AC 657 ("*Nicklinson UKSC*"). The Supreme Court reiterated that s. 2(1) did not infringe Art. 8. However, several judges questioned the extent to which this would remain so, indicating (para. 111) that they would be prepared to make a Declaration of Incompatibility if Parliament did not act, although it would be "institutionally inappropriate" to do so at that time.

6. Since *Nicklinson*, further claims have sought such a declaration. In *R (Conway) v Secretary of State for Justice* [2018] EWCA Civ 1431, [2020] QB 1, the Court of Appeal reiterated that Parliament was the appropriate body to determine issues of social policy that raised "conflicting, and highly contested, views within our society on the ethical and moral issues (para. 186)."

7. In *R (T) v Secretary of State for Justice* [2018] EWHC 2615 (Admin) and *R (Newby) v Secretary of State for Justice* [2019] EWHC 3118 (Admin), claimants sought to introduce evidence which, they argued, would allow the court to analyse these issues. Such evidence was said to amount to "legislative facts", of the kind that would guide Parliament, and would go to the question of whether prohibition was proportionate:

> in order for the court to be enabled to embark upon a meaningful assessment of whether the interference with Article 8(1) ECHR can be justified under Article 8(2) ECHR, the court must examine fully the information concerning the validity of the costs, risks, and benefits of regulating assisted suicide. By inference, the argument amounts to the proposition that ignorance of this evidence inhibits the court from making a proper assessment of whether the current law is proportionate to its legitimate aim.[5]

8. Both attempts were rejected. The Divisional Court in *Newby* reiterated that these questions (para. 42):

> plainly and simply, cannot be "resolved" by a court as no objective, single, correct answer can be said to exist. On issues such as the sanctity of life there is no consensus to be gleaned from evidence.

9. Once again, issues of high policy, and public morality, are not for the courts to decide. At present, it appears that UK courts have accepted that the judiciary is not institutionally competent to resolve such matters.[6] Questions around sanctity of life, and the

[4] *Pretty v UK* [2002] ECHR 427, (2002) 35 EHRR 1 at [67], [74]
[5] *Newby*, para. 29.
[6] The Court of Appeal refused leave to appeal in *Newby*, finding "the essence of the claim has been argued in a number of different ways in a number of different cases"; see E. Reyes. "Court of Appeal rejects JR on assisted dying", *Law Society Gazette*, 30 January 2020 <www.lawgazette.co.uk/news/court-of-appeal-rejects-jr-on-assisted-dying/5102914.article> (accessed 2 June 2020).

desirability or otherwise of permitting AD, are not binary questions of the kind that courts are usually called upon to determine on the basis of evidence; they are questions of morality, on which rational individuals can disagree. Such matters are properly left to an elected and politically accountable Parliament – the body empowered to resolve policy issues by virtue of its status as representative of the *demos*. A similar approach has been taken by the ECtHR, which has held that the availability or otherwise of AD is a matter within the wide margin of appreciation afforded to the Member States.[7] For its own part, Parliament has engaged with the issue repeatedly. Between 1994 and 2017, Parliament considered AD 15 times without changing the law.[8] Parliament has consistently rejected any attempts at changing the law in relation to AD.

Purdy

10. If claimants have had limited success in challenging s. 2(1), there has been more success in challenging s. 2(4), the requirement for consent to bring prosecutions. Section 2(4) provides:

> No proceedings shall be instituted for an offence under this section except by or with the consent of the Director of Public Prosecutions.

11. Whether consent is given is governed by the Code for Crown Prosecutors ("the Code"), promulgated by the DPP under s. 10 of the Prosecution of Offences Act 1985. In its current iteration – updated in October 2018, although broadly similar to previous versions – a prosecution may only be brought when the "Full Code Test" is met.[9] This test has two stages:
    (1) Prosecutors must be satisfied that there is sufficient evidence to provide a realistic prospect of conviction against each suspect on each charge;[10] and
    (2) Assuming the evidential test is met, whether a prosecution is required in the public interest.[11]

12. The way in which prosecutorial discretion was exercised in the context of s. 2(1) was challenged in *Purdy*.

Debbie Purdy suffered from primary progressive multiple sclerosis. She took the view that once her condition had become unbearable, she would wish to end her life by travelling to another country where AD was legal. At that stage, however, it was certain that she would require assistance from her husband to make the journey.

At the time of the final hearing, there had been some 115 cases in which individuals had assisted others to travel abroad for the purposes of AD; eight had been referred to the DPP for a decision on prosecution. In six cases, the DPP declined to prosecute on grounds that

[7] *Nicklinson & Lamb v UK* [2015] ECHR 783 (2015) 61 EHRR SE7 at [84].
[8] *R (Conway) v Secretary of State for Justice* [2017] EWHC 2447 (Admin), [2018] 2 WLR 322 at [50]–[52].
[9] CPS, *The Code for Crown Prosecutors* (8th edn, 2018), p. 7, para. 4.9.
[10] Ibid. para. 4.6.
[11] Ibid. para. 4.9.

the evidential test was not met. However, the DPP had declined to prosecute the family of Daniel James – a young man who suffered catastrophic injuries while playing rugby, and whose family had assisted him to travel to Switzerland to end his life – on the basis that the public interest test was not met. In that case, the DPP provided written reasons for the decision; he had not done so in respect of any other cases.

13. Mrs Purdy sought an indication from the DPP as to whether he would consent to her husband being prosecuted, in order to make an informed decision as to whether she could ask for her husband's assistance. The DPP declined to indicate what factors he would take into account in determining whether the public interest test would be met.

14. Their Lordships accepted that Mrs Purdy's Art. 8 rights were engaged. The question, then, was whether the interference was in accordance with the law; whether the law was "formulated with sufficient precision to enable the individual, if need be with appropriate advice, to regulate his conduct" (para. 43). They concluded that for this purpose the law included the DPP's prosecution policy, which had to satisfy (para. 47):

> the requirements of accessibility and foreseeability where the question is whether, in an exceptional case such as that which Ms Purdy's circumstances are likely to give rise to, it is in the public interest that proceedings under section 2(1) should be instituted against those who have rendered assistance.

15. It was noted that the Code as drafted at that time set out a number of factors, which were the same for all offences. There was no *specific* set of factors governing the special circumstances of prosecutions under s. 2(1). Although the DPP had established a special team to deal with such matters, the House held that this was inadequate, as any individual potentially faced with such a prosecution could not adequately appreciate the risk he faced (para. 53).

16. Their Lordships recognised that such a policy would assist CPS case workers by allowing them to take into account the whole background of the case (para. 54), as well as ensuring that vulnerable individuals are protected. Lord Hope concluded (para. 55):

> The cases that have been referred to the Director are few, but they will undoubtedly grow in number. Decisions in this area of the law are, of course, highly sensitive to the facts of each case. They are also likely to be controversial. But I would not regard these as reasons for excusing the Director from the obligation to clarify what his position is as to the factors that he regards as relevant for and against prosecution in this very special and carefully defined class of case. How he goes about this task must be a matter for him, as also must be the ultimate decision as to whether or not to prosecute. But, as the definition which I have given may show, 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 will continue to apply to all those cases that fall outside it.

17. The appeal was allowed, and the DPP was directed to produce 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" (para. 56).

The 2010 Policy

18. Following *Purdy*, and following public consultation, the DPP issued a *Policy for prosecutors in respect of cases of encouraging or assisting suicide*[12] ("the 2010 Policy") setting out the relevant factors that the DPP will consider. The centrepiece of the 2010 Policy was a list of factors that the DPP indicated he would take into account in determining whether prosecutions would be brought. Paragraph 43[13] indicated that prosecution would be more likely to be required if:
    (1) the victim was under 18 years of age;
    (2) the victim did not have the capacity (as defined by the Mental Capacity Act 2005) to reach an informed decision to commit suicide;
    (3) the victim had not reached a voluntary, clear, settled and informed decision to commit suicide;
    (4) the victim had not clearly and unequivocally communicated his or her decision to commit suicide to the suspect;
    (5) the victim did not seek the encouragement or assistance of the suspect personally or on his or her own initiative;
    (6) the suspect was not wholly motivated by compassion; for example, the suspect was motivated by the prospect that he or she or a person closely connected to him or her stood to gain in some way from the death of the victim;
    (7) the suspect pressured the victim to commit suicide;
    (8) the suspect did not take reasonable steps to ensure that any other person had not pressured the victim to commit suicide;
    (9) the suspect had a history of violence or abuse against the victim;
    (10) the victim was physically able to undertake the act that constituted the assistance him or herself;
    (11) the suspect was unknown to the victim and encouraged or assisted the victim to commit or attempt to commit suicide by providing specific information via, for example, a website or publication;
    (12) the suspect gave encouragement or 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 his or her encouragement or assistance;
    (14) the suspect was acting in his or her capacity as a medical doctor, nurse, other healthcare professional, a professional carer [whether for payment or not], or as a person in authority, such as a prison officer, *and the victim was in his or her care*;
    (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;

[12]CPS, *Policy for prosecutors in respect of cases of encouraging or assisting suicide* (2010) (updated October 2014).
[13]Quoted in *Nicklinson UKSC*, para. 46.

(16) the suspect was acting in his or her capacity as a person involved in the management or as an employee (whether for payment or not) of an organisation or group, a purpose of which is to provide a physical environment (whether for payment or not) in which to allow another to commit suicide.

19. The factors telling against prosecution, contained in para. 45:[14]
    (1) the victim had reached a voluntary, clear, settled and informed decision to commit suicide;
    (2) the suspect was wholly motivated by compassion;
    (3) the actions of the suspect, although sufficient to come within the definition of the offence, were of only minor encouragement or assistance;
    (4) the suspect had sought to dissuade the victim from taking the course of action which resulted in his or her suicide;
    (5) the actions of the suspect may be characterised as reluctant encouragement or assistance in the face of a determined wish on the part of the victim to commit suicide;
    (6) the suspect reported the victim's suicide to the police and fully assisted them in their enquiries into the circumstances of the suicide or the attempt and his or her part in providing encouragement or assistance.

"Martin's" case

20. In due course, the 2010 Policy was challenged in *R (AM) v DPP*.[15] The appellant – referred to in the judgment as "Martin" – argued that the policy was:

> … insufficiently clear in relation to the likelihood of prosecution of those individuals (other than relatives and close friends of the person concerned), especially including doctors and other members of the caring professions, who might otherwise be prepared, out of compassion, to provide a person who has a voluntary, clear, settled and informed wish to commit suicide, with information, advice and assistance in connection with that wish.[16]

21. He further argued that the Policy should be modified to make it clear that, absent aggravating circumstances, an individual providing this kind of assistance would not be liable to prosecution. The argument centred around para. 43(14), and the position of professional carers. It was suggested that the policy contained an anomaly, whereby family members who assisted would avoid prosecution but a professional carer or healthcare professional would not on the same facts. A majority in the Court of Appeal (*R (Nicklinson) v Ministry of Justice* [2013] EWCA Civ 961, [2014] 2 All ER 32 ("*Nicklinson CA*")) considered that the 2010 Policy was, in this regard, insufficiently clear (para. 140). However, dissenting, the Lord Chief Justice held:

[14]Ibid. para. 47.
[15]The appeal was joined with *Nicklinson*.
[16]*Nicklinson UKSC*, para. 57.

> 185. … [I]t seems clear to me that paragraph 14 addresses the risks which can arise when someone in a position of authority or trust, and on whom the victim would therefore depend to a greater or lesser extent, assisting in the suicide in circumstances in which, just because of the position of authority and trust, the person in authority might be able to exercise undue influence over the victim. As I read this paragraph it does not extend to an individual who happens to be a member of a profession, or indeed a professional carer, brought in from outside, without previous influence or authority over the victim, or his family, for the simple purposes of assisting the suicide after the victim has reached his or her own settled decision to end life, when, although emotionally supportive of him, his wife cannot provide the necessary physical assistance.
>
> 186. … it would come as no surprise at all for the DPP to decide that a prosecution would be inappropriate in a situation where a loving spouse or partner, as a final act of devotion and compassion assisted the suicide of an individual who had made a clear, final and settled termination to end his or her own life. The Policy … deliberately does not restrict the decision to withhold consent to family members or close friends acting out of love and devotion. The Policy certainly does not lead to what would otherwise be an extraordinary anomaly, that those who are brought in to help from outside the family circle … are more likely to be prosecuted than a family member when they do no more than replace a loving member of the family, acting out of compassion, who supports the "victim" to achieve his desired suicide. The stranger brought into this situation, who is not profiteering, but rather assisting to provide services which, if provided by the wife, would not attract a prosecution, seems to me most unlikely to be prosecuted. In my respectful judgment this Policy is sufficiently clear to enable Martin, or anyone who assists him, to make an informed decision about the likelihood of prosecution.

22. At the Supreme Court hearing, the DPP confirmed that the Lord Chief Justice's interpretation was the one it intended;[17] despite some raised eyebrows, the court declined to direct that the Policy be amended, suggesting instead that the DPP should review it, "with a view to amending it so as to reflect the concerns expressed in the judgments of this Court, and any other concerns which she considers it appropriate to accommodate" (para. 144).

23. The 2010 Policy was amended in 2014 in an effort to clarify the position. A subsequent attempt to argue that the amendment was unlawful was rejected by the High Court.[18]

Prosecution under the 2010 Policy

24. The 2010 Policy makes clear that it is intended to clarify the DPP's position on what factors would be taken into account in cases of encouraging and assisting suicide. It is also clear on what it is not intended to do (para. 6):

> This policy does not in any way "decriminalise" the offence of encouraging or assisting suicide. Nothing in this policy can be taken to amount to an assurance that a person will be immune from prosecution if he or she does an act that encourages or assists the suicide or the attempted suicide of another person.

[17] Ibid. para. 251.
[18] *R (Kenward) v DPP* [2015] EWHC 3508 (Admin), [2016] 1 Cr App R 16.

25. As the High Court characterised it:

> The Policy does not remove bright lines where previously they existed and no assistance or encouragement is rendered lawful that previously was unlawful.[19]

26. In some respects this may be inaccurate. The mens rea required to prove an offence under s. 2(1) is that the accused intended their action to assist someone to commit suicide or to encourage them to do so.[20] Motive is irrelevant.[21] This caused discomfort for their Lordships, which Lord Brown articulated. He acknowledged that the Code was based on a presumption that "whatever mitigation may be available in any given case, behaviour contrary to the criminal law is invariably to be deprecated if not always to be prosecuted".[22] However, he held:

> For my part, however, and without in the least wishing to sound contentious, I seriously question whether one should always deprecate conduct criminalised by section 2(1). … *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*.[23]

27. Lord Brown apparently envisaged any policy as going beyond clarifying circumstances in which prosecution will be brought; he seems to have envisaged it speaking to *motivation*. This approach has carried across into the terms of the 2010 Policy. At the heart of the policy are two lists of factors, for and against prosecution. The factors said to make prosecution inappropriate aim squarely at the "altruistic" defendant, whose conduct Lord Brown would be less prepared to deprecate. Fundamentally, it speaks to those whose actions are compassionate.[24] This creates an additional, motive-based element to the offence under s. 2(1). It should be noted that their Lordships considered that the Code formed part of "the law" for the purposes of determining whether the restriction was "in accordance with the law". If so, arguably the 2010 Policy implicitly incorporates motive as an element of the offence.

28. Even if this is incorrect, there appears to be a position taken that there will be no prosecution brought if the suspect's actions fall within the criteria identified as making prosecution inappropriate. A logical end of this is that prosecution may become highly unlikely in the absence of demonstrably evil motives.[25]

29. The obvious objection is that a policy is not an equivalent of statute. Prosecuting authorities always have discretion as to whether to bring proceedings. It is perhaps a

[19]Ibid. para. 53.
[20]*Attorney-General v Abel* [1984] QB 795 at 812.
[21]B. Livings, "A Right to Assist? Assisted Dying and the Interim Policy" (2010) 74 J Crim Law 31, 33.
[22]*Purdy*, para. 83.
[23]Ibid. (emphasis added).
[24]A. Mullock, "Overlooking the Criminally Compassionate: What are the Implications of Prosecutorial Policy on Encouraging or Assisting Suicide?" (2010) 18(4) Med L Rev 442, 454.
[25]Ibid. 454.

stretch to argue that merely creating a policy suggesting that prosecution will not occur amounts to a change to the offence. This is true, in that it does not change the nature of the offence or any of its statutory elements. However, in public law terms, a decision-maker must follow a published policy unless there are good reasons not to do so, in order to ensure consistency in decision-making.[26] The ultimate effect of a policy of this nature could be to create a situation where an individual who is potentially liable to prosecution under s. 2(1) could seek to argue that they *cannot* be prosecuted if they can show that there are mitigating factors for their conduct. Nobles and Schiff make this point strongly:

> As, when and if Ms Purdy's husband, or those in similar positions, take actions that fall squarely within the circumstances that indicate that a prosecution will be inappropriate they may have a right (most likely formulated through the description of any prosecution as an abuse of process, or through an application for judicial review based on frustration of legitimate expectations) not to be prosecuted for disobeying the law.[27]

30. Whatever the mechanism, the effect of a policy indicating that prosecution will not generally brought in particular circumstances could amount to de facto decriminalisation, on the basis that it would be reasonable for any individual who is able to satisfy the criteria to assume that they would not face prosecution.[28]

Ninian

31. Some illustration of the potential effect of the policy may be found from the recent case of *Ninian v Findlay* [2019] EWHC 297 (Ch), [2019] WTLR 645. Mrs Ninian's terminally ill husband attended the DIGNITAS Clinic in Switzerland in order to end his life. She assisted him in undertaking some of the administrative steps required, and travelled with him to Zurich. It was accepted that Mrs Ninian was an unwilling participant, had handed herself in to the police, and had cooperated in the ensuing criminal investigation. No charges were brought. However, Mrs Ninian was concerned that her actions may have amounted to unlawfully killing her husband; this would have prevented her from inheriting his estate under the "forfeiture rule".[29] She thus applied for relief against forfeiture under s. 2 of the Forfeiture Act 1982.

32. The court considered (para. 13) that where there had been no criminal conviction, it should consider:
    (1) Whether on the balance of probability there has been an unlawful killing. This first stage is required by s. 2(1) of the Forfeiture Act as a prerequisite to considering relief.
    (2) Whether the court should exercise its power under s. 2(1) of the Forfeiture Act, applying the criteria set out in s. 2(2).

[26] *Lumba v Secretary of State for the Home Department* [2011] UKSC 12, [2012] 1 AC 245 at [26].
[27] R. Nobles and D. Schiff, "Disobedience to Law – Debbie Purdy's Case" (2010) 73(2) MLR 295, 298.
[28] Livings (n. 21 above), pp. 50–51.
[29] *Dunbar v Plant* [1998] Ch 412.

33. In respect of the first stage, the court directed itself to consider the following questions (para. 44):
    (1) Did Mrs Ninian do an act that was capable of encouraging or assisting Mr Ninian's suicide?
    (2) If she did an act that was capable of encouraging or assisting Mr Ninian's suicide, did she intend to encourage or assist her husband's suicide?

34. On the balance of probabilities, the court was satisfied that the offence under s. 2 had been committed (para. 46). It nevertheless found that, in all circumstances, Mrs Ninian should be granted relief.

35. *Ninian* should be approached cautiously. It was a civil claim, and subject to a lower standard of proof. The claim was not contested, and thus not subject to full argument. However, it may be illustrative. The court was satisfied that the offence was committed; no proceedings had been brought, because the DPP declined to proceed. Notably, in exercising its discretion to allow relief, the court considered the factors set out in the 2010 Policy, stating upfront that this required consideration of moral culpability and motive (para. 49). The court's approach here is clear: despite identifying the statutory elements of the offence, it was prepared to remove any sanction on the basis of the claimant's motives. It is true that there are significant differences between prosecutorial discretion and discretion to grant relief from forfeiture; however, the approach taken may be instructive of how the DPP is likely to apply the policy.

De facto decriminalisation?

36. So far, we have seen that the DPP has broad discretion. Does this actually affect the way in which the offence is approached?

37. The statistics do suggest that the DPP's discretion is rarely exercised. Between 1 April 2009 and 31 July 2019, the police referred 152 cases to the CPS. Of these, nine appear to have proceeded to prosecution, three of which were outstanding as of 31 July 2019.[30] In contrast, 457 UK nationals had died at the DIGNITAS Clinic as of 2019.[31] Anyone providing material assistance to these individuals could, in principle, have committed an offence under s. 2(1), yet few have been prosecuted. Less than half have even been referred to the CPS, leading to suggestions that the current Guidelines[32] for investigation – issued by the now defunct Association of Chief Police Officers – have led to police forces not investigating cases.[33] The limited number of

[30]CPS, "Assisted Suicide", 21 July 2019 <www.cps.gov.uk/publication/assisted-suicide> (accessed 2 June 2020).
[31]DIGNITAS, "Accompanied suicide of members of DIGNITAS, by year and by country of residency (1998–2019)" (May 2019) <www.dignitas.ch/images/stories/pdf/statistik-ftb-jahr-wohnsitz-1998-2019.pdf> (accessed 2 June 2020).
[32]ACPO, *Guidelines on Dealing with Cases of Encouraging or Assisting Suicide* (2012).
[33]M. Beckford, "Assisted suicide 'is legalised' by police: Secret new guidelines from senior officers mean deaths are not investigated", *Daily Mail*, 24 February 2013 <www.dailymail.co.uk/news/article-2283561/Assisted-suicide-legalised-police-Secret-new-guidelines-senior-officers-mean-deaths-investigated.html> (accessed 29 May 2020).

cases referred to the CPS compared to the number of possible offences suggests that some policy of limited investigation is in force.

38. Taken together, there is an indication that s. 2(1) is only exceptionally enforced. This has created a situation where, essentially, AD is permitted by limiting the circumstances in which individuals will be prosecuted – a position similar to that which arose in Belgium immediately before it legalised AD.[34] At best, this is toleration; at worst, it is de facto legalisation.

The problem?

39. One might ask whether this is a problem. Parliament plainly intended to allow the DPP discretion by virtue of s. 2(4), recognising in doing so that there may be circumstances where the public interest does not require prosecution.[35] Provided the discretion is applied consistently, one might ask why it should raise concerns. There are, nevertheless, serious objections to be made.

40. A decision to refuse to prosecute is effectively final. Decisions of the DPP are amenable to judicial review; in practice, however, any challenge is unlikely to succeed. It is established that a DPP decision may only be challenged where:
    (1) there is an unlawful policy;
    (2) the DPP has failed to act in accordance with his own set policy; or
    (3) the decision was perverse.[36]

41. Such challenges will rarely succeed.[37] The practical effect is that decisions not to prosecute are likely to be insulated from challenge.

42. More fundamentally, placing such a wide discretion in the hands of the DPP is constitutionally improper. There may be strong and justifiable reasons for requiring consent to bring a prosecution. In *R (Purdy) v DPP* [2009] EWCA Civ 92, [2009] 1 Cr App R 32 at [67], the Court of Appeal endorsed a memorandum provided by the Home Office to the Franks Committee on the Official Secrets Act in 1972, which identified reasons such as:
    (a) secure consistency of practice in bringing prosecutions, e.g., where it is not possible to define the offence very precisely so that the law goes wider than the mischief aimed at or is open to a variety of interpretations;
    (b) to prevent abuse or the bringing of the law into disrepute, e.g., with the kind of offence which might otherwise result in vexatious private prosecution … ;

[34] C. MacKellar. "Some Possible Consequences Arising from the Normalisation of Euthanasia in Belgium", in D.A. Jones et al. (eds), *Euthanasia and Assisted Suicide: Lessons from Belgium* (Cambridge University Press, 2017), pp. 219, 222.
[35] *Dunbar* (n. 29 above), p. 437.
[36] *R v DPP ex p. C* (1995) Cr App R 136 at 140–141.
[37] See, inter alia, *L v DPP* [2013] EWHC 1752 (Admin), (2013) 177 JP 502 at [5].

(c) to enable account to be taken of mitigating factors, which may vary so widely from case to case that they are not susceptible to statutory definition;
(d) to provide some central control over the use of criminal law when it has to intrude into areas which are particularly sensitive or controversial …

43. The post-*Purdy* situation, however, goes beyond that. There is now an effective extra-statutory "motive" element, devised and promulgated by the DPP, but which forms part of "the law". Spencer asks:

> Is it really compatible with the rule of law that, when an Act of Parliament makes a certain form of behaviour a criminal offence, the DPP should in effect decriminalise it, in whole or in part, by saying when it will and will not be prosecuted?[38]

44. Bluntly, no. As *Nicklinson* makes clear, it is for Parliament to amend the scope of criminal offences. If it is impermissible for the judiciary to trespass on Parliament's turf, it is equally impermissible for the DPP – an officer ultimately appointed by the Crown – to do so. That is not to say the DPP should not have a role. Selective prosecution is in many ways utterly proper. It is conceivable that there may be situations which, on their facts, engender such sympathy that they should not attract the full weight of the law, whether that is by way of declining to prosecute or by minimising punishment after conviction. However, it is one thing to exercise mercy in a deserving case; it is quite another to fail to enforce the law. Constitutionally, the 2010 Policy undercuts s. 2(1).

45. The most fundamental objection, however, should not be legal, but ethical. "Laws", it has been said, "like nation states, are more secure when their boundaries rest on natural frontiers".[39] One of society's clearest natural frontiers is the one marked "thou shalt not kill"; all societies appear to have moral rules against deliberate killing, without which society cannot function.[40] Section 2(1) presents a "bright-line" rule against deliberate killing;[41] a message that human life remains inherently sacred; a basic good, worthy of protection in its own right.[42] Once society begins to depart from this, however small the step, it risks undermining that principle. Where AD is permitted, we may already see the results. Statistics from Belgium show year-on-year increases in reported cases;[43] evidence suggests up to half of euthanasia cases in the Flanders region cases go – unlawfully – unreported.[44] In the Netherlands, AD has extended from the terminally to the chronically ill; from the physically to

[38] J.R. Spencer, "Assisted Suicide and the Discretion to Prosecute" (2009) 68(3) CLR 493, 495.
[39] E. Butler-Sloss, "The law is there to protect the dying", *The Sunday Telegraph*, 15 December 2013, p. 29.
[40] A. MacIntyre, *A Short History of Ethics* (2nd edn, Routledge, 1998), p. 99.
[41] J. Keown, *Physician-Assisted Suicide: Some Reasons for Rejecting Lord Falconer's Bill* (Care Not Killing Alliance, 2014), p. 1.
[42] J. Finnis, *Natural Law and Natural Rights* (2nd edn, Oxford University Press, 2011), p. 86.
[43] E. Montero, "The Belgian Experience of Euthanasia Since Its Legal Implementation in 2002", in D.A. Jones et al. (eds), *Euthanasia and Assisted Suicide: Lessons from Belgium* (Cambridge University Press, 2017), pp. 26, 45.
[44] T. Smets et al., "Reporting of Euthanasia in Medical Practice in Flanders, Belgium: Cross Sectional Analysis of Reported and Unreported Cases" (2010) 341 (7777) BMJ 819, 819.

psychiatrically ill; to the elderly and "tired of living",[45] to the point where more than 40,000 deaths in the Netherlands in 2017 resulted from euthanasia, suicide or "terminal sedation".[46] These issues are plainly relevant to the issue of whether AD should be permitted; however, as *Nicklinson* makes clear, they are issues with which Parliament should wrestle and assume accountability.

46. Symbolically, however, the law may be said to signal what society finds acceptable, and how it intends to act in the future. Such loosening of s. 2(1) may represent a first step towards a more general change in attitude towards death and dying. This step should not be taken lightly, or by default.

Conclusions

47. AD remains a difficult and divisive subject; unsurprisingly so, since it engages highly sensitive but often opposing values – the individual's right to autonomy against the interest of the state in defending the lives of the vulnerable. It may be that the UK eventually permits those suffering serious illness to end their own lives; after all, a recent poll purports to show that 90 per cent of the population support assisted dying.[47] However, if it is to be done it should not be done by way of judicial decisions, or those tasked with enforcing the law turning a Nelsonian blind eye. It should be done fairly and squarely by Parliament, elected by, and accountable to, the electorate.

[45] J. Pereira, "Legalizing Euthanasia or Assisted Suicide: The Illusion of Safeguards and Controls" (2011) 18(2) *Current Oncology* 38, 43.

[46] J. Stonestreet and R. Rivera, "Is assisted suicide now homicide in the Netherlands?", *Christian Today*, 9 February 2019 <www.christiantoday.com/article/is-assisted-suicide-now-homicide-in-the-netherlands/131710.htm> (accessed 2 June 2020).

[47] O. Bowcott, "Legalise assisted dying for terminally ill, say 90% of people in UK", *Guardian*, 3 March 2019 <www.theguardian.com/society/2019/mar/03/legalise-assisted-dying-for-terminally-ill-say-90-per-cent-of-people-in-uk> (accessed 2 June 2020), although the extent of support varies between different polls; indeed, the wording of the question used – for example, framing it in terms of "assisted suicide" rather than "assisted dying" – has been shown to produce notably different results: K. Sleeman, "The murky issue of whether the public supports assisted dying", *The Conversation*, 5 October 2017 <https://theconversation.com/the-murky-issue-of-whether-the-public-supports-assisted-dying-85279> (accessed 2 June 2020).