

A Right to Die?

Andrew Otchie looks at proposed reforms to the law on assisted suicide

The Commission on Assisted Dying recently examined whether the current legal and policy approach to assisted suicide in England and Wales is fit for purpose. Established in November 2010 and headed by former Lord Chancellor Lord Falconer, the Commission was composed of members with expertise in law, medicine, social care, mental health, palliative care, theology, disability and policing. This month, it published a 415-page report that firmly concludes the current law, which does not allow for assisted dying, is inadequate and incoherent. After considering a vast amount of oral and written evidence, and the work of numerous experts, as well as the fact that the status quo continually presents complex dilemmas for police and prosecutors in practical situations, the Commission proposed a new legal framework, and suggested strict criteria defining who might be eligible to exercise a right to die.

The Commission's work followed the publication of the Director of Public Prosecution's "Policy for prosecutors in respect of cases of encouraging or assisting suicide" in February 2010, made in response to the case of *R (on the application of Purdy) v. Director of Public Prosecutions* [2009] UKHL 45. The document has been widely recognized as constituting a significant change in public policy, and, while it may not have affected the fundamental legal status of assisting suicide, it has had a huge impact on public perceptions of the law in England and Wales, and public understanding of how the DPP makes decisions on whether or not it is right to prosecute an individual suspected of assisting in a suicide.

Other Jurisdictions

The Commission considered the law that regulates assisted dying in other jurisdictions, and specifically the regimes that operate in the Netherlands, Belgium, Switzerland and the state of Oregon. In order to come to its conclusion, the Commission examined evidence as to the effectiveness of the safeguards that these areas variously operate, and thus how assisted dying could be regulated in England and Wales.

The assisted-dying regime proposed by the Commission for England and Wales is most similar to that which is operated in Oregon, being limited to physician-assisted suicide by prescribed medication, taking place when the doctor establishes that the person has a "settled intention to die". Interestingly, statistics from Oregon show that a significant proportion of individuals issued with a prescription of lethal medication do not use it.

Lord Falconer's Commission has proposed, among other safeguards, that any decision made by a doctor concerning an individual's eligibility to die would have to be seconded by another doctor. The patient would then have to write down their desire to die in the presence of an independent observer and wait for a further two weeks before being given lethal medication, in case they change their mind.

This is quite different to the situation in the Netherlands, where both euthanasia (the termination of life on request) and assisted suicide (helping someone to end their own life) are permitted, provided that they are performed by physicians in accordance with the statutory due-care criteria set out in the national law. Similarly, the Swiss right-to-die organizations each follow an internal protocol to determine whether an individual meets the criteria for suicide assistance, contact must be made with a physician to verify independently whether the patient meets the criteria for assisted suicide, and, since 2008, physicians in Zurich have been required to meet the individual seeking assistance on two occasions before a prescription is issued.

The Ethical Perspective

Assisting in a suicide remains a criminal offence in England and Wales, punishable by up to 14 years' imprisonment. The proponents of assisted dying, and Lord Falconer himself, argue that the legal fudge whereby those that help loved ones to die in compassionate circumstances are not prosecuted, in accordance with the new DPP guidelines, is very unsatisfactory.

The Commission's study considers the fundamental issue of whether it is morally acceptable to control the time, place, and means of one's own death. Those who oppose allowing individuals the right to die have suggested that such reforms would have a very negative impact on society, reflecting a departure from long-held views on the value of human life, and attitudes to the elderly, as well as an implied admission that the NHS has lost its ability to provide competent end-of-life care and a considerate response to suffering.

Furthermore, it has been suggested that allowing assisted suicide would constitute a significant departure from the deeply rooted cultural, historical and legal traditions of common law of England and Wales, which does not recognize a right to die. In the 18th century, the noted jurist Blackstone had characterized suicide as "self-murder" and "among the highest crimes". Thus, in s.2(1) of the Suicide Act 1961, the UK enacted statutory law specifically prohibiting

the assisting of suicide, although the Act does not make it a crime to attempt suicide, as it was deemed unjustifiable to impose further sanctions on a perpetrator whose act, it was viewed, could only be a manifestation of severe mental illness. Unlike any other offence whereby culpability is incurred by aiding and abetting, the act of suicide itself is not made unlawful.

The 1961 Suicide Act inherently acknowledged that assisted suicide threatens the most vulnerable in society and should not be pursued. In the case of *R (on the application of Pretty) v DPP* [2002] 1 AC 800, Lord Bingham opined that the “policy of the law remained firmly adverse to suicide” and the House of Lords held that art.8 of the European Convention on Human Rights pertained to protecting personal autonomy while the individual was alive, and did not confer a right to commit suicide. However, the *Pretty* case was then appealed to the European Court of Human Rights and is now styled as *Pretty v. The United Kingdom* (2002) 35 EHRR 1. The European Court’s analysis was that Ms *Pretty* did possess a right to end her own life under art.8(1), although the UK’s suicide law was a justified interference in preventing her from doing so. *Pretty* was highly significant to how the House of Lords in turn interpreted Ms *Purdy*’s case when before it, and thus each Law Lord concluded that Ms *Purdy* possessed a human right under the Convention to kill herself.


New Framework’s Safeguards

It is apparent that the Commission expended significant effort to find effective safeguards that could be put in place to avoid the abuse of patients under any new legal framework. Nevertheless, there remain significant difficulties that are already perceivable in the working of any new law.

Under the criteria suggested, the Commission recommends that a person should only be allowed to proceed with a request for assisted suicide if they have been diagnosed with a terminal illness; are over 18 years’ old; are making a voluntary choice that is an expression of their own will, not being unduly influenced by others; and that they have the mental capacity to make such a choice. However, it has been suggested that such criteria constitute a contradiction in terms because, when an individual is in the situation where they are certain of an imminent death, they often are without mental capacity, and totally reliant on the judgment of others. Yet in other situations, the loss of mental capacity does not necessarily mean that a person will die, and such individuals have been known to be the very ones wishing to exercise a right to die, as in the case of dementia sufferers,

and specifically the acclaimed author Sir Terry Pratchett, who was himself responsible for providing a large proportion of the funding for the work of the Commission (a basis upon which its impartiality has been questioned), and who, it has generally been said, would not be able to come within the given eligibility criteria, despite his forthright desire to die with dignity and comfort.

The Commission’s suggested safeguards appear to be an improvement over former attempts that have been made to allow assisted dying, such as Lord Joffe’s Assisted Dying for the Terminally Ill Bill, which was defeated by majority vote in the Lords, or the proposed amendments to the Coroners and Justice Bill 2009, which would have allowed a coroner (thus possibly a lawyer) to certify that he had “investigated the circumstances, and satisfied himself that it is indeed the free and settled wish of the person that he brings his life to a close”. This amendment was also defeated by the House of Lords, because of fears the law did not provide adequate protection for the vulnerable. These concerns have been addressed in the Commission’s suggestion that the person seeking to end their life has been fully informed of all other treatment and end-of-life care options that are available, and that there be monitoring and regulatory oversight by a national commission with powers to investigate. However, it is undoubted that many conscientious medical practitioners will continue to argue that the concept of assisted dying is fundamentally at odds with a doctor’s calling to heal.

The Ministry of Justice commented that the issue is “emotive and contentious”, so that any change in the law will be a matter for Parliament to decide, rather than Government policy. While the DPP policy has essentially had the effect of decriminalizing acts where an individual assists another to die in compassionate circumstances, it is likely that a consistent and workable law on assisted dying – one that can be integrated into our healthcare system, determine when it will not be appropriate to prosecute someone, and yet have regard to the intrinsic value of human life – will always be extremely difficult to provide, and face opposition from those with moral concerns. 

The Commission on Assisted Dying web site can be accessed at:
<http://www.commissiononassisteddying.co.uk/>
The full report of the Commission can be accessed at:
<http://www.demos.co.uk/publications/theCommissiononassisteddying>

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