

COMMENTARY

# Legalising assisted suicide: keeping sight of the fundamental issues

## COMMENTARY ON... CROSSING THE RUBICON?<sup>†</sup>

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<sup>†</sup>See pp. 369–377, this issue.

### SUMMARY

Assisting another person's suicide is a criminal offence in England and Wales, although the offence is rare and the law allows for charges not to be brought where there has been no criminal intent. Campaigners for 'assisted dying' want something else – a law licensing assisted suicide in advance for certain groups of people in certain circumstances. The present law has been challenged in the courts, hitherto unsuccessfully, as incompatible with article 8 of the European Convention on Human Rights. The Supreme Court has taken the view that, given its social policy implications, this is a matter that Parliament is better placed to consider than the courts.

### DECLARATION OF INTEREST

R.P. is director of the think-tank Living and Dying Well, which takes the view, based on analysis of the evidence, that assisted suicide should not be legalised.

to exempt assistance given to persons intending to seek assisted suicide overseas in a jurisdiction where the practice is legal.

The 1961 Act recognised that assistance with suicide might cover a wide spectrum of criminality, from malicious assistance given for personal gain to compassionate assistance given after serious soul-searching. It therefore required that no prosecution should be undertaken without the consent of the Director of Public Prosecutions (DPP). In 2010, following a judgment by what is now the Supreme Court, the DPP published a policy setting out how decisions in cases of assisted suicide were reached and what circumstances might be seen as aggravating or mitigating the offence (DPP 2010). Explaining the position in 2011 to a group, chaired by Lord Falconer, calling itself the Commission on Assisted Dying, the then DPP pointed out that 'there is residual discretion for all offences whether to prosecute or not. This is a particular version of it. But it's not unique by any stretch of the imagination; it's the way our law operates' (Starmer 2010).

### 'Assisted dying'

It is against this legal background that proposals to legalise what is being called assisted dying need to be seen. The term 'assisted dying' has no meaning in English law. It is a euphemism coined by campaigners for legal change to mean what amounts in law to assisted suicide.

Both the existing law and the proposals for legal change accept that suicide should not be encouraged or assisted, but that there may be circumstances in which assisting someone to end his or her life need not be regarded as a criminal offence. Where they differ, and fundamentally so, is in how effect should be given to this principle. The existing law prohibits all assistance with suicide, but gives the DPP the discretion to assess, in the light of all the evidence of what has occurred, the degree of criminality in any individual offence and to decide whether in that instance a prosecution is needed. An 'assisted dying' law, on the other hand, would license assistance with suicide in advance,

Suicide ceased to be a criminal offence in England and Wales with the enactment of the Suicide Act 1961. However, the Act made it a criminal offence to 'aid, abet, counsel or procure' the suicide or attempted suicide of another person. While the government of the day believed that people who attempted suicide should be treated with understanding and compassion, it wished to make clear that (to quote the words of the responsible minister in Parliament) 'we wish to give no encouragement whatever to suicide' (Hansard 1961).

This has remained the position of subsequent administrations. Indeed, the last government tightened the law, as part of wider-ranging legislation, by redefining the offence as one of 'encouraging or assisting' the suicide of another person (Coroners and Justice Act 2009: s. 59). The redefinition was considered necessary to enable the law to bite on internet encouragement to suicide, a circumstance that could not have been foreseen in 1961. During the debate on the relevant provision, the House of Lords rejected an attempt

**BOX 1 Article 8 of the European Convention on Human Rights****Right to respect for private and family life**

- 1 Everyone has the right to respect for his private and family life, his home and his correspondence.
- 2 There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

in prescribed circumstances, for defined groups of people and based on assessments of such things as motivation and state of mind. This raises a serious issue of principle – namely, whether it is appropriate that the law should license, in certain circumstances and for some groups of people, an act that in other circumstances and for everyone else is regarded as criminal.

**The courts**

Over the past 10–15 years there have been a number of appeals to the courts to rule that the current law is incompatible with the European Convention on Human Rights (ECHR), specifically with article 8 (Box 1). In its judgment on the latest appeal, delivered on 25 June 2014, the Supreme Court was divided on the question and felt that important issues of social policy were involved that Parliament was better placed to consider than are the courts (*R (on the application of Nicklinson and another) v Ministry of Justice* [2014] UKSC 38).

**The medical dimension**

The proposals for legal change differ from the existing law in another important respect, in that they envisage doctors as the assisters of suicide by placing on their shoulders the assessment of requests and the supply of lethal drugs. This concept of physician-assisted suicide raises significant difficulties, not the least of them being that the British Medical Association, the medical Royal Colleges (BMA 2014; RCGP 2014; RCP 2014; RCS 2014) and the majority of practising doctors do not regard assisting patients' suicides as an acceptable part of clinical practice (RCGP 2014).

It is therefore of interest that in his 25 June judgment (at para. 123) the President of the Supreme Court speculated that the balance between giving some individuals assistance to end their

lives and ensuring that others were not exposed to harm as a result might possibly be achieved 'if no assistance could be given to a person who wishes to die unless and until a Judge of the High Court has been satisfied that his wish to do so was voluntary, clear, settled and informed'. Parallels were offered of other life or death situations, including requests for withdrawal of artificial nutrition and hydration and for the switching off of life-support equipment, which had been handled in recent years by the High Court.

**The fundamental issues**

Whether 'assisted dying' should be legalised is a complex question, transcending as it does the law, clinical practice, mental health, ethics and society. Amid all the (often emotive) claims and counterclaims it is necessary to keep in sight what is the essential question. This is not ultimately an issue of compassion or morality or choice. These are common currency to both sides of the debate and sound arguments can be advanced both for and against legalising assisted suicide on all these grounds. The essential question is whether the law should be changed to make it lawful to supply some people and in some circumstances with the means to end their lives. That would represent a major change to the criminal law. Before it could be responsibly contemplated, there is a need for clear evidence that the law as it stands is not fit for purpose; and, if that is the case, that what would be put in its place would be better. It is on this that the debate needs to focus.

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