2010

Purdy:The First Step on the Road towards Assisted Suicide

Sayer, Laura

PURDY – THE FIRST STEP ON THE ROAD TOWARDS ASSISTED SUICIDE?

***Lauren Sayer*[1]**

Abstract:

This article considers how likely it is that English law will be amended in the near future to provide legal recognition and acceptance of assisted suicide in light of the 2009 House of Lords decision in *Purdy*. The extent to which Purdy has acted as a catalyst to generate formal legislative amendment is explored in the light of recent attempts to achieve a change in the law. Within this context the underlying and conflicting arguments of those in support and against the legalisation of assisted suicide are examined.

Keywords: assisted suicide, right to die, *Purdy*, DPP policy on assisted suicide, arguments for and against legalisation of assisted suicide

Introduction

The controversial debate about assisted suicide was projected back into the spotlight by the recent House of Lords case of *R (on the application of Purdy) v Director of Public Prosecutions,*[2] potentially suggesting that the legalisation of assisted suicide could be forthcoming.

In this context, the term 'assisted suicide' refers to incidents where 'someone provides an individual with the information, guidance and means to take his or her life.'[3] Reference will also be made to the concept of 'physician-assisted suicide' which

[1] Lauren is pictured with invited dignitaries and the Head of Plymouth Law School after receiving the **Gard & Co Solicitors Prize for the Best Law Graduate.**
[2] [2009] UKHL 45.
[3] 'Euthanasia definitions,' http://www.euthanasia.com/definitions/html 10 April 2010.

'requires the aid of a physician to act as an enabler in terminating a patient's life by medical means.'[4]

Assisted suicide is prohibited under English law by section 2(1) Suicide Act 1961; it is a particularly unique offence being the only act in the English jurisdiction that is legal to carry out but illegal to assist. Despite carrying a potential 14 year penalty, evidence appears to indicate that assisted suicide is occurring in England anyway. It is reported that more than 100 Britons have travelled to Dignitas, a suicide clinic in Switzerland, to end their lives and over 700 Britons are currently thought to be registered as members.[5] There is some indication that the number of Britons making such a voyage is on the increase with reports of more than 30 individuals making the trip in 2009 alone.[6] Any individual who accompanies a person on such a trip or helps them by booking or paying for transport will technically have committed an offence under the 1961 Act. However, it would appear that only approximately eight of these cases have been referred to the Crown Prosecution Service and no prosecutions have been instigated.[7] It is therefore clear that the law, as it stands, is not enforced with any enthusiasm.

The case of *Purdy* was significant because it highlighted the gap between what the law says and what the law does. Ms Purdy, a sufferer of progressive multiple sclerosis had come to the conclusion that she would want her suffering to end with suicide when life became unbearable. The predicament that she faced was that if she lived long enough to reach such a state, she would be unable to end her life without assistance. She wished to enlist the assistance of her husband, Omar Puente, to travel to Switzerland where she could be helped to die but she was unwilling to expose him to the risk of prosecution. Thus she sought clarity from the Director of Public Prosecutions to explain the factors he would take into consideration when determining whether to consent to a prosecution.[8] Her appeal to the House of Lords (this was the last decision of the House of Lords before its inaugural change to the Supreme Court) was successful and prosecution guidelines were ordered.

---

[4] Donnelly, S., and Purcell, S., 'The evolution of the law on assisted suicide in the United Kingdom and the possible implications for Ireland,' (2009) *Medico-Legal Journal of Ireland,* p. 84,

[5] Beckford, M., 'Record numbers of Britons ended their lives at Dignitas last year,' *The Telegraph,* 22 February 2010,

[6] Ibid,

[7] *Purdy* at 30 per Lord Hope.

[8] Cartwright, N., 'Case Comment: 48 years on: is the Suicide Act fit for purpose?' (2009) *Medical Law Review* pp.467-468..

Spencer suggests that 'the main significance of this case is that it marks a step along the road towards making assisted suicide legal.'[9] The validity of such a statement is hereafter assessed. It is considered whether the decision itself has altered the law to permit assisted suicide or whether it is likely to prompt a more formal attempt at legislation on this issue.

1 The Decision

Following the ruling of the House of Lords, many news platforms reported headlines such as:

> 'Victory for Debbie Purdy after historic ruling in right-to-die legal battle.'[10]

Given the influx of such headlines, one could be forgiven for assuming that their Lordships had created a new right-to-die under English law. However, a closer analysis of the case demonstrates that this was not their Lordships' intention. They expressed a level of discontent with the current legal situation, alluding to the fact that there were situations where 'it will be possible to regard the conduct of the aider and abettor as altruistic rather than criminal,'[11] but recognised that they did not have the authority to make such a declaration; 'it must be emphasised at the outset that it is no part our function to change the law in order to decriminalise assisted suicide.'[12]

Rather than declaring a 'right-to-die' their Lordships ordered the DPP to promulgate an offence-specific policy identifying the relevant factors and circumstances that would be taken into account when deciding whether or not to consent to a prosecution under section 2(4) Suicide Act 1961. Such a decision was significant because it was previously thought imperative that the DPP retain complete discretion over the initiating of prosecutions for this offence.[13]

---

[9] Spencer, J. R., 'Case Comment: Assisted suicide and the discretion to prosecute,' (2009) *Cambridge Law Journal* p.495
[10] Hirsch, A., 'Victory for Debbie Purdy after historic ruling in right-to-die legal battle,' *The Guardian*, 30 July 2009.
[11] *Purdy* at 83 per Lord Brown.
[12] Ibid at 26 per Lord Hope.
[13] HL Deb Vol. 674 cols. 53-54 10 October 2005.

The guidelines – a restatement of policy or legal change?

The DPP published his *Policy for Prosecutors in respect of cases of Encouraging or Assisting Suicide* on 25 February 2010.[14] The policy provides a list of public interest factors that will be taken into account, alongside the *Code for Crown Prosecutors*, when a decision is made on whether to initiate a prosecution for assisting suicide. It is clear that the guidelines amount to a technical change because they alter the way the law is operated. Rather than having complete discretion over every instance of assisted suicide, the DPP must make his decision with reference to the factors listed in the policy. There is some dispute about the policy and whether it has done anything to substantially change the law on assisted suicide or is merely a crystallisation of the current prosecutorial policy.

Significantly, there is a statement embedded in the policy which says:

> 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 such an assurance that a person will be immune from prosecution if he or she does an act that encourages or assists the suicide or attempted suicide of another person.[15]

This seems to negate the possibility that the guidelines amount to a substantive change in the law and the application of the guidelines further supports this notion. The first case to be decided under the Policy involved the suicides of Sir Edward and Lady Downes who died at Dignitas on 10 July 2009. The actions of the Downes' son were considered because he had accompanied them on the journey but the Director ultimately decided not to consent to a prosecution.[16] A comparison between the Director's statement in this case and the earlier decision regarding the suicide of Daniel James[17] (which happened some time before the *Purdy* ruling) reveals that a very similar approach was adopted by the DPP. In both cases the DPP placed emphasis upon the fact that there was a voluntary and clear wish to commit suicide

[14] Crown Prosecution Service, 'Policy for Prosecutors in respect of cases of Encouraging or Assisting Suicide*,'* (February 2010). http://www.cps.gov.uk/publications/prosecution/assisted_suicide_policy.pdf 1 March 2010

[15] 'Policy for Prosecutors in respect of cases of Encouraging or Assisting Suicide,' para.6.

[16] Crown Prosecution Service, 'Statement by Keir Starmer QC regarding the deaths of Sir Edward and Lady Downes,' (19 March 2010) http://www.cps.gov.uk/news/press_statements/the_death_of_sir_edward_and_lady_downes/ accessed 27 March 2010.

[17] Crown Prosecution Service, 'Decision On Prosecution – The Death By Suicide of Daniel James,' (9 December 2008) http://www.cps.gov.uk/news/articles/death_by_suicide_of_daniel_james/ accessed 10 October 2009.

and that the actions of those who assisted were only relatively minor in nature and motivated by compassion.

The view that the guidelines constitute a mere restatement of policy is, however, not held unanimously. They are regarded by some as effectively creating exceptions to the offence by directing individuals on how to avoid prosecution and may, therefore, be opening the backdoor to assisted suicide. Consequently there has been some suggestion that the guidelines are unconstitutional. Former MP Anne Widdecombe filed an Early Day Motion recommending that the interim guidelines be removed because they clearly overrode the will of Parliament which had rejected numerous attempts to legalise assisted suicide in the past year.[18]

The theory that the guidelines open the backdoor to assisted suicide is founded upon the idea that they provide sufficient clarity on the decision making process to enable individuals to provide assistance if they comply with the guidelines. However, the level of clarity afforded by the guidelines is also disputed. *The Guardian* reported that Debbie Purdy was 'delighted' with the guidelines because she was now able to know the likely consequences of any decision she makes in relation to her death.[19] Similarly, the campaign group Dignity in Dying described the guidance as 'a significant breakthrough for choice and control at the end of life.'[20] Opinions such as these support assertions concerning the clarity of the guidelines suggesting that the guidelines have resulted in an indirect change in the legal position on assisted suicide.

It should, however, be noted that paragraph 47 of the policy states 'these lists of public interest factors are not exhaustive and each case must be considered on its own facts and its own merits.'[21] This part of the policy expressly retains the discretion of the DPP that was provided for by section 2(4) of the 1961 Act. The final policy also removes the framework that existed in the interim version which made some factors

[18] Widdecombe, A., 'Early Day Motion 302 – Law on Assisted Suicide*,'* (1 December 2009), http://edmi.parliament.uk/EDMi/EDMDetails.aspx?EDMID=39862&SESSION=903 accessed 27 February 2010.
[19] Laville, S., 'People who assist suicide will face test of motives, says DPP,' *The Guardian*, 25 February 2010 .
[20] 'Dignity in Dying hails guidelines as 'victory for common sense and compassion,"' http://www.dignityindying.org.uk/news/general/n234-25-feb-2010-dignity-in-dying-hails-guidelines-as-victory-for-common-sense-and-compassion.html accessed 1 March 2010.
[21] 'Policy for Prosecutors in respect of cases of Encouraging or Assisting Suicide,' para.47.

carry heavier weighting than others; 'it is quite possible that one factor alone may outweigh a number of other factors which tend in the opposite direction.'[22]

These two provisions would appear to prevent the guidelines from providing total clarification on the law. It would be incredibly difficult to make a completely informed decision based on the policy because it would be virtually impossible to know which factors the DPP would consider carry greater weight and whether there would be any additional factors that he would consider.

There are certainly a number of people who are unhappy with the level of clarity afforded by the guidelines; in a comment in *The Guardian,* Yvonne Roberts said: 'Purdy asked that the worry about what might happen after assisting a suicide should be lifted from relatives. I'm not sure it has.'[23] Thus it would appear to be very difficult to conclude that the guidelines have completely opened the backdoor to assisted suicide because the course of action to be taken by the DPP following a potential assisted death is not wholly transparent.

The end of the debate?

It has been suggested that the guidelines will not constitute the end of the issue and that further contributions towards the legalisation of assisted death may be demanded. Thus it may be possible to assert that they are the first step on the road towards a formal permission in respect of assisted suicide under English law. As a result a number of 'slippery slope' concerns have been expressed about the guidelines. For example, Baroness Campbell of Surbiton said in a *BBC Panorama* documentary;

> they are not just guidelines; they are the beginning of the process. Once you open the door a crack, you're beginning to sanction or say to a culture 'yes' in some circumstances it is right to mercy kill disabled or terminally ill people. I would say to you; that's very dangerous.[24]

Keown, a well-known opponent of assisted death and euthanasia, has drawn similarities between the DPP's guidelines and the development of euthanasia in the Netherlands. He points out that the Royal Dutch Society of Medicine introduced 'rules of careful conduct' for euthanasia in 1984 and that, over time, these guidelines were not applied with the strictness that they were first intended, eventually euthanasia

---

[22] Ibid., para.39.
[23] Roberts, Y., 'Foggy guidelines won't help the dying,' *The Guardian*, 23 September 2009.
[24] *I Helped My Daughter Die,* BBC One Panorama documentary transmitted 1 February 2010.

was pressed on thousands of patients who were incapable of requesting it. Keown warns that the same will happen in England if the DPP does not make it absolutely clear that he intends to uphold Parliament's prohibition on assisted suicide.[25] However, it is possible to challenge Keown's argument by distinguishing the two scenarios. The Dutch guidelines outlined the circumstances where it was permissible to practise euthanasia and over time these circumstances were extended. By contrast, the English guidelines explain how decisions will be made at the prosecution stage; they do not, in theory, provide that it is permissible to assist or encourage suicide in some circumstances and thus it may be possible to assert that they are less susceptible to such expansion.

It would also appear that pressure for the legislators to consider the issue formally is going to continue. A number of supporters do not think the guidelines go far enough and will continue to press for an official change in the law.[26] A YouGov survey indicates that 38% of the public do not think that the guidelines go far enough because they beleive that those who assist suicide should not fear prosecution.[27]

Furthermore, it has been suggested by a number of academics that the guidelines should not be the end of the issue because the Suicide Act is no longer fit for purpose. This notion was initially propounded by Mullock who suggested that the DPP's statement about the suicide of Daniel James[28] marked 'a milestone in the development of the law as it applies in practice to assisted suicide.'[29] She suggested that the Director's covert permission of the development of suicide tourism had resulted in the validity of the Suicide Act becoming increasingly precarious.[30] Following the decision in *Purdy* this idea was extended by Cartwright who suggested that the judgment had further escalated the fragility of the Suicide Act.[31] He suggests that Parliament needs to re-legislate on this area because the current legal situation means that individuals are only protected by the rules and procedures of the Swiss

[25] Keown, J., 'Assisted suicide must not be legalised through the back door,' *The Telegraph,* 25 February 2010.
[26] Verkaik, R., 'Assisted Suicide rules fail to settle debate,' *The Independent,* 26 February
[27] '*YouGov/Daily Telegraph* Survey Results'. http://today.yougov.co.uk/sites/today.yougov.co.uk/files/YG-Archives-YouGov-euthanasia.pdf accessed 15 April 2010.
[28] 'Decision On Prosecution – The Death By Suicide of Daniel James.,'
[29] Mullock, A., 'Prosecutors making (bad) law?' (2009) *Medical Law Review,* p.290.
[30] Ibid., p.299.
[31] Cartwright, N., 'Case comment: 48 years on: is the Suicide Act fit for purpose?' p.474.

clinics.[32] Thus it is clear that pressure for a formal consideration of an assisted suicide law is going to grow.

2 The Likelihood of a Formal Assisted Dying Law

There have been a few attempts in the past to legalise some level of assisted suicide. The most notable attempts came from Lord Joffe who repeatedly tried to introduce a Private Members' Bill to legalise physician-assisted suicide. His first attempt was in 2003 with the Patient (Assisted Dying) Bill[33] but that did not proceed any further than the second reading.[34] Over the next few years Joffe tried to introduce the Assisted Dying for the Terminally Ill Bill (ADTI Bill).[35] The Bill faced a number of practical difficulties: it was initially stifled by the ending of the Parliamentary session. The Bill was then re-introduced in November 2004[36] but it was acknowledged that even this Bill would not make it onto the statute books due to the imminent dissolution of Parliament.[37]

More recently, in 2009, there were two significant attempts to legalise assisted suicide in limited circumstances by proposing amendments to the Coroners and Justice Bill. Lord Falconer proposed an amendment which would decriminalise the act of assisting a person to travel to another country for the purpose of committing suicide where that person was terminally ill.[38] This amendment was very narrow in scope and appeared to be a mere codification of what was happening in practice, yet it was still defeated by 194 votes to 141.

Lord Alderdice also proposed an amendment[39] which would permit assisted suicide for a person who was suffering from 'a confirmed, incurable and disabling illness' and had received certification from a Coroner who was satisfied that the person had a free and settled wish to end their life.[40] This amendment was not really a legislative attempt because Alderdice himself stated that he had no intention of pushing the

---

[32] Ibid., p.471.
[33] Patient (Assisted Dying) Bill [HL] HL Bill 37 introduced 19 February 2003.
[34] HL Deb Vol. 648 col. 1585 6 June 2003.
[35] Assisted Dying for the Terminally Ill Bill [HL] HL Bill 17 introduced 8 January 2004
[36] HL Deb Vol. 667 col. 384 20 November 2004.
[37] House of Lords, 'Select Committee on the Assisted Dying for the Terminally Ill Bill Volume I: Report,' HL Paper 86-I (Parliamentary Publications, 4 April 2005) para.235. http://www.publications.parliament.uk/pa/ld200405/ldselect/ldasdy/86/86i.pdf accessed17 October 2009.
[38] Amendment 173 to Coroners and Justice Bill HL Bill 69.
[39] Amendment 66 to Coroners and Justice Bill HL Bill 77.
[40] HL Deb Vol. 713 col. 1076 26 October 2009.

amendment to a vote but just wanted to use it as a facility to debate the issues surrounding it.[41]

These previous legislative attempts illustrate that achieving a formal route to assisted suicide will be an incredibly arduous task. There are a number of concerns and objections that recur each time the issue is debated, some of which seem impossible to obviate.

It is clear that any future legislative attempt will struggle to draft a Bill that is not fatally criticised for the qualification requirements. The Patient (Assisted Dying) Bill was criticised because some of the qualifying conditions such as 'irremediable condition' and 'unbearable suffering' were thought to be too subjective and ambiguous potentially allowing doctors to define such terms differently.[42] Further, it was thought that the Bill's provisions would be too widely applicable; it was noted that 'a serious and progressive physical illness' included most ailments and would encompass relatively commonplace conditions such as diabetes and angina.[43] Problematically, by contrast, the ADTI Bill was criticised for limiting its provisions to the terminally ill because some speakers suggested that changing the law in such a way, to benefit a small number of people, would create a presumption that their lives were valued less.[44]

It is clear, following the wealth of disapproval over the inclusion of the victim's health as a public interest factor in the *Interim Policy for Prosecutors in respect of cases of Assisted Suicide*, that there still remains some level of discomfort with singling the terminally ill out as more eligible for assisted suicide. *Care Not Killing* responded to the *Interim Policy* by saying that it was 'unacceptable in principle that some members of society should be singled out as more eligible.'[45] But it must be recognised that there is much discomfort at the thought of making assisted suicide provisions more widely available. Evidence from opinion surveys indicates that there is less support among the public for assistance with suicide for individuals who are not terminally ill. For example, a 2009 *Populus* poll conducted on behalf of *The Times* found that while

[41] Ibid.
[42] HL Deb Vol. 648 col. 1607 6 June 2003.
[43] HL Deb Vol. 648 col. 1598 6 June 2003.
[44] HL Deb Vol. 681 col. 1212 12 May 2006.
[45] Care Not Killing 'Response by the Care Not Killing Alliance,' http://www.carenotkilling.org.uk/pdf/CNK_additional_response_to_the_DPP_guidelines.pdf accessed 10 January 2010.

95% of people thought that the law should be changed to allow assisted suicide where the person was terminally ill, only 65% of people favoured such a change where the individual was suffering from a non-terminal degenerative condition and only 56% were in favour where the individual was suffering from extreme pain but not a terminal illness.[46] Thus it is clear that, the disagreement over the scope of such legislation which occurred in the previous legislative attempts, remains today and could prove fatal to a future attempt. This problem has been well articulated by Lord Back who notes that,

> even if one accepts that the law should change, there is no consensus on where a line should be drawn and what safeguards should be in place and for whom.[47]

The administration element of the legislative attempts has also been the focal point of much criticism. The attempts made by Lord Joffe sought to legalise physician-assisted suicide; but the inclusion of the medical profession was heavily disapproved of. It has been suggested that to require the medical profession to be involved in the killing of patients is 'utterly incompatible…with the ethical principles and position of trust which doctors hold.'[48] Lord Patten feared that by enacting the Patient (Assisted Dying) Bill,

> we would have, in effect, two classes of doctors created in this country. There would also have to be separate training, perhaps in separate medical schools, for doctors who would and would not be prepared to exercise their right to kill.[49]

Further, concern was expressed over the potential impact that an enactment of such legislation would have on medical relationships; Lord Alton warned that the Patient (Assisted Dying) Bill would 'fatally corrupt the doctor/patient relationship which is founded upon trust and doctors would become killers as well as carers.'[50] Unsurprisingly, similar concerns were echoed about the ADTI Bill; Lord Neil suggested that,

> the trust that we have and should have in the medical advisors who look after us will be damaged as soon as they are involved in instrumentalities of death.[51]

---

[46] '*Times* Poll prepared by *Populus'* http://populuslimited.com/uploads/download_pdf-190709-The-Times-THE-TIMES-POLL-19th-July-2009.pdf accessed 11 November 2009.
[47] HL Deb Vol. 712 col. 632 7 July 2009.
[48] HL Deb Vol. 674 col. 140 10 October 2005.
[49] HL Deb Vol. 648 col. 1613 6 June 2003.
[50] HL Deb Vol. 648 col. 1616 6 June 2003.
[51] HL Deb Vol. 681 col. 1253 12 May 2006.

The rationale of such concerns can be challenged; Lord Tavern referred to evidence which suggested that the level of trust in doctors in the Netherlands, where assisted dying is legal, is among the highest in Europe, he went on to assert that,

> the actual experience of the law in the Netherlands in no way upholds the contention that a change in the law would undermine the relationship between patient and doctor.[52]

Therefore it is possible that such concerns could theoretically be overcome with reassuring evidence from other jurisdictions. Alternatively the concerns could be bypassed altogether; it has been suggested that the involvement of doctors in the process is not necessary. Lord Lucas commented,

> a number of problems that have been raised relate to the medicalization of the process. I do not see why doctors should be involved; the Swiss do not involve doctors.'[53]

And the practicality of placing an assisted dying process outside the medical system also raises problems. Dr Wicks, who gave evidence to the *Select Committee* worried that,

> the establishment of a separate service is a kind of signal that there is a different group of patients who do not deserve the same kind of overall assessment and communication and discussion about options.[54]

Moreover, there are serious practical problems with identifying the relevant group of individuals with the necessary skills to administer the process. It is clear from the lack of support for Lord Alderdice's amendment that coroners are not considered the appropriate body to assess applications for 'would be suicides' assistants' licences.'[55] Early in 2010 novelist, Terry Pratchett, recommended the establishment of 'some-kind of strictly non-aggressive tribunal' that would establish all the facts and try to ensure that there were no external pressures being exerted upon the individual who pursued assisted death.[56] However, such proposals are likely to be rejected for similar reasoning to the rejection of Lord Alderdice's amendment. Thus there appears to be merit to Lord Walton's worry that it would be virtually impossible to find a group

---

[52] HL Deb Vol. 674 col. 49 10 October 2005.
[53] HL Deb Vol. 674 col.114 10 October 2005.
[54] House of Lords, 'Select Committee on the Assisted Dying for the Terminally Ill Bill, Volume II: Evidence,' HL Paper 86-II (Parliamentary Publications, 4 April 2005), Q. 325. http://www.publications.parliament.uk/pa/ld200405/ldselect/ldasdy/86/86ii.pdf accessed 17 October 2009.
[55] HL Deb Vol. 713 col. 1082, 26 October 2009.
[56] *Shaking Hands With Death,* BBC One Richard Dimbleby Lecture transmitted 1 February 2010 .

of individuals with the relevant skills and capacity who would be willing to carry out such a process.[57]

Public opinion appears to prefer the medicalization of the process. The previously cited *Populus* poll demonstrated that 74% of people questioned favoured a change in the law to allow doctor-assisted suicide, whereas only 60% favoured such a change to allow 'a friend, partner, spouse or other family member' to assist suicide. Thus it is clear that any future legislative attempt will struggle to design an assisted dying process that will be deemed acceptable by the majority.

Another recurrent theme throughout the legislative attempts was a preference for palliative care over assisted suicide. A number of speakers worried that the enactment of legislation of this nature would result in a diversion of resources and attention away from such care. For example, Lord Chan said,

> if the Bill became law its administration would require funding and it is likely that the cost of assisted dying would come from the allocation of palliative care.[58]

Opponents of legalising assisted suicide suggest it is not necessary to threaten the development of palliative care with such legislation because, as Lord Cavendish purported, 'the suffering that this Bill addresses can in time be removed through the agency of palliative care.'[59] Very similar concerns were frequently echoed in later debates suggesting that they will recur regardless of the legislative attempts. This recurrent concern is particularly problematic because, unlike the concerns discussed above, they do not relate directly to anything specific in the legislation; the concerns are fuelled by the mere concept of assisted dying and thus would appear very difficult to overcome. A number of speakers also acknowledged that palliative care cannot provide the solution for every individual and condition. Baroness Noakes, for example, referred to the fact that palliative care could do little to alleviate the suffering of those with neurological diseases.[60] Therefore, it has been suggested by numerous supporters of assisted suicide that 'a wide spectrum of alternative treatments is highly desirable.'[61]

---

[57] 'Select Committee on the Assisted Dying for the Terminally Ill Bill, Volume II: Evidence,' Q.2070.
[58] HL Deb Vol. 648 col. 1670, 6 June 2003.
[59] HL Deb Vol. 648 col. 105 6 June 2003.
[60] HL Deb Vol. 648 col. 98 6 June 2003.
[61] HL Deb Vol. 648 col. 22 6 June 2003.

Further, it is not obvious why a Bill should automatically be dismissed because of a preference for palliative care; Lord Joffe made it clear that it was his intention for palliative care to be the preferred option for the majority with the Bill running alongside it[62] and it has been suggested that there is

> no dichotomy at all between supporting, extending and improving every type of palliative care and supporting the Bill of the noble Lord, Lord Joffe…this is not an either/or question.[63]

Thus it is theoretically possible to overcome the concerns about palliative care provided there are convincing reassurances that palliative care would not suffer. The *Select Committee* suggested that it might be advisable for a future Bill to consider, as a pre-requisite to assisted death, that the applicant has experienced palliative care. It was noted that a mere consultation may be insufficient because, as a specialist explained, 'assessment takes at the very least, a week and, in proportion to the severity of the suffering experience, may take months.'[64] Baroness Hale supports the idea that assisted suicide should not be agreed to until a patient has experienced good palliative care, in her view 'experiencing good pain control is different to being told about it.'[65] If palliative care was included in the process it would create new incentives for research and development of palliative care making it less likely that it be neglected.

The failure of Lord Falconer's amendment is surprising considering that the situations it proposed to cover were relatively commonplace albeit the provisions under section 2 of the Suicide Act were not being utilised. Apparently it failed because the existing law, although rarely enforced, was viewed as a useful deterrent. Lord Mackay, for example, commented that 'the fear of prosecution is quite an important aspect of the prevention of the crime in our arrangements.'[66] It was feared that decriminalising the acts covered in the amendment would inadvertently pressurise some people into travelling to Dignitas. Baroness Wilkins suggested that the success of Falconer's amendment would 'place a new and invidious pressure on disabled and terminally ill people who think that they are close to the end of their lives.'[67]

---

[62] HL Deb Vol. 648 col. 17 6 June 2003.
[63] HL Deb Vol. 648 col. 26 6 June 2003.
[64] 'Select Committee on the Assisted Dying for the Terminally Ill Bill, Volume I: Report,' paragraph 256
[65] 'Select Committee on the Assisted Dying for the Terminally Ill Bill, Volume II: Evidence,' Q. 354
[66] HL Deb Vol. 712 col. 600 7 July 2009.
[67] HL Deb Vol. 712 col. 614 7 July 2009.

Similar concerns about the decriminalisation of assisted suicide resulting in inadvertent encouragement and the creation of a duty-to-die were frequently voiced in other debates too. Lord Neil referred to the fact that the elderly often view themselves as a burden and may feel obliged to use such provisions if they were available.[68]

Such concerns highlight a very difficult obstacle on the road to assisted suicide; the concerns centre around the fact that the removal of the deterrent of prosecution will result in covert pressure being exerted upon the vulnerable. What is particularly problematic is that such concerns appear incredibly difficult to remedy; the fear is attached to the mere creation of an assisted suicide law.

Internationally there appears to be little evidence from other jurisdictions that facilitate assisted death, to substantiate such fears about the creation of a 'duty-to-die'. Lord Tavern notes 'the idea that the Oregon law leads to a duty to die is simply an invention designed to scare, with not a shred of evidence to support it.'[69] While it would appear theoretically possible to overcome such concerns with evidence from other jurisdictions it is unlikely that such protagonists will be so easily persuaded meaning this problem is likely to remain a serious obstacle for assisted dying.

As highlighted above, another recurrent concern about the legalisation of assisted suicide relates to the idea of a 'slippery slope'; these arguments focus on the concept that the acceptance of one practice will lead to some other practice which is even more unacceptable.[70] Such fears emanate from the idea that assisted suicide legislation will not be enforced in the strict manner intended and that euthanasia will be the logical result. In a debate about the ADTI Bill, Lord Phillips commented on the application of modern legislation:

> what is implemented is implemented unevenly and with undue discretion on the part of those enforcing it. How can we be sure that this most complex legislation would have the quality of enforcement and policing without which it could be wholly counterproductive?[71]

[68] HL Deb Vol. 648 col. 1658 6 June 2003.
[69] HL Deb Vol. 681 col. 1225 12 May 2006.
[70] Smith, S. W., 'Fallacies of the logical slippery slope in the debate on physician-assisted suicide and euthanasia,' (2005) *Medical Law Review* p.224.
[71] HL Deb Vol. 674 col. 62 10 October 2005.

Similarities have been drawn with the development of abortion legislation; for example, Lord Maginnis stated, 'what was intended and what resulted are now poles apart.'[72] Such comments refer to the fact that when the Abortion Act 1967 was introduced its supporters argued that it would be an exceptional procedure and yet there are now approximately 180,000 abortions carried out in England and Wales annually.[73] It is feared that a similar trend may follow for assisted suicide legislation.

The biggest obstacle on the road to the legalisation of assisted suicide is that of absolute opposition; a number of their Lordships stated that they were opposed to the legislation out of principle. For example, Baroness Pitkeathley said 'my objections are…based on principle. There could be no Bill drafted which could overcome my objections to the principle of allowing assisted suicide.'[74] Similar objections were expressed during all the legislative attempts highlighting a difficult problem articulated by McLean:

> negotiating a path between the various sides in this debate is essentially deeply problematic. The bases from which arguments begin often seem miles apart and those who hold to certain views tend to be intransigent about them.[75]

Of course legislators are likely to be heavily divided on this issue. There are those who support assisted dying legislation and are unwilling to compromise and narrow the scope. Conversely, there are those who are so against the decriminalisation of the offence that no amount of careful drafting will nullify their concerns. Such a division in views would appear to suggest that it will be impossible to achieve an assisted dying law. But as pointed out by Lord Haskel, Parliament has been equally divided over other issues such as abortion, homosexuality and cloning but has eventually managed to legislate on these matters.[76]

The recurrent concerns suggest that it will be almost impossible to achieve a formal law on assisted suicide because of the issue of decriminalisation. Equally as little enthusiasm was expressed for the latest attempt post *Purdy* it would appear that the attitudes of the House of Lords have not changed. It is worth noting that Lord Alderdice's amendment was highly criticised for being the wrong vehicle to initiate

[72] HL Deb Vol. 648 col. 1645 6 June 2003.
[73] 'Select Committee on the Assisted Dying for the Terminally Ill Bill Volume I: Report,' para.94.
[74] HL Deb Vol. 645 col. 1636 6 June 2003.
[75] McLean, S., *Assisted dying: reflections on the need for law reform* (2007: Routledge-Cavendish) p. 8.
[76] HL Deb Vol. 681 col. 1230 12 May 2006.

such a change.[77] Thus it could be asserted that the debate is not truly indicative of their Lordships' current views on the matter because much of the opposition was dominated by concern over form rather than substance. Notwithstanding such reluctance there does appear to be a general consensus among the legislators that 'the acceptability or otherwise of a change in the law on assisted dying is a matter for society to decide as a whole.'[78]

3 Societal Views and Perceptions

There can be no doubt that assisted dying is a very prominent issue at the moment attracting considerable media attention. Aside from the newspaper headlines, the issue was also explored in a *BBC Panorama* special.[79] A debate on *Question Time*[80] was dedicated to the matter and novelist Terry Pratchett delivered a Richard Dimbleby lecture entitled 'Shaking Hands With Death.'[81] The allocation of so much media attention on different platforms suggests a growing demand for the issue to be reconsidered.

There also appears to be some support for an official inquiry as expressed by a number of speakers in the 2009 debate.[82] More recently, in March 2010, Patricia Hewitt MP suggested that a Royal Commission be established to consider how to best protect the vulnerable but this was not granted.[83] The fact that members in both Houses think the issue needs to be addressed may be indicative of the fact that *Purdy* has thrust the issue back into the spotlight and is demanding legislative consideration.

Opinion polls seem to indicate general support from the public for a change in the law. For example, a July 2009 Populus Poll indicated that 74% of respondents thought that the law should be changed to allow a doctor to assist suicide and 60% thought it should be changed to legalise non-doctor assisted suicide.[84] Similar results emerged from a ComRes survey where 74% indicated that they thought a medical professional should be allowed to help a terminally ill individual to die and 73%

[77] HL Deb Vol. 713 col. 1087 26 October 2009.
[78] HL Deb Vol. 674 col. 51 10 October 2005.
[79] *I Helped My Daughter Die,* BBC One Panorama documentary transmitted 1 February 2010.
[80] *Question Time: Coventry,* BBC One Panel show transmitted 4 February 2010.
[81] *Shaking Hands With Death,* BBC One Richard Dimbleby Lecture transmitted 1 February 2010.
[82] HL Deb Vol. 713 col. 1082.
[83] HC Deb Vol. 507 col. 404 10 March 2010.
[84] '*Times* Poll prepared by *Populus.'*

indicated that a family member or close friend should be allowed to assist death.[85] The most recent survey, conducted by YouGov illustrated that 75% of people think the law should be amended to allow some individuals (including doctors and relatives) to assist suicide in particular circumstances.[86] Although the figures vary from survey to survey there appears to be sufficient congruity among the results to conclude that the public support a move towards the permission of assisted suicide.

However, it has been suggested by some members of the legislature that too much emphasis must not be placed upon public opinion. Lord Stoddart warned that,

> public opinion is very fickle indeed. It can also be very extreme. As we have already heard…many people want a return to the death penalty. Probably about 80 per cent want to return to flogging and the cane in schools. Indeed, probably a great majority of the population want to bring in castration for rapists. So we must be very careful when we claim public opinion in our favour.[87]

It is important to recognise that many of the responses noted above may be 'knee-jerk' reactions to the hard cases – such as that of Ms Purdy – that have dominated the headlines in past months and may, therefore, not be an objective reflection of their opinion on the issue. Moreover, the *Select Committee on the Assisted Dying for the Terminally Ill Bill,* upon reviewing public opinion, concluded that most of the surveys conducted were quantitative in nature and too simplistic to provide an accurate reflection of opinion on this sensitive and complex issue.[88] Similar weaknesses will be applicable to the surveys quoted above; therefore, despite a seeming overwhelming support from the public, this alone is not sufficient to conclude that a legal change on assisted suicide is imminent.

It is interesting to contrast the opinion of the general public with that of the medical profession; the opinion of this demographic is important, not least because any future legislative proposal is likely to see them playing an integral role in the assisted dying process, but also because they have a great deal of experience in end-of-life care. Perhaps unsurprisingly, evidence indicates that the medical profession are not overly enthusiastic about the concept of legalising assisted suicide. The British Medical Association (BMA) has made clear that it 'remains opposed to doctors taking a role in

---

[85] '*BBC Panorama* Poll on Assisted Suicide' prepared by ComRes, (31 January 2010) http://www.comres.co.uk/page1901414554.aspx accessed 3 February 2010.
[86] '*YouGov/Daily Telegraph* Survey Results.'
[87] HL Deb Vol. 681 cols. 1265-1266.
[88] 'Select Committee on the Assisted Dying for the Terminally Ill Bill Volume I: Report,' para.217.

any form of assisted dying.'[89] In March 2009 *The Times* reported that only 35% of doctors were reported to be in favour of assisted suicide[90] which is considerably out of line with public opinion which generally appears to be around 75% in favour. The lack of enthusiasm from this demographic may be significant; *The Guardian* quotes Professor Clive Searle who pointed to the fact that those countries which had legalised assisted suicide had only made such a change with the support of their medical profession.[91] Thus the lack of support from the medical profession may constitute a steep hurdle on the road towards assisted suicide.

The opinion of the legislature is of paramount importance when speculating on the likelihood of an assisted suicide law because it is they who ultimately have the power to authorise a change. An Ipsos MORI survey suggests that the opinion of MPs is also out of line with the general public; only 53% of those surveyed said that they did not think a doctor should be prosecuted if they help a mentally competent, terminally ill patient to die. Further, of that 53%, only 12% indicated a desire for the law to change.[92] It is also evident that the House of Lords are not enthusiastic about any legal reform from their repeated rejection of attempts to legalise some level of assisted suicide.

Problematically, there appears to be a lack of political will for a change in the law. Lord Alton, in 2005, referred to the fact that successive governments had indicated that they will not provide time for such debate.[93] This reluctance appears to remain post *Purdy* as indicated by the rejection of the proposal to establish a Royal Commission. Prime Minister, David Cameron, has also expressed his opposition to assisted suicide and pledged to put a stop to any moves to change the law.[94] With such disinterest it is hard to envisage a situation where assisted suicide may be legalised.

---

[89] *British Medical Association,* 'BMA comment on Director of Public Prosecutions' final guidance on assisted dying,' 01 March 2010 http://www.bma.org.uk/ethics/end_life_issues/dppassistedying.jsp accessed 23 August 2010.
[90] Rose, D., 'British doctors at odds with public over assisted suicide,' *The Times,* 24 March 2009.
[91] Boseley, S., 'Majority of doctors opposed to assisted suicide,' *The Guardian,* 24 March 2009.
[92] *Ipsos MORI,* 'Summer Survey of MPS,' October 2009 available from http://www.ipsos-mori.com/Assets/Docs/Polls/dignity-indying-mps-report-2009.pdf accessed 13 March 2010.
[93] HL Deb Vol. 674 col. 90 10 October 2005.
[94] Winnett, R., 'General Election 2010: David Cameron says abortion limit should be lowered,' *The Telegraph,* 8 April 2010.

This lack of political will is unlikely to be overcome by a future government because laws are not made in a vacuum, free from external pressures and political ambitions, McLean comments that,

> some politicians have been reluctant to endorse moves towards law reform, perhaps in part based on their fear of losing the support of some of the electorate. Members of Parliament with constituencies in which certain religions and ethnic groups are strongly represented may fear that supporting the rights of people to make their own end of life choices will be a fast and easy route to unemployment.[95]

In addition our law making process is influenced strongly by international developments and currently a number of potential initiatives on assisted suicide in other jurisdictions may prompt reform. The availability of assisted dying in Switzerland has had an enormous impact on those who desire an accelerated death in Britain. However, the Swiss authorities are keen to eradicate 'suicide tourism' and have proposed introducing large fines for groups like Dignitas if they assist someone to die who has not been living in Zurich for at least a year prior to assistance.[96] If this proposal succeeds it will inevitably place greater pressure on English legislators to reconsider the issue.

Further, assisted dying appears to be slowly gathering support in the USA; Oregon was the first state to legalise assisted suicide in 1994. More recently, Washington passed their own Death with Dignity Act to provide assisted suicide to terminally ill patients. It also appears that Montana has legalised assisted suicide through a judicial decision preventing doctors being prosecuted for assisting terminally ill patients to die although the full scope of this decision is not yet clear.[97] If other states follow similar trends and assisted suicide becomes more widely available across other jurisdictions it may result in greater pressure being exerted upon British legislators to follow suit. This pressure would be particularly strong if assisted suicide was legalised close to home and there is a serious push to initiate such a legal change in Scotland with the End of Life Assistance (Scotland) Bill.

---

[95] McLean, *Assisted Dying: reflections on the need for law reform,* p.**3 .**
[96] Hope, C. and Williams, A., 'Britons travelling to Dignitas-style clinics to commit suicide face new £30,000 death tax,' *The Telegraph*, 23 January 2010.
[97] Johnson, K., 'Montana Ruling Bolsters Doctor-Assisted Suicide,' 31 December 2009 http://www.nytimes.com/2010/01/01/us/01suicide.html accessed 3 April 2010.

Conclusion

There can be no doubt that the case of *Purdy* re-ignited the debate on assisted suicide and although the decision did not directly alter the existing legal position, it does appear to have generated further consequences on the development of assisted suicide under English law.

The DPP was required to publish a policy describing the decision making process in prosecutions regarding assisted suicide. There is much disagreement over the impact of these guidelines. It is clear that the policy does not formally condone permitted assisted suicide although some commentators argue that it has opened the back door to assisted death by directing individuals on the best strategy to avoid prosecution. It is not yet possible to accurately conclude how far the guidelines have opened this door because of the debate about the level of clarity.

It has also been suggested that the decision may represent a catalyst for a more formal provision of assistance with death and it is not inconceivable that a formal request for an assisted suicide law may be made in the near future. However, it is difficult to envisage a law of this nature making it onto the statute books any time soon. The previous legislative attempts illustrate a number of recurring concerns over the legalisation of this offence, many of which appear to remain prominent in society today.

At least it was acknowledged that this is an issue which should be directed by societal opinion and it would appear that the majority of the public are in favour of legalisation. On the other hand, the seemingly overwhelming support from the public will not, of itself, drive the legislature towards a change in the law because there are concerns over the objectivity and longevity of public opinion. Moreover, it cannot be ignored that the voices which speak louder in society, that of the legislators and the medical profession, appear to be pulling in the opposite direction and formal legal developments are unlikely to evolve without the support of these demographics.

More compelling are the potential international legal developments that may add more fuel to the fire resulting in even fiercer demands for a reconsideration of the law, especially if the Swiss proceed with proposals to curtail ‘suicide tourism’. It may therefore be possible to assert that a law on this issue will eventually be enacted; as

Baroness Campbell opines 'I believe that whatever happens in the chamber today, this Bill or one worded like it will eventually become law.'[98]

If the current public hype created by *Purdy* fades, it will no doubt be re-ignited by another 'hard case' until eventually the stubborn legislative resistance is eroded into submission. Thus it may be fair to conclude that, if *Purdy* is to be regarded as the first step upon the road towards the legalisation of assisted suicide, it must be said that it is a small step on a very long, complicated road.

[98] HL Deb Vol. 681 col. 1267 12 May 2006.