

Comment on Chapter 5
Assisted Dying and the CPS

R A Duff

(J Child and R A Duff, eds, *Criminal Law Reform Now*, Hart 2018, 155-63)

As Andrew Sanders makes depressingly clear,¹ those who are considering whether to ask another for help in ending their lives, or whether to respond to such requests by providing such help, face a still uncertain, and unsatisfactory, legal position. If they provide assistance to another's suicide, their conduct satisfies the definition of a criminal offence—an offence definition that allows no room for a defence based on, for instance, the earnestness and rationality of the request to which they respond;² if what they do amounts to causing the requester's death, their conduct satisfies the definition of criminal homicide.³ Someone seeking such assistance might think that the law that criminalises it violates the 'right to respect for ... private and family life' declared in Article 8(1) of the European Convention on Human Rights (ECHR): the ECHR has held that 'the right of an individual to decide how and when to end his life ... is one aspect of the right to respect for private life',⁴ and English courts have accepted that the formal criminalisation of assisting suicide 'represents an interference with' that right.⁵ But the courts will not help such a person by declaring that law to be incompatible with the ECHR (or with the English Human Rights Act 1998): for Article 8(2) of the ECHR allows interference with that right if it 'is necessary in a

¹ A Sanders, 'The CPS, Policy-Making and Assisted Dying: Towards a "Freedom" Approach', ch 5 of this volume.

² Suicide Act 1961, s 2.

³ The position in Scotland, which has not formally criminalised assisting suicide as such, is different: the assister might be guilty of homicide, if it can be shown that her conduct 'caused' the other person's death, ie (according to the Lord Advocate) whether 'there was a direct causal link between the actings of the accused and the deceased's death', so that her conduct was 'a significant contributory factor to the death' (Letter to Health and Sport Committee considering the Assisted Suicide (Scotland) Bill (Scottish Parliament ASB 178)); but in *Ross v Lord Advocate* [2016] CSIH 12, the Court of Session refused a request to require the Lord Advocate to publish guidelines—partly on the grounds that the law in Scotland was entirely clear, and that the kind of assistance involved in such cases as *Pretty* and *Purdy* was not criminal under Scots law.

⁴ See, eg, *Haas v Switzerland* (2011) 53 EHRR 3, [51]; *Conway* [2017] EWHC 2447, [11].

⁵ See, eg, *Nicklinson* [2013] HRLR 36.

democratic society ... for the protection of health or morals, or for the protection of the rights and freedoms of others'; and the courts have held that such purposes as 'protection of the weak and vulnerable', and of the moral value of 'the sanctity of life', can thus make such interference legitimate.⁶ Someone seeking help, especially if that help would involve killing them rather than helping them to kill themselves (which is not to say that that is a sharp distinction), can thus look for no support from the law; any assistance she can find will need to be, to put it mildly, discreet, from someone willing to commit a crime and to face the prospect of prosecution. If, however, the assistance is relatively minor, and is provided out of compassion by a friend or loved one (rather than by a medical professional), she and her assister might find reassurance in the 'guidelines' issued by the Director of Public Prosecutions, as required by the Law Lords' decision in *Purdy*:⁷ for if the situation, and the help provided, fit enough of the 'factors tending against prosecution', and none or few enough of those 'tending in favour of prosecution', they can expect that the DPP will decide that a prosecution is not 'in the public interest'.

For those who believe, as Sanders does, that 'assisted dying' is under certain circumstances morally permissible, and should be legally permissible, this position is very far from satisfactory. Those who need assistance in carrying out what might be an entirely rational choice to end their lives are hindered from securing the (competent, efficient) help that they need; those who would provide such help are likewise hindered by the uncertain prospect of prosecution; those who are 'weak and vulnerable' are still in danger of having their lives shortened by doctors who quietly subvert the law by hastening death. The DPP's guidelines could be improved, but they could not be made fit for *this* purpose; the only satisfactory way forward is a formal reform of the law to make statutory, institutional provision for 'assisted voluntary dying'—though the prospects for that are rather dim, given the repeated parliamentary defeats suffered by proposals to legalise some form of assisted dying.⁸

⁶ See, eg, *Conway* [2017] EWHC 2447, and further ECtHR and English cases cited there.

⁷ Crown Prosecution Service, *Policy for Prosecutors in Respect of Cases of Encouraging or Assisting Suicide*; see *Purdy* [2009] 3 WLR 403.

⁸ See recently the fate of the Assisted Dying (No. 2) Bill in the House of Commons in September 2015; also, in Scotland, the fate of the Assisted Suicide (Scotland) Bill in 2015.

My aim in this brief comment is not to criticise Sanders’ proposals for institutional reform, or to revisit the general debate about the legalisation of ‘assisted dying’. I am inclined to agree with the central thrust of his argument; and the experience of other jurisdictions undermines the ‘slippery slope’ or ‘floodgate opening’ objections to which critics of legalisation often appeal. But I want to focus on our present position, in which the prospects for legislative reform are dim, and on the role of the DPP in issuing and applying these kinds of ‘guidelines’—whether in their present form or in a revised form that took some account of Sanders’ objections. How are we to understand the guidelines? What role can such guidelines properly play in what purports to be a parliamentary democracy?

On one reading, the guidelines mark the extent to which the DPP has in effect been rewriting the law, thus creating a significant gap between the formal and the substantive criminalisation of assisting suicide.⁹ Formally speaking, every act of aiding another’s suicide is criminal, under section 2 of the 1961 Act; every such act renders the agent formally liable to prosecution, conviction and punishment. Substantively speaking, however, only a subset of such acts are to be treated as criminal, and to be in practice liable to prosecution; the guidelines serve to indicate which kinds of formally criminal act will not be treated, substantively, as criminal. That is a reading that both the DPP and the courts have formally denied. The guidelines do not, the document itself insisted, ‘decriminalise the offence of encouraging or assisting suicide’.¹⁰ The policy is indeed, officially, a ‘policy for prosecutors’, and thus belongs, formally, among the ‘rules for courts’ that tell legal officials how to deal *ex post* with those who have or may have committed offences, rather than among the ‘rules for citizens’ that give us *ex ante* notice of what we may or may not do.¹¹ The courts have also been concerned to make clear that changing the law is a matter for parliament, not for them or for the DPP.¹² On the other hand, when the Law Lords explained why the DPP should be required to publish his *Policy*, they were prone to talk as

⁹ On formal and substantive criminalisation, see, eg, N Lacey, ‘Historicising Criminalisation: Conceptual and Empirical Issues’ (2009) 72 *MLR* 936.

¹⁰ DPP, *Policy for Prosecutors in Respect of Cases of Encouraging or Assisting Suicide* (2010, updated 2014) [6].

¹¹ See, eg, P Alldridge, ‘Rules for Courts and Rules for Citizens’ (1990) 10 *OJLS* 487.

¹² See, eg, *Purdy* [2009] 3 *WLR* 403, [26]; *Nicklinson* [2013] *HRLR* 36, [126], [134]. Consistently with this insistence, the factors tending for or against prosecution are formally described, in the *Policy*, as factors bearing on whether prosecution would be ‘in the public interest’—not on whether the offence had been committed.

if the point of the *Policy* was precisely to clarify the law in a way that would enable citizens to plan their actions, and to know what they can do ‘without breaking the law’:¹³ the DPP was thus to clarify, it seems, just what the law (as interpreted and applied by him) required of citizens or permitted them to do.

Read as an exercise in substantive legal reform, the *Policy* is of course problematic from a constitutional point of view. Even had the consultation process for the guidelines been less perfunctory; even had it involved some explicit discussion of, and had the *Policy* itself made clear, the principles that underpinned the factors tending for or against prosecution; even had it been a model of deliberative democracy in action:¹⁴ it surely involved a usurpation of the legislature’s role—a usurpation aggravated by the legislature’s own explicit refusal to legalise any form of assisted suicide.

There are other ways of reading the *Policy* that do not raise this kind of worry (and that also make sense of the way in which the non-professional status of the assister bears on the decision whether to prosecute). Instead of reading it as an exercise in substantive law reform, we could, for instance, read it as laying down guidelines for the exercise of discretionary mercy: what the assister does is indeed a criminal wrong for which there is neither justification nor excuse; but it would be harsh or inhuman to insist on prosecuting, for instance, someone who reluctantly helped a loved one end his own life, given the difficulty of her situation, the emotional impact it must have had on her, the loss that she has suffered, and so on. Or we could alternatively see the *Policy* as (implicitly) working towards a compassion-based excuse for assisting another’s suicide: given the admirable motive of the agent who acts from compassion, as well as the way in which compassion (like other powerful emotions) can destabilise practical reasoning, we should not blame someone who is led by compassion to assist a suicide—although it is still wrong to do so. On this reading, the *Policy* recognises that such assistance can mark a mistaken but reasonable, non-culpable, judgment about what one should do: it is wrong to assist the suicide, but someone moved by compassion for a loved one’s plight (as one should be moved)

¹³ *Purdy* [40] (Lord Hope; see also [46]); see also [59], [65] (Lady Hale).

¹⁴ See Sanders’ comments on the process in his chapter.

might misjudge, in a not unreasonable way, what she should do.¹⁵ All of these considerations can apply to those who are close to the would-be suicide, and (likely to be) moved by compassion for him: but they do not apply to medical professionals—not because medical professionals will not be motivated by compassion (they surely should be), but because given their training and their experience, along with the lack of close personal or emotional ties to the would-be suicide, they should be better able to think clearly and appropriately about what should be done.

However, I will not pursue these alternative readings of the *Policy* here: I will not ask whether they are plausible readings of what could have been intended. Instead, I want to discuss a third possible reading (though without asking how plausible it is as an interpretation of the *Policy* as produced by the DPP), according to which the *Policy*, and the DPP’s use of the discretion as to whether to prosecute, mark not a rewriting or revision of the law; nor a sympathetic or merciful mitigation of its stringency, or a recognition of factors that might exculpate the commission of a genuine criminal wrong: but an ongoing process of working out a context-sensitive determination of the law’s substantive meaning,¹⁶ under the (implicit if not explicit) aegis of a (misleadingly titled) ‘*De Minimis*’ principle.¹⁷

The Court shall dismiss a prosecution if, having regard to the nature of the conduct charged to constitute an offense and the nature of the attendant circumstances, it finds that the defendant’s conduct ... did not actually cause or threaten the harm or evil sought to be prevented by the law defining the offense or did so only to an extent too trivial to warrant the condemnation of conviction.¹⁸

The suggestion is that what the Model Penal Code requires of courts, we should also require of our prosecutors.

¹⁵ See further RA Duff, ‘Criminal Responsibility and the Emotions: If Fear and Anger Can Exculpate, Why Not Compassion?’ (2015) 58 *Inquiry* 189. Note that on this reading the *Policy* does not ‘decriminalise the offence of encouraging or assisting suicide’ (see [n 10](#)): such assistance is still both formally and substantively criminal, but some of those who provide it should be excused for doing so.

¹⁶ On ‘determinations’ and their importance, see DN MacCormick, ‘Reconstruction after Deconstruction: A Response to CLS’ (1990) 10 *OJLS* 539, 548–9.

¹⁷ See DN Husak, ‘The *De Minimis* “Defense” to Criminal Liability’ in Husak, *The Philosophy of Criminal Law: Selected Essays* (OUP, 2010) 362; M B Valentine, ‘Defense Categories and the (Category-Defying) *De Minimis* Defense’ (2017) 11 *Criminal Law and Philosophy* 545. The title is misleading because, as we will see, the principle is not concerned only with trivial instances of criminal conduct. A further question, which I do not have space to pursue here, is whether, if a *De Minimis* principle is sound, it should be included in the formal criminal law (as the Model Penal Code includes it).

¹⁸ Model Penal Code §2.12.

Sometimes this expectation is made explicit, if not in the statutory legislation itself, at least in the legislature. A nice example is provided by the Bill that became the Sexual Offences Act 2003. During the parliamentary debate, critics pointed out that sections 9 and 13 criminalised consensual sexual activity between young people aged fifteen — which, they thought, was absurd. A minister reassured these critics that that was not the Bill’s ‘intention’, and would not be its ‘effect’: ‘we shall be able to trust the Crown Prosecution Service to ensure that that intention is followed’.¹⁹ The government was asking Parliament to enact a statute whose offence definitions were avowedly over-broad, defining as criminal types of conduct that there was no intention to treat as criminal; and to rely on prosecutors to use their discretion to put that intention into effect. Suppose that two fifteen year olds engage in ‘sexual touching’, thus satisfying the definition of the offence of ‘sexual activity with a child’. The matter comes to the attention of the police, who (perhaps from moralistic enthusiasm) send the case to the CPS; the prosecutor, in line with the government’s expressed intention, decides not to prosecute. If this is a matter of CPS policy, as it must be, given the government’s (and by implication the legislature’s) clear intention, we should say that such sexual activity is criminal in the books, but is not (really) criminal: it was formally criminalised, but is not substantively criminalised, or has been substantively decriminalised, because it does not involve the mischief at which this law is aimed.²⁰

In other cases, including that of assisting suicide, the DPP and the CPS have no such explicit steer from the legislature, or from those who proposed the relevant legislation, about when and in what ways they should exercise their discretion over whether to prosecute.²¹ Nor will it always

¹⁹ Hansard vol 409, 15 July 2003, col 248; Paul Goggins, a Home Office Minister. But see AP Simester et al, *Simester and Sullivan’s Criminal Law: Theory and Doctrine*, 6th edn (Hart, 2016), 496–8, on the extent to which the CPS has shown this trust to be misplaced; see also *G* [2008] UKHL 37.

²⁰ It is arguable that non-prosecution in such a case should be grounded not in the ‘public interest’ test, but in the ‘evidential’ test: the prosecutor should decide not that, although there is sufficient evidence of a (genuine) crime, ‘public interest’ factors external to the criminal law militate against prosecution, but that there is no evidence that a real crime (conduct involving the mischief at which the law is aimed) has been committed. See J Rogers, ‘The Role of the Public Prosecutor in Applying and Developing the Substantive Criminal Law’, in RA Duff et al (eds), *The Constitution of the Criminal Law* (OUP, 2013) 53.

²¹ But an expectation that such discretion will be especially important in the context of assisted suicide, and that it will at least quite often be used to decide against prosecution, is suggested by the inclusion of subsection 4 in s 2 of the Suicide Act 1961: ‘no proceedings shall be instituted for an offence under this section except by or with the consent of the Director of Public Prosecutions’.

be clear (or even as clear as it was in the case of the Sexual Offences Bill, which was not wholly clear) just what ‘harm or evil’, what ‘mischief’, is the target of the statute. It will be a matter for rational reconstruction or interpretation—a task which will become especially hard when there is a diversity of possible accounts of the mischief, as there clearly is in the case of assisted dying. If we appeal to ‘the sanctity of life’, as some supporters of the existing law clearly do, we will think (or might think, depending on how we interpret ‘the sanctity of life’) that the mischief at which the law is aimed is implicated whenever a life is intentionally taken, and thus whenever such an intentional taking of life (one’s own or another’s) is assisted. If instead we focus on autonomy, and the rights discerned by the courts in Article 8 of the ECHR, we will tell a different story, about the protection of autonomy (a story which will include, as Sanders points out, a concern to enable those whose autonomous choice is to end their lives to carry that choice through, but also a concern to protect the autonomy of those who are ‘weak and vulnerable’), and we will think that in a range of cases the relevant mischief is not implicated by someone who assists a would-be suicide. If a DPP is to apply a ‘*De Minimis*’ principle, how then should she deliberate, when faced by such conflicting conceptions of the relevant mischief, generating such different conclusions? Should she, perhaps, embark on a consultation process—though one very different from that in which the DPP actually engaged for the *Policy*, since it would require not just (if at all) a listing of potential ‘factors’ for or against prosecution, but an articulation and discussion of these competing conceptions of the mischief? But that might look again like an attempt to preempt Parliament, and to come down on one side of a debate that Parliament itself clearly refused to settle. Or should she play safe, and decline to prosecute only in those cases that clearly did not involve the relevant mischief on any (plausible, ‘reasonable’) interpretation of the law²²— which would again lead her to a very cautious *Policy*?

But why should we even think of asking prosecutors to exercise this kind of discretion—to decide not just whether it is in the public interest to prosecute a provable crime, but whether what fits the law’s formal definition of a criminal offence is ‘really’, or in substance, a crime? Surely we should instead expect legislatures to define offences with sufficient precision to avoid having to rely on this kind of official discretion—given all the familiar dangers of official discretion that

²² Or cases that involved that mischief ‘only to an extent too trivial to warrant the condemnation of conviction’.

is often exercised ‘discreetly’, and that can be hard to make accountable? Here is where a further question about law reform arises from Sanders’ discussion of the CPS and assisted dying. Is this kind of discretion something that we should recognise as a valuable (as well as unavoidable) aspect of the criminal law—in which case we need to ask how it can be guided, controlled, exercised, and rendered appropriately accountable? Or is it an inherently dangerous (and undemocratic) power, that we should seek to minimise even if we cannot eliminate it altogether—which might point us towards something more like the ‘legality principle’ by which prosecutors elsewhere in Europe are said to be bound, requiring them to prosecute whenever there is sufficient evidence of what the law defines as a crime (although it is not clear how far that legality principle in fact prevails in other jurisdictions)?²³ Such a principle at least creates a strong presumption in favour of prosecution, and resists the idea that prosecutors should generally exercise wide discretion in deciding which provable cases to pursue.²⁴

How far we should aspire to a legality principle of prosecution depends in part on how far it is realistic to expect lawmakers so to craft criminal statutes that they capture exactly the mischief at which they are aimed—that they are neither over-inclusive nor radically under-inclusive; but it also depends on how far we should see the enterprise of substantive criminalisation, understood as the enterprise of determining which kinds of conduct should be seen, censured and treated as criminal, as one for the legislature, or how far we should see it as an essentially collaborative enterprise in which legislatures and other official bodies (including the police and prosecutors) and lay citizens have a role to play in collectively determining the substantive content of their criminal law. That is not a question I can pursue here:²⁵ but suppose we think that prosecutors should play the kind of role I sketched above—that part of their role should be to work out, in context-sensitive ways, more precise determinations of the wrongs that criminal statutes define

²³ See, eg, M Damaška, ‘The Reality of Prosecutorial Discretion: Comments on a German Monograph’ (1981) 29 *American Journal of Comparative Law* 119; A Perrodet, ‘The Public Prosecutor’, in M Delmas-Marty and JR Spencer (eds), *European Criminal Procedures* (CUP, 2002) 415; S Boyne, ‘German Prosecutors and the Rechtsstaat’, in M Langer and D Sklansky (eds), *Prosecutors and Democracy: A Cross-National Study* (CUP, 2017) 138.

²⁴ However, that way of putting the matter risks begging a question noted above (n 20): does a ‘*De Minimis*’ principle bear on the question of whether the (properly understood) evidential test is satisfied; or on whether it is in ‘the public interest’ to prosecute a case in which that test is satisfied?

²⁵ But see RA Duff, ‘A Criminal Law We Can Call Our Own?’ (2017) 111 *Northwestern University Law Review* 1491; also *The Realm of Criminal Law* (OUP, 2018) chs 1.7, 5.

in inevitably imprecise and potentially over-inclusive ways, and to identify more precisely and contextually the kinds of conduct that do involve the mischief at which the law is aimed. What kinds of reform might this require to the institutional structure and practices of prosecution?

It would require, first, that legislatures do more to identify the mischief at which a criminal statute is aimed. This is not to say that they should be expected to define it precisely (for if they could do that, there would be no need for the kind of prosecutorial discretion we are concerned with here), but that they should at least, in the preamble to each statute, give some indication of the relevant mischief. That would, of course, cause some problems in cases in which legislators with very different views on what the relevant mischief is can still agree on the terms of a statute—for instance if those who would appeal to the sanctity of life, and those who would appeal to the need to protect the weak and vulnerable, can still agree that voluntary euthanasia should be criminal: but if people are to be prosecuted, convicted, and so condemned for a supposed wrong, as those convicted in our criminal courts are, they should be able to know what that wrong is.²⁶

Secondly, it would require clearer guidance for prosecutors in exercising their discretion, and also some way of making that exercise suitably accountable. The former would involve revising the code for prosecutors;²⁷ the latter would involve working out procedures through which both decisions to prosecute and decisions not to prosecute can be challenged. It might be said that we already have such procedures: decisions to prosecute are in effect challenged in court, when the burden of proof puts the prosecution to the test by requiring it to prove the charge (to prove first, that is, that there is a case to answer, which is also to justify the prosecution); and it is possible for an interested party to challenge a decision not to prosecute through an independent review,²⁸ or through judicial review (of prosecutorial policies for particular types of crime, or of decisions about particular cases). Two questions arise about such provisions. First, who should have the standing to seek judicial review: should it only be the alleged victim (or someone acting on her or his behalf), at least when the review sought is of an individual decision; or should any

²⁶ This would also have the further salutary effect of imposing a more explicit burden on legislatures to justify themselves, and thus of providing a clearer focus for critical scrutiny of legislation.

²⁷ Crown Prosecution Service, *Code for Crown Prosecutors* (2013).

²⁸ See CPS, *Victims' Right to Review Scheme* (Legal Guidance, updated 2016).

concerned citizen have standing, on the grounds that crimes, as public wrongs, are every citizen's business?²⁹ Secondly, what standard should the court apply in reviewing the decision? English courts are very reluctant to interfere with prosecutorial discretion: an application can succeed only if the court finds the prosecutor's decision to be one that no reasonable prosecutor would have adopted.³⁰ As for challenging decisions to prosecute, this should be done—to make clear what the challenge is—either before the trial proper starts, on the grounds that a '*De Minimis*' finding constitutes a bar to trial; or, perhaps, as a version of 'no case to answer': for the key claim is that even if the prosecution proves beyond reasonable doubt all the 'factual' claims made in the indictment, even if it proves that the defendant's conduct did satisfy the formal definition of the offence in question, this would not prove that the defendant had committed a mischief of the kind at which the law is aimed. Thus the case is not like that in which the defendant denies, or challenges the prosecution to prove, that he acted in the way that the indictment alleges; nor like one in which he admits the commission of the offence but offers a defence: it is a case in which, he claims, even on the facts alleged by the prosecution, there was no (genuine, substantive) criminal wrong for which he could be called to answer.³¹

I cannot pursue these issues here. My suggestion is, however, that we should embrace, rather than shrink from, this kind of prosecutorial discretion:³² discretion, that is, to determine whether conduct that satisfies the legal definition of a criminal offence really does involve the mischief at which the relevant law is aimed; and to refrain from prosecution if it does not. But if we are to do this, we need to think about ways of reforming the institution and practice of prosecution so that the exercise of that discretion can be suitably guided, and rendered suitably accountable.

²⁹ See *Metropolitan Police Commissioner ex parte Blackburn (No.1)* [1969] 2 QB 118.

³⁰ *Associated Provincial Picture Houses v Wednesbury Corporation* [1948] 1 KB 223.

³¹ Compare the provision in Scots law for a pre-trial plea challenging the 'relevancy' of the charge—arguing, that is, that the charge 'did not libel a crime known to the law of Scotland' (see eg *Khalid v HM Advocate* 1984 JC 23; Criminal Procedure (Scotland) Act 1975, s 76(1)(a)).

³² A discretion that should certainly be, in Dworkinian terms, 'weak' rather than 'strong': RM Dworkin, 'The Model of Rules' (1967/8) 35 *University of Chicago Law Review* 14.