Consultation on public interest guidance for suicide pact and 'mercy killing' type cases

Care Not Killing response, April 2022

*The **Crown Prosecution Service** proposes deleting the sentence "Subject to sufficiency of evidence, a prosecution is almost certainly required, even in cases such as 'mercy killing' of a sick relative" from the "Homicide: Murder and Manslaughter" prosecution guidance, and inserting a new section[1] culminating in lists of factors tending for and against prosecution in cases of suicide pacts and "mercy killings":*

Public Interest Factors Tending in Favour of Prosecution – a prosecution is more likely to be required if:

- *the victim was under 18 years of age;*
- *the victim did not have the capacity (as defined by the Mental Capacity Act 2005) to reach an informed decision to end their life;*
- *the victim had not reached a voluntary, clear, settled and informed decision to end their life;*
- *the victim had not clearly and unequivocally communicated their decision to end their life to the suspect;*
- *the suspect was not wholly motivated by compassion; for example, the suspect was motivated by the prospect that they or a person closely connected to them stood to gain in some way from the death of the victim;*
- *the suspect pressured the victim or did not take reasonable steps to ensure that any other person had not pressured the victim;*
- *the suspect has a history of violence or abuse against the victim;*
- *the suspect was unknown to the victim;*
- *the suspect received a financial reward for their actions;*
- *the suspect deliberately used excessive violence or force causing unnecessary or prolonged suffering;*
- *the suspect was acting in his or her capacity as a medical doctor, nurse, other healthcare professional, a professional carer [whether for payment or not], or as a person in authority, such as a prison officer, and the victim was in his or her care. [This factor does not apply merely because someone was acting in a capacity described within it: it applies only where there was, in addition, a relationship of care between the suspect and the victims such that it will be necessary to consider whether the suspect may have exerted some influence on the victim.]*

Public Interest Factors Tending Against Prosecution – a prosecution is less likely to be required if:

- *the victim had reached a voluntary, clear, settled and informed decision to end their life;*
- *the suspect was wholly motivated by compassion;*
- *the victim was seriously physically unwell and unable to undertake the act;*
- *the actions of the suspect may be characterised as reluctant, in the face of a determined wish on the part of the victim to end their life;*
- *the suspect attempted to take their own life at the same time, in pursuance of a suicide pact;*
- *the suspect reported the death to the police and fully assisted them in their enquiries into the circumstances and their part in it.*

[1] www.cps.gov.uk/proposed-changes-homicide-murder-and-manslaughter-guidance

Section 2

1. Do you think that the categories of cases to which these additional factors apply are appropriate?

No

2. Can you expand on your answer to question 1?

We are told that:

> *"This section… does not in any way 'decriminalise' the offences of murder, manslaughter or attempted murder. Nothing in this approach can be taken to amount to an assurance that a person will be immune from prosecution if he or she does an act that ends the life of another person."*

The whole purpose of this review is to publish the necessary elements of a suspect's defence in the event that should be found to have ended another's life. The quotation above is unrealistic: of 171 cases of assisting or encouraging suicide referred to the CPS between 1 April 2009 and 31 July 2021, 111 were not proceeded with by the CPS. (Of the remainder, 32 cases were withdrawn by the police while eight cases were referred onwards for prosecution for homicide or other serious crime. Just three cases of encouraging or assisting suicide have been successfully prosecuted; one case was charged and acquitted after trial in May 2015; and 11 are ongoing.)[2]

This planned publication does not *introduce* prosecutorial discretion, which already exists; it simply softens a publicly firm and easily understood statement while giving the appearance of a weakened law:

> *"Subject to sufficiency of evidence, a prosecution is almost certainly required, even in cases such as 'mercy killing' of a sick relative."*

3. Do you agree that the factors considered should be broadly consistent with those set out in the assisted suicide policy?

Neither yes nor no

4. Can you expand on your answer to question 3?

We give no answer to question 3 in order to reiterate that we do not feel such factors should be published, while also reserving the right to comment in detail, constructively, on the factors and accompanying guidance which have been drafted.

Care Not Killing's then-Chairman, Lord Carlile of Berriew, responded to the Director of Public Prosecutions' final, revised assisted suicide guidance in 2010, recognising that the CPS had shown itself willing to hear and address serious concerns with the initial draft:

> *"Our main concern was that the interim guidelines singled out as a group those who were disabled or ill, thereby affording them less protection than other people under the law. We are very glad this has been removed… There are still some flaws and problems which will need attention, such as how a compassionate suspect's motives are to be determined in practice."*[3]

[2] www.cps.gov.uk/publication/assisted-suicide

[3] www.carenotkilling.org.uk/press-releases/dpp-guidelines/

Our concerns about determining the nebulous and entirely subjective status of a suspect being "wholly motivated by compassion" still stand. Viewing the proposed "mercy killing" guidance in the context of the assisted suicide guidance, we note multiple concerns.

Having welcomed the removal of the reference to disabled or ill people from the 2010 guidance, we are disturbed to read the third factor tending against prosecution here:

> *"the victim was seriously physically unwell and unable to undertake the act"*

It is once again a danger that "the CPS might take a more lenient view of assistance given to sick or disabled people than to others."[4] In doing so, the CPS would risk failing in its Public Sector Equality Duty, which states that:

> *"A public authority… having due regard to the need to foster good relations between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to… tackle prejudice."*
>
> *"A public authority… having due regard to the need to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to… remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic… [and] encourage persons who share a relevant protected characteristic to participate in public life or in any other activity in which participation by such persons is disproportionately low."*[5]

The CPS must be seen to ensure that those living with disabilities have equal protection under the law, and must never risk entrenching prejudices within society regarding the value of disabled people's lives.

We are acutely aware that an individual who is sufficiently "physically unwell and unable to undertake the act" would likely also be unable to *resist* being – in the broadest sense of the word – killed. The possibility puts us in mind of a now infamous case[6] in the Netherlands, where a patient with dementia had signed an advanced directive requesting euthanasia, but when the doctor felt the time had come, the patient resisted and was ultimately restrained by family members so as to facilitate the euthanasia.

This example in turn calls into question further factors. Prosecutors would be prompted to discern whether "the victim had reached a voluntary, clear, settled and informed decision to end their life," "clearly and unequivocally communicated their decision to end their life to the suspect," and had "capacity (as defined by the Mental Capacity Act 2005) to reach an informed decision to end their life." How would prosecutors approach cases where a suspect argues that a victim had fulfilled these criteria while they had capacity, and that the "mercy killing" had occurred at a pre-agreed later point? How could prosecutors guard against changes of mind – whether by victims with mental capacity but diminished physical powers, or else with diminished capacity? (It is worth noting that the example which prompted these questions comes from a country where euthanasia is legal and supposedly well-regulated.)

The specific reference to the Mental Capacity Act prompts us to revisit longstanding concerns regarding that legislation, whose principles assert that:

> *"A person must be assumed to have capacity unless it is established that he lacks capacity."*

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[4] www.carenotkilling.org.uk/press-releases/dpp-guidelines/
[5] www.legislation.gov.uk/ukpga/2010/15/section/149
[6] www.carenotkilling.org.uk/press-releases/cnk-condemns-dutch-elderly-euthanasia-bill/

> *"A person is not to be treated as unable to make a decision merely because he makes an unwise decision.[7]"*

Capacity is notoriously hard to assess, and while the Act states that "*a lack of capacity cannot be established merely by reference to… a condition of his, or an aspect of his behaviour, which might lead others to make unjustified assumptions about his capacity*", there is an unspoken counterpoint wherein a victim might easily have lacked capacity while appearing articulate and cogent enough for capacity to remain assumed (to say nothing of the fact that capacity, or the lack thereof, is not a fixed constant.) "Unwise" is the most prosecutors would be able to say of a victim purportedly requesting their own death in this regard, unless specifically contradicted.

If the victim is judged not to have had capacity, no "best interests" assessment should be permitted which might lessen the tendency towards prosecution. We note, within the MCA:

> *"Where the determination relates to life-sustaining treatment he [the person determining for the purposes of this Act what is in a person's best interests] must not, in considering whether the treatment is in the best interests of the person concerned, be motivated by a desire to bring about his death."[8]*

In both the assisted suicide and draft "mercy killing" factors, we find serious fault with caveats attached to two factors tending in favour of prosecution:

> *"7 the suspect has a history of violence or abuse against the victim"*

It is unreasonable to so limit assessment of the suspect's character and actions: the words "against the victim" should be omitted from the "mercy killing" guidance and excised from the assisted suicide guidance[9].

> *"11 the suspect was acting in his or her capacity as a medical doctor, nurse, other healthcare professional, a professional carer [whether for payment or not], or as a person in authority, such as a prison officer, and the victim was in his or her care. [This factor does not apply merely because someone was acting in a capacity described within it: it applies only where there was, in addition, a relationship of care between the suspect and the victims such that it will be necessary to consider whether the suspect may have exerted some influence on the victim.]"*

The insertion of the requirement that the victim be "in his or her care" into the assisted suicide guidance in 2014 caused uproar, and rightly so. Care Not Killing's then-Campaign Director Dr Peter Saunders wrote:

> *"The DPP is effectively at a stroke of her pen decriminalising assisted suicide by doctors and other health care professionals as long as they don't have an existing professional care relationship with the patient. Alison Saunders' new guidance is an invitation to doctors who wish to push the boundaries and assist others' suicides to have free rein and go ahead… she has run roughshod over the original meaning of the CPS prosecution guidance… [which] made it abundantly clear that any doctor or other health professional who assisted a suicide was running the risk of prosecution. Furthermore the General Medical Council (GMC) has warned that such doctors risk censure, including being struck off the medical register… Medical defence bodies have interpreted it in this same way in their advice to doctors and it has provided a strong deterrent to doctors abusing their powers. But now the DPP has swept this aside."[10]*

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[7] www.legislation.gov.uk/ukpga/2005/9/section/1
[8] www.legislation.gov.uk/ukpga/2005/9/section/4
[9] www.cps.gov.uk/legal-guidance/suicide-policy-prosecutors-respect-cases-encouraging-or-assisting-suicide
[10] www.carenotkilling.org.uk/articles/prosecution-shift-prompts-outcry/

The amendment was welcomed by activist former doctors who freely admit to having assisted suicides, and openly publish guides and run seminars on suicide methods; such individuals were emboldened by the change and the caveat should be both omitted from the "mercy killing" guidance and excised from the assisted suicide guidance.

5. Are there any further factors in favour of prosecution that should be included?

Yes

6. What further factors in favour of prosecution should be included if you replied Yes to question 5?

Considering the deliberate effort to reflect the factors laid out in the assisted suicide guidance, it is unclear why three (in favour of prosecution) have been left out:

> *"12 the suspect gave encouragement or assistance to more than one victim who were not known to each other;"*
>
> *"15 the suspect was aware that the victim intended to commit suicide in a public place where it was reasonable to think that members of the public may be present;*
>
> *"16 the suspect was acting in his or her capacity as a person involved in the management or as an employee (whether for payment or not) of an organisation or group, a purpose of which is to provide a physical environment (whether for payment or not) in which to allow another to commit suicide."*

Factor 12 is perhaps the most glaring omission, and we take this opportunity to argue that "who were not known to each other" should be both omitted from the guidance under consideration, and excised from the assisted suicide guidance.

The factors tending against prosecution include:

> *"6 the suspect reported the death to the police and fully assisted them in their enquiries into the circumstances and their part in it."*

A corresponding factor tending in favour of prosecution should be added, whereby any instance of "mercy killing" subsequently publicised by the suspect or their associates for political purposes should be understood, at least in part, as a death brought about for the benefit of a political campaign e.g. Dignity in Dying (formerly the Voluntary Euthanasia Society), rather than primarily for private personal reasons. It is worth considering the various sets of guidance concerning media reporting on suicide (e.g. by the WHO and Samaritans). The Editors' Code of Practice, published by the Independent Press Standards Organisation, contends that:

> *"Care should be taken to limit the risk of vulnerable people being influenced by coverage of suicide and choosing to end their own lives."*
>
> *"Journalists should be prepared to justify the inclusion of any detail of the method of suicide in any report."*
>
> *"Particular care should be taken when reporting on novel methods of suicide."*[11]

[11] www.ipso.co.uk/member-publishers/guidance-for-journalists-and-editors/guidance-on-reporting-suicide/

Any "mercy killing" used by the suspect in the media and broader public discourse to argue for a relaxation of the law against euthanasia necessarily seeks to normalise such acts, at the cost of a human life.

7. Are there any further factors tending against prosecution that should be included?

Yes

8. What further factors tending against prosecution should be included if you replied Yes to question 7?

We would not add a further standalone factor, but rather introduce and develop an omission. The assisted suicide guidance lists these two factors tending against prosecution:

> *"the suspect had sought to dissuade the victim from taking the course of action which resulted in his or her suicide;*
>
> *"the actions of the suspect may be characterised as reluctant encouragement or assistance in the face of a determined wish on the part of the victim to commit suicide;"*

The "mercy killing" guidance lists only:

> *"the actions of the suspect may be characterised as reluctant, in the face of a determined wish on the part of the victim to end their life;"*

We would argue that prosecutors cannot be satisfied that a suspect was "reluctant" unless they had (at least) evidently "sought to dissuade the victim". The two factors must not only both be present (in a single, expanded factor), but must be considered inextricably linked and so impossible to concede one without the other.

9. Please provide any other feedback you wish to share around how the revised guidance could be improved?

Regarding the new section's preamble, we are concerned at the heavy (and repeated) emphasis laid upon the mantra that "prosecution does not *automatically* follow when an offence is believed to have been committed." Nonetheless, we welcome the intent behind other clear statements:

> *"It is murder or manslaughter for a person to do an act that ends the life of another, even if they do so on the basis that they are simply complying with the wishes of the other person concerned."*
>
> *"A prosecution will usually take place unless the prosecutor is sure that there are public interest factors tending against prosecution which outweigh those tending in favour."*
>
> *"The public interest in prosecuting suicide pact cases and so called 'mercy killing' cases is high as the harm caused will inevitably be of the utmost seriousness."*

"The harm caused" is all too often not just to the victim, but to wider society as a result of an example being set. The media guidance regarding suicide, already referenced, ties into the "Werther effect": suicide contagion as prompted by cultural depictions and media reports[12]. Professor David Albert Jones, writing this year in the *Journal of Ethics in Mental Health*, has demonstrated that:

[12] www.carenotkilling.org.uk/articles/werther-papageno-on-the-cobbles/

"Introducing [euthanasia or assisted suicide] is followed by considerable increases in suicide (inclusive of assisted suicide) and in intentional self-initiated death. There is no reduction in non-assisted suicide relative to the most similar non-EAS neighbour and, in some cases, there is a relative and/or an absolute increase in non-assisted suicide... the Netherlands, which has the longest history and greatest number of deaths by EAS in Europe, the rates of non-assisted suicide have increased since EAS was legalised by statute. This was both an increase in absolute terms and an increase relative to its only non-EAS neighbour: Germany."[13]

Publishing this guidance would not change statute, but would be perceived as a significant shift in how – or whether – prosecutors respond to contraventions of a most fundamental law. What meaningful consideration has been given to the ramifications of this entirely unnecessary step?

On a point of fact, it is stated in the draft guidance that "the offence of encouraging or assisting the suicide will only apply where the victim has taken or attempted to take their own life." The Suicide Act is clear that "D may commit an offence under this section whether or not a suicide, or an attempt at suicide, occurs."[14]

[13] jemh.ca/issues/open/documents/JEMH%20article%20EAS%20and%20suicide%20rates%20in%20Europe%20-%20copy-edited%20final.pdf

[14] www.legislation.gov.uk/ukpga/Eliz2/9-10/60/section/2