

Assisted dying and Lord Falconer's recommendations; to what extent should medical and public opinion be considered when amending the law regarding assisted dying?

Dein Lowdon, Iseult McGrory, Calvin Rowley, Colm Taylor

INTRODUCTION

Assisted dying is a matter of dispute in the UK due to public interest based on landmark cases such as Debbie Purdy and Tony Nicklinson.

The biggest ever contest to the current law was Lord Falconer's Bill: Assisted Dying (2014) which was further amended by Rob Marris' attempt in parliament in 2015. We are looking at how medical and public opinion should be considered when amending the law.

CONCLUSION

The general consensus from medical professionals is that **reform in assisted dying is wrong** and it would damage the doctor-patient relationship. On the other hand, the cases of Debbie Purdy and Tony Nicklinson illustrate the **public outcry for reform** stating that it's a violation of their human rights.

As a group we align ourselves with the opinions of medical professionals due to their experience and ethical neutrality. However, the public opinion should not be disregarded, as this is the democratic rule.

PUBLIC OPINION

Public opinion was massively influenced by two landmark cases Debbie Purdy and Tony Nicklinson,

Debbie Purdy was successful in her case where she sought out the criteria of which the DPP takes into consideration before deciding whether or not to prosecute someone with regards to assisted suicide. She successfully argued that it was a breach of her human rights not to know whether or not her husband would be prosecuted which led to the publishing of the Interim Report by the DPP.

Tony Nicklinson suffered from a stroke and was paralysed from the neck down, he began the legal proceedings in 2010 taking the case on whether or not his wife would be prosecuted if she assisted him with his suicide as he did not want to live this way for another 20 years. He gave evidence before the commission of human rights saying that there is a "fundamental injustice with the present law".

CURRENT LAW

The Suicide Act 1961 details where one is criminally liable for complicity in another's suicide.

- ◊ S.2(1) states "A person ("D") commits an offence if:
- ◊ a) D does an act capable of encouraging or assisting the suicide or attempted suicide, and
- ◊ (b) D's act was intended to encourage or assist suicide or an attempt at suicide."
- ◊ S.2(1)(C) goes on to identify that this is an offence triable by indictment with a potential maximum sentence of 14 years imprisonment.

Under s.2(4) it states that DPP must consent to the possible prosecutions. The DPP released his prosecution guidelines following the case of Debbie Purdy.

Debbie Purdy



Tony Nicklinson

MEDICAL OPINIONS

The main argument in the medical debate for assisted dying is whether it would affect the relationship between the doctor and the patient.

On one hand, the British Medical Association disagrees with all forms of assisted dying saying that it will have a "profound and detrimental" effect, causing patients to have less trust in their doctors.

On the other hand, polls generated by a charity called Dignity in Dying states that 54% of GP doctors are supportive to assisted dying.

ISSUES WITH THE LAW

The main issue with this law is that the public believe it is outdated for modern society. Modern society has become far more liberal; and similarly to other issues of public policy, such as abortion, divorce, etc. the public has expressed a desire for a change in the law—one that respects the individual and gives them choice about ending their life with dignity where they have a terminal illness.

Up until 2010, s.2(4) SA61 brought with it an inherent issue, as there was no indication as to whether or not a person would be prosecuted for assisting a loved one in dying.

PROPOSED REFORMS

Under **Lord Falconer's** proposal; "A person who is terminally ill may request and lawfully be provided with assistance to end his or her own life."

This was only applicable where:

1. The person has a clear and settled intention to end his or her own life.
2. The person has made a declaration to that effect...
3. And on the day the declaration is made the person is aged 18 or over and has been ordinarily resident in the UK for at least 1 year.

Rob Marris proposed a bill which is an extension of this which made it to the second reading.

OUR OPINION: We think that the proposals gave a realistic and justified change to the law which would be effective in providing a dignified death for people with terminal illnesses. However, these reforms do not cover those who have a particularly low standard of living (e.g. paralysis).

WHAT DO DOCTORS THINK?

54%

of GPs are supportive or neutral to law change on assisted dying

KEY QUESTION

How will assisted dying impact the relationship between doctors and patients?

Assisted dying and Lord Falconer's recommendations; to what extent should medical and public opinion be considered when amending the law relating to assisted dying?

Introduction

Assisted dying in the UK is a controversial topic, this is due to a massive peak in public and medical interest in the topic. This is because of two recent Landmark cases Tony Nicklinson and Debbie Purdy. These campaigners for the right to die were arguing cases associated with the prosecution of their spouses assisting in their suicide which is illegal under the Suicide Act 1961.

The biggest debate on assisted dying is whether you should have the right to be assisted in dying. This is a very controversial topic which has been contested by new bills presented to parliament such as Lord Falconer's Bill: Assisted Dying (2014).¹ This was the biggest contest ever to the law on assisted dying. The aim for our research project is to highlight issues with the law; analysing where the law that could be reformed. We will look specifically at how medical and public opinions could be considered when amending the law relating to assisted dying.

Current law / Issues with the law

The current law on assisted dying comes from s.2 Suicide Act 1961² which details where one is criminally liable for complicity in another's suicide. S.2(1) states "A person ("D") commits an offence if- (a) D does an act capable of encouraging or assisting the suicide or attempted suicide, and (b) D's act was intended to encourage or assist suicide or an attempt at suicide." S.2(1)(C) goes on to identify that this an offence triable by indictment with a potential maximum sentence of 14 years imprisonment.

Interestingly however, s.2(4) states that "no proceedings shall be instituted for an offence under this section except by or with consent of the Director of Public Prosecutions" suggesting that this crime will not be prosecuted except where it is in the interest of the public to do so.

S.2(4) brings with it an inherent issue – when will this crime be prosecuted? This question was brought before the courts during the case of Debbie Purdy, whom argued that it was within her

¹ 'Assisted Dying Bill [HL] 2014-15' <<https://services.parliament.uk/bills/2014-15/assisteddying.html>> accessed 22 November 2018.

² Suicide Act 1961

human rights to know whether or not her husband was likely to face prosecution should he help her to end her life. In 2009 the House of Lords ruled in favour of Purdy, stating that the law here was unclear. This led to an order for the DPP to release a set of guidelines detailing what factors influence whether a person would be prosecuted – he was to “to clarify what his position is as to the factors that he regards as relevant for and against prosecution”³.

In the following February 2010, DPP Kier Starmer, released the prosecution guidelines for this offence. They are as follows:

Prosecution is more likely if the person committing suicide was:

Under 18

Lacked capacity to make an informed decision to end their life or

Physically able to end their life without assistance.

The assister is more likely to be prosecuted if they:

Had a history of violence or abuse against the person they assisted

Were unknown to the person

Were paid by the person committing suicide or

Were acting as a medical doctor, nurse or other healthcare professional.

Many people in the UK find issue with this law, and believe we are in need of change. Many believe that the act is now outdated for a more secular era. With increasing access to new medical technologies, we now have options to ease the terminally ill into end of life.⁴

Proposed Reforms

Lord Falconer first brought the issue of assisted dying to the House of Lords in June 2013 and was debated for a period of over two years until time constraints due to the 2015 General Election caused the progress of the bill to be put on hold.

³ Dignity in Dying, *Prosecution policy*. Available at: <<https://www.dignityindying.org.uk/assisted-dying/the-law/prosecution-policy/>> accessed 19 November 2018

⁴ibid

Lord Falconer's bill was inspired by, and partly based on, the Death with Dignity Act which was passed in the US state of Oregon in 1997, and proposed, among other things, to legalise assisted dying for "terminally ill but mentally competent" adults in England and Wales.

Under Lord Falconer's proposal "A person who is terminally ill may request and lawfully be provided with assistance to end his or her own life." However this was subject to stringent conditions. This was only applicable where:

The person has a clear and settled intention to end his or her own life;

The person has made a declaration to that effect; and

On the day the declaration is made the person is aged 18 or over and has been ordinarily resident in the UK for at least 1 year.

For the purposes of this bill, the term "terminally ill" refers to an illness that "has been diagnosed by a registered medical practitioner as having an inevitably progressive condition what cannot be reversed by treatment, and as a consequence of that terminal illness, is reasonably expected to die within six months." It should also be noted that treatment which relieves symptoms is not to be considered treatment which is reversible.

Rob Marris' bill proposed in 2015, was an extension of this – proposing the same ideas as Falconer, this made it to a second reading where it was defeated after a four hour debate.

We believe these proposals provided a realistic and reasonable change to the current law, which would be effective in providing a just and dignified end for those who are terminally ill, whilst still being grounded within reality, and not unnecessarily opening proverbial flood gates that would make the law too liberal.

There is however a slight discrepancy as to whether this should be considered significant change. Cases where the individual seeking help to die is completely paralysed and has a very low standard of living are not accommodated for by these proposals.

Medical

In terms of medical opinions on assisted dying, they are varied. Statistics show that "54% of GPs are supportive or neutral to reform on assisted dying"⁵. Stemming from that poll, it was

⁵ Dignity In Dying, *Public Opinion*. <<https://www.dignityindying.org.uk/assisted-dying/public-opinion/>> accessed 23 November 2018.

also said that “87% of people say an assisted dying law would increase or have no effect on their trust in doctors”⁶.

Building from this “The BMA - the union which represents thousands of doctors – officially opposes all forms of assisted dying, which it says would have a ‘profound and detrimental’ effect on the doctor-patient relationship”⁷.

If we consider medical opinions paramount, this could be used as an argument against reforming the law. Despite the slight majority supporting reform, the potential impact on the doctor-client relationship could be considered to do more harm than good.

Adversely, in the book *Death, Dying and the Law*, assisted dying is referred to in both positive and negative lights. It states “Death is perceived by some medical staff as a failure of their skills. If, however, they merely prolong the inevitable and the patient is not allowed to die with dignity, they are clearly not acting in the best interests of the patient”⁸. This provides an insight as to why doctors may be against a reform – although the reasoning could be considered selfish. More importantly, this quote suggests that in certain scenarios it is within the best interest of the patient for assisted dying to be an option, providing an argument in favour of reform.

As you would expect with all such morally ambiguous topics, the question surrounding the law on assisted dying has been subject to many reflective articles presenting arguments from both sides about the need for reform in this subject.

Sheila McLean, a Professor of Law and Ethics in Medicine provides a well-reasoned and detailed analysis on both sides of the debate on the need for state control over assisted dying in her article: *Assisted dying: Reflections on the need for law reform*.⁹ McLean details the basis for both sides, those whom believe that sanctity of life should prevail over all else, and on the other hand those who believe that an individual’s quality of life is more important than this, and that their freedom as an individual should grant them the right to do as they see fit. She then further goes on to analyse the reasons behind both of these standpoints; eventually drawing to the conclusion that “The primary consequence of this is that we must try to identify how we

⁶ Dignity In Dying, *How Will Assisted Dying Impact The Relationship Between Doctors And Patients?* <<https://www.dignityindying.org.uk/key-question/assisted-dying-impact-relationship-doctors-patients/>> accessed 23 November 2018.

⁷ ‘Should You Have The Right To Die?’ (*BBC Guides*, 2018) <<http://www.bbc.co.uk/guides/z849cwx>> accessed 23 November 2018.

⁸ Nicholas A. Pace, ‘The Practitioner’s View, in Sheila A.M. McLean (ed) *Death, Dying and the Law* (Dartmouth Publishing Company Limited 1996) 6

⁹ Sheila McLean, *Assisted dying: Reflections on the need for law reform* (Routledge 2007)

can accommodate the views of each side of this debate – and those somewhere in the middle. At the same time, I have argued that we must strive to minimise harm and maximise liberty.” In summary she believes that the individual’s freedom should win out, and that there is a need for reform on the current law of assisted dying in the UK.¹⁰

Public

There remain a vast array of public opinions on assisted dying reform. We should begin by recognising that social attitudes to such stigmatised issues such as this are becoming increasingly liberal. To the majority of the public, the ideas around assisted dying in the Suicide Act 1961 are becoming increasingly outdated.

It has been shown in recent polls carried out by the charity organisation ‘*Dignity in Dying*’ that the public are massively in favour of a change in the law. These opinion polls show that 82% of the public support the choice of assisted dying for terminally ill adults¹¹ - an overwhelming majority, especially when compared to the 54% of GPs – this begins to raise the question: whose opinions should be respected more when approaching proposed reforms? Public or professional.

One of the reasons for this change in attitude could be attributed to religion. All mainstream religions reject assisted dying outright, in all of its forms. When the act was passed in 1961 a large amount of the public may have opposed the idea of assisted dying on religious grounds. In the modern day the UK has undergone a large amount of secularisation, and the religious influence over this topic has been diluted. This too suggests that the law on assisted dying is somewhat archaic and in need of reformation.

A comparative example to this could be the law on abortion, and how it was reformed to match changing public opinions. Similarly to the assisted dying law, this was a largely taboo subject during the 20th century. In accordance with changing public attitudes however, abortion was legalised under the Abortion Act 1967.¹² This could set somewhat of a precedent for how the law on how we should go about reforming the law on assisted dying to match the public’s interest.

¹⁰ *ibid*

¹¹ Dignity In Dying, *Largest Ever Poll on Assisted Dying Shows 82% of Public Support Lord Falconer’s Proposed Change in the Law*, (4th April 2015) < <https://www.dignityindying.org.uk/news/poll-assisted-dying/> > accessed 15 November 2018

¹² Abortion Act 1967

There are two cases within the last decade that attracted a lot of media attention and evoked an emotive response around this issue from the general public.

Debbie Purdy's case was one of the most successful of its kind, as detailed earlier she successfully won a legal battle with regards to the guidelines on assisted suicide. Debbie Purdy who herself suffered from primary progressive multiple sclerosis required this information so she could make an informed decision on whether to ask for her husband's assistance in travelling to the Dignitas clinic in Switzerland where it was lawful.¹³ The case was one in the House of Lords where she argued that it was a breach of her human rights not to know whether or not her husband would be prosecuted.¹⁴ The publishing of the Interim Report by the DPP followed this victory.

Tony Nicklinson's case however was not as successful but still attracted mass amounts of media and public attention. Nicklinson's case brought to light one of the key issues of reform.

Tony Nicklinson suffered from a stroke and was paralysed from the neck down, he began the legal proceedings in 2010 taking the case on whether or not his wife would be prosecuted if she injected him with a lethal dose of drugs as he did not want to live this way for another 20 years. He gave evidence before the commission of human rights saying that there is a "fundamental injustice with the present law".¹⁵

Conclusion

To summarise, it is indisputable that there is an exigent need for reform on the current law on assisted dying. The friction within our group arises when debating whether Lord Falconer's proposals are adequate in giving those in need dignity in death, or should they be further expanded to encompass all those with a such a low quality of life, they consider it no life, a second class life, rather than just those with a "terminal illness" as defined in Falconer's/Marris' bill.

Weighing up the arguments presented by medical professionals against the prominent opinions of the general public, there is an obvious and clear division.

¹³ R. v DPP [2009] UKHL 45

¹⁴ Afua Hirsch, "Debbie Purdy Wins "Significant Legal Victory" On Assisted Suicide" (*The Guardian*, 2009) <<https://www.theguardian.com/society/2009/jul/30/debbie-purdy-assisted-suicide-legal-victory>> accessed 16 November 2018.

¹⁵ "Tony Nicklinson's Legal Fight For Right To Die" (*BBC news*, 2012) <<https://www.bbc.co.uk/news/uk-england-wiltshire-19341571>> accessed 16 November 2018.

The general consensus of medical professionals is that reform is the wrong call in terms of assisted dying. This is made evident by the BMAs outright opposition of assisted dying, and the fact that GPs generally believe that allowing this reform would damage the doctor-patient relationship, and many doctors could perceive this as a failure of their skills.

On the other hand, there is the clear outcry for change in favour of reform coming from the general public. With more prevalent and emotive cases, such as those of Debbie Purdy and Tony Nicklinson, surrounding the issue at the forefront of the mainstream media. Regardless of the relative success of these cases, they highlighted the abundantly obvious change in the attitudes of today's society.

The question becomes whose opinions do we consider more valuable? The reasoned and experienced views of medical professionals, or the democratic rule of the general public. For whose views should we provide greater accommodation?

As a group we align ourselves more with the well-reasoned opinions of medical professionals, through years of experience and a wealth of knowledge, they can view the argument from both an ethical standpoint, and from what will be in the patient's best interest – a more educated standpoint. However this is not to say that we disagree with the public view that reform is needed, and this opinion should still be held to a high regard when considering to what extent medical and public opinion should be considered when amending the law relating to assisted dying.