

## England and Wales

[Excerpted from, [The Royal Society of Canada Expert Panel: End-of-Life Decision Making, November 2011](#) (pp. 73-75) (endnotes omitted)]

The law with respect to assisted suicide in England and Wales is contained in the Suicide Act 1961, section 2 (1), which says that “[a] person who aids, abets, counsels or procures the suicide of another, or an attempt by another to commit suicide, shall be liable on conviction on indictment to imprisonment for a term not exceeding fourteen years.” The 1961 Act was primarily designed to decriminalize suicide itself. In so doing, the specific crime of assisting suicide was created, although the Act also indicates that no prosecution should take place without the agreement of the Director of Public Prosecutions (DPP). Much has changed in the legal landscape since these somewhat elderly provisions were enacted, not least the incorporation of the European Convention of Human Rights into UK law by means of the Human Rights Act of 1998. The passing of this act allows UK citizens to take full advantage of the rights contained in the Convention, many of which on their face have relevance to the assisted dying debate. More particularly, it allows citizens to challenge the compatibility of existing (and future) legislation with the Convention. As Michael Freeman has noted, it was “inevitable with the incorporation of the European Convention on Human Rights into English law that the ban on assisted suicide would be challenged.”

The first such challenge arose in the case of Diane Pretty. Diane Pretty lost her case, but Freeman nonetheless argued “the time has come for a rethink, certainly of assisted suicide, and probably of all ‘end-of-life’ decisions.” The opportunity to do so arrived some years later in the case of Debbie Purdy, which reached the House of Lords in 2009.

Debbie Purdy suffers from multiple sclerosis (MS) and is currently wheelchair bound. She sought clarification from the DPP as to what they might decide in terms of prosecution should her husband travel with her—it is presumed to Switzerland—in order that she might have an assisted death. Assisted suicide is not a crime in Switzerland providing certain conditions prevail. Two questions were raised by her case. First, was the question of whether or not her husband would commit a crime by travelling with her to facilitate an act that is legal in that jurisdiction. Second, a question was raised about the clarity of the English prosecution’s policies.

On the first question, while it might seem odd that travelling with someone to another country could be a constituent element of a crime, the House of Lords was in no doubt that it could be categorised as such. The second question was more complex. Although a Code of Practice for prosecutors already existed, the issue was whether or not it was sufficiently clear as to satisfy the requirements of the European Convention on Human Rights and, in particular, article 8(2).

As Lord Hope explained:

The Convention principle of legality requires the court to address itself to three distinct questions. The first is whether there is a legal basis in domestic law for the restriction. The

second is whether the law or rule in question is sufficiently accessible to the individual who is affected by the restriction, and sufficiently precise to enable him to understand its scope and foresee the consequences of his actions so that he can regulate his conduct without breaking the law. The third is whether, assuming that these two requirements are satisfied, it is nevertheless open to the criticism that it is being applied in a way that is arbitrary because, for example, it has been resorted to in bad faith or in a way that is not proportionate.

For Lord Brown, “with the best will in the world, it is simply impossible to find in the Code itself enough to satisfy the article 8(2) requirements of accessibility and foreseeability in assessing how prosecutorial discretion is likely to be exercised in section 2(1) cases.” The outcome of this case was a direction to the Director of Public Prosecutions that he should clarify and publicise the criteria that would be taken into consideration when deciding on whether or not to exercise his statutory prosecutorial discretion. Interim guidelines were produced in September 2009 and final guidance was issued in February 2010. The guidelines follow.

The sixteen public interest factors in favour of prosecution are:

1. The victim was under 18 years of age.
2. The victim did not have the capacity (as defined by the Mental Capacity Act 2005) to reach an informed decision to commit suicide.
3. The victim had not reached a voluntary, clear, settled and informed decision to commit suicide.
4. The victim had not clearly and unequivocally communicated his or her decision to commit suicide to the suspect.
5. The victim did not seek the encouragement or assistance of the suspect personally or on his or her own initiative.
6. The suspect was not wholly motivated by compassion; for example, the suspect was motivated by the prospect that he or she or a person closely connected to him or her stood to gain in some way from the death of the victim.
7. The suspect pressured the victim to commit suicide.
8. The suspect did not take reasonable steps to ensure that any other person had not pressured the victim to commit suicide.
9. The suspect had a history of violence or abuse against the victim.
10. The victim was physically able to undertake the act that constituted the assistance himself or herself.
11. The suspect was unknown to the victim and encouraged or assisted the victim to commit or attempt to commit suicide by providing specific information via, for example, a website or publication.
12. The suspect gave encouragement or assistance to more than one victim not known to each other.
13. The suspect was paid (by the victim, or those close to the victim) for his or her encouragement and/or assistance.
14. The suspect was acting in his or her capacity as a medical doctor, nurse, other healthcare professional, a professional care-giver (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.

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.

The six public interest factors against prosecution are:

1. The victim had reached a voluntary, clear, settled and informed decision to commit suicide.
2. The suspect was wholly motivated by compassion.
3. The actions of the suspect, although sufficient to come within the definition of the crime, were of only minor encouragement or assistance.
4. The suspect had sought to dissuade the victim from the course of action that resulted in his or her suicide.
5. 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.
6. The suspect reported the victim's suicide to the police and fully assisted them in their enquiries into the circumstances of the suicide or the attempt and his or her part in providing encouragement or assistance.<sup>259</sup>

Debbie Purdy's case has been widely heralded as a victory for right-to-die campaigners. At least one newspaper was happy to categorise it as such, calling for law reform and arguing that "a significant blow has been dealt to the 1961 Act that makes an offence of 'complicity' in suicide and so criminalises deeds that might otherwise be judged merciful." The true importance of this case, however, actually lies in its potential to bring additional clarity to the law in England and Wales.

In Scotland, suicide has never been a crime; no specific crime of assisted suicide exists. This is not to say, however, that assisting a suicide would not fall under criminal law. The law of murder or culpable homicide (the Scottish equivalent of manslaughter) is the catch all for such behaviour. However, a major difference between the jurisdictions under consideration is that there is likely to be no crime committed in Scottish law should an individual accompany someone to another country—for example, Switzerland—where they then undertake an act that is lawful in that country. However, there is a dearth of case law in Scotland; this conclusion is derived from general principles rather than actual jurisprudence.

It is important to emphasize here that the charging guidelines do not apply to voluntary euthanasia (as elsewhere, in assisted suicide, the third party merely supplies the means for the individual to kill him- or herself, in the case of voluntary euthanasia, the third party directly acts to kill). Euthanasia is prohibited throughout the United Kingdom, not

through statute, but rather through the common law. The common law makes it clear that consent is no defence against criminal charges, save in the case of rape where consent (or rather its absence) is central to the offence itself. An individual who kills another can, then, be prosecuted for the crime of murder. That said, despite the fact that there is a dearth of Scottish cases, it can be concluded that a murder charge, while possible, is unlikely in Scotland when the individual is motivated by compassion; the most likely charge would be culpable homicide, the Scottish equivalent of manslaughter (in Scotland, murder is not a form of culpable homicide, whereas in Canada murder and manslaughter are both forms of culpable homicide).