Assisted Dying Law Reform: Overcoming the Painful Process that Leads to a Painless Death

Thesis

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Assisted Dying Law Reform:
Overcoming the Painful Process
that Leads to a Painless Death

Thesis Submitted for the Degree of
Doctor of Philosophy
at
The Open University
Law School

by

Elena Roxana Tudosie

September 2021

Supervisors: Dr Lisa Claydon Prof Simon Lee
Examiners: Dr Steve Foster Dr Caroline Derry
Observer: Dr Andrew Gilbert
Chair: Dr Kim Barker
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Assisted Dying Law Reform:
Overcoming the Painful Process that Leads to a Painless Death

by Elena Roxana Tudosie

Thesis Abstract

The assisted dying debate in the legal jurisdiction of England and Wales is nearing a determining moment, therefore, this thesis analyses the factors concerning assisted dying law reform. This study argues that the criminal law and its response to instances of assisted suicide under Section 2 of the Suicide Act 1961, is merely a coping mechanism, an ‘untidy compromise’ designed to uphold the interests of ‘compassionate-helpers’. It does not meet the needs of ‘death-seekers’. Since the Human Rights Act 1998 came into force, the legal judgments in this area reveal judicial deference to the current construct of the law and the Westminster Parliament’s wish to uphold the so-called blanket prohibition.

The legislative attempts since 1936, the challenges on compatibility of the prohibition with the European Convention on Human Rights, as well as the prosecutorial decision-making process, have failed to address this cauldron of disquiet. This thesis asserts that the question on assisted dying ought to be addressed fully, with the Government providing Parliamentary time as a matter of urgency. The experience of COVID-19 has revealed the struggles endured in achieving a painless and good death. Care home deaths, and dying alone at home and elsewhere in lockdown, deepened the need to talk about death and dying.

Moreover, legal systems around the world are increasingly demonstrating there are clear ways forward to implementing access to various forms of assisted death. It would appear, therefore, that given the current climate the possibility exists for the jurisdiction of England and Wales to achieve assisted dying law reform.
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This thesis is dedicated to my grandfather Anghel Moise.

I never got the chance to meet you, yet, through my mother, your wisdom continues to inspire my search for meaning.
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Acknowledgements

From the moment when my journey for the doctoral programme started in 2017, to the point of submitting my PhD thesis in September 2021, I went through a stream of profound developmental changes. Neither the start, nor the journey, nor the treasured ending of this path would have been possible without the support of several wonderful people.

I am grateful to my family, especially my mother, Angela, my sister Nicoleta, my brother, Bogdan, and my father, Vasile, as well as Vio, Laura, Diane and Brian for their unconditional love and support. I know how lucky I am to have you in my life and to be blessed with the priceless smiles of my gorgeous nieces, Teodora and Mara, and my handsome nephew, Luca. 

Vă mulțumesc din toată inima pentru că existați frumoși mei.

I am indebted to all my former tutors, most notably Emil Popa, my first teacher who was an inspirational role model throughout my first years in school. A big thank you goes to Chris Dixon and Dr John Beaumont-Kerridge, at the University of Bedfordshire, for giving me the opportunity to experience undergraduate and postgraduate teaching without which I may never have chosen to become an academic. Chris, your expertise, and guidance have turned my academic ‘flight path’ into a smooth and enjoyable glide. John, I will never be able to express my gratitude for your invaluable encouragement, career advice, and ‘customer-care’ chats.

Bringing the research project to this stage was helped by having a dedicated, tremendously supportive, and esteemed supervision team: Dr Lisa Claydon, Prof Simon Lee, and Dr Andrew Gilbert. I will never forget the stimulating and thought-provoking interview undertaken for the appointment on this programme, and the life changing challenges I experienced since. Lisa has been a devoted guide throughout my time at The Open University. Her professionalism, intellect, and knowledge make her the kind supervisor I aspire to become. Simon’s scintillating approach to scholarship and awareness of the diverse societal lenses are traits of the most precious kind. Andrew’s experience, knowledge and expertise on law reform provided invaluable support in the latter part of this project. I am grateful to all three of you for being selfless with your time, for reading all those drafts and for believing in me even when I did not.
Many thanks go to the dedicated members of staff at The Open University and my adopted family in the OU Law School. Special mention goes to Prof Emma Bell, Mandy Winter (now retired), Dawn Harper, Michelle Stevens, Kate Bandy (now Christopher), Jon-Paul Knight, and Hugh McFaul. Their help and encouragement made my journey on the PhD programme very manageable. Emma has been there through the most difficult times. Thank you for creating opportunities for student engagement and participation. Mandy, I miss coming in and seeing your lovely smile and I know I am not the only one in the Law School to think it. Thank you for your tips on orchid upkeep. Dawn and Michelle, you create magic and make things happen. Your help is invaluable, and I hope you both feel appreciated every day. Kate, it was wonderful to have your company for a while during my first months in the Law School. You speak your mind and you do it with a warm heart. Jon-Paul, it was only for a brief spell, but I am glad we got to share neighbouring desks. You are so kind. Hugh, our numerous discussions regarding case law and judicial reasoning in this area have helped me rethink the reasons beyond decisions. Thank you for being there for me.

A big thank you goes to Dr Jessica Giles, Lin Nilsen, Dr Nicola Croxton (now in Aberdeen), Dr Marjan Ajevski and Dr Stephanie Pywell. They have all gone out of their way to support and encourage me throughout my journey and for this I will always be grateful. Jessica, I am indebted to you for your help throughout this programme, especially following my ‘upgrade’. Your passion for research is contagious. Lin, I could not have wished for someone lovelier than you to ensure my stress levels were as low as possible. Your agility, skills and dedication to your stewardship are tremendous. Nicola, I will never forget your encouragement and moral support during our time at the OU. Marjan, your help in supporting my navigating the weaknesses in my writing skills is much appreciated. I fondly remember our enthusiastic discussions on the notions of ‘dignity’ and ‘language-games’. Steph, you have been by my side, not only in the initial stages of this programme but also that time when we got stuck in Rome (if The Pantheon could speak). I enjoyed our talks on law, life, good food, and academia.

Even if they never see this, I would like to thank my dear Romania-based Nebuneală, Anca. I am fortunate to have such a caring and positive human in my life. Your energy makes this world a better place. A big thank you also goes to my friend Christine for her support and
encouragement since the time when we teamed up on the Land Law project during our LLB. I can always count on you to lift my spirits, even during lockdown. A massive thank you goes to my special and international person, Clanut. Your presence is a gift that keeps on giving. Your Welsh cakes are perfection!

Finally, I express my thanks and gratitude to the most formidable man in my life, Stuart. My love, you deserve a trophy for how you managed to keep me calm, happy, and smiling (most of the time) throughout this chapter of my life. I could not have done this without you.

Elena Roxana Tuodosie

The Open University Law School

30 September 2021
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Abbreviations

AD  Assisted Dying
AP  Anticipatory Prescribing
AU  Australia
CA  Canada
CFS  Clinical Frailty Scale
COVID-19  Coronavirus Disease
CQC  Care Quality Commission
DNR  Do Not Attempt Cardiopulmonary Resuscitation
DPP  Director of Public Prosecutions
ECtHR  European Court of Human Rights
HC  House of Commons
HL  House of Lords
MAiD  Medical Assistance in Dying
MP  Member of Parliament
NICE  National Institute of Clinical Health and Excellence
NZ  New Zealand
PAS  Physician Assisted Suicide
VAD  Voluntary Assisted Dying
Vic  Victoria, Australia
Thesis Introduction

If given the choice, no one would elect to have a painful and drawn-out death. In the face of medical advancements leading to prolongation of life and longer life expectancy, more and more people may suffer pain and indignity at the end-of-life – be it physical or mental. However, the UK is yet to step towards change of legislation.\(^1\) Since the year 2000, in the jurisdiction of England and Wales (‘England’), stories of those who are forced to grapple with these difficult circumstances, brought on by various medical conditions, have intensified the dialogue in favour of assisted dying laws to give individuals the choice of a good, and as far as possible, painless death. Therefore, as the courts of England and Wales (‘English courts’) continue to articulate reasons for their findings, the public gains an insight into how those at the apex of the legal system come to weigh their arguments in the balance.

The list of judgments produced in Table 1 below, depicts a number of cases brought on by claimants who challenged the current legislative construct in a bid to pave the way to legal provisions. The persistent appearance of challenges seems to be owing to the fact that claimants contend that only by way of an assisted dying framework or legislation to this end, would it be possible to achieve a safer and more transparent approach to receiving assistance to end their life.

\(^1\) Northern Ireland - Euthanasia – illegal and may be prosecuted as murder or manslaughter. ‘Assisting or encouraging’ another person’s suicide – illegal under Section 13 of the Criminal Justice (Northern Ireland) Act 1966, as an extension to the Suicide Act 1961 (Northern Ireland). Each case is examined by the Public Prosecution Service to decide on prosecution. Scotland - Euthanasia – illegal and may be prosecuted as murder or manslaughter. Assisting or encouraging suicide – there is no specific offence. These offences are dealt with under homicide law. Prosecutorial decisions are made by the Crown Office and Procurator Fiscal Service (COPFS). There are no offence-specific guidelines, and the decision to prosecute is based on the general code. In 2015, a legal action pressing the COPFS to produce offence-specific guidelines failed. England and Wales - Euthanasia – illegal and may be prosecuted as murder or manslaughter. ‘Assisting or encouraging’ another person’s suicide – prohibited under Section 2 of the Suicide Act 1961, as amended by the Coroners and Justice Act 2009. The Director of Public Prosecutions considers each case and decides whether to consent to prosecution. The decision-making process is guided by offence-specific guidelines published in 2010. Since 1 April 2009, of a total of 171 cases referred to the Crown Prosecution Service (CPS), three cases have been successfully prosecuted. The decision-making process is guided by offence-specific guidelines published in 2010.
Table 1 - Cases Challenging the Law

<table>
<thead>
<tr>
<th>No.</th>
<th>Period</th>
<th>Citations of Last Domestic Court and ECtHR Decisions in the Case</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.</td>
<td>2001-2002</td>
<td><em>R (on the application of Pretty) v DPP [2001] UKHL 61</em></td>
</tr>
<tr>
<td>2.</td>
<td>2002</td>
<td><em>Pretty v UK (2002) 35 EHR 1</em></td>
</tr>
<tr>
<td>3.</td>
<td>2008-2009</td>
<td><em>R (Purdy) v Director of Public Prosecutions [2009] UKHL 45</em></td>
</tr>
<tr>
<td>4.</td>
<td>2014-2015</td>
<td>*R (on the application of Nicklinson and another) v Ministry of Justice; R (on the application of AM (AP) v DPP [2014] UKSC 38</td>
</tr>
<tr>
<td>5.</td>
<td>2015</td>
<td><em>Jane Nicklinson against the United Kingdom and Paul Lamb v the United Kingdom Applications Nos 2478/15 and 1787/15 (ECHR 2015)</em></td>
</tr>
<tr>
<td>6.</td>
<td>2017-2018</td>
<td>*R (on the Application of Conway) v The Secretary of State for Justice and (1) Humanists UK (2) Not Dead Yet (UK) (3) CNK Alliance Ltd [2018] EWCA Civ 1431</td>
</tr>
<tr>
<td>9.</td>
<td>2019</td>
<td><em>Paul Lamb Application for Judicial Review in the High Court originally scheduled for 2 October 2019 was renewed for oral hearing on 19 December 2019 – Oral Decision Not Reported</em></td>
</tr>
</tbody>
</table>

Over the years, the subtle shift in narrative within judicial analysis and development of legal arguments on this point have contributed to a groundswell of public and professional support in favour of change (see Tables 2 and 3 below).

Table 2 - Professional Attitudes

<table>
<thead>
<tr>
<th>No.</th>
<th>Year</th>
<th>Neutral</th>
<th>In Favour</th>
<th>Opposed</th>
<th>Medical Body</th>
<th>Sample of Participants</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.</td>
<td>2019</td>
<td>25%</td>
<td>31.6%</td>
<td>43.4%</td>
<td>Royal College of Physicians</td>
<td>6,885</td>
</tr>
<tr>
<td>2.</td>
<td>2019</td>
<td>30.3%</td>
<td>26.9%</td>
<td>42.9%</td>
<td>Royal College of Radiologists</td>
<td>532</td>
</tr>
<tr>
<td>3.</td>
<td>2019</td>
<td>11%</td>
<td>40%</td>
<td>47%</td>
<td>Royal College of General Practitioners³</td>
<td>6,674</td>
</tr>
<tr>
<td>4.</td>
<td>2020</td>
<td>11%</td>
<td>50%</td>
<td>39%</td>
<td>British Medical Association</td>
<td>28,986</td>
</tr>
<tr>
<td>5.</td>
<td>2021</td>
<td>3%</td>
<td>49%</td>
<td>48%</td>
<td>British Medical Association⁴</td>
<td>302</td>
</tr>
</tbody>
</table>

---

³ 2% of participants were opposed

⁴ Vote was carried out at the BMA Annual Representative Meeting. The 3% in the ‘Neutral’ column represent delegates who abstained on the vote.

---


---

Table 3 - Professional Attitudes

<table>
<thead>
<tr>
<th>No.</th>
<th>Year</th>
<th>Neutral</th>
<th>In Favour</th>
<th>Opposed</th>
<th>Medical Body</th>
<th>Sample of Participants</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.</td>
<td>2019</td>
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<td>43.4%</td>
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<td>30.3%</td>
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<td>42.9%</td>
<td>Royal College of Radiologists</td>
<td>532</td>
</tr>
<tr>
<td>3.</td>
<td>2019</td>
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<td>47%</td>
<td>Royal College of General Practitioners³</td>
<td>6,674</td>
</tr>
<tr>
<td>4.</td>
<td>2020</td>
<td>11%</td>
<td>50%</td>
<td>39%</td>
<td>British Medical Association</td>
<td>28,986</td>
</tr>
<tr>
<td>5.</td>
<td>2021</td>
<td>3%</td>
<td>49%</td>
<td>48%</td>
<td>British Medical Association⁴</td>
<td>302</td>
</tr>
</tbody>
</table>
Table 3 - Social Attitudes

<table>
<thead>
<tr>
<th>No.</th>
<th>Year</th>
<th>Support for Change %</th>
<th>Polls</th>
<th>Sample of Participants</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.</td>
<td>1984</td>
<td>75</td>
<td>British Social Attitudes Survey (by NatCen)</td>
<td>1,562</td>
</tr>
<tr>
<td>2.</td>
<td>1989</td>
<td>79</td>
<td>British Social Attitudes Survey (by NatCen)</td>
<td>1,274</td>
</tr>
<tr>
<td>3.</td>
<td>1994</td>
<td>82</td>
<td>British Social Attitudes Survey (by NatCen)</td>
<td>1,000</td>
</tr>
<tr>
<td>4.</td>
<td>2005</td>
<td>80</td>
<td>British Social Attitudes Survey (by NatCen)</td>
<td>1,786</td>
</tr>
<tr>
<td>5.</td>
<td>2010</td>
<td>82</td>
<td>British Social Attitudes Survey (by NatCen)</td>
<td>2,250</td>
</tr>
<tr>
<td>6.</td>
<td>2017</td>
<td>79</td>
<td>My Death, My Decision (by NatCen)</td>
<td>1,928</td>
</tr>
<tr>
<td>7.</td>
<td>2018</td>
<td>93</td>
<td>Dignity in Dying Poll (by Populus)</td>
<td>2708</td>
</tr>
<tr>
<td>8.</td>
<td>2019</td>
<td>82</td>
<td>YouGov (GB Adults)</td>
<td>5,018</td>
</tr>
<tr>
<td>9.</td>
<td>2021</td>
<td>73</td>
<td>YouGov (Members of Parliament)</td>
<td>1,758</td>
</tr>
<tr>
<td>10.</td>
<td>2021</td>
<td>35</td>
<td></td>
<td>100</td>
</tr>
</tbody>
</table>

In spite of this, current legislative provisions continue to uphold a blanket prohibition of all intentional killing (including those where consent is given), while in practice the application of the law allows for the navigation of criminal liability for assisted suicide and suicide pacts by way of prosecutorial discretion. For the purposes of involvement with assisted suicide under Section 2 of the Suicide Act 1961 (‘1961 Act’), the ability to demonstrate that the act of assisting the seeker of good death (‘death-seeker’) was wholly motivated by compassion, enables individuals (‘compassionate-helpers’) to escape prosecution. Thus, in instances of assisted suicide, justice is largely consigned to prosecutorial discretion.

By applying the Policy for Prosecutors in Respect of Cases of Encouraging or Assisting Suicide (‘DPP Policy’), the Director of Public Prosecutions (‘DPP’) may decide – based on existing evidence – to exonerate the ‘suspect’ (the term adopted by the DPP Policy) if, at the time of the offence, they believed that (a) the ‘victim’ (the term adopted by the DPP Policy) had made a voluntary decision to commit suicide and (b) the suspect was wholly motivated by compassion. However, while the Policy allows for post-death safeguards to protect suspects from prosecution on grounds of compassion, it fails to provide any safeguards for victims pre-

5 The full list of relevant public interest factors considered for this purpose is available at: CPS, ‘Policy for Prosecutors in Respect of Cases of Encouraging or Assisting Suicide’ (Updated 17 Aug 2020) <https://www.cps.gov.uk/legal-guidance/suicide-policy-prosecutors-respect-cases-encouraging-or-assisting-suicide> accessed 11 Jan 2020
death. Furthermore, aside from instances where death-seekers take deliberate action to chronicle their voluntary and uncoerced choice to end their life,\textsuperscript{6} aftermath investigation of a successful assisted suicide is the only way to fathom whether the decision to commit assisted suicide was voluntary. This occurs post-death. In fact, prohibitive laws coupled with aftermath investigation cause the involvement with assisted suicide to take the form of a highly secretive venture. In this way, death-seekers are forced to become the victims of a silencing system, while encouraging compassionate-helpers to assist with suicide behind closed doors. This is not a sustainable compromise. Table 4 (below) captures a number of assisted suicides which contribute to the thesis discourse regarding the justiciability of the current approach and its adequacy to protect vulnerable individuals before an assisted suicide occurs.

\textit{Table 4 - DPP Consent to Prosecute in Instances of Assisted Suicide}\textsuperscript{7}

<table>
<thead>
<tr>
<th>No.</th>
<th>Date</th>
<th>Facts of the Case</th>
<th>Consent</th>
<th>Circumstances</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.</td>
<td>09/12/08</td>
<td>Mr and Mrs James (helped son)</td>
<td>No</td>
<td>Assisted Suicide at Dignitas</td>
</tr>
<tr>
<td>2.</td>
<td>26/01/10</td>
<td>Kay Gilderdale (helped daughter)</td>
<td>Yes</td>
<td>Assisted Suicide / Attempted Murder at Home</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Sentence: 12 months conditional discharge</td>
</tr>
<tr>
<td>3.</td>
<td>19/03/10</td>
<td>Sir Edward and Lady Downes (helped son)</td>
<td>No</td>
<td>Assisted Suicide at Dignitas</td>
</tr>
<tr>
<td>4.</td>
<td>24/05/10</td>
<td>Michael Bateman (helped his wife)</td>
<td>No</td>
<td>Assisted Suicide at Home</td>
</tr>
<tr>
<td>5.</td>
<td>25/06/10</td>
<td>Dr Irwin (helped Raymond Cutkelvin)</td>
<td>No</td>
<td>Assisted Suicide at Dignitas</td>
</tr>
<tr>
<td>6.</td>
<td>16/08/10</td>
<td>Dr Elisabeth Wilson (advised Caroline Loder)</td>
<td>No</td>
<td>Assisted Suicide at Home</td>
</tr>
<tr>
<td>7.</td>
<td>02/02/10</td>
<td>Death of Jane Hodge</td>
<td>No</td>
<td>Assisted Suicide at Home</td>
</tr>
<tr>
<td>8.</td>
<td>27/08/13</td>
<td>Kevin Howe (encouraged a vulnerable victim to set himself alight)</td>
<td>Yes</td>
<td>Assisted Suicide at Home Sentence: 12 years detention</td>
</tr>
<tr>
<td>9.</td>
<td>15/01/14</td>
<td>Georgina Roberts (death of parents)</td>
<td>No</td>
<td>Assisted Suicide at Home</td>
</tr>
<tr>
<td>10.</td>
<td>15/09/14</td>
<td>Milly Caller (helped Emma Crossman)</td>
<td>Yes</td>
<td>Assisted Suicide at Home Decision: Acquitted</td>
</tr>
<tr>
<td>11.</td>
<td>29/08/15</td>
<td>Bipin Desai (confessed to helping his father to commit suicide)</td>
<td>Yes</td>
<td>Assisted Suicide at Home Sentence: 9 months custody suspended</td>
</tr>
<tr>
<td>12.</td>
<td>01/12/17</td>
<td>Natasha Gordon (encouraged Matthew Burkinshaw to commit suicide)</td>
<td>Yes</td>
<td>Assisted Suicide at Home (Suicide Pact) Sentence: 4 years imprisonment</td>
</tr>
</tbody>
</table>

\textsuperscript{6} \textit{Nisian v Findlay & Ors} [2019] EWCH (297) Ch; Beryl Taylor, 70 years of age, recorded herself explaining her voluntary and uncoerced decision minutes before she took her own life with some assistance from her husband. See BBC \textit{News}, ‘Rattlesden woman’s death was suicide not murder, inquest hears’ (17 October 2018) <https://www.bbc.co.uk/news/uk-england-suffolk-45891508> accessed 17 Apr 2020

\textsuperscript{7} Reference to ‘at Home’ in this table indicates the assistance was provided in England and Wales – including but not limited to the death-seeker’s home.
By reference to Table 4 it can be observed that sample instances where the offence is in connection with an assisted suicide abroad, the risk of prosecution is lower, whereas the same cannot be said of those which occur ‘at Home’ or a location in England and Wales. Yet, these last instances led to prosecution in five cases of this kind and only three of them resulted in successful prosecutions.\(^8\) Thus, for now, prosecutorial discretion is tasked with striking the right balance for victims and suspects alike. However, for victims, only their autonomous decision expressed free from coercion and pre-death may attest to their true wishes.

Notwithstanding several unsuccessful attempts to change the law (Table 5), the Westminster Parliament continues to oppose the introduction of an exception to the current prohibition, in the name of protecting vulnerable groups.

**Table 5 - Unsuccessful Legislative Attempts in England and Wales**

<table>
<thead>
<tr>
<th>No.</th>
<th>Date</th>
<th>Bill Short Title</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.</td>
<td>1936</td>
<td>Voluntary Euthanasia (Legalisation) Bill [HL]</td>
</tr>
<tr>
<td>2.</td>
<td>1969</td>
<td>Voluntary Euthanasia Bill [HL]</td>
</tr>
<tr>
<td>3.</td>
<td>1975</td>
<td>Incurable Patients Bill [HL]</td>
</tr>
<tr>
<td>4.</td>
<td>1990</td>
<td>Voluntary Euthanasia Bill [HC]</td>
</tr>
<tr>
<td>5.</td>
<td>1993</td>
<td>Medical Treatment (Advance Directives) Bill [HL]</td>
</tr>
<tr>
<td>6.</td>
<td>1993</td>
<td>Voluntary Euthanasia Bill [HC]</td>
</tr>
<tr>
<td>7.</td>
<td>1997</td>
<td>Doctor Assisted Dying Bill [HC]</td>
</tr>
<tr>
<td>8.</td>
<td>2003</td>
<td>Patient (Assisted Dying) Bill [HL]</td>
</tr>
<tr>
<td>9.</td>
<td>2004</td>
<td>Assisted Dying for the Terminally Ill Bill [HL]</td>
</tr>
<tr>
<td>10.</td>
<td>2005</td>
<td>Assisted Dying for the Terminally Ill Bill [HL]</td>
</tr>
<tr>
<td>11.</td>
<td>2006</td>
<td>Assisted Dying for the Terminally Ill Bill [HL]</td>
</tr>
<tr>
<td>12.</td>
<td>2009</td>
<td>Coroners and Justice Bill – Amendment [HL](^9)</td>
</tr>
<tr>
<td>13.</td>
<td>2013</td>
<td>Assisted Dying Bill [HL]</td>
</tr>
<tr>
<td>14.</td>
<td>2014</td>
<td>Assisted Dying Bill [HL]</td>
</tr>
<tr>
<td>15.</td>
<td>2015</td>
<td>Assisted Dying Bill [HL]</td>
</tr>
<tr>
<td>16.</td>
<td>2015</td>
<td>Assisted Dying (No 2) Bill [HC]</td>
</tr>
<tr>
<td>17.</td>
<td>2016</td>
<td>Assisted Dying Bill [HL]</td>
</tr>
<tr>
<td>18.</td>
<td>2020</td>
<td>Assisted Dying Bill [HL]</td>
</tr>
<tr>
<td>19.</td>
<td>2021</td>
<td>Assisted Dying Bill [HL]</td>
</tr>
</tbody>
</table>

\(^8\) This reference to prosecutions excludes the case of Kay Gilderdale as the issue came before the publishing of the 2010 Policy, nevertheless, it is important for the purposes of highlighting the nature of actions in connection with assisted suicide which are likely to lead to prosecution of suspects.

\(^9\) Lord Falconer moved an amendment to insert a new Clause – ‘Acts not capable of encouraging or assisting suicide’ – into the Suicide Act 1961
However, this notion is based on an illusion largely because aftermath investigation is not equipped to attest to the lack of vulnerability of a death-seeker. It is for this reason, as seen from the numerous introductions over the years in Table 5, why Private Members’ Bills continue to make their way before Parliament indicating that the matter is not likely to go away.

Yet, recent years have registered a noticeable ripple of change. In fact, since this study began in 2017, the number of countries, states, and territories that reformed their laws to allow individuals to choose an autonomous, painless, and compassionate death under prescribed safeguards has more than doubled (see Table 6 below).

As such, the number of jurisdictions with assisted dying legislation has reached a total of 27. Thus, as regards Table 6, it can be observed that of these, only two jurisdictions do not have a written constitution. Therefore, jurisdictions without a written constitution appear to be in the minority in respect of achieving legislative change in this area. The reasons for this are unclear. Moreover, six jurisdictions have undertaken this shift owing to court decisions, an option not available through the English courts. Thus, given the constitutional arrangements, the English courts do not possess strike down power.

Moreover, existing frameworks involve either self-administered (see Assisted Suicide column in Table 6) or doctor-administered (see Euthanasia column in Table 6) lethal medication, with nearly half of them – 13 jurisdictions – providing both. In England and Wales (‘England’), the Assisted Dying Bill 202110 – the latest introduction in a line of unsuccessful attempts (in Table 5 above) – provides only for self-termination by self-administration facilitated by way of medical assistance.

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10 The Bill was presented for a Second Reading before the Westminster Parliament on 22 October 2021. At the time of carrying out amendments for this study, the bill has been ‘committed to a Committee of the Whole House’. See UK Parliament, Assisted Dying Bill [HL] < Second Reading - House of Lords Business - UK Parliament > accessed 8 Aug 2022
<table>
<thead>
<tr>
<th>No.</th>
<th>Year</th>
<th>Country/State</th>
<th>Manner of Introduction</th>
<th>Written Constitution</th>
<th>Assisted Suicide</th>
<th>Euthanasia</th>
<th>By Court Decision</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.</td>
<td>1942</td>
<td>Switzerland</td>
<td>Swiss Criminal Code 1942</td>
<td>✔️</td>
<td>✔️</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>2.</td>
<td>1994</td>
<td>Oregon, USA</td>
<td>Death with Dignity Act 1994</td>
<td>✔️</td>
<td>✔️</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>3.</td>
<td>1997</td>
<td>Colombia (and 2015)</td>
<td>Constitutional Court Decision</td>
<td>✔️</td>
<td>✔️</td>
<td>✔️</td>
<td>✔️</td>
</tr>
<tr>
<td>4.</td>
<td>2001</td>
<td>The Netherlands (also, since 1973)</td>
<td>Termination of Life on Request and Assisted Suicide Act 2001</td>
<td>✔️</td>
<td>✔️</td>
<td>✔️</td>
<td>-</td>
</tr>
<tr>
<td>5.</td>
<td>2002</td>
<td>Belgium</td>
<td>Belgian Act on Euthanasia 2002</td>
<td>✔️</td>
<td>✔️</td>
<td>✔️</td>
<td>-</td>
</tr>
<tr>
<td>6.</td>
<td>2008</td>
<td>Washington, USA</td>
<td>Death with Dignity Act 2008</td>
<td>✔️</td>
<td>✔️</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>7.</td>
<td>2009</td>
<td>Luxembourg</td>
<td>Right to Die with Dignity Act 2009</td>
<td>✔️</td>
<td>✔️</td>
<td>✔️</td>
<td>-</td>
</tr>
<tr>
<td>8.</td>
<td>2009</td>
<td>Montana, USA</td>
<td>Supreme Court Decision</td>
<td>✔️</td>
<td>✔️</td>
<td>-</td>
<td>✔️</td>
</tr>
<tr>
<td>9.</td>
<td>2013</td>
<td>Vermont, USA</td>
<td>Patient Choice and Control at the End-of-life Act 2013</td>
<td>✔️</td>
<td>✔️</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>10.</td>
<td>2014</td>
<td>Québec, CA</td>
<td>An Act Respecting End-of-Life Care 2014</td>
<td>✔️</td>
<td>✔️</td>
<td>✔️</td>
<td>-</td>
</tr>
<tr>
<td>11.</td>
<td>2015</td>
<td>Canada</td>
<td>Medical Assistance in Dying (Supreme Court decision)</td>
<td>-</td>
<td>✔️</td>
<td>✔️</td>
<td>✔️</td>
</tr>
<tr>
<td>12.</td>
<td>2015</td>
<td>California, USA</td>
<td>End-of-life Option Act 2015</td>
<td>✔️</td>
<td>✔️</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>13.</td>
<td>2016</td>
<td>Colorado, USA</td>
<td>End-of-life Options Act 2016</td>
<td>✔️</td>
<td>✔️</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>14.</td>
<td>2017</td>
<td>Victoria, AU</td>
<td>Voluntary Assisted Dying Act 2017</td>
<td>✔️</td>
<td>✔️</td>
<td>✔️</td>
<td>-</td>
</tr>
<tr>
<td>15.</td>
<td>2017</td>
<td>Washington DC, USA</td>
<td>Death with Dignity Act 2017</td>
<td>✔️</td>
<td>✔️</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>16.</td>
<td>2019</td>
<td>Italy</td>
<td>Constitutional Court Decision</td>
<td>✔️</td>
<td>✔️</td>
<td>-</td>
<td>✔️</td>
</tr>
<tr>
<td>17.</td>
<td>2019</td>
<td>New Zealand</td>
<td>End-of-life Choice 2019</td>
<td>-</td>
<td>✔️</td>
<td>✔️</td>
<td>-</td>
</tr>
<tr>
<td>18.</td>
<td>2019</td>
<td>Western Australia, AU</td>
<td>Voluntary Assisted Dying Act 2019</td>
<td>✔️</td>
<td>✔️</td>
<td>✔️</td>
<td>-</td>
</tr>
<tr>
<td>19.</td>
<td>2019</td>
<td>New Jersey, USA</td>
<td>Aid in Dying for the Terminally Ill Act 2019</td>
<td>✔️</td>
<td>✔️</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>20.</td>
<td>2019</td>
<td>Hawai, USA</td>
<td>Our Care, Our Choice Act 2019</td>
<td>✔️</td>
<td>✔️</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>21.</td>
<td>2019</td>
<td>Maine, USA</td>
<td>Death with Dignity Act 2019</td>
<td>✔️</td>
<td>✔️</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>22.</td>
<td>2020</td>
<td>Austria</td>
<td>Constitutional Court Decision</td>
<td>✔️</td>
<td>✔️</td>
<td>-</td>
<td>✔️</td>
</tr>
<tr>
<td>23.</td>
<td>2020</td>
<td>Germany</td>
<td>Constitutional Court Decision</td>
<td>✔️</td>
<td>✔️</td>
<td>-</td>
<td>✔️</td>
</tr>
<tr>
<td>24.</td>
<td>2021</td>
<td>Spain</td>
<td>The Regulation of Euthanasia</td>
<td>✔️</td>
<td>✔️</td>
<td>✔️</td>
<td>-</td>
</tr>
<tr>
<td>25.</td>
<td>2021</td>
<td>South Australia, AU</td>
<td>Voluntary Assisted Dying Bill 2021</td>
<td>✔️</td>
<td>✔️</td>
<td>✔️</td>
<td>-</td>
</tr>
<tr>
<td>26.</td>
<td>2021</td>
<td>Tasmania, AU</td>
<td>End-of-Life Choices (Voluntary Assisted Dying) Act 2021</td>
<td>✔️</td>
<td>✔️</td>
<td>✔️</td>
<td>-</td>
</tr>
<tr>
<td>27.</td>
<td>2021</td>
<td>Queensland, AU</td>
<td>Voluntary Assisted Dying Act 2021</td>
<td>✔️</td>
<td>✔️</td>
<td>✔️</td>
<td>-</td>
</tr>
</tbody>
</table>
This thesis takes the view that the current state of the law is a coping mechanism, and coping is the opposite of change. In 2020, the struggle for a painless and good death took on new meaning. Bringing with it unprecedented challenges such as social distancing, lockdown restrictions, and high mortality as part of everyday life, the coronavirus disease (COVID-19) pandemic – which spread at a phenomenal rate – caused consternation amongst governments around the world. In England, those seeking lawful assisted suicide abroad received the government’s official permission to travel. Yet, at the same time, a more disturbing and unsettling reality revealed the inadequacy of the current system’s handling of death and dying.

Therefore, at the beginning of a revolutionary decade, both legislative stasis and normalising prolonged and intolerable suffering caused by medical conditions – against the individual’s wish for a choice to end their life – are demonstrably not sustainable norms.

This thesis investigates matters concerning assisted dying law reform. For this reason, this study endeavours to contribute to the wider debate by situating the individual’s choice to end their life at the centre.

A Personal Lens

I was raised in Romania by a generation that had endured a communist regime. Their individual identities were suppressed by the state. The fall of the communist dictatorship in 1989 was meant to put an end to this totalitarianism. And it did, at least on the surface. The mirage of democracy, inspired by Western societies, promised a future founded upon respect for personal autonomy, freedom of choice and most of all compassion. It soon became apparent that the ethos of democratic values was lost in translation. After all, the journey towards democracy was being navigated by those groomed under the old regime. Still blinkered by their experiences, the road ahead was muddy. Inevitably, this led to dysfunctional interpretations.
In the West, the images of the old Romania, remembered even today, are those of children (not all of whom were orphans) abandoned to suffer and die in orphanages.\footnote{BBC News, ‘Growing up in a Romanian orphanage’ (6 April 2016) <https://www.youtube.com/watch?v=VCeWr8OFuEs> accessed 16 Aug 2021} These conditions, as the cause and effect of the repressive regime, continue to lead many in the West to judge ordinary Romanians harshly, as if there were something in our culture which made us uniquely insensitive to such suffering.

Decades later – a hopeful immigrant galvanised by dreams of a future in which personal autonomy and compassion exist in harmony – I am at odds with the apparent reluctance to adopt assisted dying laws. In England and Wales, this resistance means that individuals who wish to end their life in a dignified way and are unable to do so without some level of assistance, are confined to a prolonged suffering and potentially undignified death. The system promotes two parallel realities, the law in theory and prosecutorial discretion in practice, but this is not good enough for human dignity.

I began this thesis, therefore, to argue that the law must change as a matter of urgency to allow everyone to have autonomy over their own dignified dying, with a good death. I have learnt that the rational development of case law, the promotion of Private Members’ Bills or the use of prosecutorial discretion not to prosecute in instances of assisted suicide, are not in themselves sufficient to achieve change. Something else is needed, a catalyst, a cause célèbre, a scandal, a vision, because the forces of inertia are too great. Or so it seems until, suddenly, law reform emerges. At that point, and with the benefit of hindsight, all court challenges, proposed Bills, and prosecutorial discretion reveal their contributing value. While not at that stage quite yet in this saga, this thesis contributes to understanding the path travelled to this point, when I believe the journey is nearing its end; the quest for a compassionate good death is almost over.
When the exploration of this study commenced in 2017, I did not anticipate how it would come about, nor did I realise how those images from Romanian orphanages that linger in the consciousness of the West since 1990 would have a contemporary parallel in my adopted country. However, fast forward to 2020 and 2021, when news broadcasts of the initial lockdown in the United Kingdom depicted vulnerable old individuals trapped in care homes, seeing their families only dimly through windows, with no physical contact allowed, and the law forbidding families from being with them in their dying days.

For these reasons, my thesis traces the value of relevant events and contributing factors and their impact on the possibility of adopting lawful assisted death in England and Wales.
Research Methodology

The methodology employed in this study has followed the doctrinal legal research analysis, also known as black letter methodology. This method provided the means to focus, almost entirely, on the law’s own language drawing on sources and documents such as statutes, case law and Hansard debates, to make sense of the legal world relevant to the assisted dying debate. These primary sources include Parliamentary House of Commons and House of Lords records, Government Papers, Case Judgments, Bills of Parliament. The purpose of this combination is to bring consistency and coherence to the layers of law related to or engaged by the various legal, political, ethical, medical strands influencing the wider debate. At the core of this methodology is deductive reasoning which enabled the navigation and comprehension of a set of rules that appeared, at first glance, to be an unrelated and jumbled mass.

Moreover, on the premise that the law enables the detection of principles upon which its compliance can be determined, the search explores the manner of their application and effect within the overall legislative framework. Therefore, the thesis has considered primary legislation from other jurisdictions which offer comparable principles of practice to provide a balanced approach in evaluating the potential of lessons for England and Wales as regards the scope of potential laws in this area.

The initial stages of this research involved the exploration of the notion of ‘good death’ within the context of the assisted dying debate. Thus, following the PhD programme ‘upgrade’ stage, this author employed a rigorous approach in managing data provided by the NVivo

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Software, which ‘ensures that the user is working more methodically, more thoroughly, more attentively’. The process involved using the software system to observe the recurrence of themes and terms within chosen peer-reviewed articles. The advantage of this technique consists in its ability to generate a list of words and phrases of interest which guided the rest of the research project. The top 25 identified terms were chosen due to their significantly higher number of appearances within the literature, compared to the rest within the remainder of the list. These were separated in two groups.

The first group represented the key words and phrases used within the assisted dying debate which needed to be defined and explored to establish their purpose within the scope of the thesis. These terms – assisted suicide, assisted dying, double effect, euthanasia, mercy killing, murder, terminal illness – went on to provide the basis for definition development while also offering the means to highlight inconsistencies of the ‘language-game’ (see section 1.2. in Chapter One) within the wider debate.

The second group – autonomy, capacity, choice, coercion, compassion, competent, consent, dignity, kindness, mental illness, pain, protection, safeguard, self-administration, self-determination, suffering, voluntary decision, vulnerability – went on to sow the seeds for what became the common thread of this qualitative study. Their significance in connection with the idea of a ‘good death’ by way of assisted dying, as depicted in the debate, is at the heart of this research and its original contribution to knowledge. This structure allowed for the systemisation and rationalisation of law in a way that led to the discovery and establishment of six essential elements (autonomy, capacity, compassion, safeguard, voluntary decision,

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14 NVivo is a software program used for qualitative and mixed-methods research. Specifically, it is used for the analysis of unstructured text, audio, video, and image data, including (but not limited to) interviews, focus groups, surveys, social media, and journal articles. It is produced by QSR International.

15 P Bazeley and K Jackson, Qualitative Data Analysis with NVivo (2013, 2nd ed, London, Sage)
vulnerability) which are encompassed within the notion of a good death as depicted in this research.

In England, the assisted dying debate engages the legislative, the judiciary and the executive. Consequently, this research critically evaluates the effect of the current law (Chapter One) and the progresses made by Parliament in terms of legislation and other Bills of Parliament (Chapter Three), judicial opinion (Chapter Two), and application of the law by the Director of Public Prosecutions (‘DPP’) (Chapter Four). While not able to plan for such a turn of events, this research considering assisted dying law reform (Chapter Six) has extended over the COVID-19 pandemic (Chapter Five). This development made it necessary to consider the current legislative attempt under the Assisted Dying Bill 2021 and its potential effect on the current public and professional attitudes in England and Wales.

Thus, the thesis has investigated the struggle for a good death during a time when the government-imposed emergency powers in response to the threat to public health, to determine the potential shift to adopt assisted dying laws. To this end, the thesis has engaged with the fast-moving topic of the pandemic to capture the changing attitudes on death and dying alone, through media channels. Thus, secondary sources include journal articles, books, chapters in books, online sources including newspaper articles and reports. Moreover, the path to critically analysing assisted dying law reform by way of black letter research, was extended to involve the ingredients of unsuccessful legislative attempts since 1936, including those proposed as part of the Assisted Dying Bill 2021.

That the law prohibits any assistance in suicide (Section 2 of the Suicide Act 1961 (‘Section 2’)), while in practice compassionate-helpers can escape prosecution for assisting death-seekers to end their life (DPP reasons for prosecutorial discretion), compels this study to highlight the need for reform, as the current law is vague and inconsistent. Thus, the current
arrangement is not capable of conferring the necessary safeguards to distinguish between vulnerable individuals and genuine death seekers, while compassionate assistors become subject to criminal liability, facing uncertainty as regards the application of the law in instances of assisted suicide. Yet, it is the wake of the pandemic and the events of 2020-2021 when dying alone without being able to say goodbye to loved ones (see section 5.4. in Chapter Five) deepened the struggle for and the meaning of having access to a good death with dignity. Thus, the impact of this epidemic has been explored as an additional means of evaluating the assisted dying debate, where the original contribution to knowledge traces the exacerbation and widening of the discussion of COVID-19 and its effect on how we die.

For ease of reference, the Appendices to this thesis provide the relevant text of the following: Section 2 of the Suicide Act 1961 (Appendix 1), the DPP Policy (Appendix 2), Articles 2, 3, 8, 9, 14 of the European Convention on Human Rights (Appendix 3), and Sections 3 and 4 of the Human Rights Act 1998 (Appendix 4). Any mention of ‘Section’ (big ‘S’) refers to legislative provisions, while ‘section’ (small ‘s’) indicates a specific part of the thesis that is relevant.

Any reference to the terms ‘victim’ and ‘suspect’ within this study reflects their use within the DPP Policy. The analysis within this thesis engages with the terms ‘death-seeker’ and ‘compassionate-helper’ as representative of individuals involved in an assisted suicide offence under Section 2 of the 1961 Act who, for the purposes of criminal law, are not considered to have committed a crime which warrants prosecution. Thus, the term ‘death-seeker’ is designated to an individual who, in connection with prosecutorial discretion, has formed a voluntary decision to end their life and needs assistance to achieve this. Also, the term ‘compassionate-helper’ points to a willing participant – wholly motivated by compassion – who assists a death-seeker in achieving their goal to end their life. Consequently, the decision-
making process deems their act as one that, on public interest grounds (DPP Policy), ought not to be prosecuted.

**Thesis Structure**

This thesis investigates the matter of assisted dying law reform, using the methodology and the tools described in the Thesis Introduction. Chapter One sets out the foundation of the law prohibiting assisted dying and examines the historical underpinning of criminal law as regards involvement with assisted suicide, intentional killing and the juncture with the assisted dying debate. Chapter Two analyses judicial opinions generated as part of a series of legal actions by claimants who, like others in their position, are concerned ‘that they should not be forced to linger on in old age or in states of advanced physical or mental decrepitude which conflict with strongly held ideas of self and personal identity.’¹⁶ This chapter offers an insight into judicial attitudes as regards change of legislation to encompass an exception to the current prohibition, while noting the current constitutional arrangements and limited powers of the judiciary in terms of law reform.

Chapter Three investigates the introduction of Private Members’ Bills aimed at introducing the choice of lawful hastened death between 1936 and 2021, culminating with a critical evaluation of the framework within the Assisted Dying Bill 2021, currently awaiting its Second Reading on 22 October 2021. Chapter Four analyses the manner of application of Section 2. On the one hand, the current arrangement appears to promote a ‘blanket ban’, while on the other hand, it emphasises (through prosecutorial discretion) the possibility for a compassionate-helper to escape prosecution following their involvement with assisting a death-seeker to commit suicide. Chapter Five investigates the effect of the emergency powers adopted by the UK

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¹⁶ *Pretty v United Kingdom* (2002) 35 EHRR 1 [65]
Parliament in response to the COVID-19 pandemic, to expose the wider impact of recent events considering the lives of dying people in their struggles for a painless and good death.

Finally, Chapter Six draws together the threads of research to address the question set in the thesis: What considerations are needed to enact sustainable assisted dying law reform? The answer to this is in four parts, where the COVID-19 experience and dying alone are deemed capable of changing attitudes and contributing to the assisted dying debate. With that in mind, the study culminates by bringing together the essential elements and their influencing factors in the form of a diagram encapsulating the visual fabric of a good death by way of assisted dying.

**Thesis Contribution**

This thesis contributes to understanding the concept of assisted dying and the path of legislative attempts since 1936. This study has led to the discovery and establishment of six elements (autonomy, capacity, compassion, safeguard, voluntary decision, vulnerability) and their influencing factors which together represent an essential evaluative tool that may and should be used in connection with Assisted Dying Bills and the enactment of law in this area. Thus, the thesis exploration develops the argument that, by navigating the assisted dying debate through the lens of the six elements and their influencing factors, the journey to a compassionate good death by way of assisted dying law reform can lead to the achievement of a more robust framework.

Moreover, the benefit of hindsight of the COVID-19 impact on death and dying, places the thesis discussion at the heart of the debate and the challenge of striving to achieve a good death with dignity. Nevertheless, if achieved, the step towards change is expected to inspire a high
level of legislative robustness by way of assisted dying provisions, in a way that warrants longevity of enacted assisted dying legislation.

**Potential Limitation of the Thesis**

In considering potential limitations to this thesis, three aspects stand out. First, while answering the research question, the consideration of movements in other jurisdictions has been confined to the way changes have been introduced or deliberated in the process leading to assisted dying law reform. For this reason, this thesis engages with frameworks in other jurisdictions (see section 5.5. in Chapter Five) as regards their relevance in terms of comparable principles of practice. As such, the thesis remains focused on the lessons which may become useful for the purposes of legislative scrutiny of Assisted Dying Bills when they are presented for debate in Parliament.

Second, as regards the matter of prosecutorial discretion and cases that have been referred to the DPP, only three such cases have led to the successful prosecution of defendants for assisting or encouraging suicide contrary to Section 2 of the 1961 Act. For this reason, the thesis undertakes a generalised approach based on the findings in these cases (Chapter Four) only to highlight the nuances of the current application of the law in this area, more specifically, the relationship between ‘assisting’ and ‘encouraging’ the suicide of another. Thus, any further generalisation based on this point ought to be developed with this restricted value in mind.

Third, the thesis develops the argument that by navigating the assisted dying debate through the lens of the six elements and their influencing factors, the journey to a compassionate good death by way of assisted dying law reform can lead to the achievement of a robust framework. Yet, the relationships of these elements and their influencing factors depicted throughout this study and more specifically in Chapter Five, are by no means intended as the only ones possible
within the context of the assisted dying debate. In fact, the respective contexts and emphasis of each individual element are capable of influencing their importance in a given narrative, leading to results beyond those characterised in this research.

Finally, the literature review regarding the effects of COVID-19 was confined to emerging views and studies as the pandemic and experience of lockdown followed their course. Thus, there may be some limitations regarding research available at the time of writing.
1.1. Introduction

The quest for legal reform to establish lawful provisions to access a hastened death began in 1931, in the form of a public address in Leicester advocating the legalisation of euthanasia.¹ This event led to what was reputed to be the first Bill² of its kind. Initiated by Killick Millard – a controversial public health activist and devoted contributor to the eugenics, temperance, cremation, and birth control movements – the Bill made its way in Parliament in 1936 (the 1936 Bill).³ That introduction was succeeded by various attempts to move Bills of this kind.

Despite a high level of public support in favour of assisted dying law reform in recent years,⁴ the layers of complexity in achieving change appear as if embedded within the English legal

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³ Voluntary Euthanasia (Legalisation) Bill 1936; HL Deb 01 December 1936, vol 103, cols 465-505 - Lord Ponsonby noted the 1936 Bill to be ‘the first measure of its kind that has come before Parliament.’ This fact was later confirmed by Lord Raglan in HL Deb 25 March 1969, vol 300, cols 1143-254 (3.20pm) to clarify the position in relation to the 1969 Bill as ‘the second time [the] matter [came] before Parliament.’
<http://www.bsa.natcen.ac.uk/media/39196/bsa34_full-report_fin.pdf> accessed 27 Feb 2019; This 2017 Report established that 78% of the British public favour a means whereby patients are allowed to request and receive assistance to die; this figure was ‘the same in 2016 as in 1983’. NatCen Panel, ‘Technical information - MDMD, My Death, My Decision’ (conducted December 2018)
system. Yet, the matter of assisted dying brings to the surface certain notions such as autonomy, mental capacity, compassion, voluntary decision, vulnerability, and safeguards, in connection with the current legislative construct. This is owing to the rigidity of the law in books which exists in parallel with a flexible application of its provisions. Thus, the relationships between these six elements bring to the surface the inconsistencies and lack of safeguards within the overall application of the law, while strengthening the argument for the need to access a good death. This chapter sets the foundation of this study and examines the historical underpinnings of criminal law as regards involvement with assisted suicide and intentional killing, and the juncture with the assisted dying debate.

1.2. Phraseology Inconsistencies and Thesis ‘Language-Game’

Within the current scope of the debate even the term ‘assisted dying’, as an encompassing set-criterion for potentially permissive legislation, takes on different forms – distinguished from a variety – depending on the protagonist and the context in which the term is used. At times, therefore, as Keown observes, the confusion can be attributed ‘to the imprecise use of language, sometimes careless and sometimes deliberate’.

One such incidence of imprecise or deliberate language stands out. Thus, even organisations campaigning for a change of legislation to achieve assisted dying law reform may adopt their own language and definitions. For instance, the Dignity in Dying organisation takes the position that change should be available for terminally ill adults with six months or less to live – a term which, as demonstrated in Chapter Three, may turn out to be a less than robust

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6 Even campaigners on the same side of the debate may disagree in terms of assisted dying criteria.
criterion. Conversely, My Death, My Decision goes a couple of steps further. The organisation campaigns for assisted dying to also be available for individuals suffering from a ‘severe and incurable condition’ or suffering from a ‘severe degenerative condition’.

Therefore, from the term euthanasia, to assisted suicide prohibition, to the quest for lawful assisted dying upon request and their incidental derivatives, this section offers an insight into definitions of and the relationship between terms that make up the assisted dying ‘language-game’ – a term referred to by Wittgenstein, who remarks that ‘the meaning of a word is its use in the language’.

**Euthanasia**

The term originates from the Greek word ‘euthanatos’ – a combination of the words ‘eu’ meaning ‘good’, and ‘thanatos’ meaning ‘death’. In the medical context, the term ‘euthanasia’ was first used in the 17th century by Francis Bacon, English philosopher and statesman, a pioneer of modern scientific thought who also served as the Attorney General and Lord Chancellor of England. By employing its etymological meaning Bacon referred to euthanasia in the sense of a painless and happy death, as something that doctors should do to help their patients when ‘all hope of recovery is gone, to help make a fair and easy passage from life’.
In its contemporary sense, euthanasia is defined as ‘the practice of killing without pain a person or animal who is suffering from a disease that cannot be cured’. As the movement for law reform in support of legalising euthanasia began in 1931, the historical events that followed soon after, gave rise to an array of negative associations with this notion. Consequently, despite criticisms of Nazi writings for using the term euthanasia ‘as both camouflage and euphemism for a programme of murder’, its meaning continues to be perceived in the post-Nazi sense, to symbolise politically motivated genocide.

Nevertheless, in terms of the legal sphere, the House of Lords Select Committee on Medical Ethics defined euthanasia as ‘a deliberate intervention undertaken with the express intention of ending life to relieve intractable suffering’. In the 1994 House of Lords debate Lord Walton, the chair of the Committee, indicated the definition was attributed to the more specific term of voluntary euthanasia, as it was carried out ‘at the request of the individual concerned’. By reference to the approaches adopted in the Netherlands, this term was distinguished from non-voluntary euthanasia conducted in the same manner but without the individual’s express consent.

Conversely, the Committee went on to acknowledge the legitimacy of ‘letting [someone] die’, determined by reference to the 1980 Papal Encyclical on Euthanasia, as the point at which ‘inevitable death is imminent, in spite of the means used, it is permitted in conscience to take

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17 M Battin, Ending Life: Ethics and the Way We Die (Euthanasia and Physician-Assisted Suicide, Oxford Scholarship Online, 2011) 29
19 HL Deb 09 May 1994, vol 554, cols 1344-412 (Lord Walton 3.8pm)
20 ibid
21 ibid (The Lord Bishop of Oxford 4.48pm)
the decision to refuse forms of treatment that would only secure a precarious and burdensome prolongation of life.’

Moreover, the Committee Report defended the principle of double effect, rejecting some allegations that this notion was ‘used as a cloak for what in effect amounted to widespread euthanasia’. For that reason, it said that medical professionals have the duty to evaluate the circumstances when faced with the possibility of double effect and ‘[i]f [their] intention is the relief of severe pain and distress, and the treatment given is appropriate to that end, then the possible double effect should be no obstacle to such treatment being given.’ Therefore, in such instances, the patient’s death would be recorded as ‘exclusively caused by the injury or disease to which his condition is attributable’. As will become apparent in this chapter, for the purposes of criminal liability for causing death, the concept of attributability is key in determining an unlawful death.

Mercy Killing

Associating hastened death based on compassion with a friend or family, as opposed to a medical professional, is identified by way of a different term – mercy killing. As explored later in this chapter, at the point when the Suicide Bill 1961 (‘1961 Bill’) was making its way through Parliament, this notion cropped up as a matter of great difficulty that needed to be avoided because there was a danger ‘in regard to mercy killing […] that it might be used, or people might be encouraged to use it, without a real sense of responsibility, and a dangerous practice might be set up’. Yet, when the Bill reached the House of Commons, this matter was

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22 ibid
24 ibid - House of Lords Select Committee on Medical Ethics, Select Committee on Medical Ethics Report, (London, HMSO, 1994) (House of Lords paper 21-1) referenced in Keown (2018) 25
25 Airedale NHS Trust v Bland [1993] AC 789 [867D] (Lord Goff of Chieveley)
27 HL Deb 2 March 1961, vol 229 (The Lord Chancellor Viscount Kilmour – 5.24pm)
no longer an issue of concern because the new offence under ‘Clause 2’ (‘Section 2’), was designed to capture this kind of practice. Therefore, despite its prevalent criminal nature, during a House of Commons debate on the 1961 Bill, it was noted that mercy killings were not to be punished by imprisonment. Upon enactment of the Suicide Act 1961, Section 2 became the provision prohibiting assisted suicide.

Nevertheless, the notion of mercy killing lived on. In July 2005, pursuant to the Government announcement for a review on the law of murder, the Law Commission considered the law in this area, including defences and partial defences to murder, and ‘the relationship between the law of murder and the law relating to homicide’. The terms of reference for the review included the issue of mercy killing. The Commission defined it as involving ‘an intention to prevent the continuation of one kind of harm (extreme pain and suffering) to a person by doing another kind of harm (killing) to the very same person.’ At the same time, the Commission acknowledged that compassionate reasons can never provide a partial excuse for mercy killers, insisting that to do otherwise, would ‘become a cover for selfish or ignoble reasons for killing, not least because people often act out of mixed motives.’

The review also covered details of surveys based on public attitudes towards mercy killing. In connection with this, the findings of Professor Barry Michell for the review, led to the conclusion that when presented with a scenario of this nature – where an individual acted upon

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28 HC Deb 14 July 1961, vol 644, col 843 (Mr Peter Kirk - 3.56pm)
29 Law Commissions Act 1965 Section 3(2)
30 Homicide Act 1957
31 The Law Commission, Murder, Manslaughter and Infanticide: Project 6 of the Ninth Programme of Law Reform: Homicide, Com No 304, Part 1 [1.1]
32 ibid - The Commission indicated these to include ‘the Department of Health; groups representing doctors and patients; care organisations; gerontologists; and groups both “pro” and “anti” euthanasia.’
33 ibid [1.5]
34 The Law Commission, Murder, Manslaughter and Infanticide: Project 6 of the Ninth Programme of Law Reform: Homicide, Com No 304, Part 7 [7.3]
35 ibid [7.7]
the pleas of a terminally ill wife, asking to ‘put her out of it’, by smothering her with a pillow – participants were mostly concerned with whether the case was a ‘genuine mercy killing’.\(^{36}\) For them, the key question was ‘had the victim truly and freely wanted to die, and was the killer’s motive a “good” one?’\(^{37}\) In addition to the need to establish the autonomous decision of the so-called victim, the Commission also indicated there is a need to consider the issue as part of a much wider debate ‘before concluding that the concept of “compassion”, as a motive, is in itself a sufficiently secure foundation for a “mercy” killing offence or partial defence.’\(^{38}\)

In its concluding remarks on this issue, the Commission provided considerable rationale on instances of diminished responsibility as distinguished from what it ultimately termed ‘rational mercy killing’.\(^{39}\) The Commission recommended the Government take a public consultation and determine whether the law should recognise the offence or partial defence to mercy killing.

**Assisted Suicide**

A less problematic notion is the term ‘assisted suicide’, which determines an offence under Section 2(1) of the Suicide Act 1961 (‘1961 Act’) (see Appendix 1) providing that:

A person (‘D’) commits an offence if—

(a) D does an act capable of encouraging or assisting the suicide or attempted suicide of another person, and

(b) D’s act was intended to encourage or assist suicide or an attempt at suicide.\(^{40}\)

\(^{36}\) ibid [7.12]-[7.17]

\(^{37}\) ibid

\(^{38}\) ibid [7.29]

\(^{39}\) ibid [7.36]-[7.37]

\(^{40}\) Suicide Act 1961 Section 2 as amended by the Coroners and Justice Act 2009 Section 59
However, despite operating a blanket ban on ‘encouraging or assisting […] suicide’, which triggers criminal liability to imprisonment ‘for a term not exceeding 14 years’, the application of this provision by the Director of Public Prosecutions (‘DPP’) who gives their consent to prosecution under Section 2(4), endorses the notion that not all assisted suicides require to be prosecuted in the public interest. In fact, since April 2009 – when the Crown Prosecution Service (‘CPS’) started its data collection of instances of Section 2 offences, following a high number of Freedom of Information requests – of the total number of cases referred to the DPP only three instances of assisted suicide have led to the defendants being successfully prosecuted, and two other instances where the defendants were acquitted.

In recent years, the prosecutorial decision-making process has involved consideration of the DPP Policy for Prosecutors in respect of Cases of Encouraging or Assisting Suicide (‘DPP Policy’) (see Appendix 2). As will be analysed in Chapter Three, the manner of application of

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41 ibid Section 2(1C)
42 CPS, Policy for Prosecutors in Respect of Cases of Encouraging or Assisting Suicide, <https://www.cps.gov.uk/legal-guidance/suicide-policy-prosecutors-respect-cases-encouraging-or-assisting-suicide> accessed 11 Jan 2020
43 Personal email correspondence (12 Nov 2020) with the CPS Senior Policy Adviser, Special Crime and Counter Terrorism Division, regarding the reason for the 1 April 2009 starting date for data collection observed that ‘[w]hile we cannot be sure of the exact reason we started publishing figures given this was some time ago, we think this was in response to the high number of FOI [Freedom of Information] requests we started to receive on this topic.’
45 CPS, ‘Referral of cases’ (Updated: 8 November 2019) <https://www.cps.gov.uk/legal-guidance/referrals-cases> accessed 17 Dec 2020; The CPS states that ‘Cases of Assisted Suicide […] should be notified to Private Office for the Director’s information. These do not require formal consent, but he must be satisfied with the decision made before it is finalised.’
46 R v Howe [2014] EWCA Crim 114; [2014] 2 Cr App R (S) 38; R v Natasha Gordon 19 January 2018 Leicester Crown Court; R v Bipin Desai 17 November 2017 Guildford Crown Court (Mr Justice Green)
prosecutorial discretion points to two different outcomes. First, if on the facts, the suspect’s act in connection with the victim’s suicide was wholly motivated by compassion (compassionate assistance) and there are no other public interest reasons in favour of prosecution, the suspect may not be prosecuted. Second, if the evidence points to the fact that the victim was deemed to be particularly vulnerable\(^{48}\) (in the sense that they were suffering from a mental illness) and the suspect encouraged them to end their life – by exploiting the victim’s vulnerability\(^{49}\) – it is more likely than not for the involvement (encouraging suicide) to require prosecution in the public interest. While the way in which Section 2(1) is applied indicates the possibility that a compassionate-helper may escape prosecution, the involvement with suicide remains a criminal act, thereby attracting the requisite police investigations and risk of prosecution. Driven by kindness and a desire to avoid a potentially undignified end or even a botched suicide, pro-choice campaigners strive to achieve assisted dying law reform.

**Assisted Dying**

In contrast with the concept of assisted suicide, the terms ‘assisted dying’ and ‘assisted death’, while not currently recognised under the law, are meant to indicate the lawful process (if such provisions are adopted) by which individuals may be allowed to access assisted death. Still, since being captured as part of the title of the Doctor Assisted Dying Bill 1997,\(^{50}\) the term ‘assisted dying’ continued to feature in subsequent Bills of this kind,\(^{51}\) to signal a medical means of ending of life, available in limited circumstances and under strict safeguards.

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\(^{48}\) Both *R v Howe* [2014] EWCA Crim 114; [2014] 2 Cr App R (S) 38 and *R v Natasha Gordon* 19 January 2018 Leicester Crown Court represent successful prosecutions by the CPS for offences of assisted suicide involving vulnerable victims.

\(^{49}\) *R v Natasha Gordon* [14]

\(^{50}\) HC Deb 10 December 1997, col 1025 - Doctor Assisted Dying Bill 1997 - (Joe Ashton MP - 4.14pm)

\(^{51}\) All Assisted Dying Bills since 1997 have adopted and improved the scope of this measure as representing the process involved in the assistance offered by medical professionals to individuals requesting assistance to end their life.
The latest Assisted Dying Bill 2021 determines assisted dying as a process that would allow ‘competent adults who are terminally ill [to be] provided at their request with specified [medical] assistance to end their own life’\(^{52}\) by self-administration\(^{53}\) or doctor-prescribed lethal medication for self-ingestion. This definition represents a clear exception from Section 2 of the 1961 Act, to be available only with the involvement of a medical practitioner. This distinction clarifies, with much greater detail, the circumstances, and procedures necessary, if such assistance would become lawful. However, unpacking the meaning of the term ‘assisted dying’, presents further complications regarding specific factors of the set criteria; for instance, the meaning of the notion ‘competent adult’ (Chapter Three).

However, Judicial Review challenges brought before the courts since 2000\(^{54}\) have led to the consideration that wider, more encompassing criteria ought to be considered as part of the assisted dying provisions within Bills of this kind.\(^{55}\) Specifically, judicial attitudes (Chapter Two) favour a potential exception from the current prohibition for individuals who, because they are unable to bring about their own death or refuse life-sustaining treatment (aside from starving to death), would not qualify under criteria as presented under the Assisted Dying Bill 2021. This is because those individuals require a more active involvement of doctor-administered lethal injection or the setting up of a delivery system for self-administration.

Nevertheless, judicial opinions have yet to influence the consideration of different assisted dying provisions.

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\(^{52}\) Assisted Dying Bill 2021 – Long Title: A Bill to ‘[e]nable competent adults who are terminally ill to be provided at their request with specified assistance to end their own life; and for connected purposes.’

\(^{53}\) Assisted Dying Bill 2021 Clause 4(4) ‘In respect of a medicine which has been prescribed for a person under subsection (1), an assisting health professional may—
(a) prepare that medicine for self-administration by that person;
(b) prepare a medical device which will enable that person to self-administer the medicine; and
(c) assist that person to ingest or otherwise self-administer the medicine; but the decision to self-administer the medicine and the final act of doing so must be taken by the person for whom the medicine has been prescribed.’

\(^{54}\) See Chapter Two

\(^{55}\) R (on the application of Nicklinson and another) v Ministry of Justice; R (on the application of AM) (AP) v DPP [2014] UKSC 38 (Nicklinson) – the claimants were quadriplegic and were not able to bring about their own death without assistance.
For now, the prescribed assisted dying framework remains confined to the form most likely to achieve the best odds in a Parliamentary vote. Consequently, when – and if – change is adopted to allow for lawful assisted death, the criteria are likely to attract civil actions based on discrimination. Thus, as suggested by Papadopoulou, the physical and mental criteria should be abandoned in favour of a voluntary, settled, and informed decision to have an assisted death.\(^{56}\)

Recently, Canada, the state of Victoria (Australia), and New Zealand, have adopted assisted dying provisions involving comparable principles of practice to those presented by Assisted Dying Bills in Westminster Parliament.\(^{57}\) For instance, Canada has adopted legislative provisions for Medical Assistance in Dying which gives individuals access to assisted dying whether by:

(a) the administering by a medical practitioner […] of a substance to a person, at their request, that causes their death; or

(b) the prescribing or providing by a medical practitioner […] of a substance to a person, at their request, so that they may self-administer the substance and in doing so cause their own death.\(^{58}\)

Essentially, these three jurisdictions have joined an exclusive group allowing both assisted suicide and certain forms of euthanasia as part of their frameworks.\(^{59}\) On this premise, this study recognises the assisted dying process, as part of future law reform, to encompass an

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\(^{58}\) Medical Assistance in Dying Bill C-14 Section 241.1

\(^{59}\) The Netherlands, Belgium, Luxembourg
exception whereby competent adults are able to choose either self-administered or doctor-administered lethal assisted death medication – whether by setting up a drug delivery system or direct administration of a lethal injection.

**Thesis Language-Game**

For this thesis, agreement at the outset on the nuances of all terms within the assisted dying debate is essential. This approach is guided by Neal’s concept – drawing on Wittgenstein’s famous contribution to philosophy – on ‘language-games’. While the renowned maxim holds that ‘the meaning of a word is its use in the language’, Neal observes this lens can be applied in any situation where a group uses language to play by the same rules; thus, playing a language game. Consequently, for the assisted death debate, this thesis places the individual’s autonomous and voluntary decision to end their life by way of assisted death, at the centre.

To date, Bills of this kind introduced in Parliament have yet to achieve the enactment of lawful assisted death, while court challenges since 2000 have provided the opportunity for judicial evaluation and interpretation of the law concerning this topic. Despite various attempts to change the law, for claimants seeking assistance with their death, the only options available are to starve themselves to death through a ‘painful and undignified process’, or – if at all available to them – remove their non-invasive ventilator (refusing life-sustaining treatment) under heavy sedation, leading to death within minutes, hours or even days. Accordingly, by reference to the way courts approach the idea of an exception to the current prohibition, Hobson

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61. Wittgenstein (1976)
64. R (on the application of Jane Nicklinson), Paul Lamb v Ministry of Justice, R (on the application of AM) v DPP [2013] EWCA Civ 961 [1] (Elias LJ)
65. R (Conway) v The Secretary of State for Justice [2017] EWHC 2447 (Admin) [26]
argues that focusing on the manner in which someone would end their life and the expected course of their medical condition ‘is arguably too blunt’.  

Therefore, this thesis draws on Hobson’s argument and claimants’ depiction of a kind of death which mirrors Bacon’s vision of ‘a fair and easy passage from life’ – where the onus as regards criteria to be met is on assessing the individual’s ‘voluntary, clear, settled and informed wish to end [their] own life’, as opposed to the arbitrary exception determined by a medical diagnosis. Thus, this study takes the position that individuals seeking assisted dying law reform are in pursuit of securing access to a ‘good death’.

In light of the definitions considered in this section, this thesis determines a good death as the deliberate and compassionate intervention – under strict safeguards and lawful provisions – by a medical professional that facilitates, as far as possible, a painless and easy passage from life pursuant to a genuine and freely reached request of an adult person, where a precarious and burdensome prolongation of life is not wanted.

On this premise, the thesis engages with the term ‘assisted dying’ as representative of a process, complete with the necessary safeguards, which provides access to a lawful means of achieving an assisted death under prescribed criteria. Thus, ‘assisted death’ is identified as the act which

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66 Hobson (2018) 262
68 Assisted Dying Bill 2021 Section 1(2)(a)
72 The Law Commission, Murder, Manslaughter and Infanticide: Project 6 of the Ninth Programme of Law Reform: Homicide, Com No 304, Part 7 [7.12]-[7.17]
73 This thesis confines the matter of a good death within the context provided by the Assisted Dying Bill 2021 criteria concerning only individuals who are over 18 years of age.
74 HL Deb 09 May 1994, vol 554, cols 1344-412 (The Lord Bishop of Oxford 4.48pm)
brings about the individual’s good death regardless of when this option is required and requested by way of self-administered or doctor-administered lethal medication. The meaning and nuances of assisted death are further explored, by way of legal actions brought before the courts (see Chapter Two), by claimants to determine the link with a good death.

1.3. Criminal Liability for Assisting with Ending of Life

For this thesis various criminal law offences are relevant. Complicity with assisting another to commit suicide is prohibited by statute. Additionally, unlawful intentional killing amounts to murder, established at common law, while other unlawful killings are criminalised by way of manslaughter offences. Given the context of an assisted death framework, this thesis will focus on the criminal law in connection with assisted suicide, because the type of involvement by a medical professional with ending an individual’s life amounts to a breach of Section 2 of the 1961 Act. It will only consider the offence of murder briefly in relation to ‘mercy killings’.

While assisted dying frameworks adopted by other jurisdictions involve either self-administered or doctor-administered lethal medication, or both (see Table 6 in Thesis Introduction), the Assisted Dying Bills introduced in Westminster Parliament involve criteria confined only to self-termination by self-administration, facilitated by way of medical assistance. In enacting the 1961 Act, which introduced a sense of harmony with ‘the needs

75 Suicide Act 1961 Section 2(1)
76 R v Dr Bodkins Adams [1957] Crim LR 365; In relation to administration of pain relief Devlin J stated that ‘a doctor is entitled to do all that is proper and necessary to relieve pain and suffering even if such measures may incidentally shorten life.’; Airedale Hospital Trustees v Bland [1993] 2 WLR 316 (withdrawing and withholding treatment); Re A (conjoined twins) [2001] 2 WLR 480 (defence of necessity). These defences are outside the scope of this thesis.
78 HL Deb 2 March 1961, vol 229 (The Lord Chancellor Viscount Kilmour - 4.4pm); Suicide Bill 1961 Section 1 stated ‘[t]he rule of law whereby it is a crime for a person to commit suicide is hereby abrogated.’
and the outlook’ of that time—putting an end to a decree of almost a thousand years– Parliament considered it necessary to safeguard individuals confined in unfavourable circumstances by criminalising any involvement with assisting in suicide. Thus, claimants challenging the law before the courts since 2000 (Chapter Two) aim to achieve change whereby assisted death may be lawfully provided as an exception from the current prohibition by medical professionals, in certain circumstances and under strict safeguards.

Furthermore, as observed by Lord Judge CJ, ‘[u]ntil Parliament decides otherwise, the law recognises a distinction between the withdrawal of treatment supporting life, which subject to stringent conditions, may be lawful, and the active termination of life, which is unlawful’. Accordingly, the offence of murder does not distinguish ‘between murder committed for malevolent reasons and murder motivated by familial love.’ Therefore, for the purposes of criminal law, an individual’s consent to being killed does not absolve another of liability for murder. Thus, in a civil matter related to choosing death over life (in a persistent vegetative state), Hoffmann LJ observed that ‘the sanctity of life entails its inviolability by an outsider. Subject to exceptions like self-defence, human life is inviolate even if the person in question has consented to its violation. That is why, although suicide is not a crime, assisting someone to commit suicide is.’ Consequently, as explored in more detail later in this chapter, the act of switching off life-sustaining treatment is an omission and does not amount to homicide.

79 ibid
80 HL Deb 2 March 1961, vol 229 (Lord Denning - 5.3pm)
81 Suicide Bill 1961 Section 2
82 R v Inglis [2010] EWCA Crim 2637 [38]
83 The exception of the principle of double effect is evaluated later in this chapter.
84 R v Inglis [2010] EWCA Crim 2637 [37] (Lord Judge CJ)
85 Airedale NHS Trust v Bland [1993] AC [831] (Hoffmann LJ)
86 See section 1.5. in this chapter
The English criminal law’s approach to those seeking medical assistance to die is based on Section 2 of the 1961 Act. In hindsight, this provision which served as a tool to ‘minimise [the] opposition’ response during the Bill’s passage through the Parliamentary process and ensured its addition into the Statute Book, continues to have far-reaching ramifications for those favouring law reform. Nevertheless, it is worth noting that, at the time of receiving its Royal Assent, the content of the 1961 Act – which was moved as a Government Bill – remained exactly as when it was introduced for its first reading (in the House of Lords) – thus, the Parliamentary debates and Bill stages left the provisions untouched.

Yet, the way in which Section 2 of the 1961 Act emerged, and the fact that it maintained its inaugural form, are testament to the long-lasting prevalence of the assisted suicide prohibition. In fact, the matter of assisted suicide was handed over to the Criminal Law Revision Committee (‘CLRC’) in 1959.88 When their report ‘Suicide’ was published, they recommended what became Clause 2 of the Suicide Bill 1961.89 The provision had been commissioned by the CLRC to Parliamentary drafting.90

When the Suicide Bill 1961 was first introduced in the House of Lords, the debates revolved around a sense of need to protect individuals since, without express prohibition to this end, any involvement with aiding or abetting the successful or attempted suicide of another would not amount to a criminal offence.91 As stated by the Lord Chancellor, Viscount Kilmour, in the 2

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87 HL Deb 13 November 1985, vol 468 col 273 - Suicide Act 1961 (Amendment) Bill (Lord Jenkins)
88 Criminal Law Revision Committee, Chaired by Lord Justice Sellers, Report published as a White Paper (Command Paper 1187) referred to in HL Deb 2 March 1961, vol 229 (The Lord Chancellor Viscount Kilmour - 4.4pm)
89 HL Deb 2 March 1961, vol 229 (Lord Denning - 5.3pm)
90 Moore (2000) 217
91 HL Deb 2 March 1961, vol 229 (The Lord Chancellor Viscount Kilmour - 4.4pm)
March 1961 House of Lords debate, prohibiting assisted suicide was considered ‘the most satisfactory solution’\textsuperscript{92} to account for the troublesome instances. More specifically, in terms of the troublesome cases, the Lord Chancellor drew a comparison between instances where the ‘assistance may be no more than providing […] drugs for a person who is suffering from painful and incurable illness’ and those where the individual assisting and encouraging the suicide ‘derives financial advantage’.\textsuperscript{93}

However, although in certain cases the assistance ‘may be committed in circumstances in which the moral culpability will be very small’, the decision on prosecutions can only be made after circumstances of the offence have been fully investigated.\textsuperscript{94} Furthermore, Lord Denning recognised the need for this legislative approach on account of the likelihood that ‘anxious that [their spouse] should commit suicide [an individual] might be quite ready to aid and abet’.\textsuperscript{95}

Still, the unique character of the assisted suicide prohibition was also acknowledged as ‘an offence without precedent’,\textsuperscript{96} because its aim was to criminalise the involvement with the act of suicide which in itself was set to no longer be criminal.\textsuperscript{97}

One such recognition was offered by Lord Denning, who pointed to the illogical characteristic of this prohibition, and in spite of that, decided to abandon that line of reasoning in favour of the premise that, actually, the new offence stemmed from a crime which, albeit decriminalised, remained illegal and capable of being subject to aiding and abetting.\textsuperscript{98} Indeed, it made sense to depict the measure in that way, since the matter of suicide was not set to suddenly become a morally accepted behaviour upon enactment of the Suicide Bill 1961. This is because suicide

\begin{flushright}
92 ibid  
93 ibid  
94 ibid  
95 ibid (Lord Denning - 5.3pm). This explanation was offered by Lord Denning in support of Section 2.  
96 HC Deb 14 July 1961, vol 644, col 843 (Mr Peter Kirk - 3.56pm)  
97 HL Deb 2 March 1961, vol 229, col 253 (Lord Silkin - 5.5pm)  
98 ibid, col 262 (Lord Denning - 5.3pm)
\end{flushright}
was a phenomenon distinguished from other examples involving more liberal attitudes to human behaviour.\textsuperscript{99} Thus, the suicide reform restructured the nature of control, previously exercised by way of law enforcement, in exchange for a more effective one provided by medical professionals.

Nevertheless, the emphasis of debates on Section 2 prohibition as a way of protecting the weak and vulnerable from abuse detracted from the matter of decriminalisation of suicide as a step in the wrong direction. Indeed, this led Wicks to argue that while the documented passing of the 1961 Act through Westminster Parliament appears noncontentious, subsequent developments indicate that ‘enduring moral and ethical conflicts’ regarding suicide remain a matter of concern and relevance for questions surrounding the assisted dying law reform.\textsuperscript{100}

\textit{Shades of Compassion}

Beyond decriminalisation of suicide, the debates on the Suicide Bill 1961 were, for many, ‘motivated by compassion’.\textsuperscript{101} Accordingly, the aim of the move was, as Lord Silkin remarked, to do ‘everything we can to help these unfortunate people who are driven to these desperate courses’\textsuperscript{102} and who – as pointed out by Eric Fletcher a few months later, during a House of Commons debate on the same – were ‘in need of compassion and assistance, […] not punishment’.\textsuperscript{103} On reflection, these remarks have set the tone for the application of the law in a way that also promoted a compassionate approach towards willing assistors.

\textsuperscript{100} E Wicks, ‘Assisted dying reframed in the context of English law’s approach to suicide’ Medical Law International (2020) Vol 20(4) 287-307
\textsuperscript{101} HL Deb 2 March 1961, vol 229, (The Lord Bishop of Carlisle - 4.42pm)
\textsuperscript{102} HL Deb 9 March 1961, vol 229, cols 534-61 (Lord Silkin - 4.12pm)
\textsuperscript{103} HC Deb 14 July 1961, vol 644, col 843 (Eric Fletcher MP - 3.56pm)
By the time the Bill reached the House of Commons, it became apparent that the new offence of assisted suicide was expected to be mainly ‘concerned [with] mercy killings’. Thus, during the Bill’s Second Reading, Charles Fletcher-Cooke observed that ‘the offences are not likely to be frequent, and, with very few exceptions, may be expected to attract only a small penalty’. Consequently, offences under Section 2 were to be dealt with in a prescribed manner. In fact, this anticipation was based on the premise that ‘[m]ost of the cases with which [Section] 2 will be concerned […] we shall not wish to punish by imprisonment’; instead, it was predicted that it would be ‘possible to deal with the matter in another way.’

The anticipation of a certain level of uniformity in applying Section 2(1) was based on Section 2(4), which states that prosecutions for assisted suicide can only ‘be instituted […] by or with the consent of the Director of Public Prosecutions’ – relevant in both private and public actions. This arrangement preserved the unwritten rule, frequently rehearsed by the Attorney General, Sir Hartley Shawcross, in 1951, that ‘[i]t has never been the rule of this country – I hope it never will be – that criminal offences must automatically be the subject of prosecution.’ Accordingly, consent to prosecute was only expected in cases where the offence, or the particular circumstances of its commission, was of a certain kind that prosecution would be required in the public interest.

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104 ibid (Mr Peter Kirk - 3.56pm)
105 ibid (Charles Fletcher-Cooke - 3.27pm)
106 ibid (Mr Peter Kirk - 3.56pm)
107 HL Deb 2 March 1961, vol 229, col 246 (The Lord Chancellor Viscount Kilmour - 4.4pm)
108 Suicide Bill Clause 2(4) became Suicide Act 1961 Section 2(4)
109 Smedleys Ltd v Breed [1974] AC 839 - Viscount Dilhorne (House of Lords) cited the Attorney General, Sir Hartley Shawcross [856]
110 Prosecution of Offences Act 1879; Lewis Hawser and Basil Wigoder, The Prosecution Process in England and Wales (Report), (Justice Educational and Research Trust, London, 1970) 2 summarises, among other things, the DPP’s functions under the Prosecution of Offences Regulation 1946 as follows: ‘(i) The Director is under a duty to prosecute in cases involving the death penalty, and in a variety of cases ranging from coining and incest to explosives and dangerous drugs: cases referred to him by a government department in which he thinks criminal proceedings should be instituted; and in any case which appears to him to be of importance or difficulty or which for any other reason requires his intervention.’
111 HC Deb 29 January 1951, vol 483, cols 679-90 (The Attorney-General Sir Hartley Shawcross 8.51pm)
In 1963, following the decriminalisation of suicide,\textsuperscript{112} Hart warned against further change of the criminal law:\textsuperscript{113}

The Suicide Act 1961, though it may directly affect the lives of few people, is something of a landmark in our legal history. It is the first Act of Parliament for at least a century to remove altogether the penalties of the criminal law from a practice both clearly condemned by conventional Christian morality and punishable by law. Many hope that the Suicide Act may be followed by further measures of reform and that certain forms of abortion, homosexual behaviour between consenting adults in private, and certain forms of euthanasia will cease to be criminal offences; for they think that here, as in the case of suicide, the misery caused directly and indirectly by legal punishment outweighs any conceivable harm these practices may do. But the fate of the recommendations of the Wolfenden Committee does not encourage the belief that such reforms are likely in the near future. As our history only too clearly shows, it is comparatively easy to make criminal law and exceedingly difficult to unmake it.\textsuperscript{114}

Evidently, Hart’s prediction regarding the law on euthanasia persists.\textsuperscript{115} However, the events in 1967 leading to the decriminalisation of both homosexual acts and abortion led Hart to admit (in May 1969) of his ‘too pessimistic’ estimation regarding law reform.\textsuperscript{116} Nevertheless, while his updated ‘Author’s Note’ only glances over these two pivotal shifts within the criminal law, there is a sense that while in principle such reforms had been slow to come forth, they

\textsuperscript{112} Suicide Act 1961 Section 1  
\textsuperscript{113} HLA Hart, \textit{Law, Liberty and Morality}, (Oxford, OUP, 1978)  
\textsuperscript{114} ibid, Preface; This passage had been written in 1963 and was picked up in the 1978 copy to highlight the erroneous estimation regarding potential criminal law reforms.  
\textsuperscript{115} Suicide Act 1961 Section 2(1)  
\textsuperscript{116} ibid, Author’s Notes states: ‘The views expressed in the Preface, written in 1963, concerning the prospects of further reform of the criminal law proved, by 1967, too pessimistic. The Sexual Offences Act 1967 provides that, with certain exceptions, a homosexual act in private shall not be an offence if the parties consent thereto and have attained the age of twenty-one. The Abortion Act 1967 permits a registered medical practitioner to perform an abortion if two such practitioners are of the opinion that the continuance of the pregnancy would involve risk to the mother’s life or mental health (a question on the determination of which account may be taken of the mother’s environment) or that there is a substantial risk that if the child were born it would suffer such physical or mental abnormalities as to be seriously handicapped.’ This Note was dated May 1969.
nevertheless materialised, and were anything but sudden.\textsuperscript{117} In fact, their noncontentious nature had been demonstrated by the overwhelming support on the Sexual Offences Act 1967 with 101 votes to 16,\textsuperscript{118} and on the Abortion Act 1967 which passed its Second Reading by 223 votes to 29.

Indeed, the mechanics of law change have demonstrated too well that while pathways to reform may be bumpy, change nevertheless materialises. In the context of abortion law, Lee’s influential Report in 1993\textsuperscript{119} argued that the law was left to function in a ‘twilight zone’ as difficult decisions were passed on to the ‘moral views and legal boldness of doctors’.\textsuperscript{120} While it took decades for this change to emerge, the long battle for legal clarification by ‘sustained struggle by pro-reform campaigners’, is recognised to be a key contributor to change.\textsuperscript{121} In the same way, Gilbert argues that the evolutionary development of Parliament debates on the issue of same-sex relationships led to the achievement of reform on this point.\textsuperscript{122}

Thus, to the extent that law and morality reveal a divided society on matters of controversy, including that of assisted death upon request, Mill’s harm-to-others principle (which went on to influence the 1967 Report of the Wolfenden Committee on Homosexual Offences and Prostitution and its insistence on the ‘realm of private morality’\textsuperscript{123}) may assist to situate the wider scope of the question of reform in this area. It holds that:

\textsuperscript{117} Andrew Gilbert, ‘From “Pretended Family Relationship” to “Ultimate Affirmation”: British Conservatism and the Legal Recognition of Same-Sex Relationships’ (2014) 26 Child & Fam LQ 463


\textsuperscript{120} Lee (1993) [10]

\textsuperscript{121} S Sheldon, J O’Neill, C Parker and G Davis, “‘Too Much, too Indigestible, too Fast’? The Decades of Struggle for Abortion Law Reform in Northern Ireland’ (2020) 83(4) Modern Law Review 761-796

\textsuperscript{122} Gilbert (2014)

\textsuperscript{123} Wolfenden, ‘Report of the Committee on Homosexual Offences and Prostitution’ Cmnd 247 (1967)
The only purpose for which power can be rightfully exercised over any member of a civilised community against [their] will is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant.\textsuperscript{124}

However, as Lee observes,\textsuperscript{125} the principle creates a host of questions which ought to be answered: What is harm? Who are the ‘others’? Does the need for prevention mean there should be a restriction? Thus, the principle was developed further within the Hart-Devlin debate. Essentially, Hart develops the harm-to-others principle (focus is on the individual) to include self-harm – a paternalistic approach.\textsuperscript{126} Devlin’s position (focus is on society), although arguably leading to the same result, is identified by Hart as legal moralism – an arrangement whereby immoral behaviour is prevented regardless of whether anyone is harmed.\textsuperscript{127} Nevertheless, Lee provides an alternative to these approaches as a formulation based on ‘rights’ (for instance, to privacy, liberty) and ‘pains’ (for instance, unhappiness caused by prohibiting one’s liberty) to be accommodated within a rights-based or a utilitarian moral code. However, he concludes that it is more helpful to admit that ‘hard choices have to be made and [...] there is no escape from analysing the contrasting factual and moral assumptions which characterise disagreements on law and morals.’\textsuperscript{128} Yet, while in the context of Hart’s Preface in his \textit{Law, Liberty and Morality} the (above) two law reforms on abortion and same-sex relationships will – like the Suicide Act 1961 – ‘directly affect the lives of few people’,\textsuperscript{129} matters of end-of-life and the ability to choose a good death are bound to affect not few but most people whether directly, as a death-seeker, or indirectly, as the loved one of a death-seeker.

\textsuperscript{124} John Stuart Mill, \textit{On Liberty} (1859)
\textsuperscript{125} Simon Lee, \textit{Law and Morals} (1986, OUP, Oxford) Chapter 5
\textsuperscript{126} HLA Hart, \textit{Law, Liberty and Morality} (Oxford, 1968)
\textsuperscript{127} Lord Devlin, \textit{The Enforcement of Morals} (Oxford, 1968)
\textsuperscript{128} Lee (1986) 87
\textsuperscript{129} Hart (1978) Preface
Therefore, despite a prevailing resistance to adopting assisted dying provisions, attempts for law reform to legalise the act of medical hastening of death continues to be introduced in both Houses of Parliament. Thus, it is no longer unfathomable that, whether by way of a court challenge, a Private Member Bill or prosecutorial decision-making not to prosecute in instances of assisted suicide, the long and painful process in the quest for change could lead\textsuperscript{130} to the possible enactment of assisted dying legislation.

\textit{The First Attempt to Introduce an Exception from Section 2 Prohibition}

Almost 25 years from its coming into force, it was observed that the mode of application of Section 2 prohibition endorsed the notion that assisting someone to die ‘was not necessarily a criminal act’.\textsuperscript{131} Thus, despite refusing to adopt permissive legislation, Parliament enabled the DPP to engage with a certain level of prosecutorial discretion regarding an offence which, in theory, remained criminal. On this premise, in December 1985 Lord Jenkins proposed an Amendment to the 1961 Act,\textsuperscript{132} to harmonise the scope of Section 2 offences. This was to be achieved by inserting the provision that ‘[i]t shall be a defence to any charge under [the 1961] Act that the accused acted on behalf of the person who committed suicide and in so acting behaved reasonably and with compassion and in good faith.’\textsuperscript{133} This resolution was not only equipped to (a) give the DPP a rationale for instances when deciding to take a lenient approach towards a compassionate-assistor, but would also to (b) provide sympathetic judges and juries the means to justify refraining from convicting under Section 2.\textsuperscript{134} This format – aimed at

\textsuperscript{131} HL Deb 11 December 1985, vol 469, cols 288-318 - Suicide Act 1961 (Amendment) Bill (Lord Jenkins - 8.10pm)
\textsuperscript{132} HL Deb 13 November 1985, vol 468, col 273 - Suicide Act 1961 (Amendment) Bill - (Lord Jenkins)
\textsuperscript{133} HL Deb 11 December 1985, vol 469, cols 288-318 – Suicide Act 1961 (Amendment) Bill (Lord Jenkins - 8.10pm)
\textsuperscript{134} ibid
bypassing the inevitable police investigations and potential prosecution which remained an issue despite the prosecutorial decision-making process – would provide a defence for ‘brave and compassionate’ individuals who assist another to commit suicide.135

However, the timing of Lord Jenkins’ move for an amendment was distinctly unfavourable.136 Given that his proposal came only months behind the enactment of the Prosecution of Offences Act 1985137 – which instituted the CPS with the DPP as its head138 – the transfer of responsibilities from the police to the CPS had yet to manifest its potential footprint within the prosecutorial sphere. In fact, this led Lord Denning to observe that, even without the change suggested by Lord Jenkins, in an ‘ordinary case of mercy killing [the DPP] should not […] and [would] not [prosecute]’.139 This remark echoed, once again, the well-established attitudes rooted in the passing of the Suicide Bill 1961 through Parliament. In agreement with Lord Denning, Lord Glenarthur supported this point, declaring that between 1980 and 1984 the number of convictions under the 1961 Act for complicity to suicide counted a total of ‘[ten] convictions’.140

Effectively, this outlook confirmed the attention that had been directed towards the fresh union between the DPP and CPS, prompting Lord Denning’s critical estimation that even without Lord Jenkins’ suggested amendment, ‘by this almost procedural means’ it was possible to ‘achieve the result which is desired.’141 Hence, the structure conferred by the Prosecution of Offences Act 1985,142 persuaded Lord Denning to appreciate the scope of this marriage in the

135 ibid
136 ibid (The Deputy Speaker Lord Strabolgi - 10.27pm)
137 Prosecution of Offences Act 1985
138 ibid Section 1(1)(a) states ‘the Director of Public Prosecutions, who shall be head of the Service’.
139 HL Deb 11 December 1985, vol 469, cols 288-318 - Suicide Act 1961 (Amendment) Bill (Lord Denning - 8.58pm)
140 ibid (Lord Glenarthur - 10.06pm)
141 ibid (Lord Denning - 8.58pm)
142 Prosecution of Offences Act 1985
long term, and beyond its fundamental values. Lord Denning went on to suggest that in time, a policy would evolve ‘from case to case’ to distinguish, for the benefit of the public, the instances where an individual’s act ‘ought not to be regarded as criminal and certainly ought not to be prosecuted at all’.

In hindsight, what Lord Denning provided here represents the essence of what became the approach in instances of assisted suicide as well as the publishing of the DPP Policy, which guides the current application of the law. Still, despite the merits of this vision, perhaps owed to Lord Denning’s appreciation of the development of the English legal system, Lord Jenkins’ proposal aimed to build actual foundations for a defence that promised to soften the reaction of the criminal law for complicity with assisted suicide. Even so, similar to the law’s response as regards a compassionate approach towards assistors, neither Lord Denning nor Lord Jenkins indicated the need to ascertain the wishes of the victim pre-death.

On that account, Lord Jenkins’ Amendment Bill was delayed for its Second Reading ‘this day six months’. The Bill failed to return to the House of Lords and was never mentioned in the Commons.

1.4. Enhancing the Resilience of the Assisted Suicide Prohibition

For the next 25 years, following Lord Jenkins’ proposed amendment in 1985, the assisted suicide prohibition remained unchanged. Yet, a whirlwind of events surrounding the application of the law under Section 2(4) by the DPP brought the matter back into the public eye in 2008 by the developments surrounding two key events. The first was a court action advanced by Mrs Purdy, who suffered from progressive multiple sclerosis. The second

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143 HL Deb 11 December 1985, vol 469, cols 288-318 - Suicide Act 1961 (Amendment) Bill (Lord Denning - 8.58pm)
144 ibid (The Deputy Speaker Lord Strabolgi - 10.27pm)
concerned the public statement made by the DPP explaining their decision not to prosecute in the case of Daniel James, who, owing to his desire to end his life, was accompanied for an assisted suicide at Dignitas - To Live with Dignity - To Die with Dignity (‘Dignitas’). These events created the setting whereby the assisted suicide prohibition under Section 2 came out the other side of these stronger and more resilient than ever.

Mrs Purdy’s action against the DPP for failing to publish detailed guidance in connection with instances of assisted suicide, promised the evaluation of the context of the law and its application. As that case continued its legal path through the courts, a different commotion emerged in response to the lawful assisted suicide of Daniel James at Dignitas. Ordinarily, pursuant to Section 2(4), the DPP had to consider whether they would consent to the prosecution of those involved with the travel arrangements. Nevertheless, on this occasion the DPP took an unprecedented decision and made a public statement explaining the reasons for the decision not to prosecute. While emphasising that Daniel was an intelligent and independent person ‘with full capacity to make decisions about his medical treatment’, the DPP clarified that Daniel was deemed to be competent for the purposes of reaching this resolution.

145 Dignitas - To Live with Dignity - To Die with Dignity <http://www.dignitas.info> accessed 20 Sep 2021
146 R (on the application of Purdy) v DPP [2008] EWHC 2565 (Admin) [1] (Lord Justice Scott Baker)
148 Dignitas provides a non-official version of the Swiss Criminal Code of 21 December 1937 (Status as of 1 July 2020) Art 115 Inciting and assisting suicide states: ‘Any person who for selfish motives incites or assists another to commit or attempt to commit suicide is, if that other person thereafter commits or attempts to commit suicide, liable to a custodial sentence not exceeding five years or to a monetary penalty.’ Available here <http://www.dignitas.ch/index.php?option=com_content&view=article&id=54&Itemid=88&lang=en> accessed 3 Oct 2020; As to the requirements and process of an ‘Accompanied Suicide’, Dignitas stipulates this is available on the premise that ‘[a]ny member of DIGNITAS – no matter whether resident within Switzerland or “abroad” – can ask for an accompanied suicide to take place at […] DIGNITAS’. < http://www.dignitas.ch/index.php?option=com_content&view=article&id=20&Itemid=60&lang=en> accessed 2 Oct 2020
without any coercion from his parents, because ‘he was not vulnerable to manipulation’.\textsuperscript{151} Thus, the matter of capacity was swayed by evidence that Daniel was deemed competent to make the final decision; a decision considered to be voluntary due to his explicit consent and lack of coercion on the part of his family. Consequently, these strengthened the case against prosecution by the DPP.

By reference to an observation by Lord Lane CJ – that in enacting Section 2(1), ‘Parliament had in mind the potential scope for disaster and malpractice in circumstances where elderly, infirm and easily suggestible people are sometimes minded to wish themselves dead’\textsuperscript{152} – the DPP said that it was ‘very unlikely that a court would impose a custodial penalty on any of the potential defendants’.\textsuperscript{153} The DPP’s finding was also influenced by the public interest stage within the Full Code Test, which deemed it a factor against prosecution if ‘the penalty [was] likely to be nominal’.\textsuperscript{154} Nevertheless, giving consent to prosecute – at least as far as the theoretical prohibition on Section 2(1) goes – does not, and should not, depend on the DPP’s categorical prediction as to the likelihood of a suspect receiving a custodial sentence. Yet, since assisted suicide continues to be a criminal offence, the law’s response may be to impose a non-custodial sentence such as ‘an absolute discharge or, possibly, a small fine.’\textsuperscript{155} However, this approach contributes to the resilience of the Section 2(1) prohibition by imposing a disproportionate judgement, more fitting for a jury, on one person (the DPP or the CPS acting on their behalf). Moreover, in the absence of lawful assisted dying by way of legislative


\textsuperscript{152} R v Hough (1984) 6 Cr App R (S) 406

\textsuperscript{153} Starmer (9 December 2008)

\textsuperscript{154} Public interest Stage of the Full Code for Crown Prosecutors as against prosecution: [5.10 (a)] is relevant (whether the penalty is likely to be nominal)

\textsuperscript{155} Starmer (9 December 2008)
provisions, it operates in a way that absolves compassionate assistors from an otherwise chargeable offence.

In fact, given the pattern established by the DPP’s decision-making process since 2009, only one of the three successful prosecutions thus far appears to have raised doubts regarding the need for criminal proceedings. By reference to this threshold in their sentencing remarks,156 Mr Justice Green noted the defendant’s conduct in that case – giving the victim a lethal smoothie then proceeding to give them an insulin injection to speed up the death process – fell ‘into the category of cases where there would be no prosecution.’157 This observation further intensifies the notion that consent to prosecute ought to be given in instances where the gravity of the offence is higher.158 However, if the circumstances of the evidence regarding the offence are such that prosecution is required in the public interest, then it is for the DPP to consent to prosecution. Indeed, as will be explored in Chapter Four, the decision-making process seems to differ between instances where the assistance in suicide (as well as the actual suicide of the individual) was provided at home (in England and Wales), as opposed to when an individual merely assists with travel arrangements and accompanies another to have a lawful assisted suicide abroad.

As the House of Lords handed down its long-anticipated decision in Purdy,159 the high level of judicial interest in the statement made by the DPP – and other similar instances of assisted suicide – was striking. This was especially so because, for the first time, the DPP gave their reasons for the decision not to prosecute.160 Hence, the court explored the DPP’s duty to initiate and conduct the prosecution of offences, pursuant to Section 10 of the Prosecution of Offences

156 R v Bipin Desai 17 November 2017 Guildford Crown Court (Mr Justice Green)
157 ibid [36]
158 ibid [41]-[44] – facts in the case were distinguishing from those in R v Howe [2014] EWCA Crim 114
159 R (Purdy) v Director of Public Prosecutions [2009] UKHL 45
160 ibid [30], [49]-[53] (Lord Hope), [64] (Lady Hale), [79] (Lord Brown), [97] (Lord Neuberger)
Act 1985,\textsuperscript{161} including their duty to promulgate a Code for Crown Prosecutors (the Code) ‘giving guidance on general principles to be applied by them’\textsuperscript{162} as regards the decision-making process.\textsuperscript{163}

Consequently, the House of Lords established that the mode of enforcement of Section 2(1) – for the purposes of prosecution – interfered with an individual’s decision in contemplation of ending their life (by way of assisted suicide). This arrangement was not in accordance with Article 8(1)\textsuperscript{164} of the Convention for the Protection of Human Rights and Fundamental Freedoms (1950) (European Convention on Human Rights, as amended) (‘Convention’)\textsuperscript{165} (this matter is further explored in Chapter Two). Thus, by following the principle of legality, the court deemed it necessary that rules in connection with Section 2(4) of the 1961 Act must be sufficiently accessible to the individuals who are impacted by them. Accordingly, providing such guidance was expected to enable individuals to foresee the likely consequences of being

\textsuperscript{161} Prosecution of Offences Act 1985 Section 10 ‘Guidelines for Crown Prosecutors:
(1) The Director shall issue a Code for Crown Prosecutors giving guidance on general principles to be applied by them—
(a) in determining, in any case—
(i) whether proceedings for an offence should be instituted or, where proceedings have been instituted, whether they should be discontinued; or
(ii) what charges should be preferred; and
(b) in considering, in any case, representations to be made by them to any magistrates’ court about the mode of trial suitable for that case.
(2) The Director may from time to time make alterations in the Code.
(3) The provisions of the Code shall be set out in the Director’s report under section 9 of this Act for the year in which the Code is issued; and any alteration in the Code shall be set out in his report under that section for the year in which the alteration is made.’
\textsuperscript{162} ibid Section 10(1)
\textsuperscript{163} ibid Section 10(1)(a)(i)
\textsuperscript{164} Purdy (n 165)
\textsuperscript{165} Hasan and Chaush v Bulgaria (2000) 34 EHRR 1339 at [84] the court stated:
‘For domestic law to meet these requirements [that is, of accessibility and foreseeability] it must afford a measure of legal protection against arbitrary interferences by public authorities with the rights safeguarded by the Convention. In matters affecting fundamental rights it would be contrary to the rule of law, one of the basic principles of a democratic society enshrined in the Convention, for a legal discretion granted to the executive to be expressed in terms of an unfettered power. Consequently, the law must indicate with sufficient clarity the scope of any such discretion conferred on the competent authorities and the manner of its exercise. The level of precision required of domestic legislation - which cannot in any case provide for every eventuality - depends to a considerable degree on the content of the instrument in question, the field it is designed to cover and the number and status of those to whom it is addressed.’
involved in an act of assisted suicide. In 2010, following the House of Lords’ decision, the DPP published offence-specific guidance under the DPP Policy. Save for the slight update in 2014, at the time of writing, the DPP Policy remained the same.

In reflection, the Purdy judgment contributed to future-proofing the assisted suicide prohibition and its inherent resilience. This is because not only had the DPP’s decision alluded to the possibility of a pre-death test even if established in the aftermath of a Section 2 offence, but the decision to order the DPP to publish the Policy, was formed on the basis that, as Lady Hale observed in the case, ‘[p]eople need and are entitled to be warned in advance so that […] they can behave accordingly.’ However, while the application of the law through DPP consent acts as a safeguard mechanism for suspects, the same cannot be said about safeguards for those seeking assistance with their suicide – for them, only well-drafted assisted dying provisions may be capable of conferring protection, allowing the system to move away from what has steadily become an established and recognised prosecutorial decision-making process in instances of assisted suicide.

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166 ibid [40]
168 ibid; Following the case of R (on the application of Nicklinson and another) v Ministry of Justice; R (on the application of AM) (AP) v DPP [2014] UKSC 38 which led to the clarification of one matter within the Policy, by inserting an explanatory footnote.
169 At the time of carrying out the amendments for this research, the CPS has undertaken a Consultation on Public Interest Guidance for Suicide Pact and ‘Mercy Killing’ Type Cases < Consultation on public interest guidance for suicide pact and ‘mercy killing’ type cases | The Crown Prosecution Service (cps.gov.uk) > (accessed 5 Aug 2022) which led to amendment of the Policy (Policy for Prosecutors in Respect of Cases of Encouraging or Assisting Suicide) by way of the Proposed changes to ‘Homicide: Murder and Manslaughter’ Guidance < Proposed changes to ‘Homicide: Murder and Manslaughter’ Guidance | The Crown Prosecution Service (cps.gov.uk) > (accessed 5 Aug). These changes are outside the scope of this thesis.
170 R (Purdy) v Director of Public Prosecutions [2009] UKHL 45 [59] (Lady Hale)
171 ibid; R (on the application of Nicklinson and another) v Ministry of Justice; R (on the application of AM) (AP) v DPP [2014] UKSC 38
Following an independent review, the Law Commission revealed the existence of confusion as regards the scope of application of Section 2, in cases involving assisting and encouraging another to commit suicide via the internet. The issue was set to be cured by way of an amendment as part of the Coroners and Justice Bill introduced in Parliament in January 2009 (‘2009 Bill’). Both sponsors to the 2009 Bill promised the motion would increase public understanding by simplifying the language of Section 2, while confirming its application ‘to the digital medium of the internet’ in the same way ‘as it [did] offline’. The ‘wide-ranging [Public] Bill’ was part of the work of the Justice Committee – appointed by the House of Commons. On the whole, the introduction was aimed at delivering a ‘more effective, transparent and responsive’ justice system for victims, witnesses, the wider public and ‘the most vulnerable’.

172 HC Deb 26 January 2009, vol 487, col 35 – Coroners and Justice Bill 2009 - (Mr Jack Straw)
173 ibid
174 ibid - Mr Jack Straw (House of Commons) and HL Deb 18 May 2009, vol 710, col 1206 - Lord Bach (House of Lords) Jack Straw made specific observations regarding strong representations on the issue from the Member for Bridgend (Mrs Moon), regarding the terrible tragedy of a series of suicides.
175 HC Deb 3 March 2009, vol 708, col 459 – (Mrs Moon 4.45pm)
176 HC Deb 26 January 2009, vol 487, col 35 – Coroners and Justice Bill 2009 - (Mr Jack Straw)
178 The Constitutional Affairs Committee became the Justice Committee from the beginning of the 2007-08 Parliamentary session.
180 HC Deb 26 January 2009, vol 487, col 26 – Coroners and Justice Bill 2009 Second Reading – The Secretary of State for Justice and Lord Chancellor (Mr Jack Straw – 3.38pm); (First Reading had taken place on 14 January 2009)
Notwithstanding the acknowledgement of those opposing the amendment – who wanted to ‘see a change in the law with a view to legalising doctor-assisted dying in certain circumstances’\textsuperscript{183} – it was suggested the matter was ‘too important and too profound […] to be slipped into a passing Government Bill.’\textsuperscript{184} It is worth noting that, whether tactically employed or not, even the mention of ‘doctor-assisted dying’ in this context, denotes a kind of subscription to terminology akin to that of individuals who are pro-reform.

Nevertheless, the debate shifted towards the storm of discussions\textsuperscript{185} that had surfaced that same morning. Effectively, Viscount Craigavon recalled a Radio 4 discussion broadcast, with reference to the Section 2 application, during which Lord Bingham observed the law was getting to a point where it no longer matched ‘the expectations of reasonable people’.\textsuperscript{186} Thus, on reflecting on the discussion, Viscount Craigavon argued that ‘one or two cases might be an anomaly but 100 is something that we should be seriously paying attention to’.\textsuperscript{187} During the same transmission the former DPP, Sir Ken Macdonald, had remarked that ‘society may have moved, beyond the law and […] the law need[ed] to catch up a bit’.\textsuperscript{188} In fact, Lord Bingham went so far as to question the murky application of the law by noting that, ‘if in nearly 100 cases the DPP is saying I do not think it is in the public interest to prosecute, it is getting awfully close to a situation where Parliament ought to be saying, well, we had better have some rules’.\textsuperscript{189}

\textsuperscript{183} ibid, col 1206 – (Lord Bach – 3.09pm)
\textsuperscript{184} ibid
\textsuperscript{185} ibid, col 1287 – 8.48pm, Viscount Craigavon reflected over events of the previous week regarding a discussion programme on Radio 4 entitled ‘The Law and Death’. The programme explored the current state of the law in an effort to clarify the future of the assisted suicide prohibition by noting that the former DPP, Sir Kenneth Macdonald, had made no prosecutions.
\textsuperscript{186} ibid – (Viscount Craigavon - 8.48pm)
\textsuperscript{187} ibid
\textsuperscript{188} ibid, col 1272 (Lord Taverne - 7.49pm)
\textsuperscript{189} HL Deb 18 May 2009, vol 710, col 1287 – (Viscount Craigavon - 8.48pm)
As the above observations indicate, the inconsistencies in applying the law were attributed to Parliament’s reluctance to move in the same direction with the attitudes of the very society it served. Consequently, navigating the troublesome side effects of this prohibitive legislation was left to the DPP to deal with in accordance with the prosecutorial decision-making process.

*The Second Attempt to Introduce an Exception from Section 2 Prohibition*

The spirited developments of that time represented an adequate prelude for Lord Falconer to propose an amendment of his own to the 2009 Bill. That said, his move was narrower in that it concerned only lawful assisted suicide abroad. Lord Falconer recommended the elimination of the risk of prosecution for those willing to assist ‘terminally ill’ individuals with the necessary arrangements to receive assistance with their death abroad. Effectively, this was designed to mirror the contemporary approach by the DPP towards individuals who ‘in good faith and with good motives, assist a loved one to go to a clinic in Switzerland or another place where suicide is lawful.’ Lord Falconer gave three reasons for introducing the amendment. Firstly, the existing evidence pointed to the fact that the DPP was predictably considering that prosecution in those circumstances (assisted suicide abroad) was not in the public interest. Secondly, proper protection by way of safeguards regarding instances of assisted suicide could only be achieved by way of detailed provisions. On this point, the amendment was meant to put an end to the law’s response by way of criminal investigations in cases where assistance in suicide was provided in connection with lawful assisted suicide

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190 ibid, col 1221 - Coroners and Justice Bill 2009 (Lord Falconer – 4.17pm)
192 House of Lords, Coroners and Justice Bill – Amendments to be moved in Committee, Lord Falconer of Thornton Amendment: After Clause 49 insert ‘Acts not capable of encouraging or assisting suicide’, <https://publications.parliament.uk/pa/ld200809/ldbills/033/amend/am033-g.htm> accessed 5 Jan 2020
194 ibid
abroad. Thirdly, the uncertainty regarding the application of the law was demonstrated by legal proceedings (the hearing of Purdy\textsuperscript{195} was expected to come imminently before the House of Lords) challenging the decision-making process in cases involving individuals who wished to be accompanied by a loved one to receive lawful assisted suicide abroad.\textsuperscript{196}

Nevertheless, for the House of Commons, the prosecutorial discretion in connection with assisted suicide abroad was not a contentious issue. In fact, by reference to the Lord Chief Justice in Purdy\textsuperscript{197} – six months before the House of Lords ordered the DPP publish the Policy – Edward Garnier said it was unnecessary to publish guidelines because ‘it was unlikely that the courts would give a custodial sentence if someone was prosecuted in similar circumstances to [Mrs] Purdy and her husband.’\textsuperscript{198} And so, the relaxed attitude towards the operation of Section 2 in practice, was not only reinforced but somehow justified. Thus, despite Lord Falconer’s reasoning, the amendment was refused and as planned, the Coroners and Justice Act 2009 (‘2009 Act’), adopted Section 59 amending Section 2 of the 1961 Act.\textsuperscript{199} The new Section reshaped the assisted suicide prohibition by widening the scope of its application.

\begin{itemize}
\item \textsuperscript{195} \textit{R (Purdy) v Director of Public Prosecutions} [2010] AC 345
\item \textsuperscript{196} Lord Falconer was referring to the case of Purdy which had, by that time, been heard by the Divisional Court and the Court of Appeal without any meaningful hope for a favourable judgment in the case.
\item \textsuperscript{197} \textit{R (Purdy) v Director of Public Prosecutions} [2010] AC 345
\item \textsuperscript{198} HC Deb 3 March 2009, vol 708, col 450 – (Mr Edward Garnier - 4pm)
\item \textsuperscript{199} Coroners and Justice Act 2009 Section 59 Encouraging or assisting suicide (England and Wales)
\end{itemize}

\begin{verbatim}
(1)The Suicide Act 1961 (c. 60) is amended as follows.
(2)In section 2 (criminal liability for complicity in another's suicide), for subsection (1) substitute—
(1A)A person (“D”) commits an offence if—
(a)D does an act capable of encouraging or assisting the suicide or attempted suicide of another person, and
(b)D's act was intended to encourage or assist suicide or an attempt at suicide.
(1B)D may commit an offence under this section whether or not a suicide, or an attempt at suicide, occurs.
(1C)An offence under this section is triable on indictment and a person convicted of such an offence is liable to
imprisonment for a term not exceeding 14 years.”

(3)In subsection (2) of that section, for “it” to the end substitute of a person it is proved that the deceased person
committed suicide, and the accused committed an offence under subsection (1) in relation to that suicide, the
jury may find the accused guilty of the offence under subsection (1).’

(4)After that section insert—
‘2AActs capable of encouraging or assisting
\end{verbatim}
Establishing the Limits of the Prohibition

In hindsight, even without Lord Jenkins’ 1985 proposed amendment to introduce a defence for individuals who assist another in committing suicide – and ‘behaved reasonably and with compassion and in good faith’\(^{200}\) – the current system reflects the 1985 proposal regarding prosecutorial discretion. What is more, with the implementation of the DPP Policy in 2010, Lord Denning’s prediction – 25 years earlier – as regards clarification of the approach to prosecutorial decision-making, came to fruition. Yet, as will be demonstrated in Chapter Four, the DPP Policy allows for aftermath prosecutorial discretion so long as the act of ‘assisting or encouraging with suicide’\(^{201}\) was ‘wholly motivated by compassion’.\(^{202}\)

The most resilient feature of Section 2 – besides it being so carefully drafted – is the requirement for the consent of the DPP to prosecute under Section 2(4). This is evidenced by the various failed attempts to limit the scope of its application in an effort to influence change of legislation. Thus, in an exercise that appears to have come full circle, all lines of attack against Section 2 have culminated in the clarification and widening of both, Section 2(1) prohibition under the 2009 Act, and the decision-making process regarding consent to

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\(^{(1)}\)If D arranges for a person (“D2”) to do an act that is capable of encouraging or assisting the suicide or attempted suicide of another person and D2 does that act, D is also to be treated for the purposes of this Act as having done it.

\(^{(2)}\)Where the facts are such that an act is not capable of encouraging or assisting suicide or attempted suicide, for the purposes of this Act it is to be treated as so capable if the act would have been so capable had the facts been as D believed them to be at the time of the act or had subsequent events happened in the manner D believed they would happen (or both).

\(^{(3)}\)A reference in this Act to a person (“P”) doing an act that is capable of encouraging the suicide or attempted suicide of another person includes a reference to P doing so by threatening another person or otherwise putting pressure on another person to commit or attempt suicide.

2BCourse of conduct

A reference in this Act to an act includes a reference to a course of conduct, and a reference to doing an act is to be read accordingly.’

\(^{200}\) HL Deb 11 December 1985, vol 469, cols 288-318 – Suicide Act 1961 (Amendment) Bill (Lord Jenkins – 8.10pm)

\(^{201}\) Suicide Act 1961 Section 2(1)

\(^{202}\) CPS, ‘Policy for Prosecutors in respect of Cases of Encouraging or Assisting Suicide’ [43.6] and [45.2]

prosecution under Section 2(4), by way of the DPP Policy. However, in practice, the prevailing anticipation during debates on the Suicide Bill 1961, that involvement with mercy killing would be dealt with by the DPP in a different way than by way of imprisonment – for they ‘ought not to be prosecuted at all’ – is now part of what Lewis has labelled the ‘informal legal change’.

Even so, while assisted suicide remains a criminal act, the inconsistencies of the law in this area remain a matter for the DPP prosecutorial discretion. Thus, through practice – or as Lord Denning put it, by this ‘procedural means’ – it was possible to balance the interests of the community with those of individual persons and ‘achieve the result which is desired.’ Here, the desired result was for suspects to not be subjected to prosecution if their involvement with assisted suicide stemmed from compassion.

Nevertheless, for the assisted dying debate the application of the law – as noted by the judiciary (Chapter Two) and in Parliamentary debates (Chapter Three) – behaves as though an exception to the prohibition has already been established through practice. Indeed, the theoretical implications of the prohibition are filtered in a way that gives rise to a clear distinction between compassionate assistance on the one hand and encouraging suicide on the other hand (Chapter Four). Still, the current construct of the criminal law preserves a system whereby the suspect (compassionate-helper) is placed at the centre. That the same arrangement should imply that

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203 Suicide Bill 1961 Clause 2(4) which, upon enactment, became Suicide Act 1961 Section 2(4)
204 HL Deb 2 March 1961, vol 229, col 246 - (The Lord Chancellor Viscount Kilmour - 4.4pm)
205 HC Deb 14 July 1961, vol 644, col 843 (Mr Peter Kirk - 3.56pm)
206 ibid
207 P Lewis, ‘Informal legal change on assisted suicide: the policy for prosecutors’ Legal Studies, Vol 31 No 1, March 2011, 119-134
208 HL Deb 11 December 1985, vol 469, cols 288-318 - Suicide Act 1961 (Amendment) Bill (Lord Denning - 8.58pm) (Lord Denning - 8.58pm)
209 ibid (Lord Jenkins - 8.10pm)
such legislative construct (through prosecutorial discretion) is also equipped to establish the authenticity of the victim’s wishes in the aftermath of an assisted suicide, is wrong.

This is because under the current system the authority of the DPP can only cater for suspects in response to a Section 2 offence. This practice, demonstrating prosecutorial discretion in a significant majority of cases, has led to the establishment of an unofficial pre-death test in connection with amateur help to die, where the individual’s involvement is such that it would be ‘very unlikely that a court would impose a custodial penalty’. Nevertheless, it is only a matter of time until Section 2 reaches its expiration point in itsappropriateness to deal with cases which, by their very nature, resemble the kind of exception intended to be achieved by way of Assisted Dying Bills. However, only the latter can provide the professional setting with adequate safeguards while ascertaining, in line with express provisions, the free and voluntary request of an individual to have an assisted death, pre-death. This vision then promotes protection through the ascertainment of the individual’s consent to have an assisted death where the undertaking fails to identify the existence of any coercion within the decision-making process. Indeed, as the law stands, the line between where prosecutorial discretion for assisted suicide stops and where lawful assisted death would begin is extremely blurred.

Nevertheless, one thing is clear. Without providing a compassionate, professionally conducted and monitored lawful assisted dying framework, there is a risk that for a vulnerable individual, the mere consumption of a smoothie that turns out to be lethal – without their knowledge or consent – followed by an insulin injection, justice will not be served if their assailant walks free. After all, for a judge, these exact circumstances fell ‘into the category of cases where there would be no prosecution.’

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210 Starmer (9 December 2008)
211 R v Bipin Desai 17 November 2017 Guildford Crown Court (Mr Justice Green)
212 ibid [36]
1.5. Exceptions to Criminal Liability for Causing Death

The challenge for an assisted dying framework is that the very nature of its construction is designed with the fact of death at the centre. Thus, the contemplation of any legislative provisions for lawful assisted death aims to escape the notion of intent by creating another lawful exception to the criminal law regarding involvement with causing death. Until and unless permissive legislation is passed by Westminster Parliament, the coincidence of an intention to kill for any reason, including where the victim consents, ought to attract attributability for the offence and the relevant criminal liability.

The Fact of Death and the Criminal Law

The ‘uniqueness of causing death’ lies within its central point, which is ‘neither the act nor the intent, but the fact of death’. Therefore, where ‘death […] has already occurred’, the law is interested ‘in bringing in persons to stand responsible’. Thus, the criminal law steps in when both the act and the intention to kill exist. Yet, the absence of intention to kill, within the principle of double effect and instances of termination of life by omission, are established exceptions at common law and do not trigger criminal liability.

Given the construction of the law on causing death, including the recognition of exceptions to the general rule, Fletcher’s analysis of criminal liability may provide an insightful perspective. He distinguishes two parts to involvement with a criminal offence: the defendant’s breach of the law, and the associated attribution of blameworthiness to the defendant. In other words,

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214 ibid
216 Airedale NHS Trust v Bland [1993] AC 789
217 ibid 455
Fletcher’s formula holds that an individual is criminally liable if they breach the law, and that breach is attributed to them.\textsuperscript{218} Consequently, this allows for an accusation of breach to generate either (1) a denial of the breach or (2) an acceptance of the breach followed by a legitimate excuse.

Following Fletcher’s concept, an exception to criminal liability for causing death behaves in such a way that the second defensive dissolves into the first.\textsuperscript{219} Hence, where death can be justified by way of an excuse, this determination leads to the denial of an essential element of the criminal act – intention or willingness to cause death. The remainder of this section unpacks both ‘the somewhat convoluted doctrine’\textsuperscript{220} of double effect and termination of life by omission. It then goes on to evaluate involvement with active termination of life as distinguished from passive termination.

\textit{The Doctrine of Double Effect}

Frequently criticised, the widely professed principle of double effect is often considered to be embedded within the English legal system.\textsuperscript{221} Evolved within the bounds of the medical arena, the doctrine contends that, during medical treatment, an action such as administering a drug may have two effects.\textsuperscript{222} One is good, such as pain relief, and the other is bad, where consequences may include the shortening of life. So long as the desired good effect is the

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{218} ibid 455-457, 469
\item \textsuperscript{219} ibid 577-578
\item \textsuperscript{220} Grayling (2009) 134
\end{itemize}
\end{footnotesize}
primary intended result – despite foreseeing the bad effect\textsuperscript{223} – the action remains ethically\textsuperscript{224} and morally\textsuperscript{225} acceptable and is not expected to give rise to criminal liability.\textsuperscript{226}

In 1993, two significant court judgments – \textit{Cox} and \textit{Bland}\textsuperscript{227} – prompted the House of Lords to establish the Select Committee on Medical Ethics,\textsuperscript{228} assigned to undertake a review of the law regarding criminal liability for causing death. It is worth noting that, despite being part of deliberations conducted some 25 years ago, the Committee’s findings continue to represent Parliament’s prevailing attitudes as regards legal change.\textsuperscript{229}

In terms of double effect, the Select Committee defended the principle and rejected allegations claiming that the notion was ‘used as a cloak for what in effect amounted to widespread euthanasia’.\textsuperscript{230} On that premise, it established that the responsibility falls on the medical professional to evaluate the circumstances when faced with the possibility of double effect and ‘[i]f [their] intention is the relief of severe pain and distress, and the treatment given is

\begin{itemize}
\item ‘the act one is engaged in is not itself bad;
\item the bad consequence is not a means to the good consequence;
\item the bad consequence is foreseen but not intended; and
\item there is a sufficiently serious reason for allowing the bad consequence to occur.’
\end{itemize}

\begin{itemize}
\item ‘(a) the action is not intrinsically wrong (i.e. wrong considered apart from its effects);
\item (b) the person acting is aiming to do something good (e.g. to relieve pain);
\item (c) the bad effects are not aimed at and are not means of achieving the good effects;
\item (d) the good effects are sufficiently good to outweigh the bad effects. (This is sometimes referred to as the “proportionality criterion”.)’
\end{itemize}

\textsuperscript{223} \textit{R v Woollin} [1999] 1 AC 82; See J Keown, \textit{Euthanasia, Ethics, and Public Policy: An Argument Against Legalisation} (Cambridge University Press, 2002) 28-29; In his first edition Keown argues that \textit{Woollin} will have a ‘chilling effect’ on palliative care. This prediction is not confirmed in his second edition in 2018.


\begin{itemize}
\item the act one is engaged in is not itself bad;
\item the bad consequence is not a means to the good consequence;
\item the bad consequence is foreseen but not intended; and
\item there is a sufficiently serious reason for allowing the bad consequence to occur.’
\end{itemize}

\textsuperscript{225} T Cavanaugh, \textit{Double-Effect Reasoning: Doing Good and Avoiding Evil} (Clarendon Press, Oxford, 2006); T Beauchamp, and J Childress, \textit{Principles of Biomedical Ethics} (4th ed, Oxford, Oxford University Press, 1991) 207; Beauchamp and Childress provide a more precise account of circumstances in which the doctrine is deemed morally acceptable, provided the following conditions are met:

\begin{itemize}
\item (a) the action is not intrinsically wrong (i.e. wrong considered apart from its effects);
\item (b) the person acting is aiming to do something good (e.g. to relieve pain);
\item (c) the bad effects are not aimed at and are not means of achieving the good effects;
\item (d) the good effects are sufficiently good to outweigh the bad effects. (This is sometimes referred to as the “proportionality criterion”.)’
\end{itemize}


\textsuperscript{227} \textit{R v Cox} [1992] 12 BMLR 38; \textit{Airedale NHS Trust v Bland} [1993] AC 789


\textsuperscript{229} Assisted Dying (No 2) Bill 2015

\textsuperscript{230} Report of the Select Committee on Medical Ethics HL Paper 21-I of 1993-1994, [243]
appropriate to that end, then the possible double effect should be no obstacle to such treatment being given.231 In circumstances of death by way of double effect, the patient’s death would be recorded as ‘exclusively caused by the injury or disease to which his condition is attributable’.232 Hence, because the intention to kill is absent, attributing the death to the medical condition mirrors Fletcher’s formulation of an excuse.

**Passive Termination of Life by Omission**

The opinion of the medical profession has grown further as regards the legitimacy of causing the death of an individual in a persistent vegetative state by withdrawing treatment and nutrition.233 These too, are now established exceptions which behave similarly to the ‘excuse’ of double effect. The matters arising before the House of Lords led to the conclusion that the fact of stopping feeding and antibiotics was an omission,234 therefore, not considered homicide because the offence required the doing of an act. Effectively, on this point, the Select Committee had to consider the law’s response to the passive termination by ‘letting [someone] die’.235 It was recommended that, going forward, the medical profession agree on a definition of persistent vegetative state and a proposed code of practice.236 More recently, the Supreme Court clarified this matter further,237 confirming there was no longer a need for the involvement

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231 ibid; House of Lords Select Committee on Medical Ethics, ‘Select Committee on Medical Ethics. Report’ (London, HMSO, 1994) (House of Lords paper 21-I) referenced in Keown (2018) 25; It said that foreseeability of ‘double effect should [not be an] obstacle to such treatment being given’ by medical professionals.

232 *Airedale NHS Trust v Bland* [1993] AC 789 [867D] (Lord Goff of Chieveley)

233 ibid

234 For a discussion on the issue of intent regarding acts and omissions in the cases of Dr Cox and Bland see Pamela R Fergusson, ‘Causing death or allowing to die? Developments in the law’ Journal of Medical Ethics 1997, Vol 23, 368-372

235 *Airedale NHS Trust v Bland* [1993] 1 All ER 821 HL

236 HL Deb 09 May 1994, vol 554, cols 344-412 (Lord Walton - 3.8pm)

237 *Re Y* [2018] UKSC 46
of the court to decide whether such treatment ought to be ended, so long as the doctors and family agreed on the issue.\textsuperscript{238}

Consequently, for the purposes of criminal law, the findings of the Select Committee confirmed both excuses, whereby the medical profession is deemed to be well equipped to deal with instances of death, whether by an act primarily intended to alleviate pain or by switching off a machine and letting the patient die. These developments in the law demonstrate the considerable sway held by the medical profession in connection with matters of death and dying.

\textit{Active Termination of Life}

In terms of a more active involvement with the termination of life,\textsuperscript{239} the Select Committee had to consider\textsuperscript{240} ‘whether […] active euthanasia […] by a doctor or some other person [with the] intention […] of […] shortening […] life may be justified [because] they accord with that [patient]’s wishes or with that [patient]’s best interest’.\textsuperscript{241} The matter arose in connection with Dr Cox who, following the pleas of his patient, Mrs Boyes, decided to give her a potassium chloride injection; a measure which in typical circumstances would be expected to hasten the patient’s death.\textsuperscript{242}

\textsuperscript{238} Alex Ruck Keene, ‘Supreme Court confirms that no need to go to court before treatment withdrawal where doctors and family agree’ (30 July 2018) <https://www.mentalcapacitylawandpolicy.org.uk/supreme-court-confirms-that-no-need-to-go-to-court-before-treatment-withdrawal-where-doctors-and-family-agree/> accessed 2 Jul 2021
\textsuperscript{239} \textit{R v Cox} [1992] 12 BMLR 38
\textsuperscript{240} HL Deb 9 May 1994, vol 554, cols 1344-412 - Medical Ethics: Select Committee Report
\textsuperscript{242} \textit{R v Cox} [1992] 12 BMLR 38
In hearing the case, the Crown Court Judge directed the jury that it had been ‘Dr Cox’s duty to
do all that was medically possible to alleviate her pain and suffering, even if the course adopted
carried with it an obvious risk that, as a side effect of that treatment, her death would be
rendered likely or even certain.’\textsuperscript{243} Yet, while this direction was largely akin to one indicating
circumstances of double effect, the criminal law did not recognise the facts of the case as
lacking intention to end life. Therefore, the court asked whether it was proper to prosecute a
doctor for causing the death of a patient even though their involvement stemmed from kindness
and compassion.\textsuperscript{244} However, asking this question highlighted the fact of Mr Cox’s intention
to cause death.

Ultimately, it was not possible to determine whether Mrs Boyes’ death was attributable to the
medical illness or Dr Cox’s injection, therefore, the court handed down a 12-month suspended
sentence.\textsuperscript{245} This apparent leniency towards Dr Cox was mirrored by the approach of the
General Medical Council\textsuperscript{246} (‘GMC’), which merely required him to undertake a period of
retraining.\textsuperscript{247}

In dealing with the question on the issue of a more active termination of life, the Select
Committee recommended that the law should not change to allow euthanasia.\textsuperscript{248} Nevertheless,

\textsuperscript{243} ibid [41]
\textsuperscript{244} ibid; Upon establishing the failure to relieve his patient’s suffering by administering heroin, Dr Cox injected
her with potassium chloride. His patient, Mrs Boyes, died within two hours. Evidence pointed to the liability of
Dr Cox for murder, however, the court handed down a 12-month suspended sentence, on the basis that it was
not possible to establish whether Mrs Boyes was killed by her illness or the administered injection.
\textsuperscript{245} Brahams (1992) 227; The article highlights that in the preceding sixty years of all cases regarding medical
negligence (including Bourne, Bodkin Adams, Arthur, Dr Cox) all but Dr Cox were acquitted. The editorial
exudes a sense frustration at the turn of events – at least in reflecting the essence of the case for the medical
profession – with the specific emphasis on the potential different result (as was previously successfully argued
in Bodkin Adams) if only Dr Cox had decided to give his patient, Mrs Boyes, a large quantity of analgesics
instead of a potassium chloride injection.
\textsuperscript{246} Medical Profession’s Regulatory Body for National Health Service under which Dr Nigel Cox was serving
as a rheumatology consultant
\textsuperscript{247} Decision of the Professional Conduct Committee in the Case of Dr Nigel Cox, General Medical Council
News Review (Supplement, December 1992); Brahams (1992) 227
\textsuperscript{248} HL Deb 09 May 1994, vol 554, cols 1344-412 - Medical Ethics: Select Committee Report; Euthanasia was
defined as that which occurs ‘at the request of the individual concerned, as being a deliberate intervention
it was decided that, while the courts should have ‘full respect for life’, this principle ought not
to be pursued to the extent of sacrificing other values such as dignity and the individual’s
freedom to choose for themselves.\textsuperscript{249} Instead, the Report observed that the responsibility of
achieving ‘a dignified death with minimal suffering’\textsuperscript{250} was better left to the judgement of
medical professionals – because deliberate killing should not be negotiable by any means.\textsuperscript{251}

Yet the consequences of these findings are somewhat confusing. The jury’s decision to find Dr
Cox guilty was based on the intent to kill, supported by his choice to inject his patient with a
potassium chloride injection as opposed to a large dose of analgesics. However, administering
the latter may have led to an unconditional discharge or even no prosecution based on the
principle of double effect. Even so, despite establishing ‘intent’ to hasten death, the fact that
Dr Cox’s action stemmed from kindness and compassion led to a more lenient approach by the
court (through judicial discretion regarding sentencing) and the GMC regarding his ability to
practise. Similarly, while clearly opposing the legalisation of euthanasia by active involvement,
the Select Committee endorsed the key role of medical professionals in achieving ‘a dignified
death with minimal suffering’.\textsuperscript{252}

Thus, under the current legislative construct, such dignified death is only possible so long as
the facts of death point to one of the accepted excuses (double effect or passive termination by
omission), as opposed to active termination of life. However, rationalising such a final decision
as one that is better suited to the judgement of the medical professionals indicates the existence
of an acute paternalistic approach, in the sense that ‘doctors know best’. Still, as indicated by

\textsuperscript{249} ibid - The Earl of Listowel - 5.04pm
\textsuperscript{250} HL Deb 09 May 1994, vol 554, cols 1344-412 - Lord Colwyn 5.40pm
\textsuperscript{251} ibid
\textsuperscript{252} ibid
the excuses explored in this section, this construct is a predominant feature of the exceptions from criminal liability.

1.6. Uncertainties Surrounding the Act of Assisting with Suicide

Under the current system, the law allows for a lenient approach towards suspects in the aftermath of a Section 2 offence. However, while the notion of compassion (as captured within the DPP Policy) is steadily becoming an established maxim for determining the matter of prosecution in the aftermath of involvement with assisted suicide, the legislative construct is not equipped to deal with the matter of human dignity and accord the protection that vulnerable individuals require, pre-death. Indeed, the same provision cannot offer protection pre-death since it was never designed to meet these norms. Hence, the normalisation of compassionate assistance in suicide by way of prosecutorial discretion – in a context lacking monitoring powers and safeguards to ensure the authenticity of the individual’s choice to end their own life – deepens the need for assisted dying law reform and calls into question the justiciability of the Policy within the overall framework of lawful assisted death.

_Compassionate Assisted Suicide as an Excuse_

Despite Section 2(1) operates a blanket prohibition on assisted suicide, prosecutorial discretion exercised under Section 2(4) by way of DPP consent seems to attribute a high level of leniency in cases where involvement with the offence appears to be ‘wholly motivated by compassion’.253 Essentially, the DPP Policy clarifies that even where compassionate involvement leads to potential gain by the suspect, the police and reviewing prosecutor ‘should

253 DPP Policy [43.6], [45.2]
adopt a common sense approach’. Therefore, so long as ‘compassion was the only driving force’, the fact that the suspect may have gained some benefit (financial or otherwise) will not usually be treated as a factor in favour of prosecution. Unsurprisingly, these characteristics mirror the 1961 debates on the Suicide Bill.

On this premise, this thesis argues this particular approach represents a safeguard mechanism for suspects which behaves in the same way as an excuse (as depicted earlier in this chapter) and by design is unable to protect the victim (death-seeker) of the offence.

The Impact on Potential Vulnerable Victims

The matter of vulnerability arises in connection with both criminal offences as well as guiding the path towards potential change of legislation. On the one hand, as depicted throughout judicial considerations on this point (see section 4.4. in Chapter Four), any pain and suffering endured by the victim, especially those with a mental illness, tend to compound the defendant’s sentence for involvement with assisted suicide. Thus, it may enhance the likelihood of a custodial as opposed to a suspended sentence.

On the other hand, in attempting to achieve an exception from the blanket prohibition to access lawful assistance with death, claimants of limited physical ability argue for their need for assistance which requires more active involvement than that proposed within the Assisted Dying Bills. One such example stands out. In acknowledging the limitations faced by an individual with quadriplegia to end their own life, Lord Neuberger considered that a machine – as explained by Dr Philip Nitschke in Nicklinson – could be used to help those in the

254 ibid [43.6]
255 ibid [44] clarifying [43.6]
256 HC Deb 14 July 1961, vol 644, col 843 (Mr Peter Kirk - 3.56pm)
257 R (on the application of Nicklinson and another) v Ministry of Justice; R (on the application of AM) (AP) v DPP [2014] UKSC 38
position of claimants to self-administer a lethal drug. Indeed, while the drug delivery system would require it to be set up by another individual, the final act would be undertaken by the death-seeker at the flick of a switch.

Thus, if this became an option – and would not be unlawful under criminal law – so long as the final act is capable of being identified as one of self-termination, the involvement of setting up the machine or technical apparatus would potentially amount to passive, as opposed to active, assistance with suicide. Indeed, in contrast with enacting robust and transparent legislative measures, the lack of a lawful framework would still render that option as dangerous, since it would not address the matter of vulnerability and capacity as regards the death-seeker’s competence in the circumstances, including the fact of consent by way of a voluntary decision, free from coercion. Fast forward a few years, Dr Nitschke’s Sarco machine, launched in 2019,\(^{258}\) may turn out to be the kind of technology that leads to the development of another ‘excuse’, navigated through the lens of the DPP Policy as compassionate assistance, all the while contributing to camouflaging the cracks within the law in this area.

*Assistance Distinguished from Encouragement*

At the time of modernising the wording of Section 2 of the Suicide Act 1961 by way of an Amendment to the Coroners and Justice Act 2009, an important issue regarding the distinction between encouraging suicide and assisting suicide was offered in the House of Commons by David Howarth, who observed:

> Encouraging suicide takes place before the person has decided to commit suicide and is entirely reprehensible, whether it is aimed at a specific person or at the world in general.

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general. In that sense, what the Government are doing is right, but assisting suicide can, by contrast, occur after the person has autonomously decided to commit suicide. Many hon. Members think that assisting suicide is also wrong, but if it is wrong, it is a different sort of wrong from encouraging suicide. Other hon. Members think that assisting suicide is not necessarily wrong if the right sort of safeguards are in place.259

This emphasis between different behaviour capable of amounting to a Section 2 offence seems to be mirrored in practice, by way of prosecutorial decision-making. The practical implications which give rise to this distinction are explored in Chapter Four by reference to successful prosecution of instances of ‘encouraged’ suicide. For now, it is essential to highlight that the comment in connection with ‘assisting’ suicide places the emphasis on the individual’s autonomy. A mere choice to end their life expressed by way of self-determination, and free from coercion. This section aims to determine the basis of the distinction between approaches regarding ‘encouraging’ and ‘assisting’ the suicide of another, by reference to Fletcher’s formulation of an excuse.

Like the law’s response regarding legitimate excuses for causing death by way of double effect and passive termination of life, the prosecutorial decision-making process in instances of assisted suicide seems to operate as an established and recognised excuse for compassionate ‘assistance’ with suicide, as distinguished from acts deemed to have ‘encouraged’ (Chapter Four) suicide.260

In applying Fletcher’s excuse formula in connection with a Section 2 offence, an individual becomes subject to criminal liability under Section 2(1) if they carried out the assistance

259 HC Deb 26 January 2009, vol 487, cols 68-69 (David Howarth)
(breaching the law), and that act attracts punishment to them (breach is attributed to them). Yet, application of the law under Section 2(4) by way of prosecutorial discretion behaves differently. In relation to double effect and passive termination of life the context of Fletcher’s defensives leads to the denial of ‘intent’ to commit the crime. However, in connection with an assisted suicide offence – despite the undeniability of ‘intention’ with the act of assisting – the defensives trigger a similar outcome. Thus, so long as the involvement under Section 2(1) was ‘wholly motivated by compassion’ the law’s response is considerably more lenient in nature.

Consequently, the current legislative construct operates as though there already is an exception from the blanket ban, which functions (particularly well) by way of prosecutorial discretion. However, while this arrangement continues to establish the support for suspects in the aftermath of an offence, in relation to victims the law is turning a blind eye to the need to ascertain the true wishes of the individual who is believed to have sought a good death by this means (death-seeker).

Therefore, in contemplation of a more suitable arrangement, able to deliver a painless and good death, this thesis takes the position that only a pre-death test in the form of an assisted dying framework, or similar, would ever be capable of regulating the matter of hastening death in a safe way, based on a voluntary request of a death-seeker.

Until and unless such provisions are implemented, Westminster Parliament continues to allow assisted suicide practices to take place without safeguards, in the hope that current legislation is capable of protecting vulnerable individuals from potential abuse while aftermath investigations and the DPP decision-making process, are adequately equipped to ascertain the wishes of victims, post-death.

261 Fletcher (1878) 455-457 and 469
As the UK was preparing for a second lockdown due to the COVID-19 pandemic (Chapter Five), news reports confirmed a ‘frontline NHS worker with terminal breast cancer’ had chosen an earlier assisted suicide at Dignitas, in Switzerland, due to potential uncertainties regarding the ability to travel. In response to a question in Parliament, the Secretary of State for Health and Social Care, Matt Hancock, considered the question of whether travel restrictions under the Coronavirus Act 2020 (‘CA 2020’) would impact travel arrangements for lawful assisted suicide abroad. Ordinarily, involvement with and travel for these purposes would not attract any impositions – save for potential aftermath investigations of the accompanying individual upon returning to the UK. Consequently, it was confirmed that anyone undertaking such travel ‘would not be breaking the law’ under CA 2020, for this is a ‘reasonable excuse’. Therefore, it appears that once again the ‘maelstrom of circumstances’ as indicated by Fletcher, have led to the confirmation of a so-called ‘excuse’, also ‘motivated by compassion’ and kindness in the context and the circumstances created by the pandemic.


266 HC Deb 5 November 2020, vol 683, col 475 - Coronavirus Regulations: Assisted Deaths Abroad (Andrew Mitchell – 10.34am)

267 ibid (Matt Hancock - The Secretary of State for Health and Social Care)

268 Fletcher (1878) 808
Moreover, the experience of COVID-19 exacerbated and widened the discussions of the need for a good death by bringing attention to the issue of how we die. Developed in Chapter Five, this exploration is driven by the frequent experiences of dying at home, dying alone and the pressure of providing a good death during the pandemic.

1.7. Summary

The quest for law reform to allow for hastened death has its origins in a 1931 public address. Thus far, legislative attempts to amend the law have further enhanced the scope of the prohibition of assistance with suicide under the 1961 Act. In parallel, the criminal law has devised limited exceptions to liability for causing death by way of double effect, passive termination of life and withdrawing or withholding life-sustaining treatment. Thus, whether an individual has made a voluntary decision to have an assisted death via a more ‘active’ or ‘passive’ assistance (as developed in this chapter) to end their life, a willing compassionate-helper remains subject to criminal law for wrongful causing of death by way of murder, manslaughter or assisted suicide.

However, since the 1961 Act came into force, criminal liability in connection with assistance in suicide has been applied in a way that exhibits considerable prosecutorial discretion towards brave and compassionate-helpers. These norms contribute to highlight the relationship between the six elements (autonomy, mental capacity, compassion, voluntary decision, vulnerability, and safeguards) as regards the law in theory and the application of the law in practice. For now, the DPP decision-making process continues to yield comparable outcomes since 1961, despite the strengthening of the Section 2 prohibition by way of the Coroners and Justice Act 2009. Thus, the decision-making process in connection with a prosecution for what this chapter has termed as ‘passive’ assistance with suicide, demonstrates a tendency not to prosecute
compassionate helpers for their involvement, so long as they are ‘wholly motivated by compassion’.

However, the nature of aftermath investigations in these cases means that the current arrangement is merely a coping mechanism designed to safeguard compassionate helpers. Yet, it is the protection of vulnerable individuals which needs to come to the fore by recognising their autonomous and voluntary decision (free from coercion) to bring an end to their life. Under the current laws, competent individuals who wish to have a painless and good death and need assistance to achieve this, are unable to seek help to do so lawfully and without risking the liberty of their willing compassionate helper. For those individuals, the only way to achieve lawful and dignified assisted death is by challenging the current legislation before the courts.
Chapter 2 – Judicial Deference and the Assisted Dying Debate

2.1. Introduction

In October 2000, on the date of its coming into force, the Human Rights Act 1998\(^1\) (‘HRA 1998’) granted certain courts\(^2\) a constitutional role in matters where domestic legislation is incompatible with the European Convention for the Protection of Fundamental Freedoms and Human Rights (‘Convention’).\(^3\) While courts are unable to bring actions ‘of [their] own motion’,\(^4\) a series of civil cases has provided the ‘necessary context’ in an effort to persuade the courts to give a declarations of incompatibility under Section 4 of the HRA 1998 (provided in full in Appendix 4). Essentially, these challenges by way of Judicial Review\(^5\) dispute the compatibility of the criminal offence under Section 2 of the Suicide Act 1961 (‘1961 Act’),\(^6\) for prohibiting individuals from receiving lawful assistance with ending their life – an interference considered to not only engage, but also breach, the claimants’ human rights.\(^7\)

Chapter One has demonstrated that within the current system, despite operating a blanket ban on assisted suicide,\(^8\) the prosecutorial decision-making process in connection with a Section 2 offence allows compassionate-helpers to escape prosecution – not without requisite exposure to police investigations. For these reasons, claimants endeavour to persuade judges to make a

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\(^1\) Human Rights Act 1998
\(^2\) ibid Section 4(5)
\(^3\) ibid Section 4
\(^5\) Under the Civil Procedure Rules (CPR) Part 54 a claimant may bring an application for Judicial Review if they are applying for a declaration of incompatibility, by giving precise details of the Convention right which has allegedly been infringed, and the domestic law provision which is said to be incompatible. This requires following CPR PD 16, paras 15.1(2)(a), (c)(i), and (d).
\(^6\) Suicide Act 1961 Section 2
\(^7\) Human Rights Act 1998 Schedule 1 The Articles
\(^8\) Carmen Draghici, ‘The blanket ban on assisted suicide: between moral paternalism and utilitarian justice’ [2015] 3 EHRLR 286
declaration to this end and start the dialogue with the Westminster Parliament\(^9\) in the hope of influencing the adoption of assisted dying provisions with safeguards, pre-death.

This chapter engages with judgments of the English courts and the European Court of Human Rights (ECtHR), by critically evaluating judicial attitudes and their wider impact as regards claimants’ attempts to engage with their human rights and influence assisted dying law reform. This will be achieved by considering (1) judicial attitudes regarding a potential exception to the current prohibition which leads to the question of (2) whether, and in what circumstances, a court may make a declaration of incompatibility. The chapter culminates by (3) evaluating the possible reasons why courts have demonstrated a high level of deference to the construct of the law and Parliament’s decision not to reform the law in this area.

The investigation of the chapter begins to map out the relationship between certain elements essential for the notion of a good death, and their influencing factors. With the notion of dignity as its driving influencing factor, the development of arguments regarding claimants in this area is guided by the individual’s autonomy to choose death over life in the context where it is possible to ascertain their voluntary decision, free from coercion, to have an assisted death.

### 2.2. Case Law Challenging the Prohibition on Assisted Dying

The coming into force of the HRA 1998 in October 2000 enabled claimants – suffering from various degenerative medical conditions – to challenge the legislation prohibiting them from being assisted to end their life, on the basis that it breaches their protected rights under the Convention. While together the claimants argue for legislative change to allow them to choose the manner and timing of their death, separately, each of the legal arguments has contributed

\(^9\) For a more in-depth discussion on the benefits of this dialogue see Nicholas Petrie, ‘Indications of inconsistency’ Cambridge Law Journal (2019) 78(3), 612-639
to the exposure of what may be achieved through the courts. This section aims to evaluate the emerging legal arguments and capture the reasons why claimants have not been successful in achieving the resolution they seek.

The Principle of Personal Autonomy – Diane Pretty

Almost one year had passed from the coming into force of the 1998 Act when the aspiration to achieve ‘a peaceful end’ – and escape the painful dying process guaranteed by a terminal illness – led Mrs Dianne Pretty to bring an action before the English courts. This was based on a prior refusal by the Director of Public Prosecutions (‘DPP’) to grant an anticipatory pardon – to protect Mrs Pretty’s husband from prosecution under Section 2(1) of the 1961 Act – if he helped her to commit suicide. Mrs Pretty had been confined to a wheelchair due to suffering from progressive, neurodegenerative motor neuron disease (‘MND’), and significantly depended on others for her daily routine. While her competence to make a voluntary decision and mental capacity were not affected, her speech, swallowing and movement in her legs and arms were entirely lost. For this reason, Mrs Pretty needed help to end her life. Her husband was willing to assist so long as the DPP would consent not to prosecute him (under Section 2), following the assistance with Mrs Pretty’s suicide.

The authority under Section 2(4) which becomes activated in the aftermath of a Section 2(1) offence, did not allow the DPP to offer immunity in contemplation of a future criminal act. In fact, such an approach would be capable of undermining the prohibition of Section 2(1) as

10 R (on the application of Pretty) v DPP [2001] EWHC (Admin) 788; R (on the application of Pretty) v DPP [2001] UKHL 61; Pretty v UK (2002) 35 EHRR 1
12 R (on the application of Pretty) v DPP [2001] EWHC (Admin) 788 [9], [24]-[25] (LJ Tuckley)
13 ibid [1]
14 Suicide Act 1961 Section 2(4)
15 Pretty v DPP [2001] [13]-[16], [21]
intended by Parliament. The case reached the House of Lords, where it was held the DPP’s refusal did not breach the Convention rights.\textsuperscript{16} However, the decision noted two essential points. First, the DPP did not have the power to legislate; instead, it could only ‘ascertain and apply the law of the land’.\textsuperscript{17} Second – by reference to a similar approach in Scotland in relation to Section 10 of the Prosecution of Offences Act 1985 – Lord Bingham indicated that the discretion afforded under Section 2(4) of the 1961 Act meant that if it came to it, the DPP could publish policy guidance\textsuperscript{18} regarding their approach in instances of assisted suicide\textsuperscript{19} – other than the one in the Code for Crown Prosecutors.\textsuperscript{20}

Mrs Pretty took her case before the ECtHR;\textsuperscript{21} she argued that the refusal by the DPP and the prohibition under Section 2(1) infringed her rights under Articles 2, 3, 8, 9 and 14 of the Convention (see Appendix 3).\textsuperscript{22} The court found that Article 3 (degrading treatment) did not create a positive obligation requiring the Government to give the requested undertaking or to devise a lawful means for accessing assisted suicide;\textsuperscript{23} Article 9 (right to freedom of thought) was, to the extent of the application, dealt with in the context of Article 8 (discussed below);\textsuperscript{24} as for Article 14 (non-discrimination) it was noted that the Government had ‘objective and reasonable justification’ not to distinguish between individuals who are able and those who are not able to commit suicide unaided.\textsuperscript{25}

\textsuperscript{16} Pretty v DPP [2001] UKHL 61
\textsuperscript{17} ibid [2] (Lord Bingham)
\textsuperscript{18} ibid [39]
\textsuperscript{19} ibid [80] Lord Hope pointed out ‘the Director is entitled to form a policy as to the criteria which he will apply when he is exercising his discretion under section 2(4) of the 1961 Act’.
\textsuperscript{21} Pretty v the UK (2002) 35 EHRR 1
\textsuperscript{22} Pretty v United Kingdom (2002) 35 EHRR 1 [H2]
\textsuperscript{23} ibid [56]
\textsuperscript{24} ibid [82]
\textsuperscript{25} ibid [88]-[89]
In terms of Article 2 (right to life), the ECtHR confirmed the decision of the House of Lords in that the right could not be read to confer ‘the diametrically opposite right’ to die, nor does it provide a right to self-determination to choose death over life. In fact, the provision prompts the state to not only refrain from intentionally and unlawfully taking life but also to safeguard life. The UK Government meets the latter obligation through Section 2(1) of the 1961 Act, which aims to protect vulnerable individuals. Thus, Article 2 did not concern matters of quality of life as regards an individual’s wish to end their life by choosing death.

In connection with Article 8 (right to private life), the court established for the first time, that the assisted suicide prohibition interfered with Mrs Pretty’s right to self-determination. More specifically, the court found that the right to private life included the notion of personal autonomy, which sits at the centre of the interpretation of rights guaranteed under Article 8. This momentous finding would go on to change the landscape of future arguments in connection with assisted suicide prohibition as a matter which interferes with Article 8(1) in the UK, as well as all other signatories to the Convention.

However, the margin of appreciation afforded under the Convention as to how the requirement to protect life is met, led the ECtHR to accept that Section 2(1) was intended to protect the weak and vulnerable. This protection applied to Mrs Pretty although she was not considered to fall within this category. Thus, the prohibition was deemed an appropriate mechanism (and interference) that strikes the balance ‘between the general interest of the community and the

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26 ibid [39]
27 ibid [4], [12], [36], [38]-[39]
28 ibid [48]
29 ibid [62]-[64], [67]
30 ibid [4] H22(h)-H23(i)
31 ibid
interests of the individual’.

The ECtHR concluded the DPP was not obligated to grant a pardon and held that Section 2(1) was compatible with the Convention.

Nevertheless, the court observed that ‘[t]he very essence of the Convention is respect for human dignity and human freedom’. Indeed, individual autonomy and freedom of choice are at stake here, because dying is part of living, and does not diminish their entitlement to uphold their rights if they are competent to do so. Yet, Biggs goes on to question the legal prohibition for being unjust, limiting patient’s choice to request a hastened death. Thus, in terms of the assisted dying debate, the manner of dealing with the issue in connection with Article 8, the approach of the ECtHR as regards Article 2 rights takes on a religious blueprint whereby the ‘right to life’ is often collapsed into the notion of ‘sanctity of life’. This is captured by Perry’s argument that the belief that ‘every human being is sacred’ is in fact ‘inescapably religious’.

Thus, in the context of stepping towards reform, Oates doubts the Parliament’s readiness to pass assisted dying laws, since the fabric of UK legislation is embellished with the ‘enduring legacy of Christianity’. It then seems that the notion of autonomy for the purposes of assisted dying laws, bears certain limitations. Nevertheless, autonomy expressed by way of choice and self-determination to end one’s own life without assistance is not prohibited.

33 Pretty v United Kingdom (2002) 35 EHRR 1 [74]
34 ibid [65]
36 Pretty v United Kingdom (2002) 35 EHRR 1 - the ECtHR seems to approach the notion of a ‘right to life’ and the ‘sanctity of life’ as largely interchangeable.
On the premise that a judgment in favour of Mrs Pretty was ‘never a realistic possibility’,\(^{41}\) Coggon\(^{42}\) suggested that a formulation of the law as advanced by Munby J in *Burke*,\(^ {43}\) – that ‘any obligations of the State under Article 2 must […] accommodate its obligations under Article 3’\(^ {44}\) – may have warranted a different outcome for the decision in *Pretty*. Coggon based this on the fact that without her husband’s assistance, Mrs Pretty would have endured an ‘exceedingly distressing and undignified’\(^ {45}\) end-of-life.\(^ {46}\) Thus, as captured later in this chapter, for individuals in Mrs Pretty’s position, it is a desire for a good death of the kind where their dignity is protected, that drives their pursuit for change of legislation.

Furthermore, in the context of degrading treatment and the right to non-discrimination, Coggon suggests that, in conjunction with Article 14, the inability to derogate from Article 3 – in the same way as, for example Article 8(1) in Article 8(2) – would potentially deem the Government in breach of the interference with Section 2(1).\(^ {47}\) However, none of the cases which followed advanced this argument. Still, during the House of Lords deliberations in the *Pretty* case, it was observed that for the purposes of clarifying the application of the law under Section 2(1), the DPP could publish a policy guidance\(^ {48}\) on their approach in such instances\(^ {49}\) – other than that


\(^{43}\) *R (On the Application of Oliver Leslie Burke) v The General Medical Council, The Disability Rights Commission, The Official Solicitor to the Supreme Court* [2004] EWHC 1879 (Admin) (The first instance decision in Burke was overruled); *R (On the Application of Oliver Leslie Burke) v The General Medical Council* [2005] EWCA Civ 1003

\(^{44}\) *R (On the Application of Oliver Leslie Burke) v The General Medical Council, The Disability Rights Commission, The Official Solicitor to the Supreme Court* [2004] EWHC 1879 (Admin) [129]

\(^{45}\) *Pretty v United Kingdom* (2002) 35 EHRR 1 [8]

\(^{46}\) Coggon (2006) 234

\(^{47}\) ibid 235

\(^{48}\) *Pretty v DPP* [2001] UKHL 61 [39]

\(^{49}\) ibid [80] Lord Hope pointed out ‘the Director is entitled to form a policy as to the criteria which he will apply when he is exercising his discretion under section 2(4) of the 1961 Act’.
in the Code for Crown Prosecutors. Even so, this was not the issue in the case, therefore, it would take eight years for the matter to reappear before the courts.

Outlining the Bounds of Compassion – Debbie Purdy

In a move that would attract significant academic attention,50 Ms Debbie Purdy – a primary progressive multiple sclerosis sufferer – asked the DPP to provide clarification regarding the likely approach51 in instances of assisted suicide under Section 2 of the 1961 Act.52 Ms Purdy set out to establish53 whether, upon helping with her travel abroad to have a lawful assisted suicide, her husband was likely to be prosecuted upon his return to the UK.54 In the Divisional Court, Scott Baker LJ distinguished Purdy as a case based on clarification of the law – as opposed to the issue in Pretty concerning immunity from prosecution.55 Although the DPP had previously engaged with undertakings of this kind,56 the court found the DPP’s failure to publish offence-specific guidance was ‘in accordance with the law’, therefore justified under Article 8(2).57

51 R (on the application of Purdy) v DPP [2008] EWHC 2565 (Admin); R (on the application of Purdy) v DPP [2009] EWCA Civ 92 [1]
52 ibid [1]-[2]
53 R (on the application of Purdy) v DPP [2008] EWHC 2565 (Admin); R (on the application of Purdy) v DPP [2009] EWCA Civ 92; R (on the application of Purdy) v DPP [2009] UKHL 45
54 R (on the application of Purdy) v DPP [2008] EWHC 2565 (Admin) [3]-[4]
55 ibid
56 For example, in instances of driving offences or non-fatal offences.
57 R (on the application of Purdy) v DPP [2008] EWHC 2565 (Admin) [83]
When the case made its way to the House of Lords, the legal dispute was characterised by Lord Hope as one seeking information to be used in connection with a decision that affects private life.\(^58\) Also, the court noted that the practice in relation to the kind of ‘compassionate assistance’ Ms Purdy sought from her husband (to assist with travel arrangements and accompany her to Dignitas), was ‘far less certain’.\(^59\) In departing from the premise that Section 2(1) interfered with Article 8(1) rights (established in *Pretty*), the court assessed whether the DPP’s refusal satisfied the Convention requirements for ‘accessibility and foreseeability’,\(^60\) and concluded the test had failed. Consequently, the DPP was ordered to publish offence-specific policy regarding instances of assisted suicide.\(^61\) While Ms Purdy did not benefit from the publishing of the policy, as she eventually died in a UK hospice after refusing food,\(^62\) the case of *Purdy* created new hopes for the effect of legal actions as regards the wider assisted dying debate and the prospect of inching towards legislative change.

As for the policy to be published by the DPP, Lord Brown noted the DPP had already considered the key elements in the statement made in Daniel James’ case,\(^63\) while Lady Hale suggested the manner of their construction ought to ‘protect the right to exercise a genuinely autonomous choice’.\(^64\) This brings to the surface the importance of the apparent relationship between autonomy as expressed by way of a choice and carried out by way of self-determination. However, for the purposes of assisted dying the nuances of the latter remain a matter for legislative provisions if or when they are enacted.

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\(^{58}\) *R (Purdy) v Director of Public Prosecutions* [2009] UKHL 45 [30]-[31]

\(^{59}\) ibid [27], [54] (Lord Hope)

\(^{60}\) ibid [40]-[43], [53] (Lord Hope)

\(^{61}\) ibid [56], [69] (Baroness Hale), [83]-[86] (Lord Brown), [88], [101]-[102] (Lord Neuberger)


\(^{63}\) ibid [86] (Lord Brown)

\(^{64}\) ibid [65]-[66] (Lady Hale)
The eventual publishing of the DPP Policy in 2010 would later prompt Mullock to argue the judgment in Purdy led to the recognition of compassion ‘as a key determining factor which effectively decriminalise[d] acts of assisting or encouraging suicide […] despite such acts remaining technically criminal.’\textsuperscript{65} While Mullock’s argument is predominantly accurate, in practice (Chapter Four) – through prosecutorial discretion combined with jury verdicts and judicial discretion regarding sentencing – only compassionate assisting as opposed to encouraging suicide seems to attract a high level of prosecutorial discretion.

Moreover, Parliamentary debates during the passing of the Suicide Bill to its Royal Assent (Chapter One), indicate that ‘compassionate assistance’ was anticipated to emerge as part of the DPP’s set of considerations under Section 2(4), in dealing with Section 2(1) offences.\textsuperscript{66} Hence, the published Policy for Prosecutors in Respect of Cases of Encouraging or Assisting Suicide (‘DPP Policy’) (Appendix 2) has essentially captured an approach agreed and established during the debates on the Suicide Bill which led to the enactment of Section 2(1). Thus, in line with the argument by Mullock, this thesis contends that under the current legal construct, prosecutorial discretion remains confined to promoting ‘compassion’ to safeguard ‘compassionate-helpers’, in the aftermath of an offence. Yet, it is the manner of this application that gives rise to questions regarding necessary safeguards and protection as well as the incidental vulnerability of the so-called ‘victim’ (a term adopted by the DPP Policy) or ‘death-seeker’ (a term used in this thesis in connection with a genuine choice to have an assisted and good death (Chapter Four)) at the time when the assistance with suicide is committed.

\textsuperscript{65} A Mullock (2010)
\textsuperscript{66} See section 1.3. in Chapter One
Despite the publication of the DPP Policy, claimants continued to bring legal challenges in a bid to present the most adequate set of circumstances capable of persuading the courts of the need for lawful assisted death. Instead, in its first decision of this kind, the Supreme Court would reveal the prevalence of traditional judicial deference to Parliament, and judicial caution in connection with the possibility of giving a declaration of incompatibility. Thus, preservation of life through ‘protection of the vulnerable’ was preferred over a kind of change ‘likely to call for an infrastructure of safeguards which a court decision could not create.’

This matter involved legal actions brought by three different claimants: Mr Nicklinson, ‘Martin’ (Martin) (a name used to protect the claimant’s privacy), and Mr Lamb.

Mr Tony Nicklinson had suffered a stroke in 2005 which left him paralysed (locked-in state) save for limited head movements which enabled him to communicate via an eye-blink computer. Unable to bring about his own death, Mr Nicklinson wished to achieve a lawful means of accessing assisted death, complete with the necessary safeguards. Thus, he asked the court to (1) give a declaration that would enable a doctor to end his life on grounds of necessity; (2) give a declaration that the law of murder and the prohibition on assisted suicide are incompatible with Article 8(1) rights on the premise that both euthanasia and assisted suicide are criminal offences; and (3) a declaration of incompatibility as regards the failure of the current system to enable lawful access to active euthanasia, on the basis that it breached Article 2.

Moreover, in demonstrating he was not vulnerable in the sense of needing the

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67 R (on the application of Nicklinson and another) v Ministry of Justice; R (on the application of AM) (AP) v DPP [2014] UKSC 38 [267] (Lord Hughes)
71 ibid [5]
protection under Section 2 of the 1961 Act, Mr Nicklinson told the court he would be willing to take his own life with the help of a computerised device operated by eye-blink – an invention by Dr Philip Nitschke. Only the first two claims were considered arguable by the High Court. Due to the similarity of circumstances of another legal action with that of Mr Nicklinson’s hearing before Toulson LJ, Martin’s claim was joined.72

Martin had suffered a brain stem stroke in 2008 which left him a quadriplegic. His mode of communication was via small movements and an eye recognition computer.73 Martin asked the court (1) for an order that the DPP clarifies their Policy further, regarding the likelihood of prosecuting a willing assistor – particularly a health professional or solicitor – for assisting with the necessary arrangements and travel to Dignitas, for a lawful assisted suicide; if this failed (2) to give a declaration that Section 2(1) was incompatible with Article 8(1).74

As regards Mr Nicklinson’s first point, the High Court found that as euthanasia amounted to intentional killing, this required the creation of a new defence of necessity to the criminal offence of murder. This was in itself an issue involving ‘strongly held conflicting views’ of change of legislation rejected by Parliament on various occasions.75 As for the second point regarding the declaration of incompatibility, the court emphasised the finding of the ECtHR in Pretty, that owing to the margin of appreciation afforded to Member States, even a complete prohibition of assisted suicide is compatible with the Convention rights.76 It was concluded this principle also applied ‘with added force’ to the prohibition on euthanasia.77

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72 R (on the application of Nicklinson) v Ministry of Justice; R (on the application of AM) v DPP [2012] EWHC 2381 (Admin) [8] (Toulson LJ)
73 ibid [7]
74 ibid [10]
75 ibid [84], [87]
76 ibid [118]-[122]; The decision referred to was that in Pretty v the UK (2002) 35 EHRR 1.
77 ibid [121]-[122]

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As for Martin’s first argument, the court deferred to Parliamentary supremacy, concluding not only that it would be wrong for it to order further clarification of the DPP Policy, but if it did so, the DPP would ‘cross a line’ which, owing to constitutional arrangements, ought not to be crossed. In connection with the second argument, the High Court met the question of compatibility in the same way as before, attributing the justification of any interference with Article 8(1) to the margin of appreciation granted under the Convention. The case continued to the Court of Appeal where, due to Mr Nicklinson’s death, his widowed wife Mrs Jane Nicklinson was already a party to proceedings at the High Court level. At this point, Mrs Nicklinson and Martin were joined by a third claimant, Mr Paul Lamb.

Mr Lamb was left paralysed following a car crash in 1990. His claim was identical to the one previously advanced by Mr Nicklinson, as regards the issue of necessity as a defence to intentional killing – Mr Lamb’s claim was set to ‘keep that argument in play’. While the Appeal Court upheld the conclusions of the High Court as regards Mrs Nicklinson and Mr Lamb, it allowed Martin’s claim because the DPP Policy was not sufficiently clear regarding prosecution in connection with medical professionals, whom the court termed as Class 2 helpers. This was on the premise that, unlike the information regarding Class 1 helpers (represented by family and friends of the victim), in relation to Class 2 helpers – individuals

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78 ibid [137]
79 ibid [136]-[138]
81 In Koch v Germany (2013) 56 EHRR 6 the court held that given the non-transferable nature of Article 8, the applicant in the case had no standing.
82 R (on the application of Nicklinson) v Ministry of Justice [2013] EWCA Civ 466 (The Master of the Rolls and Lord Justice Elias)
83 ibid [14]
84 ibid [13]
85 R (on the application of Jane Nicklinson), Paul Lamb v Ministry of Justice, R (on the application of AM) v DPP [2013] EWCA Civ 961 [149]
86 ibid [129]-[132]
who come from outside ‘have no close or emotional connection with the victim’\textsuperscript{87} – the Policy was ‘not sufficiently clear to satisfy the requirements of Article 8(2)’.\textsuperscript{88} Therefore, the requirement of legality\textsuperscript{89} under Article 8(2) was not satisfied.\textsuperscript{90}

By the time the matter reached the Supreme Court the claim was based on two issues. First, whether the DPP Policy was lawful, and second, whether the assisted suicide prohibition infringes Convention rights.\textsuperscript{91} As regards the first issue, the Supreme Court overruled the decision of the Court of Appeal due to the inherent inappropriateness for a court to dictate the contents of the DPP’s own Policy.\textsuperscript{92} However, Lord Neuberger pointed out that if the Policy did not mirror the view of the DPP, this had to be amended to resolve any confusion as a matter of domestic public law regarding a ‘public authority’.\textsuperscript{93}

In October 2014, the DPP went on to update the Policy in support of the notion that, where a healthcare professional provides assistance to a patient, the likelihood of prosecution increases only where a relationship of care existed, such that the DPP would be required to consider ‘whether the suspect may have exerted some influence on the victim’.\textsuperscript{94} This matter appeared to be linked to the matter of vulnerability as well as potential capacity of the individual regarding their competence to make such a final decision and request assistance. The court’s

\begin{itemize}
  \item \textsuperscript{87} ibid [130]
  \item \textsuperscript{88} ibid [138]-[140]
  \item \textsuperscript{89} \textit{Sunday Times v the UK} (1979) 2 EHRR 245 [49]; Hasan and Chaush v Bulgaria (2002) 34 EHRR 1339 [84]
  \item \textsuperscript{90} \textit{R (on the application of Jane Nicklinson), Paul Lamb v Ministry of Justice, R (on the application of AM) v DPP} [2013] EWCA Civ 961 [140], [148]
  \item \textsuperscript{91} \textit{R (on the application of Nicklinson and another) v Ministry of Justice; R (on the application of AM) (AP) v DPP} [2014] UKSC 38 [1]-[2] (Lord Neuberger)
  \item \textsuperscript{92} ibid [141], [144]-[145]
  \item \textsuperscript{93} ibid [143]
  \item \textsuperscript{94} The DPP Policy update in the form of a footnote to the initial public interest factors clarifies that: ‘For the avoidance of doubt the words “and the victim was in his or her care” qualify all of the preceding parts of this paragraph [43.14]. 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.’
\end{itemize}
decision on this point sparked criticism by disability campaigners with one in particular, Nikki Kenward, applying for Judicial Review. The High Court dismissed the application on the basis that the claim lacked merit.

In terms of the second issue, the Supreme Court concluded the assisted suicide prohibition was a measure which the UK Parliament was able to enforce, as it fell within the measure of appreciation afforded under the Convention. In responding to the issue of ‘institutional inappropriateness’, the Supreme Court confirmed it was open to the English courts to give such a declaration under Section 4(2) of the HRA 1998, if it considered that Section 2(1) breached Article 8(1) and the interference could not be justified under Article 8(2) (see Appendix 4).

Yet, given the imminence of events involving Westminster’s consideration of an Assisted Dying Bill later that year, the Supreme Court deemed it inappropriate to give a declaration before Parliament could consider the issue. This decision appeared as a shift in judicial attitudes compared to the prevailing judicial deference of the House of Lords in the case of

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97 R (on the application of Kenward and another) v Director of Public Prosecutions and another (AM intervening) [2015] EWHC 3508 (Admin)
98 R (on the application of Nicklinson and another) v Ministry of Justice; R (on the application of AM) (AP) v DPP [2014] UKSC 38 [66] (Lord Neuberger), [154] (Lord Mance), [218] (Lord Sumption), [267] (Lord Hughes), [339] (Lord Kerr)
99 ibid [90]-[98] (Lord Neuberger), [259] (Lord Hughes)
100 ibid [76] (Lord Neuberger), [191] (Lord Mance), [299] (Lady Hale), and [326] (Lord Kerr)
101 Human Right Act 1998 Section 4(2)
102 R (on the application of Nicklinson and another) v Ministry of Justice; R (on the application of AM) (AP) v DPP [2014] UKSC 38 [100] (Lord Neuberger)
104 R (on the application of Nicklinson and another) v Ministry of Justice; R (on the application of AM) (AP) v DPP [2014] UKSC 38 [113], [115]-[116]
Indeed in 2001, soon after the HRA 1998 came into force, the House of Lords – the highest court of the land with over 600 years of experience – supported the need for assisted suicide prohibition. Yet, in 2014, five years from it being established, the Supreme Court announced the likelihood that a declaration of incompatibility in connection with Section 2 of the 1961 Act may be given in the future. While this shift appears meaningful owing to the contrasting judicial attitudes, the Supreme Court statement did nothing more than to acknowledge what was in fact provided by Westminster Parliament within the HRA 1998. What indicated a clear attitudinal shift was that several judges went to the point of conceptualising potential criteria for lawful assisted dying provisions and two judges were prepared to give a declaration at that time.

For the President of the Supreme Court, Lord Neuberger, ‘an open and professional way’ of enabling assisted dying with greater ‘protection for the weak and vulnerable’ was said to involve a judge – acting as an independent assessor – tasked with ascertaining whether the individual seeking such assistance has reached ‘a voluntary, clear, settled and informed wish to die’. Thus the emphasis here is on reaching a decision where the influencing factor would be consent to the act which is demonstrably free from coercion (another influencing factor). Lord Neuberger distinguished this from the current approach, which does not confer any safeguards for such individuals, as it relies on aftermath investigations by a lawyer from the DPP’s office, who tries to establish the victim’s wishes and the suspect’s motives, post-death. In this way his Lordship emphasised the circumstances of his suggested model as a

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105 R (on the application of Pretty) v DPP [2001] UKHL 61
107 R (on the application of Nicklinson and another) v Ministry of Justice; R (on the application of AM) (AP) v DPP [2014] UKSC 38 [76] (Lord Neuberger), [191] (Lord Mance), [299] (Lady Hale), and [326] (Lord Kerr)
108 ibid [299]-[300], [317] (Lady Hale), [356] (Lord Kerr)
109 ibid [107]-[108] (Lord Neuberger)
110 ibid [108]
more appropriate and satisfactory approach in dealing with those seeking assisted death and with compassionate friends or relatives, who currently risk prosecution.\[111\]

Both Lord Kerr and Lord Wilson supported this proposition.\[112\] In fact, Lord Wilson identified 18 factors that could be considered by judges assessing the genuineness of such decisions.\[113\] Lord Mance and Lady Hale also agreed.\[114\] Lady Hale observed that such an arrangement would be better suited to provide protection of the vulnerable, pre-death.\[115\] Mrs Nicklinson and Mr Lamb brought their case before the Strasbourg Court. Their applications were deemed inadmissible.\[116\]

In terms of the assisted dying debate, the Supreme Court judgment created hope for future claims,\[117\] especially since two Supreme Court judges – Lady Hale and Lord Kerr – were willing to give a declaration.\[118\] Three further claimants went on to challenge the law.

\textit{A Voluntary, Clear, Settled, and Informed Wish to Die – Mr Conway}

Given the judicial exploration of potential assisted dying criteria in \textit{Nicklinson}, the next claimant was inspired to propose a scheme likely to strike a new balance between the interests of the community and those of the individual under Article 8(1) of the Convention. The claimant, Mr Noel Conway, had been diagnosed with motor neuron disease (‘MND’), ‘a

\[\begin{align*}
\text{\[111\] & ibid} \\
\text{\[112\] & ibid [205] (Lord Wilson), [355] (Lord Kerr)} \\
\text{\[113\] & ibid [205] (Lord Wilson)} \\
\text{\[114\] & ibid [186] (Lord Mance), [316] (Lady Hale)} \\
\text{\[115\] & ibid [316]} \\
\text{\[116\] & \textit{Jane Nicklinson against the United Kingdom and Paul Lamb v the United Kingdom} Applications Nos 2478/15 and 1787/15 (ECHR 2015)} \\
\text{\[117\] & E Wicks, ‘The Supreme Court Judgment in Nicklinson: One Step Forward on Assisted Dying; Two Steps Back on Human Rights’ Medical Law Review 23(1) (2014) 144-156} \\
\text{\[118\] & \textit{R (on the application of Nicklinson and another) v Ministry of Justice; R (on the application of AM) (AP) v DPP} [2014] UKSC 38 [299]-[300], [317] (Lady Hale), [356] (Lord Kerr)}
\end{align*}\]
degenerative and terminal illness’ in 2014. Faced with the prolonged and painful process of dying guaranteed by his medical condition, Mr Conway wished to have the choice to seek the assistance of ‘a medical professional […] to bring about his peaceful and dignified death’ at a point when he no longer wished to live. The scheme aimed to allow terminally ill, mentally competent individuals (over 18 years of age), with a clear, voluntarily settled and informed decision, to access lawful assisted death complete with adequate safeguards.

Mr Conway sought a declaration of incompatibility under Section 4(2) of the HRA 1998 that Section 2(1) of the Suicide Act 1961 is incompatible with his rights under Articles 8(1) and 14 of the Convention. The application for Judicial Review was denied on the basis that there had been no new developments since the decision in Nicklinson to render a different outcome in the case. In particular, Parliament had since considered the issue of legalisation by way of Private Members’ Bills on Assisted Dying in both the House of Lords and the House of Commons, with the latter Bill being defeated by 330 to 118 votes.

Mr Conway applied for permission to appeal the decision of the Divisional Court. In acknowledging the similarity of the issues to those in Nicklinson, the court distinguished the facts in the appeal as ‘a more wide-ranging selection of primary factual and expert evidence.’ Thus, both the permission to appeal and permission to apply for Judicial Review were

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120 ibid
121 ibid [1]
122 ibid [4]-[5] (Burnett LJ), [58] (Jay J)
123 ibid [5]
124 Assisted Dying HL Bill (2013-14)
125 HC Deb 11 September 2015, vol 599, cols 656-728
126 R (Conway) v the Secretary of State for Justice [2017] EWCA Civ 275
127 ibid [40]
As the claim returned to the High Court, the case became distinctive for providing the outline of a scheme as an alternative approach to the blanket prohibition on assisted suicide. Still, Lord Kerr had already pointed out that deliberation of an alternative protection to that under Section 2(1) did not require the courts to examine its precise conditions. Nevertheless, this strategy received academic criticism as continuing a ‘novel, and disturbing, new trend’ since Nicklinson.

In assessing the issue of compatibility, the court had to consider the obligation of the UK under Article 8, which establishes positive substantive obligations regarding ‘respect for [an individual’s] private and family life, his home and his correspondence’. These rights are defined broadly, offering the ECtHR the flexibility to develop its jurisprudence in harmony with ‘social and technological developments’. Furthermore, Article 8(1) places a negative obligation on states to avoid arbitrary interference with these rights. However, in line with Article 8(2), public authorities may interfere with these protected rights so long as this is ‘in

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128 ibid [42] (Beatson LJ)
129 The Queen (on the application of Noel Douglas Conway) v The Secretary of State for Justice (1) Humanists UK (2) Care Not Killing (3) ND Yet UK (1) The Crown Prosecution Service (2) Attorney General [2017] EWHC 2447 (Admin)
130 R (on the application of Nicklinson and another) v Ministry of Justice; R (on the application of AM) (AP) v DPP [2014] UKSC 38 [107] (Lord Neuberger), [188] (Lord Mance), [355] (Lord Kerr)
131 The Queen (on the application of Noel Douglas Conway) v The Secretary of State for Justice (1) Humanists UK (2) Care Not Killing (3) ND Yet UK (1) The Crown Prosecution Service (2) Attorney General [2017] EWHC 2447 (Admin) [14]; The scheme was similar in content as Lord Falconer’s Bill and included the requirement that a High Court Judge consents to granting a voluntary request for lawful assisted death.
132 R (on the application of Nicklinson and another) v Ministry of Justice; R (on the application of AM) (AP) v DPP [2014] UKSC 38 [355] (Lord Kerr)
134 Wicks (2014) 154
135 ECHR Article 8
137 ibid [4]
138 ibid [5], [7]
accordance with the law, in pursuit of a legitimate aim, and necessary in a democratic society." Accordingly, the court had to consider the following questions:

(a) is the legislative objective sufficiently important to justify limiting a fundamental right?; (b) are the measures which have been designed to meet it rationally connected to it?; (c) are they no more than are necessary to accomplish it?; and (d) do they strike a fair balance between the rights of the individual and the interests of the community?

As regards the matters of legitimate aim (a), rational connection (b) and necessity (c), the court concluded ‘the prohibition in [S]ection 2 is necessary to protect the weak and vulnerable’. The matter of necessity was largely based on Lord Sumption’s rationale, that the current legislative construct accounts for the potential ‘vulnerability’ of individuals who may not be ‘as intelligent, articulate or determined as Diane Pretty or Tony Nicklinson’. This vulnerability is considered as one linked to the mental capacity of the individual and hints to the possibility of them having a mental illness. Yet, Lord Sumption’s approach to vulnerability is largely based on a presumed need for protection.

However, this assumption that mentally competent individuals with physical disabilities ought to ‘be treated as a vulnerable person, whose personal autonomy must be restricted in the name of protecting them’ was argued by Draghici to amount to moral paternalism. Indeed, a

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139 R (Conway) v The Secretary of State for Justice [2017] EWHC 2447 (Admin) [77]-[78]
141 R (Conway) v The Secretary of State for Justice [2017] EWHC 2447 (Admin) [91]
142 ibid [95]
143 ibid [100]-[111]
144 ibid [111]
145 ibid [101] and [110] quoting Lord Sumption in R (on the application of Nicklinson and another) v Ministry of Justice; R (on the application of AM) (AP) v DPP [2014] UKSC 38 [228] and [232]
146 ibid [101]
different take on vulnerability particularly in terms of the pain and suffering caused by their medical condition was not explored. Thus, Lord Sumption’s scrutiny addresses the theoretical aspects of the prohibition in that the prohibition prevents abuse of vulnerable individual and a potential slippery slope.\footnote{R (Conway) v The Secretary of State for Justice [2017] EWHC 2447 (Admin)} Yet, beyond acknowledging that no doubt ‘both assisted suicide and euthanasia occur’,\footnote{R (on the application of Nicklinson and another) v Ministry of Justice; R (on the application of AM) (AP) v DPP [2014] UKSC 38 [227] (Lord Sumption)} Lord Sumption’s analysis fails to consider the implications of the prohibition in practice; in particular, post-death investigation is not equipped to assist those vulnerable individuals before the event.

In dealing with the matter of proportionality (d), the court went on to consider the status of Mr Conway’s medical condition,\footnote{ibid [117]} indicating the options available to him ‘cannot fairly be characterised as amounting to a form of cruelty’.\footnote{ibid} This observation was based on the notion that because Mr Conway was expected to die soon\footnote{ibid [7]} – and the fact of palliative care being an option for him (in the sense that it was capable of contributing to hastening his death) – made his interests ‘less badly affected’ by contrast to those of claimants in *Nicklinson*.\footnote{ibid} Moreover, failing this, Mr Conway would be entitled to refuse his non-invasive ventilator which, in due course (minutes, hours, or days),\footnote{ibid [26]} would cause him to choke and eventually die\footnote{ibid [24]} – a so-called option, available to him even if he reached a ‘locked-in state’.\footnote{ibid [24]} The court concluded the current prohibition achieved a fair balance between the interests of the wider community and those of people in Mr Conway’s position.\footnote{ibid [118]} Mr Conway appealed this decision.\footnote{R (on the Application of Conway) v The Secretary of State for Justice and (1) Humanists UK (2) Not Dead Yet (UK) (3) Cnk Alliance Ltd [2018] EWCA Civ 1431}
The Court of Appeal had to decide whether the assisted suicide blanket prohibition was a breach of the Convention rights as a matter of domestic law under the HRA 1998. In considering the decision in Pretty the court found it was not bound by the previous finding that the prohibition was justified under Article 8(2) since that case was connected to a question on ‘euthanasia rather than assisted suicide’. Moreover, the Supreme Court’s decision in Nicklinson was also identified as having no direct relevance, since the legal arguments were based on the premise that claimants experienced ‘long-term suffering’, as opposed to being terminally ill and expected to die within months, as indicated by Mr Conway’s proposed scheme.

The court indicated the available evidence did not demonstrate the effectiveness of the proposed scheme. Furthermore, given the wide-ranging policy, moral and ethical issues raised by implementing such a framework, Parliament was deemed to be better suited to deal with such complex matters ‘on which society is divided and many people hold passionate but opposing views’. Accordingly, the Court of Appeal found that Section 2 achieved a fair balance. Mr Conway pressed on with his case and applied to the Supreme Court for permission to appeal the order and the notice of objection.

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159 ibid [1]
160 ibid [126]
161 ibid [116], [134]
162 ibid [134]
163 ibid [141]-[142]
164 ibid [178]
165 ibid [139]-[141]
166 ibid [135]
167 ibid [206]
168 R (on the application of Conway) v The Secretary of State for Justice Application for Permission to Appeal to the Supreme Court of the United Kingdom, 27 November 2018. This was an application for permission to appeal the order made by the Court of Appeal on 27 June 2018 and of the notice of objection filed by the Respondent (‘Conway Application’).
In considering the application, the composition of the Supreme Court panel – Lady Hale, President of the Supreme Court, Lord Kerr, and Lord Reed – generated a certain level of anticipation for the assisted dying debate especially as two of the Supreme Court judges had previously been willing to officially declare the incompatibility of Section 2(1) with Article 8(1) rights. Still, the court concluded that the prospects of success ‘in this case’ were ‘not sufficient to justify giving permission to appeal’. Therefore, the opportunity for a full evaluation of the compatibility issue was missed. That said, it is possible that this outcome could have been predicted. The possible reasons for and effect of this decision, in light of previous judgments on the same issue, are central to the evaluation undertaken later in this chapter.

 Searching for the ‘Right’ Case – Mr T

In parallel with Mr Conway’s action, the High Court also heard an application for Judicial Review brought by Mr ‘Omid T’ (Mr T), who was granted anonymity to protect his identity. This matter presented striking differences to the one in Conway. Mr T suffered from Multiple System Atrophy, a neurological non-terminal but irreversible medical disorder. Mr T constantly relied on others for his daily routine, he was bedbound, had poor mobility, his speech and his limb function were severely impaired. Proceedings for his claim began on 14 March 2017, seeking a declaration that Section 2(1) was incompatible with Articles 2 and 8 of the Convention, as adopted under the HRA 1998. By July 2017, 11 experts had filed their evidence as regards the impact of implementing a system capable of protecting the rights of

169 ibid [8]
170 S Foster, ‘R. (Conway) v Ministry of Justice: assisted suicide - right to die - right to private life - incompatibility of domestic law - judicial deference’ Cov LJ 2018, 23(1), 122-125
171 R (on the application of Omid T) v The Ministry of Justice [2017] EWHC 3181 (Admin) [2]
172 ibid
173 ibid [2], [36]
Nevertheless, in December 2017 a Divisional Court ordered a preliminary issue to be tried to decide whether it was ‘appropriate for the court to hear primary evidence on issues of policy, in the context of a challenge to the proportionality of [S]ection 2, or whether […] this is something that only Parliament should appropriately do.’ The claimant’s application to cross-examine Baroness Finlay was adjourned to allow for determination of the preliminary issue.

As noted by Chahal, the case presented a new set of factors, previously favoured by Supreme Court judges in contemplation of making a declaration. First, Mr T represented a category of people who were not terminally ill, thus, not considered by Parliament as part of their previous debates on the issue and in relation to Assisted Dying Bills. Second, there was no option for him to refuse life-sustaining treatment apart from refusing food. Third, the expert evidence in the case was set to demonstrate the potential effect of law reform on the weak and vulnerable individuals.

In October 2018, the answer to the preliminary issue handed down by Irwin LJ was ‘no’, and Philips J agreed. Before handing down their decision, the court learned of Mr T’s lawful assisted suicide in Switzerland. The claim made no further progress because Mr T had been a sole claimant in the case.

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175 R (on the application of Omid T) v The Ministry of Justice [2017] EWHC 3181 (Admin) [42]

176 ibid [45]

177 Saimo Chahal, ‘In Practice: Legal update: Assisted Dying: A right to autonomy and dignity’ (2017) LS Gaz 6 Nov, 26 (2)

178 R (on the application of Omid T) v The Ministry of Justice [2018] EWHC 2615 (Admin) [24]

179 ibid [28]

Since the Supreme Court’s refusal to hear the Conway Application, two further claimants have attempted to challenge the law. Yet, claimants’ resilience seems to be met with a higher level of resistance. Two attempts have so far been deemed not justiciable.

First was Mr Philippe Newby, diagnosed with MND in May 2014. At the time of writing, Mr Newby is the only individual (among claimants in these cases) who is still alive. The progressive nature of his medical condition means that, with each month that passes, his ability to carry out daily tasks, including going to the toilet, have continued to diminish. He requires help from others to dress, undress and even with his personal hygiene. Mr Newby sought a Judicial Review on the basis that Section 2(1) prohibition breaches his rights under Articles 2 and 8. Permission was refused on the basis that the court was not the appropriate forum to consider and determine matters of sanctity of life or for resolution of issues that go beyond the analysis of evidence or judgement governed by legal principle. The claim made no further progress.

Second was Mr Lamb who, five years from the decision of the Supreme Court in Nicklinson, returned before the High Court to argue that the current legislation breaches his rights under Article 8(1) and Article 14 (Protection from discrimination). Mr Lamb distinguished his circumstances from those previously stated in cases involving Mr Conway and Mr Newby, in

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181 The Queen on the Application of Philippe George Newby v The Secretary of State for Justice [2019] EWHC 3118 (Admin) [5]
182 ibid
183 ibid [2]-[3]
184 ibid [40], [43], [50]
185 ibid [42]
that Mr Lamb is not able to end his life by refusing life-sustaining treatment or by removing life-sustaining medical equipment, such as a non-invasive ventilator (‘NIV’). The application was rejected and did not proceed to a full hearing as the court concluded the case was unarguable.\(^{188}\)

Consequently, to date, the case of *Nicklinson* remains the authoritative case on the issue of assisted dying law reform.

*Assisted Death and Human Dignity*

While the overall essence of judicial deliberations in these cases holds the current legislative prohibition as a justified interference with Article 8(1), there is a sense that the message claimants endeavoured to convey remains inconclusive. Thus, alongside the struggles posed by legal challenges, there is a profound cry for help which, within the context of the law, is destined to remain severely muted.

Mrs Pretty wished to be spared the suffering and indignity which she expected to endure if the disease ran its course.\(^{189}\) Ms Purdy wanted the option to choose a dignified death when her quality of life was no longer adequate.\(^{190}\) Mr Nicklinson considered his life as ‘dull, miserable, demeaning, undignified and intolerable’ and wished to put an end to it.\(^{191}\) Martin regarded his existence as ‘undignified, distressing and intolerable’ despite being devotedly cared for by his wife and carers.\(^{192}\) Mr Lamb described his life as ‘a mixture of monotony, indignity and

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\(^{189}\) *R (on the application of Pretty) v DPP* [2001] EWHC Admin 788 [5] (Lord Justice Tuckey)

\(^{190}\) *R (on the application of Purdy) v DPP* [2009] UKHL 45 [59] (Lady Hale)

\(^{191}\) *R (on the application of Nicklinson and another) v Ministry of Justice; R (on the application of AM) (AP) v DPP* [2014] UKSC 38 [3] (Lord Neuberger)

\(^{192}\) ibid [9]
Mr Conway wished to end his life when he considered it was ‘the right moment to do so, in a way that is swift and dignified’. Mr T admitted his medical condition meant that he needed help to end his life ‘safely and painlessly and with dignity’. Mr Newby wished to have the right to end his own life when he considered he ‘had run out of road – and not before’. These claimants are unable to choose an assisted ‘dignified’ death even though the ECtHR maintains that ‘[t]he very essence of the Convention is respect for human dignity and human freedom’. In the context of a good death as defined in this thesis (see Chapter One), these claimants highlight the inability, within the current system, for individuals to access a compassionate intervention by a medical professional – complete with adequate protection in the form of recognised safeguards – that enables them to have a painless (as far as possible) death upon request, provided their decision is voluntary and free from coercion.

Yet, conveying the principles of human dignity as a way of highlighting the need to carve out a lawful choice to have an assisted death, is left in the hands of legal representatives, despite acknowledging ‘[t]here is hardly any legal principle more difficult to fathom in law that that of human dignity’ (quote in original translation). The notion of dignity has been outlined by Gearty as one of the three determinative principles when applying human rights legislation, alongside legality and respect for civil liberties. For instance, the English Bill of Rights of

\[\text{\textsuperscript{193}}\text{ ibid [8]}\]
\[\text{\textsuperscript{194}}\text{ R (on the Application of Conway) v The Secretary of State for Justice and (1) Humanists UK (2) Not Dead Yet (UK) (3) Cnk Alliance Ltd [2018] EWCA Civ 1431 [4]}\]
\[\text{\textsuperscript{195}}\text{ R (on the application of Omid T) v The Ministry of Justice [2018] EWHC 2615 (Admin) [1]}\]
\[\text{\textsuperscript{196}}\text{ The Queen on the Application of Philippe George Newby v The Secretary of State for Justice [2019] EWHC 3118 (Admin) [6]}\]
\[\text{\textsuperscript{197}}\text{ Pretty v United Kingdom (2002) 35 EHRR [65]}\]
\[\text{\textsuperscript{200}}\text{ C Gearty, Principles of Human Rights Adjudication (Oxford, OUP, 2004) 4}\]
1689 made reference to ‘the Crown and royal Dignity’. Indeed, even without a codified constitution, the United Kingdom incorporated the notion of dignity into English Law with the ratification of the Human Rights Act of 1998.

International Human Rights Instruments and national constitutions explicitly provide for the protection of dignity. Chapter I of The Charter of Fundamental Rights of the European Union, usefully entitled ‘Dignity’, states in Article 1 that ‘[h]uman dignity is inviolable. It must be respected and protected.’ The Preamble for the Universal Declaration of Human Rights establishes for its signatories, including the United Kingdom, that ‘the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world’. Article 1 of the same provides that ‘[a]ll human beings are born free and equal in dignity and rights.’ The significant role of dignity in human rights matters is also reaffirmed by the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights, both providing that ‘human rights derive from the inherent dignity of the human person’.

Albeit mentioned only once within the European Convention on Human Rights (‘the Convention’), the ‘inherent dignity of all human beings’, as described in the preamble, is at the core of this instrument which provides for the rights of all humans. Furthermore, the notion of dignity has been considered by courts in various cases including same-sex couples.
patients, prisoners, detainees, asylum seekers, women seeking abortions as well as cases involving individuals wishing to have assistance in ending their lives. In the case of *Bland*, one legal representative noted that ‘[h]uman dignity […] is not an abstract metaphysical notion it is an established and orthodox legal concept which can be judged objectively by a court or tribunal, whether by our courts or by the European Court of Human Rights.’

Coggon rightly concedes the term would be better defined by the individual patient as their best interests extend beyond medical questions to ethical, social, moral, emotional and welfare matters. This is expected to be especially important in the context of a request for lawful assisted dying as it offers the nuanced perspective of the individual wishing to die. Formosa provides more depth to this concept and identifies two kinds of dignity – status dignity and achievement dignity. The two are identified and contrasted by answering five questions:

1. Scope: Who or what has dignity?  
2. Types: Are there different types of dignity, such that two beings with dignity might possibly have different levels or types of dignity?  
3. Ground: What is the basis or ground of dignity and why do some beings have it and others do not?  
4. Internal implications: How should beings with dignity be treated by themselves and others?  
5. External implications: What does the concept of dignity imply about how we should treat beings or things which lack dignity?

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208 R (on the application of Burke) v General Medical Council [2005] EWCA Civ 1003
209 Grant v Ministry of Justice [2011] EWHC 3379 (QB)
210 R (on the Application of (HA) (Nigeria)) v Secretary of State for the Home Department [2012] EWHC 979 (Admin)
211 NS v Secretary of State for the Home Department [2012] 2 CMLR 9
212 RR v Poland (2011) ECHR 31
213 Nicklinson v Ministry of Justice [2012] EWHC 304 (QB)
214 Airedale NHS Trust v Bland [1993] AC 789; Lester QC at 848
215 Ibid [221]
216 P Formosa, ‘Nussbaum, Kant, and the Capabilities Approach to Dignity’ Ethic Theory Moral Prac (2014)
17:875, 876
217 Ibid 877-878
Thus, the matter of ‘dignity’ is approached in a way relevant to individuals who ‘have dignity’ and can demonstrate this, differentiating themselves from individuals unable to establish ‘dignity’ due to various medical conditions. As such, it was found that conceptions adopted as to the status dignity or achieved dignity are linked to the personal views and opinions of the notion. Based on Shroeder’s findings regarding euthanasia debates dealing with human ‘dignity’, those defending euthanasia focus on achievement dignity, pertaining to bodily behaviour and control, while rejecting the notion of status dignity, assumed by those against euthanasia. 218 Formosa is certain that one may adopt only one type of dignity but not the other. 219 Nevertheless, the subjective matter of the issue of dignity ought not to be toned down.

The meaning of dignity from a legal perspective has been considered within vast scholarship dedicated to it – despite Gaylin once noting ‘the literature on dignity is a sparse one’. 220 Glensy observed that notwithstanding the ‘increased attention’ devoted to dignity at present, ‘the notion of the role of human dignity within law is still an underexplored topic’. 221 Legal scholars such as Dworkin, 222 Alexy 223 and Waldron, 224 have analysed the role of dignity within legal normativity, analysing its status, purpose, and specifically its relationship with substantive rights. This is also evident from the fact that the ECtHR continues to use the concept of dignity to justify its decision-making. 225

219 P Formosa, Nussbaum, Kant, and the Capabilities Approach to Dignity, Ethic Theory Moral Prac (2014) 17:875, 878
225 B Rainey, Human Rights and Sexual Offenders, in K Harrison, B Rainey (eds), The Wiley- Blackwell Handbook of Legal and Ethical Aspects of Sex Offender Treatment and Management (Chichester, Wiley- Blackwell, 2013)
In practice, legislation which provides for punishment of offenders, includes the notion of dignity despite the need to balance it against protection of prospective future victims.\textsuperscript{226} Thus, the focus on protection of the public is based on degree of risk and may restrict an individual’s substantive rights when they themselves represent a risk to the safety of others. As such, there is a prevalent emphasis on the state’s obligation to take positive measures to safeguard the rights of all individuals and, within the context of assisted dying, the notion of dignity falls short of reaching the necessary threshold to make the cut. What is more, outside her judicial role, Lady Hale contended ‘[i]t is much easier to see [human dignity] as a value which underlies other more concrete rights than it is to see it as a right in itself.’\textsuperscript{227} Hence, the nature of legal arguments in this area is confined to the fundamental rights of the Convention. However, while the value of dignity sits in the shadow, it is nevertheless essential within the assisted dying debate and a prominent influencing factor as regards matters of compassion, vulnerability and autonomy in connection with the idea of a good death.

The remainder of this chapter examines the effect of court decisions in this area of law since the decision in \textit{Pretty}. Thus, in navigating the compatibility issues regarding domestic legislation in line with the powers conferred on them by way of HRA 1998, the English courts have demonstrated a gradual shift in judicial attitudes towards the need for an exception from the current blanket prohibition. However, while some judges are willing to support the quest for an exception to the prohibition, claimants have yet to persuade an entire court to give a declaration of incompatibility. Therefore, this chapter endeavours to also estimate the impact and meaning of judicial opinions and attitudes as regards their value as an integral part of the slow process that may lead to assisted dying law reform.

\textsuperscript{226} ibid
2.3. Framing Judicial Attitudes

The judgment of the House of Lords in *Pretty* was the first of many to demonstrate judicial deference to Parliament’s repeated decision not to change the law to allow lawful assistance with death. Nevertheless, the ECtHR’s judgment in *Pretty v UK* confirmed that the question of a choice to end one’s own life engages Article 8(1) rights, even though this interference was justified under Article 8(2) as being necessary to safeguard life and to protect the rights of others. Thus, the outcome was a technical but positive knockout that provided a stronger foundation for future legal action of this kind.

This section evaluates judicial attitudes and deliberations regarding the possibility of closing in on the current legislative construct prohibiting any assistance with the death of another.

*Judicial Deference to Parliament: An Imaginary U-turn?*

The judgment of the House of Lords in *Pretty* was the first to demonstrate judicial deference to Parliament on the issue of assisted dying law reform. In the two legal challenges of *Purdy* and *Nicklinson*, which followed the case of *Pretty*, the judgments of domestic courts seemed to indicate the emergence of a shift in judicial attitudes, as regards a willingness to step on the opposite side of the Westminster Parliament on the issue of assisted suicide prohibition. Therefore, while the decisions were deemed successful – in that the House of Lords (in *Purdy*) ordered the DPP to publish the Policy and later the Supreme Court clarified this further

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228 *Pretty v UK* (2002) 35 EHRR 1
229 ibid [4]
230 R (on the application of Purdy) v DPP [2009] UKHL 45
231 R (on the application of Nicklinson and another) v Ministry of Justice; R (on the application of AM) (AP) v DPP [2014] UKSC 38
232 Kate Greasley, ‘R(Purdy) v DPP and the Case for Wilful Blindness’ Oxford Journal of Legal Studies, Vol 30, No 2 (2010), 301-326, 305
pursuant to the decision in *Nicklinson* – in reality, they merely prolonged the sustainability of the current legislative construct.

On reflection, both decisions merely endorsed the application of Section 2(1) prohibition by confirming the resiliency of the current system through prosecutorial discretion under Section 2(4), serving as a safeguard mechanism by way of DPP consent. Yet, the issue is with Parliamentary sovereignty. Essentially, considerations of a change of legislation regarding assisted dying ‘transcend public importance’ and engage social, political, legal, and medical questions. To this end, judicial opinion, even in the context of constitutional authority handed down by the Westminster Parliament, is handled with great care. Thus, within the context of the HRA 1998, which provides that courts may declare domestic legislation not to be in accordance with Convention rights, the courts defer to the current legislative construct and Westminster’s recurring decision (regarding Bills and debates on issues of this kind) to uphold the blanket prohibition.

That said, in the unrelated but widely documented matter of Brexit in the case of Miller, the Supreme Court demonstrated a less deferential approach in a remarkable development which rehashed Parliament’s sovereignty. Thus, it is fathomable for the more wide-ranging question of assisted suicide prohibition to become subject to a similar treatment by a judicial panel, should an opportunity arise. This section traces the judicial deference to the Westminster

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233 *R (on the application of Conway) v The Secretary of State for Justice Application for Permission to Appeal to the Supreme Court of the United Kingdom, 27 November 2018 [5]*

234 Human Rights Act 1998 Section 4

235 S Foster, ‘Back to you: judicial deference, Parliament and the right to die’ Coventry Law Journal, 2019, 24(2) 105-115 (2019a)


237 Draghici (2015)

238 *R (on the application of Miller) (Appellant) v The Prime Minister (Respondent) Cherry and others (Respondents) v Advocate General for Scotland (Appellant) (Scotland) [2019] UKSC 41*
Parliament in a bid to analyse the layers of complexity behind judicial decision-making in this area, in dealing with issues of assisted suicide prohibition.

First, came the decision in *Purdy* which appeared as a deviation from traditional deference to Parliament (in the earlier case of *Pretty*). Mrs Purdy challenged the DPP for failing to ‘promulgate a specific policy’ as to the approach to prosecution under Section 2(4) in connection with a Section 2(1) offence. In essence, the principle of legality under the Convention required domestic legislation (in this instance Section 2(4) application) to be sufficiently accessible and foreseeable to individuals impacted by it. In this way, they could foresee the likely consequences of involvement with assisted suicide. While in theory this landmark decision was said to represent a manifestation of the ‘spirit of judicial supremacy over the positive law itself’, arguably aimed at achieving ‘de facto (but legally sanctioned and articulated) immunity from criminal prosecution’, in practice, there was no tangible change in the manner of application of the law by the DPP.

Indeed, the decision in *Purdy* enabled the outing of a practice already established since the enactment of Section 2 in 1961, by way of Section 2(4). This was evidenced by judicial remarks

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239 *R (on the application of Purdy) v DPP* [2008] EWHC 2565 (Admin) [5] (Lord Justice Scott Baker)

240 *Hasan and Chaush v Bulgaria* (2000) 34 EHRR 1339 [84] the court stated:

‘For domestic law to meet these requirements [that is, of accessibility and foreseeability] it must afford a measure of legal protection against arbitrary interferences by public authorities with the rights safeguarded by the Convention. In matters affecting fundamental rights it would be contrary to the rule of law, one of the basic principles of a democratic society enshrined in the Convention, for a legal discretion granted to the executive to be expressed in terms of an unfettered power. Consequently, the law must indicate with sufficient clarity the scope of any such discretion conferred on the competent authorities and the manner of its exercise.

The level of precision required of domestic legislation - which cannot in any case provide for every eventuality - depends to a considerable degree on the content of the instrument in question, the field it is designed to cover and the number and status of those to whom it is addressed.’

241 ibid [40]


244 ibid
in support of the DPP’s published decision in the case of Daniel James.\textsuperscript{245} As noted by Lord Brown, the statement had ‘done enough to establish that the blanket ban on assisting suicides is being operated “in accordance with the law”.’\textsuperscript{246} Essentially, the DPP’s approach was recognised as one that, over the years (and especially by way of the statement made), has demonstrated the ability to deal with the troublesome instances under Section 2.\textsuperscript{247} Accordingly, as Lord Hope remarked, the role of judges is ‘to say what the law is and, if it is uncertain, to do what we can to clarify it’.\textsuperscript{248} The decision highlighted that the practice surrounding prosecutorial decision-making could be clearer.

In retrospect, the judicial opinions in \textit{Pretty} had already raised the incidental matter that the DPP could make a statement regarding their prosecuting policy in instances of assisted suicide ‘other than in the Code for Crown Prosecutors which he [was] obliged to issue by Section 10 of the Prosecution of Offences Act 1985’.\textsuperscript{249} In fact, both Lord Bingham\textsuperscript{250} and Lord Hope\textsuperscript{251} articulated this point. Hence, the development in \textit{Purdy} advanced only so far as the authority of DPP under Section 2(4) could extend. This was on the premise that the DPP was an authority as prescribed under Section 6(1) of the HRA 1998, and thus, was expected to act or not omit to act as required under Section 6(6) of the same.\textsuperscript{252} Thus, only the publishing of the DPP Policy was deemed as being ‘in accordance with the law’.

Furthermore, as noted by Lord Hope, the courts could go no further than this, since the way in which the DPP went about fulfilling this task is ‘a matter for him, as also must be the ultimate

\begin{footnotes}
\item \textsuperscript{245} Bedeutung, ‘Decision on Prosecution: The Death by Suicide of Daniel James, Statement of Keir Starmer’ \[35\] <\texttt{http://www.bedeutung.co.uk/magazine/issues/3-life-death/starmer-prosecution-suicide-daniel-james/}> accessed 2 Apr 2020
\item \textsuperscript{246} \textit{R (on the application of Purdy) v DPP} [2009] UKHL 45 [85] (Lord Brown)
\item \textsuperscript{247} See section 1.3. in Chapter One
\item \textsuperscript{248} ibid [26] (Lord Hope)
\item \textsuperscript{249} \textit{R (on the application of Pretty) v DPP} [2001] UKHL 61 [39] (Lord Bingham)
\item \textsuperscript{250} ibid
\item \textsuperscript{251} ibid [80]
\item \textsuperscript{252} Human Rights Act 1998 Sections 6(1) and 6(6)
\end{footnotes}
decision as to whether or not to prosecute.'\textsuperscript{253} Nevertheless, the outcome demonstrated the importance of the ‘creative function of judges’\textsuperscript{254} in influencing the tectonic plates of the way in which legislation is enforced. This left the wider implications of the DPP Policy in respect of individual’s rights under the Convention for future claimants.

Second, came the decision in \textit{Nicklinson}\textsuperscript{255} which enabled the further clarification of the DPP Policy, while confirming the readiness of the Supreme Court to give a declaration ‘in the right case and at the right time’.\textsuperscript{256} While the latter has yet to materialise (investigated later in this chapter), the former point regarding the clarification of the Policy – relevant for this discussion – translated into the addition of a footnote to the DPP Policy. Still, the need for this further amendment, while navigated by judicial reasoning in the case, was only possible because of an error during proceedings rather than an instruction by the Supreme Court.

The error emerged before the Supreme Court as counsel for the DPP accepted the interpretation of paragraph [43.14] of the Policy\textsuperscript{257} as depicted by the previous Court of Appeal judgment in the case.\textsuperscript{258} Essentially, the argument pointed to the conclusion that the Policy was not sufficiently clear regarding the effect of involvement\textsuperscript{259} of a ‘professional carer who, with no earlier responsibility for the care of the victim, comes in from outside to help’ with arrangements for an assisted suicide abroad.\textsuperscript{260} Acknowledging the Policy ought to ‘correctly

\textsuperscript{253} \textit{R (on the application of Purdy) v DPP} [2009] UKHL 45 [55] (Lord Hope)
\textsuperscript{255} \textit{R (on the application of Nicklinson and another) v Ministry of Justice; R (on the application of AM) (AP) v DPP} [2014] UKSC 38
\textsuperscript{256} ibid [299] (Lady Hale)
\textsuperscript{257} DPP Policy [43.14] stated (before update): ‘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’.
\textsuperscript{258} \textit{R (on the application of Nicklinson and another) v Ministry of Justice; R (on the application of AM) (AP) v DPP} [2014] UKSC 38 [251] – Here Lord Sumption referred to Lord Judge CJ in \textit{R (Nicklinson) v Ministry of Justice} [2013] EWCA Civ 961 [185]-[186]; [2014] 2 All ER 32
\textsuperscript{259} ibid [143] (Lord Neuberger)
\textsuperscript{260} \textit{R (Nicklinson) v Ministry of Justice} [2013] EWCA Civ 961 [185]-[186] (Lord Chief Justice)
[represent] her policy’, 261 Alison Saunders, the DPP at that time, undertook to cure 262 the ‘extraordinary anomaly’. 263 However, this evolution was merely a procedural clarification of the application and interpretation of a single public interest factor by the DPP, far from an indication of judiciary readiness to involve itself with the content of the DPP Policy. In fact, based on accepting the ‘extraordinary anomaly’, the court merely anticipated the DPP would update their Policy. 264 After all, as Lord Neuberger clarified, ‘it would not be right for a court […] to dictate to the DPP what [their] policy should be.’ 265 Thus, as regards the scope of the decision-making process, the courts could go so far as to point to the inconsistencies of interpretation and clarification of the approach as related by the DPP.

Therefore, so far as the development of the DPP Policy is concerned, any argument of an apparent shift in judicial attitudes towards change of legislation 266 as a rationale influencing the decisions in Purdy and Nicklinson must fail. In fact, as demonstrated in this section, the emergence of an offence-specific guidance in the form of a published DPP Policy had already been signalled in Pretty in 2001 and had even been anticipated by Lord Denning as early as 1985. 267 Still, while the developments prompted by Purdy and Nicklinson represent a necessary progression of the current system in preserving the resilience of Section 2(1) prohibition via

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261 R (on the application of Nicklinson and another) v Ministry of Justice; R (on the application of AM) (AP) v DPP [2014] UKSC 38 [250] (Lord Sumption)
262 DPP Policy
263 R (Nicklinson) v Ministry of Justice [2013] EWCA Civ 961 [185]-[186] (Lord Chief Justice)
264 R (on the application of Nicklinson and another) v Ministry of Justice; R (on the application of AM) (AP) v DPP [2014] UKSC 38 [148(e)] (Lord Neuberger), [192]-[193] (Lord Mance), [250]-[251] (Lord Sumption), [322] (Lady Hale)
265 ibid [141]
266 Greasley (2010), 305
267 HL Deb 11 December 1985, vol 469, cols 288-318 (8.58pm) Lord Denning estimated that in time, a policy would evolve ‘from case to case’ to distinguish, for the benefit of the public, the instances where an individual’s act in connection with assisted suicide ‘ought not to be regarded as criminal and certainly ought not to be prosecuted at all’.
prosecutorial discretion under Section 2(4) of the 1961 Act, judicial interpretation is nevertheless a necessary authoritative guide that contributes to shedding light on the mechanics of the law.

*Judicial Opinion and a Possible Exception from the Blanket Prohibition*

While judgments in this area have yet to persuade the courts to make a declaration of incompatibility (examined later in this chapter), judges have been more willing to explore potential criteria for an exception from the blanket prohibition. This section explores the issues of vulnerability and physical ability of claimants seeking assistance with ending their life as represented by the courts and argues that the scope of this inquiry risks a determination of the issue of assisted dying in isolation from the wider question of personal autonomy and control at the end of one’s life. This is because – despite its wider prescribed purpose as part of judicial determination – judicial considerations appear to support the notion that access to a choice to end one’s life with assistance is contingent on the circumstances of the individual’s medical condition or even physical ability (or lack thereof).

Yet, as indicated in Chapter One, this approach is rooted in paternalism (in the sense that ‘the doctor knows best’)[268] which in itself goes against the jurisprudence of the ECtHR.[269] Nevertheless, judicial opinions on the issue have mapped out the reasoning as regards the current state of the law which, if anything, seems to put pressure on the Westminster Parliament

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[269] Haas v Switzerland (2011) 53 EHRR 33 [51]
to justify the decision to maintain the current prohibition without offering an exception to ‘those few people, who should be allowed help to end their own lives’.²⁷⁰

Who is Vulnerable?

The legislative objective of Section 2(1) of the Suicide Act 1961 is to protect the lives of the vulnerable and weak.²⁷¹ Regardless of whether this vulnerability emerges by way of the inability to make ‘informed decisions’ in connection with acts to end life,²⁷² or in the way of ‘pressures […] to consider their own lives a worthless burden to others’.²⁷³ This protection is afforded across the board, even if claimants do not consider themselves as part of this class of individuals. As such, within the current context of the law, there appears to be a strong relationship between the safeguards being afforded and the potential coercion a victim may experience if they lack the mental capacity and competence to choose assisted suicide. However, the attempt to influence law reform based on a voluntary and uncoerced decision exposes the current inadequacy of safeguards.²⁷⁴ That is to say that, beyond its potential to prevent a Section 2 offence, the measure is not capable of protecting individuals, pre-death.

Lord Neuberger highlighted this discrepancy regarding safeguards under the current law by reference to the current application of the law post-death. Thus, with the Westminster Parliament’s approval, in the aftermath of an assisted suicide a lawyer from the DPP’s office investigates the actions and motives of the suspect to determine whether the deceased had made a voluntary decision to end their life.²⁷⁵ The alternative – which Lord Neuberger believed could

²⁷⁰ R (on the application of Nicklinson and another) v Ministry of Justice; R (on the application of AM) (AP) v DPP [2014] UKSC 38 [314] (Lady Hale)
²⁷¹ ibid [81] (Lord Neuberger)
²⁷² Pretty v UK (2002) 35 EHRR 1 [74]
²⁷³ R (on the application of Purdy) v DPP [2009] UKHL 45 [65]
²⁷⁴ The imposition of a blanket prohibition is aimed to protect everyone, including vulnerable individuals.
²⁷⁵ R (on the application of Nicklinson and another) v Ministry of Justice; R (on the application of AM) (AP) v DPP [2014] UKSC 38 [108] (Lord Neuberger)
provide greater and more satisfactory protection for the weak and vulnerable’ – would involve a system enabling an independent assessor to establish the individual’s ‘voluntary, clear, settled, and informed wish to die’ pre-death, allowing for a more professional and safe approach.276 Lady Hale went a step further to reckon that ‘[i]t would not be beyond the wit of a legal system to devise a process for identifying those people […] who should be allowed help to end their own lives.’277 Indeed, this same notion had been advanced by Lord Jenkins some 20 years earlier when, in the context of the 1994 Report of the Select Committee on Medical Ethics, he noted that it would not be ‘beyond human ingenuity […] to change the law to make an exception […] that people shall be assisted to leave this life in dignity and in peace.’278

Yet, while courts deliberate the likely potential of establishing and alleviating any concerns regarding vulnerability of individuals for the purposes of making such a final decision by way of civil law, the criminal law has already embraced a network of public interest factors designed for this very purpose.279 The difference is that they are used as a way of safeguarding offenders against prosecution in instances of compassionate assistance (compassionate-helpers), within the broader sense of prosecutorial discretion in line with relevant ethical principles.280 Thus, as will be demonstrated in Chapter Four, for the DPP and even for judges in sentencing offenders under Section 2(1), a lack of vulnerability on the part of the death-seeker, coupled with a suspect whose action was ‘wholly motivated by compassion’, leads them to conclude that: (1) it is more likely than not that the death-seeker had the mental capacity (as provided by the Mental Capacity Act 2005) to make such a decision, and (2) the death-seeker had reached ‘a

276 ibid
277 ibid [314] (Lady Hale)
278 HL Deb 09 May 1994, vol 554, cols 1344-412 - Lord Jenkins of Putney 6.15pm
279 DPP Policy
voluntary, clear, settled and informed decision to commit suicide’.\textsuperscript{281} This rationality brings to the surface the apparent relationship and influencing value of the notions of compassion, vulnerability and capacity for the purposes of establishing the existence of a voluntary decision to have an assisted suicide. In turn, this serves to confirm the authenticity of compassion on the part of the compassionate-helper. However, only two instances of Section 2 offences have, so far, demonstrated the effect of vulnerability for the purposes of prosecution of defendants (see Chapter Four).

At the outset, the protection conferred under Section 2 is engaged in its broadest sense, leading to a ‘blanket’ prohibition (see section 4.3. in Chapter Four), without the option for anyone to waive this protection. Within the criminal law sphere, the scope of ‘vulnerability’ embodies two aspects. First, the law imposes the protection of those who are weak and vulnerable to indicate the existence of a group of individuals (within the wider community) who need the protection of the law – in this instance, this is provided under Section 2 of the 1961 Act. Under the current construction of the law, this class of people cannot be precisely identified,\textsuperscript{282} hence the need for a blanket prohibition. Second, in applying the law in the aftermath of the offence, both the executive, and if it comes to it the judiciary, must ask whether the death-seeker was vulnerable. This measure ensures that involvement with the act of assisting (as opposed to encouraging) suicide\textsuperscript{283} does not call for prosecution on public interest grounds.

In practice, following involvement with an assisted suicide, when deliberating the matter of vulnerability for the purposes of establishing its compassionate nature, the evidence needs to indicate that either (1) the death-seeker was not vulnerable, or (2) that the compassionate-helper

\textsuperscript{281} DPP Policy Public Interest Factors [45.1] and [45.2]
\textsuperscript{282} Save for the documented medical conditions of individuals via recognised National Health Service channels. The scope of this thesis does not allow for exploration of these conditions.
\textsuperscript{283} \textit{R v Howe} [2014] EWCA Crim 114; [2014] 2 Cr App R (S) 38 and \textit{R v Natasha Gordon} 19 January 2018 Leicester Crown Court. These cases represent successful prosecutions by the CPS for offences of assisted suicide involving vulnerable victims.
did not take advantage of the death-seeker’s alleged vulnerability (including any similar derivatives). While evidence of (1) goes to the nature of the death-seeker (under the DPP Policy), criminal liability weighs more towards (2) – to establish that the death-seeker had the mental capacity to reach the voluntary decision to commit suicide. Thus, prosecutorial discretion will side with the compassionate-helper even if the evidence points to their involvement with the death-seeker’s suicide. In this context, the outcome in the case of Daniel James stands out (see Chapter Four). Therefore, in both aspects, the Westminster Parliament endorses the current approach post-death (in the aftermath of an assisted suicide) theorising – as opposed to proving – the aspects of the death-seeker’s vulnerability (or lack thereof) at the time when the offence was committed.

Conversely, in contemplation of a potential exception to the current prohibition at civil law, judges explore the notion of vulnerability for the purposes of lawful assisted death, pre-death. Over the years, the ability to assess mental capacity in connection with end-of-life decisions has been established as a right at civil law. Patients have the right to refuse life-sustaining treatment which may bring about their protracted, swift, or agonising death, so long as they are mentally fit to make this decision. Thus, the same principle has the potential to enable judges, or an independent assessor, to evaluate an individual’s vulnerability and competence as regards making such a final voluntary decision. However, even the scope of Assisted Dying Bills criteria, at least in connection with the terminal illness requirement, would prove problematic for judicial determination (see section 3.3. in Chapter Three).

284 This was the argument against the defendant in *R v Bipin Desai* 17 November 2017 Guildford Crown Court (Mr Justice Green).
285 Save for instances where the individual may be suffering from unknown or not visible medical conditions.
286 *Re B (Consent to Treatment – Capacity)* [2002] 1 FLR 1090
One point raised by Lord Steyn in *Pretty* was that ‘[t]he terminally ill and those suffering great pain from incurable illnesses are often vulnerable.’ Yet, this is a flawed generalisation since, in the context of an assessment designed for this very purpose, an individual’s vulnerability could be adequately identified (or at the very least raised), pre-death. Thus, as already mentioned, restricting personal autonomy to protect individuals despite a voluntary, clear, settled, and informed wish to die, amounts to moral paternalism. This is especially so if, in the wider context of the issue, as Lord Wilson observed, the courts have yet to establish ‘an inability to distinguish between the expression of an intention which genuinely reflects the speaker’s wish and one which does not do so.’

Nevertheless, potential safeguards are offered under the current arrangement as opposed to a set of measures designed for the purpose of identifying – at least to the highest possible level of probability – that an individual seeking assistance to end their life is or is not vulnerable. Between investigating the issue of vulnerability in the aftermath of an offence and conducting a pre-death assessment, only the latter can offer a more reliable means of identifying vulnerable individuals, including the nature of that vulnerability, pre-death. A safeguarding mechanism of this kind is not available within the current application of the law.

*Profiling the Medical Condition*

Judicial reasoning attached to the claimants’ medical conditions progressed around various questions. The exploration of the physical ability of claimants, as a means of justifying change of legislation, is best contrasted by reference to the judicial opinions of the Supreme Court in

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287 *R (on the application of Pretty) v DPP* [2001] UKHL 61 [54] (Lord Steyn)
288 See section 2.2. in this chapter
289 *Draghici* (2015)
290 *R (on the application of Nicklinson and another) v Ministry of Justice; R (on the application of AM) (AP) v DPP* [2014] UKSC 38 [205] (Lord Wilson)
Nicklinson and their impact as regards the subsequent legal challenge presented in Conway. In connection with this discussion, three stand out: (1) Is the claimant’s death likely to occur in months or years? (2) Is the claimant physically able to bring about their own death? (3) Is it the Nicklinson-type or Conway-type claimants that justify the need for an exception to the blanket prohibition?

As already mentioned, judicial attitudes, especially those of two past Supreme Court Presidents, Lord Neuberger and Lady Hale,291 appear to favour an exception to the current blanket prohibition. However, unlike the latest Private Members’ Bills on Assisted Dying292 – which continue to predictably encompass criteria tailored293 for individuals with a terminal illness,294 with six months left to live,295 who are able to self-administer the lethal medication296 – judges appear to favour change in support of individuals who face many years of pain and indignity (due to a medical condition) and are unable to end their life without assistance.297

In terms of the first question, since Nicklinson, it became apparent that judges probed the justification of change by giving weight to a set of characteristics stemming from the claimants’ medical conditions. While pain and suffering remain a subjective matter, Conway-claimants with a prognosis of six months or less to live were categorically distinguished from Nicklinson-claimants who ‘ha[d] the prospect of living for many years a life that they regarded as valueless, miserable and often painful’.298 However, the issue of prognosis has wider implications than those assessed by judges during case proceedings. Primarily, a terminal illness diagnosis is

291 ibid [314] (Lady Hale)
292 See Chapter Three section 3.2.
293 Assisted Dying Bill 2020 Clause 1
294 ibid Clause 2(1)(a)
295 ibid Clause 2(1)(b)
296 ibid Clause 4(4)(a) and (b)
297 R (on the application of Nicklinson and another) v Ministry of Justice; R (on the application of AM) (AP) v DPP [2014] UKSC 38 [94] (Lord Neuberger), [299] (Lady Hale)
298 ibid [122] (Lord Neuberger)
something that enables individuals such as Conway-claimants to access certain state benefits. Nevertheless, these individuals may go on to live for many years beyond their estimated prognosis.

Therefore, in justifying change of legislation by reference to the length of time that a claimant would be anticipated to suffer, there is a sense of unjust arbitrariness emphasising the infringement of Article 8(1) rights. Indeed, in Lord Neuberger’s view, an exception is comparatively more justified in the instance where individuals are bound to suffer for a longer period measured in years. However, this approach does not seem to be supported by the ECtHR jurisprudence. For instance, in the case of Haas299 (2011) the ECtHR considered the scope of Article 8(1) to allow an individual to have the right to self-determination on the condition they are able to make their decision and act in consequence300 pursuant to their own free will.301 However, the ECtHR did not support the notion that this right is conditional on having a terminal illness or suffering unbearably. Therefore, the fact of distinguishing between Nicklinson-claimants and Conway-claimants on the basis of the type or length of suffering does not seem to align with the ECtHR’s interpretation of Article 8(1).

As regards the second question – concerning the physical ability to bring about one’s own death – Lady Hale, and several other judges in Nicklinson,302 accounted for an exception on the premise that the claimants (despite being autonomous and able to make such a choice) were physically unable303 to bring about their own death without assistance.304 Conversely, Mr

299 Haas v Switzerland (2011) 53 EHRR 33
300 ibid [51]
301 ibid [16], [46], [54], [58]
302 R (on the application of Nicklinson and another) v Ministry of Justice: R (on the application of AM) (AP) v DPP [2014] UKSC 38; Only three (Lord Reed, Lord Clarke and Lord Wilson) of the nine Justices refrained from indicating physical ability or lack thereof as a determinant factor in their assessment. It is worth noting this fact is linked to the specific approach of their dissent exploring institutional inappropriateness as the main justification for not giving a declaration.
303 ibid [4] (Lord Neuberger)
304 ibid [314] (Lady Hale)
Conway had the so-called option to end his life by refusing his NIV and dying ‘under heavy sedation’. This is in fact the way Mr Conway died in June 2021. By reference to the case of B, Lady Hale noted this right at civil law was not available to those in the position of Nicklinson-claimants, owing to the circumstances of their medical conditions. Accordingly, their only option – one which Mr Nicklinson was forced to choose – was to starve themselves to death. Yet, the undignified nature of their deaths was exactly what both claimants strove to avoid. Indeed, this so-called option is clearly increasing the pain and suffering tolerated by them. An alternative far removed from the kind of good death they wish to access.

Attitudinal shifts embodied by the current legal system prompt judges such as Lady Justice Arden to observe that ‘the common law […] has […] made a significant swing […] from a tolerance of paternalism (the idea that “doctor knows best”) to the promotion of individualism.’ But this individualistic shift does not support the idea of active involvement with ending life. Therefore, the question remains subject to the criminal justice system because ‘[t]he difference between letting someone die and taking active steps to bring about their death [is] central to the common law’. Yet, while this is true in the context of judicial interpretation, in practice, prosecutorial discretion has, for legitimate reasons and in line with ethical principles, blurred the lines of criminal liability in the context of compassionate assistance, whether of a passive or more active nature (see Chapter One).

Thus, judicial interpretation cannot provide the measure capable of overbalancing the element of intention to kill under the criminal law and is equally limited in their authority to influence

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305 R (on the application of Conway) v The Secretary of State for Justice Application for Permission to Appeal to the Supreme Court of the United Kingdom, 27 November 2018 [4]
306 Re B (Consent to Treatment: Capacity) [2002] EWHC 429 (Fam), [2002] 1 FLR 1090
307 R (on the application of Nicklinson and another) v Ministry of Justice; R (on the application of AM) (AP) v DPP [2014] UKSC 38 [301] (Lady Hale)
308 Lady Justice Arden (2017)
309 R (on the application of Conway) v The Secretary of State for Justice Application for Permission to Appeal to the Supreme Court of the United Kingdom, 27 November 2018 [6]
changes of legislation within the bounds of civil law. In terms of civil law, Lord Neuberger observed that High Court judges already endorse a variety of acts involving or leading to the death of another, whether by ‘sterilisation, denial of treatment, withdrawal of artificial nutrition and hydration, switching off a life support machine, and surgery causing death to preserve the life of another.’

This is a practice that has been normalised for over 30 years. Still, the need to address the confinements of the criminal law in relation to intentional killing, means that any consideration of change is less concerned with the wishes of the individual who seeks a hastened death, and more interested in how this paradox could be bypassed.

One such exploration was provided in Nicklinson. This came in response to Lord Neuberger’s observation that for him, the switching off of an individual’s life support machine as in Bland is, to some extent, a more drastic active step than setting up ‘a lethal drug delivery system’ for self-administration. The availability of such a machine, Lord Neuberger said, would render ‘a declaration of incompatibility [as] a less radical proposition for a court to contemplate’. Therefore, it may be that advancements in technology – based on an invention – may eventually shift judicial opinions to justify a move in favour of starting a democratic dialogue on the issue. Hence, in conjunction with the view that the role of medical professionals is to achieve ‘a dignified death with minimal suffering’, the concern expressed by Lord Neuberger regarding the setting within which such assistance could be offered, becomes

310 R (on the application of Nicklinson and another) v Ministry of Justice; R (on the application of AM) (AP) v DPP [2014] UKSC 38 [124] (Lord Neuberger)
311 ibid [21]-[26]
312 Airedale NHS Trust v Bland [1993] 1 All ER 821 or Re B (Adult: Refusal of Medical Treatment) [2002] 2 All ER 449
313 R (on the application of Nicklinson and another) v Ministry of Justice; R (on the application of AM) (AP) v DPP [2014] UKSC 38 [94] - Lord Neuberger referred to the Machine as introduced by Dr Philip Nitschke. (In recent years this invention has evolved into a machine called Sarco, launched in Venice in April 2019. See Exit International, ‘Sarco’ <https://www.exitinternational.net/sarco/history/> accessed 20 Jun 2021)
314 ibid
315 ibid [110] (Lord Neuberger)
316 HL Deb 09 May 1994, vol 554, cols 1344-412 - Lord Colwyn 5.40pm
apparent. Essentially, he indicated the need for the involvement and provision of assistance by a qualified medical professional. Indeed, achieving such safeguards would most certainly go beyond the current ability of the law to pick up the pieces of evidence in the aftermath of an assisted suicide.

As for the third question, judicial attitudes have entertained the possibility of change on the basis that *Nicklinson*-claimants are unable to end their life without assistance, other than starving to death. For Lady Hale, it is this specifically drawn interference that causes the prohibition with Section 2(1) to go further than what is strictly necessary to protect vulnerable individuals.\textsuperscript{317} Lady Hale’s envisioned exception is based on four requirements: (1) the ability to demonstrate the mental capacity to make such a final decision, (2) which needs to be voluntary and free from coercion, (3) and made in the knowledge of the options available and potential consequences of their decision, and (4) they would ‘have to be unable, because of physical incapacity or frailty, to put that decision into effect without some help from others.’\textsuperscript{318} Yet this fourth point demands further evaluation. Previously, Supreme Court judges\textsuperscript{319} have considered the ECtHR jurisprudence on this point in that:

... an individual’s right to decide by what means and at what point his or her life will end, provided he or she is capable of freely reaching a decision on this question and acting in consequence, is one of the aspects of the right to respect for private life within the meaning of article 8 of the Convention.\textsuperscript{320}

\begin{footnotes}
\item[317] *R (on the application of Nicklinson and another) v Ministry of Justice; R (on the application of AM) (AP) v DPP* [2014] UKSC 38 [317]. Lady Hale said that: ‘the rights of those who have freely chosen to commit suicide but are unable to do so without some assistance and the interests of the community as a whole.’
\item[318] ibid [314]
\item[319] ibid [158], [160] (Lord Mance), [216] (Lord Sumption), [306], [309] (Lady Hale), [328], [332]-[333] (Lord Kerr)
\item[320] *Haas v Switzerland* (2011) 53 EHRR 33 [51]
\end{footnotes}
Lord Kerr rejected the suggestion that the words ‘capable of [...] acting in consequence’ were meant to exclude those physically unable to end their own life from being protected under Article 8.\textsuperscript{321} Indeed, even the wording of the latest Assisted Dying Bill could be interpreted to allude to the option of setting up a self-administration machine for the death-seeker. There is nothing to say this may not be possible even for those with limited physical mobility, so long as their wishes can be ascertained beforehand and they are autonomous in the sense of acting by way of self-determination to end their life by flicking a switch. Thus, his Lordship’s interpretation was meant that ‘the person should be capable of exercising free will at all stages of the process.’\textsuperscript{322} Lady Hale agreed, affirming that the focus ought to be on consent to the act by way of a voluntary and uncoerced decision of the individual.\textsuperscript{323} Essentially, her Ladyship declared that ‘no distinction can be drawn between those who could do it all for themselves, but merely prefer to have some help, and those who cannot do it all for themselves.’\textsuperscript{324} But these convincing views were not applied in connection with Mr Conway. Hence, the abrupt end of the Conway case owing to the decision to which Lord Kerr and Lady Hale contributed, came as a surprise.\textsuperscript{325}

Therefore, despite considering the matter presented in Conway as ‘of transcendent public importance [which] touches us all’,\textsuperscript{326} the decision of the Supreme Court acknowledged that ‘opinions of conscientious judges […] may legitimately differ. Indeed, they differ amongst the members of this panel.’\textsuperscript{327} This acknowledgement highlights the difficult task faced, even by

\begin{footnotesize}
\begin{enumerate}
\item\footnotesize \textsuperscript{321} R (on the application of Nicklinson and another) \textit{v} Ministry of Justice; \textit{R (on the application of AM) (AP) v DPP} [2014] UKSC 38 [332] (Lord Kerr)
\item\footnotesize \textsuperscript{322} ibid [333]
\item\footnotesize \textsuperscript{323} ibid [307]-[309] (Lady Hale)
\item\footnotesize \textsuperscript{324} ibid [309]
\item\footnotesize \textsuperscript{325} ibid; In \textit{Nicklinson} [2014] UKSC 38 Lord Reed did not indicate an interest in interpreting the law in favour of giving a declaration. Indeed, it may be correct to estimate this position persisted in connection with the Conway Application where he formed part of the decision-making panel.
\item\footnotesize \textsuperscript{326} \textit{R (on the application of Conway) \textit{v} The Secretary of State for Justice} Application for Permission to Appeal to the Supreme Court of the United Kingdom, 27 November 2018 [5]
\item\footnotesize \textsuperscript{327} ibid [7]
\end{enumerate}
\end{footnotesize}
judges, in their attempt to convince a panel to see the problem through a particular lens. While the decision of the Supreme Court in the *Conway* Application suggests a certain level of judicial bias in favour of *Nicklinson*-claimants, the outcome seems rooted in the implications and consequences of making a declaration of incompatibility under the HRA 1998.

2.4. Political Nuances and the Quest for a Declaration of Incompatibility

At the outset, cases challenging the prohibition of legislation call into question the interference of Section 2(1) of the 1961 Act with Convention rights. Yet, these attempts hinge on a hope that judicial panels are the key to achieving an exception to the current blanket prohibition. However, despite the democratic nature of legal proceedings, and owing to the separation of powers within the English legal system, the question of a declaration of incompatibility under the HRA 1998 is met with a sense of judicial deference to Parliament. Nevertheless, as demonstrated in this section, even if the Supreme Court were to eventually find in favour of claimants on this matter, such a decision would not have the potential to accomplish the change in the form of lawful means of assisted death sought by claimants. This section investigates the process faced by claimants in their efforts to influence legislative change through the means available via domestic courts.

Section 2 of the HRA 1998 places a duty on the English courts to uphold the ECtHR jurisprudence in determining issues in connection with alleged breaches of Convention rights. The process of a declaration of incompatibility under the HRA 1998 is available to courts under certain circumstances. Thus, while the application for a Section 4 declaration in connection with a public authority (including the DPP) requires to be brought by an individual

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328 Human Rights Act 1998 Section 2. The courts have interpreted this as a measure requiring them to do ‘no more, but certainly no less’ than the ECtHR. See *R (on the application of Ullah) v Special Adjudicator* [2004] UKHL 26; [2004] 2 AC 323 [20] (Lord Bingham).
whose Convention rights have been breached, there is no provision within the HRA 1998
that the challenge of incompatibility as regards domestic legislation must be brought by an
individual for a declaration of incompatibility to be made.

Nevertheless, both Sections 3 (Interpretation of legislation) and 4 (Declaration of
incompatibility) (see Appendix 4) apply in the same way regardless of the involvement of a
public authority or not. Thus, the approach of courts is to consider the issue of incompatibility
based on the circumstances of the case before it and where an incompatibility is established,
proceed to give a declaration. However, where the issue before the court is deemed not to be
especially compelling, in spite of the apparent incompatibility – and given that a declaration
may (as opposed to must) be made – the courts need to make the difficult decision whether to
take this step and make a declaration.

The development of the assisted dying debate in this context is represented by a web of
interrelationships between the courts, appellants, and the Westminster Parliament. In terms of
courts – as the channel which enables the initiation of the democratic dialogue between citizens
and Parliament – the judgments in Pretty, Purdy and Nicklinson indicated the possibility that
the judiciary may be persuaded to engage with their power under the HRA 1998 and declare
the assisted suicide prohibition as incompatible with the Convention. However, in post-
Nicklinson cases (Conway, Newby, Lamb) judicial attitudes appeared to have moved away from
this position, exhibiting a strong inclination for deference to Parliament. This partiality became
more apparent when the path of the Conway case came to an abrupt halt as the Supreme Court

329 Human Rights Act 1998 Section 7(1)
330 Ibid Section 7 applies in connection with Sections 6-8 concerning public authorities.
331 Ibid Section 3
332 Ibid Section 4
333 R (on the application of Nicklinson and another) v Ministry of Justice; R (on the application of AM (AP) v
DPP [2014] UKSC 38 [111] (Lord Neuberger)
133 LQR 631

121
refused Mr Conway’s application for permission to appeal the order made by the Court of
Appeal on 27 June 2018 and of the notice of objection filed by the Respondent.335

Achieving a Declaration of Incompatibility

Thus far, cases challenging the compatibility of current legislation with human rights have not
yielded judgments that favoured claimants’ attempts to secure lawful assisted deaths. Nevertheless, in the context of the process involved in reforming the law, this tool available to
the courts – and open to future claimants – is one way of influencing change (explored in
Chapters Three and Five). The matter of seeking and achieving a declaration of incompatibility
as part of the wider question of legislative change encompasses two key questions: (1) What
does a declaration of incompatibility represent? and (2) What are the consequences, for
claimants or the process of law reform, in the event that a court decides to take this step?

Section 4 of the HRA 1998, presents the courts with an entirely democratic power to
‘delineat[e] the boundaries of a rights-based democracy’.336 Still, the fact of seeking a
declaration of incompatibility zeroes in on the constitutional relationship between the courts
and the Westminster Parliament. This is something that claimants contend with, in their efforts
to secure the initial step in persuading the courts of the need for assisted dying law reform.
However, if at any point, a court337 ventures to declare the incompatibility of Section 2 with
Article 8(1) (see Appendix 3), such a measure does not affect the validity of the assisted suicide
prohibition. This is because, as highlighted even by the courts, Section 10 of the HRA 1998
provides that ultimately the matter of whether to cure the specific incompatibility lies with the

335 R (on the application of Conway) v The Secretary of State for Justice Application for Permission to Appeal
to the Supreme Court of the United Kingdom, 27 November 2018
337 Human Rights Act 1998 Section 4(5)
appropriate ‘Minister of the Crown’ by making a remedial order, enacting legislation, or even choosing to do nothing.

Evidently, aware of the possibility that nothing may come out of achieving such a declaration, claimants’ persistent quests of this nature signal two things. First, there seems to be an expectation that a favourable court judgment is bound to transpire at some point. One such inference is not unreasonable given that two past Supreme Court Presidents, Lord Neuberger and Lady Hale, have accepted that ‘in the right case and at the right time, it would be open to this court to make a declaration that section 2 […] is incompatible with […] article 8 of the [Convention]’. Second (in consequence of the first), of the abovementioned options available to a Minister of the Crown, claimants seem confident that pursuant to a court’s willingness to make a declaration, Parliament would most likely choose to cure the said irregularity by enacting assisted dying provisions. This is explored in section 2.5. in this chapter by reference to recorded declarations of incompatibility for over 20 years since 2000.

In the face of a series of unsuccessful legal attempts, the more compelling question is: What would it take for the courts to make a declaration? The answer seems to lie within the Supreme Court decision in Nicklinson, where unfolding judicial opinions revealed an exceptionally divided panel. Despite representing a tool granted by Parliament and democratically available to the courts, the concept of giving a declaration is largely perceived as a ‘radical step’ for a judicial panel. Lord Neuberger, the President of the Supreme Court at that time, was persuaded by Lord Bingham’s observations as regards the respect to be afforded to decisions of the House of Commons.

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338 ibid Section 10
339 ibid
340 R (on the application of Nicklinson and another) v Ministry of Justice; R (on the application of AM) (AP) v DPP [2014] UKSC 38 [300] (Lady Hale)
341 ibid [299] (Lady Hale)
342 ibid [110] (Lord Neuberger)
Essentially, Lord Bingham had said that judges ‘should be very cautious’ before acting upon their jurisdiction under Section 4 of the HRA 1998.\(^{343}\) Yet this approach subscribes to the notion that difficult decisions ought to be passed on to the Westminster Parliament. What is more, for judges, including Lord Neuberger, the rationale of opinions regarding the step towards a declaration are also tainted with the sense that the nature of judicial membership – unlike that of the directly responsible electorate – brings with it a certain level of detachment regarding consequential pressures.\(^ {344}\) Moreover, as noted by Foster, another notion to contend with is that ‘courts are said to lack the democratic legitimacy to challenge legislation passed by a democratically elected Parliament’.\(^ {345}\) Nevertheless, in the context of the process involved in achieving law reform, judicial reasoning offers an evaluation of the law in a way that Members of Parliament resisting change do not.

Thus, while Lord Neuberger did not rule out the option to exercise judicial responsibility under Section 4,\(^ {346}\) he concluded that it was not appropriate to grant a declaration at that time.\(^ {347}\) He had four reasons for his determination.\(^ {348}\) First, the matter before the courts raised ‘moral and religious dimensions’, meaning that courts had to approach this with caution. Second, he did not think the issue of incompatibility as regards Section 2 was an easy fix; indeed, it requires considerable investigation by the legislator so, this too, Lord Neuberger considered, warrants deceleration. Third, Parliament had already considered Section 2 prohibition on several occasions and indeed was expecting an imminent debate on the issue within a matter of months.

\(^{343}\) ibid [102]-[103]  
\(^{344}\) ibid [104]  
\(^{345}\) Foster (2019b) 82  
\(^{346}\) \textit{R (on the application of Nicklinson and another) v Ministry of Justice; R (on the application of AM) (AP) v DPP} [2014] UKSC 38 [112]  
\(^{347}\) ibid [113]  
\(^{348}\) ibid [116]
Fourth, in *Pretty* the House of Lords signalled to Parliament that it would be inappropriate to give a declaration of incompatibility in connection with Section 2.

However, neither of these is justified as an acceptable reason, at least not under the provisions of the HRA 1998, for a court to delay or simply choose not to give a declaration because Parliament is expected to consider the issue at a future point; especially since debates on the issue of law reform to allow for a type of assisted death continue to be introduced since 1936. Thus, while the question of a declaration persists, the fact of missing the opportunity to give a declaration in *Nicklinson* – especially as this would have potentially enhanced the nature and scope of the imminent Parliamentary debate – is to demonstrate undue deference to Westminster.

Nevertheless, if the court decides to exercise its democratic authority under Section 4, it will still be for the Westminster Parliament to decide whether to cure this incompatibility or do nothing. It follows that by design, a declaration in *Nicklinson* would have informed Parliament of an issue it was already set to consider, by emphasising the need for quality and clarity of research to drive the scheduled debate. Instead, the Supreme Court’s apparent reluctance to take that leap in *Nicklinson* denotes a move intended to prevent the subsequent ripple effect. Yet, this reluctance to engage with Section 4 demonstrates an internal judicial struggle to conclude the time is right to step in and rule that a domestic provision violates the Convention.\(^{349}\) However, for claimants, the decision to give a declaration is far from being the last piece of the puzzle in their quest for lawful assisted dying laws. That said, withholding the opportunity to start this democratic dialogue continues to harm those directly affected by prohibiting legislation.

\(^{349}\) ibid [101]
In contemplating the possibility of a different outcome on this point in future challenges, the position of Lady Hale and Lord Kerr in *Nicklinson* are also of particular interest. Lady Hale indicated that, but for the imminent Parliamentary debate on the issue, the case could have been decided differently. Then again, as already mentioned, Bills of this kind are introduced in Parliament not infrequently. As noted by Lady Hale, although only she and Lord Kerr were prepared to give a declaration in the case, similar examinations of the law provided by Lord Neuberger, Lord Wilson and Lord Mance, would have led to a different majority judgment.

Effectively, Lady Hale based this conclusion on the view that none of the Judges in the case considered that Section 2 could be ‘read and given effect, under section 3(1) [of the HRA 1998], in such a way as to remove any incompatibility with the rights of those who seek the assistance of others in order to commit suicide.’ Consequently, her Ladyship thought there was ‘little to be gained, and much to be lost’ by refraining from making a declaration. Fast forward to another opportunity to consider this issue in the *Conway* case, a similar reluctance was exhibited once again. On this occasion, the advancement of Mr Conway’s case through the domestic courts, and the inevitable anticipation of a possible full hearing before the Supreme Court, generated a certain amount of interest. This was also on account of the composition of the judicial panel hearing the *Conway* Application comprising of Lady Hale, the President of the Supreme Court at that time, Lord Kerr and Lord Reed. Accordingly, considering the settled views of Lady Hale and Lord Kerr in *Nicklinson* – primarily as regards their willingness to make a declaration – the decision of the Supreme Court panel to

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350 Parliament was due to deliberate the matter under a scheduled debate of the Assisted Dying Bill 2015 (introduced by Rob Marris MP)
351 *R (on the application of Nicklinson and another) v Ministry of Justice: R (on the application of AM) (AP) v DPP* [2014] UKSC 38 [299] (Lady Hale)
352 *ibid* [300]
353 *ibid*
354 *ibid*
bring the Conway case to an abrupt end was particularly surprising. Thus, the opportunity for a full evaluation of the law and the issue of compatibility was missed.

This apparent attitudinal shift in Conway leads to one important question stemming from a previous willingness to give a declaration in Nicklinson but not in Conway. In other words, how do the Nicklinson and Conway cases contribute to swaying the judicial decision-making process in connection with the justification for a declaration of incompatibility?

**Potential Shortcomings of the Nicklinson and Conway Cases**

At the outset, judicial opinions in Nicklinson and Conway cases appear to indicate that any probability of achieving a declaration in the future, is more likely to be made in connection with Nicklinson-type as opposed to Conway-type claimants. Yet, aside from the polarity imposed by their specific medical conditions, in what seems to be treated as a spectrum-like evaluation, both sets of claimants had the common goal to control the time and manner of their death in order to prevent a prolonged, distressing and undignified end to their life.355

In the process of engaging with the features of the medical condition as a way of assessing whether a declaration should be given, the courts take a case-specific approach. In one sense, this may also transpire because to do otherwise – by evaluating the legislation on its face – the court would need to engage with the more difficult question of ‘moral and religious dimensions’ (considered in the next section).356 Consequently, this approach, based on the comparable judicial attitudes in Nicklinson and Conway, gives rise to the misconception that the issue of compatibility of Section 2(1) with Article 8(1) hinges on a case (and set of factual

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356 R (on the application of Nicklinson and another) v Ministry of Justice; R (on the application of AM) (AP) v DPP [2014] UKSC 38 [116] (Lord Neuberger)
circumstances) which demonstrates the individual lacks the physical ability to end their own life (Nicklinson-claimants). But the question of whether the current law is compatible is a matter connected to the dignity, autonomy and self-determination of individuals who endure unbearable suffering, inclusive of, but not limited to, Conway-claimants. Thus, their aim is to achieve a means of choosing to make a voluntary decision and access a kind and compassionate good death with adequate safeguards.

Moreover, in assessing whether to give a declaration, the courts have also explored the merits of assisted dying schemes proposed by Nicklinson-type and Conway-type claimants. However, as rightly observed by Lord Neuberger, the determination of ‘precise details of any scheme’ remains a matter for Parliament. Indeed since 1936, Bills of this kind debated in the House of Lords and the House of Commons have involved varied eligibility criteria. But even these present and continue to include provisions identifying medical conditions which sit at opposite ends to those proposed by courts (especially as regards Nicklinson-claimants). For example, the latest Assisted Dying Bill 2021 introduces provisions for individuals who, among other things, are terminally ill – and therefore are ‘reasonably expected to die within six months’ – and are able to ingest or otherwise self-administer the lethal medication under prescribed safeguards.

Conversely, by reference to the difficulty of estimating life expectancy ‘even for the terminally ill’, Lord Neuberger considered there was ‘significantly more justification’ to make assisted dying available to Nicklinson-claimants, who face many years of living a life which they regard

357 Clark Hobson, ‘Has the UK reached a tipping point on assisted suicide?’ (BioEdge, 3 February 2017) <https://www.bioedge.org/indepth/view/has-the-uk-reached-a-tipping-point-on-assisted-suicide/12165> accessed 14 Sep 2021
358 R (on the application of Nicklinson and another) v Ministry of Justice: R (on the application of AM) (AP) v DPP [2014] UKSC 38 [107] (Lord Neuberger)
359 See Chapter Three
360 Assisted Dying Bill 2021 Section 1
361 ibid Section 2(1)(b)
as ‘valueless, miserable and often painful, than if they have only a few months left to live’.\textsuperscript{362}

But, these kinds of observations, and incidental evaluations, go beyond the purpose of analysing the issue of compatibility of the current law; instead, they go on to explore the most adequate criteria for potential assisted dying law reform.

Hence, while proposed schemes appear to distract from the issue at hand,\textsuperscript{363} judges have readily assessed the scope and consequences of their respective criteria\textsuperscript{364} in an effort to establish whether these represent ‘adequate protection for the weak and vulnerable’.\textsuperscript{365} In considering the ‘principle of proportionality’,\textsuperscript{366} Lord Kerr explained\textsuperscript{367} these may be successfully challenged without there being a need to offer a less intrusive alternative way of achieving the objective to demonstrate the disproportionality of provisions.\textsuperscript{368} Therefore, proportionality does not need to be established based on ‘the absence of a viable, less intrusive alternative’\textsuperscript{369}

Even so, the Supreme Court judicial opinions in \textit{Nicklinson} led academics,\textsuperscript{370} the wider community,\textsuperscript{371} and even future claimants,\textsuperscript{372} to anticipate that given the right case and the right conditions, the current law would be declared incompatibility with the Human Rights Act 1998.

\begin{itemize}
  \item \textsuperscript{362} \textit{R (on the application of Nicklinson and another) v Ministry of Justice; R (on the application of AM) (AP) v DPP} [2014] UKSC 38 [122] (Lord Neuberger)
  \item \textsuperscript{363} ibid [107]
  \item \textsuperscript{364} ibid [128]
  \item \textsuperscript{365} \textit{R (on the Application of Conway) v The Secretary of State for Justice and (1) Humanists UK (2) Not Dead Yet (UK) (3) Cnk Alliance Ltd} [2018] EWCA Civ 1431 [77]
  \item \textsuperscript{366} \textit{R (on the application of Nicklinson and another) v Ministry of Justice; R (on the application of AM) (AP) v DPP} [2014] UKSC 38 [354] (Lord Kerr)
  \item \textsuperscript{367} ibid
  \item \textsuperscript{368} ibid
  \item \textsuperscript{369} ibid
  \item \textsuperscript{371} Dignity in Dying, ‘Supreme Court Puts Parliament on Notice that the Suicide Act is under Pressure and may be Declared Incompatible with Human Rights Law’ (25 June 2014) <https://www.dignityindying.org.uk/news/supreme-court-suicide-act/> accessed 15 Jul 2020
\end{itemize}
time, the court would be willing to reverse its position of deference to Parliament and step in to give a declaration on incompatibility. Yet, the opportunity to do so in Conway was missed and the eight-paragraph Supreme Court decision appears to amount to more than merely a refusal to permit Mr Conway’s application to appeal.

‘Mixed Ethical, Moral and Social Policy Issues’

In Pretty the House of Lords rejected the argument that Article 8(1) was engaged; yet the jurisprudence of the ECtHR established the right to self-determination through personal autonomy was triggered even when individuals choose something that may be deemed as morally harmful or dangerous to them.\footnote{Foster (2019b)} As the cases continued to challenge the law in a bid to influence law reform, the issue of morality was back in the spotlight. In Nicklinson Lord Neuberger considered the various moral arguments:\footnote{\textit{R (on the application of Nicklinson and another) v Ministry of Justice; R (on the application of AM) (AP) v DPP} [2014] UKSC 38 [90]-[98] (Lord Neuberger)} (1) there is a moral justification to maintain the current prohibition to safeguard life;\footnote{ibid [90]} (2) another moral justification for the current construct is that to do otherwise Parliament would risk sending the message that ‘human life is to be undervalued’;\footnote{ibid [91]} (3) a different moral issue is that while it is one thing for an individual to take their own life, it is quite another to ‘take, or even to assist in the taking of, someone else’s life’.\footnote{ibid [92]} Yet, in terms of the first two, Lord Neuberger thought that to base the argument of a moral justification for the sanctity of life within a system that allows for the taking of one’s own life, is at best a weak argument. The third argument is considered later in this section.

\footnote{373 Foster (2019b)}
\footnote{374 \textit{R (on the application of Nicklinson and another) v Ministry of Justice; R (on the application of AM) (AP) v DPP} [2014] UKSC 38 [90]-[98] (Lord Neuberger)}
\footnote{375 ibid [90]}\footnote{376 ibid [91]}\footnote{377 ibid [92]}
In *Conway* the Court of Appeal used the proposed scheme as a pivotal front for the argument that in the context of permitting lawful assisted dying, the scheme failed to demonstrate its potential effectiveness as regards meeting important moral and ethical issues. Thus, in taking a stand on the issue of incompatibility as regards the relationship between the judiciary and the legislature, the Court of Appeal in *Conway* noted that ‘[w]eighting the views of Parliament heavily in the balance […] is not the same as a complete abdication of responsibility to consider the merits of the arguments on either side in relation to Article 8(2)’. Yet, as Adams argues, the fact of engaging with ‘constitutional considerations’ courts appear to have ‘a judicial escape route’ which enables them to avoid political controversy.

Most recently, in the case of *Newby* it was argued that the ‘mixed ethical, moral and social policy issues’ were relevant for the question of proportionality of interference with the Article 8 rights. The case was distinguished from previous challenges on the basis that it engaged Article 2 (right to life) because the current prohibition would force him to choose an earlier death, as he may not be able to be assisted to end his life at a later point. Nevertheless, the court concluded that, in the interest of the relationship between the judiciary and the legislature, the Westminster Parliament is better suited to resolve matters of this kind. Moreover, when Paul Lamb returned to the High Court in 2019, the conclusion was that the

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378 *R (Conway) v The Secretary of State for Justice* [2017] EWHC 2447 (Admin) [135], [141]
380 Foster (2019a)
381 Elizabeth Adams, ‘Judicial discretion and the declaration of incompatibility: constitutional considerations in controversial cases’ Public Law (2021) Apr, 311-333
382 *The Queen on the Application of Philippe George Newby v The Secretary of State for Justice* [2019] EWHC 3118 (Admin) [30]; The relevant categories regarding costs, risks, and benefits were extracted from the case of *Carter v AG of Canada* [2015] SCC5
383 ibid [4]
384 ibid [27]
385 ibid [37]-[41]
386 ibid [34]
case was not justiciable. Thus, considering the approach in the last two instances before the courts, it appears that in the face of this difficult question on prohibition, the judiciary is slowly taking a step back from further contributing to the debate.

On the point of issues that raise moral, social and ethical considerations, the jurisprudence of the ECtHR has repeatedly endorsed the choice – which remains within the margin of appreciation of the Westminster Parliament – to uphold the current prohibition. In this regard, Foster argues this position justifies the ‘arguments as to the unlikelihood or appropriateness of a declaration being made.’\(^{387}\) However, as noted by Lord Neuberger in *Nicklinson*, the fact that the question before judges involves moral issues, does not mean that ‘the courts have to keep out’.\(^{388}\) This is an even more compelling argument in the context that such deliberations are undertaken not to reform the law but in contemplation of a Section 4 declaration which, in any event, is designed to give Parliament the opportunity to decide what to do, if anything, about the incompatible legislation. Yet, in touching upon the relationship between the legislative, the executive and the judiciary on a different issue, Sir Philip Sales suggests that ‘[t]he courts would risk squandering their own reputation as impartial appliers of the law if they tried to assume a wider role for themselves.’\(^{389}\) However, while this seems to also echo the historical context of a Section 4 declaration (see section 2.5. in this chapter), it does not justify the tendency to hold back from enabling the constitutional arrangements which have at their core the fourth party in the relationship web, the individual.

The third moral argument referred to by Lord Neuberger as regards the act of taking one’s own life as opposed to being involved in taking the life of another, raises further questions especially

\(^{387}\) Foster (2019b) 81
\(^{388}\) *R (on the application of Nicklinson and another) v Ministry of Justice; R (on the application of AM) (AP) v DPP* [2014] UKSC 38 [98] (Lord Neuberger)
\(^{389}\) Sir Philip Sales, ‘Legalism in constitutional law: judging in a democracy’ PL 2018, Oct, 687-707, 706
in the context of the current application of the law regarding prosecutorial discretion.\textsuperscript{390} Thus, in the context of profiling an individual’s medical condition (analysed earlier in this chapter) the law deems it (a) ‘morally corrupting’ for someone to assist with the death of another compared to (b) self-termination which is judged as ‘morally acceptable’.\textsuperscript{391} Thus, under the current law, (a) attracts criminal liability for murder or manslaughter while (b) amounts to a Section 2 offence. Yet, for Lord Neuberger, the difference between the act of setting up a machine for self-administration and that of directly administering lethal medication to an individual as a question of both law and morality, is best answered by reference to personal autonomy.\textsuperscript{392}

Thus, as regards the circumstances in the \textit{Newby} case, the prohibiting legislation does not only impede the individual with a degenerative disease from exercising their personal autonomy but also drives some people to cut their life short at an earlier point, for lack of options later.\textsuperscript{393} Furthermore, within the scope of prosecutorial discretion and aftermath investigation, the law enables amateur assistance (‘wholly motivated by compassion’), whereas in the context of lawful assisted death, an individual would be able to exercise their personal autonomy pursuant to a ‘voluntary, clear, settled and informed decision’ within a professional setting complete with adequate safeguards for medical assistance to end their life. Therefore, regardless of the means of assistance by self-administered or doctor-administered lethal medication (which would remain a matter for Parliament to decide) judicial attitudes explored in this chapter seem to support a lawful exception to the current prohibition. Consequently, while not directly benefiting the claimants, judicial evaluation of the law and the impact on people’s ability to

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\textsuperscript{390} See Chapter Four
\textsuperscript{391} \textit{R (on the application of Nicklinson and another) v Ministry of Justice; R (on the application of AM) (AP) v DPP} [2014] UKSC 38 [92] (Lord Neuberger)
\textsuperscript{392} ibid [94]-[95]
\textsuperscript{393} ibid [96]
access a good death in certain circumstances, sets out for the wider public and Parliament the incidence of morality and law.

### 2.5. A Subtle but Profound Undertone

The Supreme Court judgment in *Nicklinson* endorsed the prospect that ‘in the right case and at the right time, it would be open to [the] court to make a declaration’. 394 Not surprisingly, the challenges of this kind continued to make their way before the courts. Yet, while *Nicklinson* came close to being ‘the right case’ (at least to the extent of judicial attitudes in the Supreme Court) the case did not seem to transpire ‘at the right time’ (arguably because the issue was due to be debated in Parliament). The next opportunity presented by the *Conway* case, despite its troubled path, stumbled before three Supreme Court judges – Lady Hale, President of the Supreme Court, Lord Kerr and Lord Reed – in a bid to secure permission to appeal the order made by the Court of Appeal and of the notice of objection. 395 While the Supreme Court refused the application, the eight-paragraph decision appears to convey a subtle but profound overtone regarding the confinements within which a court will consider giving a declaration of incompatibility. This section explores the development of decisions on the issue by comparing judicial decisions with the scope of predicting the prospects of achieving a declaration of this kind by way of future legal actions. Yet, before unpacking this undertone, one aspect of the meaning of the decision is clear: even if *Conway* had come ‘at the right time’, it was (in the court’s view) far from being ‘the right case’.

At the outset, the opinions of Lady Hale and Lord Kerr (as part of the panel in the *Conway* decision) are particularly important, especially because of their willingness and readiness to

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394 *R (on the application of Nicklinson and another) v Ministry of Justice; R (on the application of AM) (AP) v DPP* [2014] UKSC 38 [299] (Lady Hale)

395 *R (on the application of Conway) v The Secretary of State for Justice* Application for Permission to Appeal to the Supreme Court of the United Kingdom, 27 November 2018
give a declaration in Nicklinson. This is because, while given another chance to take a stand against traditional reluctance in Conway, the Supreme Court panel indicated that, in essence, the facts of the case were not sufficiently compelling to point to the prospect that Mr Conway would succeed in his claim. But this kind of approach, especially since it comes with the court’s pre-emption regarding ‘all that [giving permission] would entail for him, for his family, for those on all sides of this multi-faceted debate, for the general public and for this court’, raises a number of questions, of which three stand out. First, what is the background against which courts consider whether to give a declaration of incompatibility? Second, would the prospects of a declaration in Conway hinge purely on the merits of the facts of the case? Third, would a Hypothetical Conway Application be capable of leading to a different outcome? This section evaluates the ins and outs of these questions in that order, to establish whether the Nicklinson/Conway approaches are likely to persist in future actions of this kind.

**Historical Context of Section 4 Declarations**

The first question looks back to the time when the HRA 1998 was merely a Bill. As the Human Rights Bill 1998 was making its way through the Parliamentary stages, at the third reading stage Lord Irvine (the architect of the Bill) explained that a Section 4 declaration (see Appendix 4) was not expected to be necessary ‘in 99 per cent. of the cases that will arise’. Moreover, during the third reading in the House of Lords and the Second Reading in the House of

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396 Shona Wilson Stark, ‘Facing facts: judicial approaches to section 4 of the Human Rights Act 1998’ (2017) 133 LQR 631; Young, ‘Ghaidan v Godin-Mendoza: avoiding the deference trap’ [2005] Public Law 23 – Young argues that courts should be more willing to engage with Section 4 of the 1998 Act, while pointing to the fact that the approach in this regard has been too deferential.

397 R (on the application of Conway) v The Secretary of State for Justice Application for Permission to Appeal to the Supreme Court of the United Kingdom, 27 November 2018 [8]

Commons the Home Secretary set the expectation that ‘in almost all cases, the courts will be able to interpret the legislation compatibility with the Convention’.\footnote{ibid; HC Deb 16 February 1998, vol 306, col 778 (Mr Jack Straw)}

These kinds of assertions appear to have set the tone for judicial caution, evidenced by the subsequent use of the quotes by Lord Steyn in support of the notion that ‘[a] declaration of incompatibility is a measure of last resort’.\footnote{R v A (No 2) [2001] UKHL 25 [44] (Lord Steyn)} Consequently, the number of instances where courts have ventured to give a declaration of incompatibility are relatively few. The most recent Ministry of Justice update on recorded declarations of incompatibility for over 20 years, made before July 2020, comes to a total of 43, of which 10 were overturned on appeal, thus only 33 were final.\footnote{Ministry of Justice, ‘Responding to human rights judgments: Report to the Joint Committee on Human Rights on the Government’s response to human rights judgments 2019-2020’ (Ministry of Justice Report 2019-2020) available at <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/944858/responding-to-human-rights-judgments-2020-print.pdf> accessed 11 Jun 2021} Yet, the fact of giving a declaration means that Parliament can rectify the incompatibility under Section 10 of the HRA 1998.\footnote{Human Rights Act 1998 Section 10} Thus far, interferences with Convention rights signalled to the executive by means of a Section 4 declaration have been cured in all but one instance (prisoners’ voting rights).\footnote{Smith v Scott [2007] CSIH 9; 2007 SC 345; In April 2020 the Government addressed this anomaly in response to the long-standing judgment in Hirst v the UK (No 2) (Application 24035/01; 6 October 2005); See Ministry of Justice Report 2019-2020, 35-36} Consequently, as argued by Stark, the current frequency of giving declarations keeps them in high regard while preserving the relationship between the judiciary and the executive.\footnote{Stark (2017) 30} Thus, for these reasons, the quest for a declaration of incompatibility,\footnote{J Murkens, ‘Judicious review: the constitutional practice of the UK Supreme Court’ CLJ (2018) 77(2), 349-374} and the decision for the court to make this step, would overcome the current impediment in a move that could potentially\footnote{Foster (2019b) 82}
lead to law reform. It is against this background, and the facts in the case, that the Supreme Court had to consider the prospects of the Conway Application, which leads to the next point.

A Missed Opportunity?

The second question explores the possible reasons behind the Supreme Court decision to refuse the Conway Application on account of its prospects of success in achieving a declaration. The Supreme Court decision acknowledged the fact that the opinions of judges regarding the questions to be answered ‘may legitimately differ’, and they also differed ‘amongst the members of [that] panel.’\(^{407}\) Indeed, this emphasis signals the importance of judicial support on issues of this kind without which the matter is destined to fail. However, given the origins of this indication, ‘from the guardians and interpreters of fundamental rights’,\(^{408}\) this reasoning does little to justify this determination for judicial deference when the only defence (in the form of Section 10 of the HRA 1998) protecting ‘the citizen, against Parliament’,\(^{409}\) and available under constitutional arrangements to potential victims of such incompatibility, enables the surfacing of a blockage.

The admission of a sense of dismay (which aligns with something akin to what Lady Hale would say)\(^{410}\) for being ‘unable to persuade three of [her] colleagues’ on another human rights issue, is not a first.\(^{411}\) The same goes for reaching the decision to refuse the Conway Application ‘[n]ot without some reluctance’ (emphasis added),\(^{412}\) as opposed to, say, ‘considerable

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\(^{407}\) R (on the application of Conway) v The Secretary of State for Justice Application for Permission to Appeal to the Supreme Court of the United Kingdom, 27 November 2018 [7]


\(^{409}\) N W Barber and A L Young, ‘The Rise of Prospective Henry VIII Clauses and Their Implications for Sovereignty’ [2003] PL 112, 126

\(^{410}\) The decision was addressed by the Supreme Court as a whole. The estimation that the matter aligns with something Lady Hale is based on similarities offered in the judgment mentioned in this section.

\(^{411}\) L v Birmingham City Council [2007] UKHL 27; [2008] 1 AC 95

\(^{412}\) R (on the application of Conway) v The Secretary of State for Justice Application for Permission to Appeal to the Supreme Court of the United Kingdom, 27 November 2018 [8]
reluctance’ (*emphasis added*). But even this may simply indicate the existence of a spectrum of ‘reluctance’ linked to the type of hearing (the decision in *Black* was made in contemplation of a full hearing, whereas that in *Conway* represented a refusal of such an opportunity) which does little to justify the apparent struggle to open the door and allow for a ‘healthy democratic dialogue’ (between the judiciary, the executive and the legislative), by way of Section 4.

For the purposes of the *Conway* Application, the court had to consider two issues: (1) Whether a blanket ban regarding assistance with suicide was ‘a justified interference with the Convention rights of those who wish for such assistance’; (2) If it was not, the court had to decide whether to make a declaration to that end. On this point, the issue was whether it was appropriate to make a Section 4 declaration ‘in this case’.

As regards the first matter, judicial views in *Nicklinson* – especially that of Lady Hale highlighting this point – confirmed the difficulty of reading and giving effect to the Section 2 prohibition (under Section 3(1) of the HRA 1998 (provided in full in Appendix 4)), in a way that removes ‘any incompatibility’ with the rights of individuals who wished to be assisted in this way.

As such, it is the second matter that holds the answer to the reasoning behind the decision: whether it was ‘appropriate’ for the court to make a declaration ‘in this case’. At this point it is worth mentioning the justification for making a declaration of incompatibility is also considered in the context of its potential effect regarding the power of a Minister of the Crown.

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413 R (on the application of Black) (Appellant) v Secretary of State for Justice (Respondent) [2017] UKSC 81 [50]
415 R (on the application of Conway) v The Secretary of State for Justice Application for Permission to Appeal to the Supreme Court of the United Kingdom, 27 November 2018 [7]
416 R (on the application of Nicklinson and another) v Ministry of Justice; R (on the application of AM) (AP) v DPP [2014] UKSC 38 [300] (Lady Hale)
417 ibid
to take remedial action under Section 10, if there are ‘compelling reasons’.\textsuperscript{418} Nevertheless, as already mentioned, of the total of 43 declarations, only eight have been addressed by remedial order under Section 10.\textsuperscript{419} Therefore, the Supreme Court may signal that such a step could be possible in the context of a case that is compelling in nature. Accordingly, the decision to refuse the application means that the Conway case was not the one.

The Supreme Court decision pointed to Mr Conway’s medical condition, highlighting his option to remove the non-invasive ventilator (‘NIV’) which he was using almost 24 hours a day. This so-called ‘option’ would bring about his death, but this meant Mr Conway would die by suffocation. Hence, the court’s decision points to a case-specific approach, based on the facts. Yet, as noted by Buxton, for the purposes of seeking a declaration of incompatibility the parties in the case need only serve as ‘necessary context’ because the court cannot engage with this matter ‘of [its] own motion’.\textsuperscript{420} This is because Section 4 does not require there to be a victim, or a breach of legislation connected to the facts of the case. What is more, Section 4(6) explicitly states that a declaration ‘is not binding on the parties’.\textsuperscript{421} Therefore, the emphasis of Section 4 is on the provision in question, not the party to the proceedings. Yet, the same court which three years earlier pointed to the incompatibility of Section 2 with Article 8 rights (at least to the extent that the judicial arguments allowed in connection with Nicklinson-claimants) would later shy away from hearing the issue altogether.

\textsuperscript{418} Human Rights Act 1998 Section 10(2)  
\textsuperscript{419} Ministry of Justice Report 2019-2020, 30  
\textsuperscript{421} Human Rights Act 1998 Section 4(6)(b)
The ‘Right Case’ and ‘Right Time’

The third question is more hypothetical in nature. What if a claimant suffering the same medical conditions as Nicklinson-claimants came before the court at the time when Conway did (say in a ‘Hypothetical Conway Application’), potentially representing the ‘right case’ (based on the facts), presented at the ‘right time’? Would this timely coincidence persuade the courts to give a declaration that Section 2 prohibition is incompatible with Convention rights? First, the issue would have to come before the right court,\textsuperscript{422} however, for the purposes of this discussion the Hypothetical Conway Application would have reached the Supreme Court. Second, the fact of ‘the right time’ poses an issue, particularly as this was one of the central points of the decision in Nicklinson due to the imminence of the assisted dying matter expected to be debated by Parliament.

As such, if a case were to be decided in similar circumstances, the court would be within its right to repeat the Nicklinson decision and defer to Parliament on the basis that ‘it would not be appropriate to grant a declaration of incompatibility […] before [giving] Parliament the opportunity of considering whether to amend section 2’ to enable the claimants to ‘be assisted in ending their lives’.\textsuperscript{423} This approach would also be in keeping with the provision of Section 4(2) of the HRA 1998 which provides that the court ‘may’, not that a court has a duty, to give a declaration.\textsuperscript{424} For this reason, it is not surprising that, in the time that the Conway case was making its way through the courts – between the first High Court appearance in March 2017\textsuperscript{425} and until the Supreme Court decision in November 2018 – the Assisted Dying Bills ceased to

\textsuperscript{422} Human Rights Act 1998 Section 4(5); This includes the Supreme Court, the High Court and the Court of Appeal
\textsuperscript{423} R (on the application of Nicklinson and another) v Ministry of Justice; R (on the application of AM) (AP) v DPP [2014] UKSC 38 [113] (Lord Neuberger)
\textsuperscript{424} Human Rights Act 1998 Section 4(2)
\textsuperscript{425} The Queen (On the Application of Noel Douglas Conway) v Secretary of State For Justice and Crown Prosecution Service and Attorney General [2017] EWHC 640 (Admin)
be introduced in Parliament, despite their regular introductions of this kind in previous years. Therefore, for the sake of this exercise, the hypothetical issue meets the ‘right time’ stipulation.

Third, the court would move on to evaluate whether the Hypothetical Conway Application ought to be deemed as ‘the right case’, thus, warranting a full hearing. The court would be under a duty to attempt reading and giving effect to Section 2 under Section 3 of the HRA 1998 or the court may give a Section 4 declaration. However, it is worth noting that, if the court considers making a declaration, ‘the Crown must receive 21 days’ notice’ of its intention.

The Section 3 test would therefore require the court to assess whether the provision breaches Convention rights based on the circumstances in the case. This is where the difference between the particulars of the medical conditions in Nicklinson and Conway appeared to be paramount. In the Conway Application the Supreme Court highlighted that while, at the time, Mr Conway could manage to go without his NIV for one hour a day, ‘once he [became] dependent on continuous NIV’ he could choose to have this withdrawn, which ‘would usually lead to […] death within a few minutes, although it can take a few hours or in rare cases days.’ In fact, this is the way Mr Conway died. But this was not a measure available to Nicklinson—claimants as their medical condition did not involve such reliance and they faced years of life in this state. For this reason, and due to being quadriplegic, Mr Nicklinson was unable to end his life other than by resorting to a ‘painful course of self-starvation, refusing all nutrition, fluids, and medical treatment, and he died of pneumonia’.

[426] In March 2017, the House of Lord held a short debate on the issue of assisted dying. See HL Deb 6 March 2017, vol 779, col 1175
[427] Human Rights Act 1998 Section 5(1); Civil Procedure Rules (CPR) 19.4A(1) states that ‘[t]he court may not make a declaration of incompatibility in accordance with section 4 of the Human Rights Act 1998 unless 21 days’ notice, or such other period of notice as the court directs, has been given to the Crown.’
[428] R (on the application of Conway) v The Secretary of State for Justice Application for Permission to Appeal to the Supreme Court of the United Kingdom, 27 November 2018 [3]
[430] R (on the application of Nicklinson and another) v Ministry of Justice; R (on the application of AM) (AP) v DPP [2014] UKSC 38 [6] (Lord Neuberger)
Consequently, and with the *Nicklinson/Conway* decisions in mind, the interpretation of Section 2 under Section 3 of the HRA 1998 failed in *Nicklinson* but would succeed in *Conway*. This is because Section 2 prohibits assistance in suicide. By contrast, the context of prosecutorial discretion afforded in such instances, and the medical conditions suffered by Mr Conway, would have enabled him to end his life with assistance, whereas *Nicklinson*-claimants would have required a more involved level of assistance through setting up a machine or by lethal injection.

Therefore, in a Hypothetical *Conway* Application the court could not read and give effect (under Section 3(1)) to Section 2 in a way that removes ‘any incompatibility with the rights of those who seek the assistance of others in order to commit suicide’. Accordingly, it would need to consider the Application as one capable of achieving a declaration of incompatibility. Consequently, the claimant would most likely be given permission to appeal. However, while the legislative thresholds would have been met by such a hypothetical case, the likelihood of a declaration under Section 4 hinges on judicial attitudes and the traditional judicial caution with which cases seeking such declarations have been approached. Yet, by attempting to influence change by pursuing a declaration of incompatibility – which is not capable of meeting the needs of claimants and enabling them to access lawful assisted death – claimants have enabled the courts to develop the debate that paves the way to law reform.

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431 See Chapter Four
432 See ‘Mixed Ethical, Moral and Social Policy Issues’ section in this chapter
433 *R (on the application of Nicklinson and another) v Ministry of Justice; R (on the application of AM) (AP) v DPP* [2014] UKSC 38 [300] (Lady Hale)
2.6. Summary

This chapter has shown that some individuals of today’s society are concerned ‘that they should not be forced to linger on in old age or in states of advanced physical or mental decrepitude which conflict with strongly held ideas of self and personal identity.’ Accordingly, since the coming into force of the HRA 1998, a series of court actions have endeavoured to achieve lawful assisted dying by challenging the prohibition of assisted suicide under Section 2 of the 1961 Act.

Despite claimants’ efforts to persuade the courts to open the democratic dialogue with Parliament by way of a Section 4 declaration of incompatibility, judicial attitudes have exhibited undue deference to the construct of the law and Parliament’s decision not to adopt provisions for lawful assistance with death. Yet, as demonstrated by legal decisions in this chapter, the exercise of judicial caution has created a blockage within the channels that enabled the start of communication between citizens and the Westminster Parliament. Nevertheless, the historical context surrounding the HRA 1998 enactment is intended to maintain declarations of incompatibility in high regard – without the intention that their frequency damages the relationship between the judiciary and the executive. Thus, while judicial attitudes continue to shape the understanding of the assisted dying debate, the tendency to shy away from making a Section 4 declaration may contribute to withholding the possibility for the pathway to a good death, with adequate safeguards.

Therefore, as depicted in this chapter, judges have been more willing to explore potential assisted dying criteria, as a way of justifying the need for an exception from the current blanket

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434 Pretty v United Kingdom (2002) 35 EHRR 1 [65]
435 HRA1998
436 Suicide Act 1961 Section 2
prohibition. Thus, while highlighting the limitations of judicial powers on the issue, case law has allowed for the exploration of issues within the current construct of the law while keeping the matter of assisted dying law reform afloat.

The exploration of the chapter brought to the surface the relationship between the value of dignity as a driving influencing factor for cases in this area, and the development of judicial arguments. These arguments seemed to be motivated by the individual’s autonomy to choose death over life in the context where it is possible to ascertain their voluntary decision, free from coercion, to have an assisted death. Yet, the prevalence of this perspective is partial to the argument that those destined to suffer pain and indignity for many years may seem more deserving of assistance to end their life than those with months left to live and the option of removal of life sustaining treatment which eventually leads to death.

Given that judicial attitudes remain tied to a system built for Parliament supremacy, this study turns to investigate legislative attempts of Bills of this kind. Thus, the next chapter explores, among other things, whether the current Assisted Dying Bill 2021\textsuperscript{437} can attract the support of the Westminster Parliament in a conscience vote.

\textsuperscript{437} Assisted Dying Bill 2021
Chapter 3 – The Reform Pathway and Westminster Parliament

3.1. Introduction

Within the context of judicial attitudes, as Chapter Two makes clear, the level of deference to the Westminster Parliament became more apparent within the context of the Nicklinson judgment. Indeed, owing to the constitutional arrangement and historical outcomes of legislative introductions to reform the law, Parliament is the most appropriate forum to solve these difficult questions. Yet, the historical pathway of unsuccessful legislative attempts does little to support the notion that Parliament is ready, or even remotely willing, to move towards reforming the law on assisted dying.

Chapter Two dealt with the struggles faced by claimants in their quest to influence assisted dying legislative change by way of court challenges. Beyond their ability to order the clarification of the mechanics of applying the law by way of prosecutorial discretion – and even owing to insufficient support within judicial panels – courts have shied away from making a declaration of incompatibility as regards the interference of Section 2 of the Suicide Act 1961 (1961 Act) prohibition with the rights pursuant to the European Convention on Human Rights (Convention). Thus, in the interest of preserving the relationship between the judiciary and the legislator, courts demonstrate a high level of deference to Parliament.

This chapter begins the task of exploring (1) whether, and to what extent, the Westminster Parliament has developed the scope of debates on the issue of law reform in this area since 1936,¹ to determine the potential value of introductions and debates of this kind. This will be achieved by (2) evaluating the development and scope of assisted dying criteria, over the years,

¹ HL Deb 01 December 1936, vol 103, cols 465-505 - Voluntary Euthanasia (Legalisation) Bill 1936
which in turn is used to (3) consider the prospects of success for the Assisted Dying Bill 2021
to pass into the Statute Book.

This exploration is developed by focusing on the emphasis of debates on the issues of capacity
to make a voluntary decision and the ability to create robust safeguards to protect vulnerable
individuals. In this context, the aim is to bring to the surface the relationship between Assisted
Dying criteria and their likelihood of making their way into the Statute Book.

3.2. Legislative Attempts to Reform the Law Since 1936

That the issue of assisted dying is not going away, is demonstrated by the numerous attempts,
since 1936, to introduce a change of legislation by way of Private Members’ Bills. 2 Indeed, the
foundation of the 1936 Bill arose in 1931 with a draft Bill presented during a public address
by Dr Killick Millard in Leicester. 3 Dr Millard had used this platform to reflect on the
increasing number of ‘mercy killings’ and highlight ‘how random the law’s response could
be.’ 4 Consequently, the enthusiasm of certain key individuals – Dr Killick Millard, Lord
Moynihan and The Earl of Listowel 5 – led to the creation of the Voluntary Euthanasia
Legislation Society (‘VELS’) – now known as Dignity in Dying. 6

2 ibid
3 C Killick Millard, Euthanasia: A Plea for the Legalisation of Voluntary Euthanasia, (London, 1931)
referred in Ian Dowbiggin, “‘A Prey on Normal People’: C. Killick Millard and the Euthanasia Movement in
New Delhi, 2001 Vol 36 No 1, 59-85
4 Ann Oakley, A Critical Woman: Barbara Wootton, Social Science and Public Policy in the Twentieth Century
(Bloomsbury Academic, 2011) Chapter 16 Incurable Patient, 315-342, 319
5 HL Deb 1 December 1936, vol 103, cols 465-505 (The Earl of Listowel)
6 Dignity in Dying <https://www.dignityindying.org.uk> accessed 7 Feb 2021
**Introducing the 1936 Bill**

The principal objective of VELS was ‘to enlist the support of public opinion for the principle of [the Voluntary Euthanasia Bill] and, when the time [was] ripe, to carry a Bill of this kind through both Houses of Parliament.’ In 1936, as the Voluntary Euthanasia (Legalisation) Bill (‘1936 Bill’) made its way into the House of Lords, the passing of Lord Moynihan meant that the introduction lost the benefit of his ‘medical knowledge or […] expertise’. Therefore, the Bill was at ‘some disadvantage’ as Lord Ponsonby confessed he was ‘not […] equipped’ with the necessary knowledge regarding the key principle of the Bill.

Instead, Lord Ponsonby had to rely on Lord Moynihan’s official recommendations for change of legislation that euthanasia should be made available ‘[in instances] of advanced and inevitably fatal disease, attended by agony which reaches, or oversteps, the boundaries of human endurance’ so long as all safeguards and protection were met. Despite its less advantageous introduction, the 1936 Bill, was ‘the first measure of its kind [presented] before Parliament.’ Its move before the House of Lords was the first of a series of comparable Private Members’ Bills, aimed at ‘sway[ing] public opinion’ towards supporting change of legislation. The true impact of the 1936 Bill would later be claimed to have ‘started a trend of public opinion that has been growing ever since.’ Indeed, its defeat by 35 votes to 14.

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7 Millard (1931) in Dowbiggin (2001)
8 HL Deb 4 November 1936, col 41 (Lord Ponsonby)
9 HL Deb 1 December 1936, cols 465-505 (Lord Ponsonby)
10 ibid
11 ibid
12 ibid
13 ibid
14 Dowbiggin (2001) 84
15 HL Deb 25 March 1969, cols 1143-254 (William Francis Hare 5th Earl of Listowel)
16 ibid (The Earl of Listowel - 6.13pm)
17 ibid (Lord Ailwyn - 4.55pm); Tim Helme, ‘The Voluntary Euthanasia (Legislation) Bill (1936) Revisited’ Journal of Medical Ethics, 17 (1991), 25-29, 25-26
indicates the debate was far from controversial among the members of the House of Lords, at that time.

_The Matter of Death and Medical Discretion_

Some 33 years later, the Voluntary Euthanasia Bill 1969 (‘1969 Bill’),\(^{18}\) featuring a similar title to that of its predecessor,\(^ {19}\) faced a similar outcome to the 1936 Bill at the Second Reading stage.\(^ {20}\) During the debate for the 1969 Bill, one paternalistic view (in the sense that ‘doctors know best’) came from Lord Grenfell, who said that ‘in this strange world in which we live we have not reached the stage when we can by legislation take the life of an innocent man or woman’; thus, he advised that ‘[we should] leave the future of the suffering in the able hands of the […] medical profession who would not, I feel sure, prolong unnecessarily the life of a suffering patient.’\(^ {21}\)

Lord Grenfell’s position was based on the premise that there was a risk that such legislation may be ‘extended to those who cannot speak for themselves’.\(^ {22}\) Thus, medical professionals were better equipped to provide a more compassionate approach at the right time, without the need for legislation. Viscount Waverley took this argument even further.\(^ {23}\) In particular, he pointed to the explanatory memorandum of the 1969 Bill before the House, which stated:

> Clause 8 declares that all terminal patients are entitled to receive whatever quantity of drugs may be required to keep them entirely free from pain; and that in a case where severe distress cannot be alleviated by pain-killing drugs, the patient is entitled, if he

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\(^{18}\) HL Deb 25 March 1969 vol 300 cc1143-254 (Lord Raglan – 2.54pm)

\(^{19}\) The new title did not feature the word ‘Legalisation’.


\(^{21}\) ibid (Lord Grenfell - 6.30pm)

\(^{22}\) ibid

\(^{23}\) ibid (Viscount Waverley - 6.36pm)
so desires, to be made and kept entirely unconscious. The section applies to patients whether or not they have made any declaration, and is expressed to be for the removal of doubt as to the existing state of the law.24

Thus, Viscount Waverly, speaking from experience as a consultant physician at the Royal Berkshire Hospital for 20 years, questioned the extent of the norms conferred by Clause 8 as a kind of practice that was already part of the contemporary medical practice at ‘the attendant doctor’s discretion’.25 For him, the issue was that the Bill was made available based on ‘the patient’s “request”’.26 Therefore, he rejected the Bill because ‘the request [for voluntary euthanasia] is virtually never forthcoming and legal rigidity, far from easing the path of the dying […] would have a contrary effect’.27 Instead, a more favourable approach, Viscount Waverley suggested, was to accept ‘that medical discretion as now practised will, when necessary, humanely ease the road from life to death.’28 Yet, the fact of deferring to the judgement of the medical profession left the matters of capacity, personal autonomy and consent of patients unaddressed. In fact, Viscount Waverly’s rationalisation of his view was to dismiss, quite entirely, the need for a legislation that required the patient’s request (by way of a declaration) for ‘a quiet and easy death’.29

Indeed, this kind of attitude shared by Lord Grenfell and Viscount Waverley seems to be at the very core of a system which, several years later, would bring about several unlawful deaths. Thus, both the Liverpool Care Pathway ‘and the abuses that sometimes took place under that name’,30 and the hundreds of questionable deaths carried out at Gosport War Memorial

24 Voluntary Euthanasia Bill 1969 Clause 8
25 HL Deb 25 March 1969, vol 300, col 1217 (Viscount Waverley – 6.36pm)
26 ibid
27 ibid
28 ibid
29 ibid
30 HC Deb 11 September 2015, vol 599, col 684 (Norman Lamb - 11.33am)
Hospital, represent harrowing events that transpired within a system that places a high level of trust in medical professionals and did not allow for lawful assistance with ending life. Therefore, the emphasis on (medical) professional’s compassion as the catalyst for making difficult decisions surrounding a hastened death – as well as the intentional overlooking of an individual’s self-determination by way of a voluntary decision in this way – is problematic. Indeed, political aspects attached to the question of law reform mean that, so far as Members of Parliament (MPs) are concerned, if the question is not answered by way of the Parliamentary process, responsibility for these conundrums falls on the medical professionals.

In fact, as the events noted above highlight, the normalisation of paternalistic approaches that function based on trust and confidence that, in all circumstances, medical professionals will strike the right balance in matters of death, may ultimately lead to catastrophic outcomes. Hence, without the need for a patient’s voluntary decision, the legislative construct deprives patients of necessary safeguards regarding end-of-life decisions, while giving medical professionals the choice over the patient’s fate.

_Safeguarding Against Abuse_

A more pragmatic approach to how the 1969 Bill would take effect in terms of safeguards, was noted by The Earl of Huntingdon. His concern was linked to matters of coercion, namely the possibility that patients may be encouraged by family or friends to choose euthanasia. Nevertheless, as he swiftly attested, the Bill provided for safeguards including an interval of time from making the request until they could access euthanasia, as well as the number of

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32 HL Deb 25 March 1969, vol 300, cols 1143-254 (The Earl of Huntingdon – 6.41pm)
people involved – ‘the general practitioner, the witnesses, the doctors who decide who should be a qualified person’ – who would potentially discover any pressures ‘against possible abuse’. It is therefore apparent that the 1969 Bill began to set the tone for the need to protect individuals by way of implementing recognised safeguards to prevent against abuse.

In the context of the next two Bills – Incurable Patients Bill 1975 (‘1975 Bill’) and Doctor Assisted Dying Bill 1997 (‘1997 Bill’) – where one was introduced in the House of Lords and another in the House of Commons, ‘the right of patients’ was emphasised further. The 1975 Bill was set to enable individuals to receive assistance if they were suffering from an ‘incurable suffering’, whereas the 1997 Bill provided for criteria available to individuals ‘diagnosed with a terminal illness’. In terms of prospects of success for the latter, as the first House of Commons introduction of this kind, it made no difference that the 1997 Bill was moved by a Labour MP during a Labour Government.

Indeed, the ensuing Second Reading stage defeat by 234 to 89 echoes a similar divide to that of the 1936 Bill by 35 votes to 14. Thus, despite being separated by over 60 years, these two results demonstrate the contentious nature of the debate was mirrored by the results in both Houses by prompting the 38% and 40% minority votes in favour of change of legislation.

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33 ibid col 1219
34 HL Deb 4 December 1975, vol 366, col 756 – Incurable Patients Bill 1975
35 ibid
37 ibid
38 ibid - Mr Joe Ashton MP
39 ibid
40 ibid; HL Deb 25 March 1969 vol 300 cc1143-254 (Lord Ailwyn - 4.55pm); Helme (1991) 25-26
**Assisted Dying Bills Since 2003**

Successive Bills have essentially\(^1\) been represented by approaches of two sponsoring Members.\(^2\) In the period 2003-2006,\(^3\) four attempts to move the Assisted Dying for the Terminally Ill Bill – a provision founded upon the principle of personal autonomy – gave rise to the Select Committee Investigation Report in 2005.\(^4\) The work of the Committee included visiting jurisdictions where some form of assistance was provided in achieving a hastened death – the US State of Oregon, the Netherlands and Switzerland.\(^5\) However, the recommendations of the Report were set against the observation that Lord Joffe’s Bill would ‘be unable to make progress […] due to shortage of time’, which meant that passing on the baton to the next Parliamentary Session came with the duty to reintroduce another Bill on this kind for scrutiny.\(^6\) Since 2012,\(^7\) Parliamentary debates have involved a series of Assisted Dying Bills which, to this day, continue to shape the parameters of assisted dying criteria within frameworks of this kind, while maintaining a steady media profile on this matter.\(^8\) In 2015, the introduction of a similar Bill in both Houses of Parliament\(^9\) culminated with its defeat by

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\(^1\) Similar versions of those same Bills have also been introduced by other sponsors: Assisted Dying (No 2) Bill 2015 presented by Rob Marris MP; Assisted Dying Bill 2016 presented by Lord Hayward

\(^2\) Lord Joel Joffe - Member of the House of Lords 2000-2017; Lord Charles Falconer Member of the House of Lords 1997-Present


\(^4\) House of Lords Select Committee on the Assisted Dying for the Terminally Ill Bill, ‘Assisted Dying for the Terminally Ill Bill’, Report, 4 April 2005; The Committee was appointed to consider and report on the Assisted Dying for the Terminally Ill Bill presented on 24 November 2004.

\(^5\) ibid; Also see HL December 12 May 2006, vol 681, col 1183

\(^6\) ibid


\(^9\) Assisted Dying Bill 2016 sponsored by Lord Hayward; Assisted Dying Bill 2015 sponsored by Rob Marris
Once again, the number of votes confirmed the lasting divide on assisted dying law reform.

Unsuccessful Legislative Attempts in England and Wales

Over the years, persistent introductions of Bills of this kind in both the House of Commons and the House of Lords have kept the issue in the spotlight.

Table 7 - Unsuccessful Legislative Attempts in England and Wales

<table>
<thead>
<tr>
<th>No.</th>
<th>Date</th>
<th>Bill Short Title</th>
<th>Stage Reached</th>
<th>Sponsor</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.</td>
<td>1936</td>
<td>Voluntary Euthanasia (Legalisation) Bill [HL]</td>
<td>Defeated 2nd R 35/14 (HL)</td>
<td>Lord Ponsonby</td>
</tr>
<tr>
<td>5.</td>
<td>1993</td>
<td>Medical Treatment (Advance Directives) Bill [HL]</td>
<td>1st R; 2nd R NR (HL)</td>
<td>Lord Allen</td>
</tr>
<tr>
<td>6.</td>
<td>1993</td>
<td>Voluntary Euthanasia Bill [HC]</td>
<td>2nd R (HC)</td>
<td>Piara Khabra</td>
</tr>
<tr>
<td>10.</td>
<td>2005</td>
<td>Assisted Dying for the Terminally Ill Bill [HL]</td>
<td>Unknown (HL)</td>
<td>Lord Joffe</td>
</tr>
<tr>
<td>11.</td>
<td>2006</td>
<td>Assisted Dying for the Terminally Ill Bill [HL]</td>
<td>Voted 148/100 for 6m delay (HL)</td>
<td>Lord Joffe</td>
</tr>
<tr>
<td>12.</td>
<td>2009</td>
<td>Coroners and Justice Bill – Amendment [HL]54</td>
<td>Refused (HL)</td>
<td>Lord Falconer</td>
</tr>
<tr>
<td>15.</td>
<td>2015</td>
<td>Assisted Dying Bill [HL]</td>
<td>P Session Ended (HL)</td>
<td>Lord Falconer</td>
</tr>
<tr>
<td>16.</td>
<td>2015</td>
<td>Assisted Dying (No 2) Bill [HC]</td>
<td>Defeated 330/118 (HC)</td>
<td>Rob Marris</td>
</tr>
<tr>
<td>17.</td>
<td>2016</td>
<td>Assisted Dying Bill [HL]</td>
<td>P Prorogued (HL)</td>
<td>Lord Hayward</td>
</tr>
<tr>
<td>18.</td>
<td>2020</td>
<td>Assisted Dying Bill [HL]</td>
<td>P Prorogued (HL)</td>
<td>Lord Falconer</td>
</tr>
</tbody>
</table>

50 Assisted Dying Bill 2015 sponsored by Rob Marris MP
51 See Unsuccessful Legislative Attempts in England and Wales Table 7 below.
52 Legend: P – Parliament; R – Reading; NR – Not Requested; CS – Committee Stage; Importantly, thus far, Bills of this kind have yet to progress past the House in which they have been introduced.
54 Lord Falconer moved an amendment to insert the following new Clause within the Suicide Act 1961 – ‘Acts not capable of encouraging or assisting suicide’. In seeking a vote on the issue put forward, Lord Falconer’s Amendment was refused by 194 to 141.
By reference to the table provided in this section, it may be observed that voting results offer a corresponding split on the issue of assisted dying, with steady support in favour of change between 26% and 29%. Yet, the popularity of Bills of this kind is more apparent in one of the Houses.

Since 1936, the House of Lords seems to have been more insistent in bringing this issue to the fore. One potential contributor for this dynamic may be rooted in the type of membership secured by members of each House. Those in the Commons are an elected body, whereas in the Lords’ membership is by appointment, heredity, or official function. Consequently, while members of the House of Commons may fear their decision-making process may influence the prospect of their re-election, members in the House of Lords need not concern themselves with such matters.

Another possible reason why these Bills surface more frequently in the House of Lords may be due to the generational contrast of the two Houses. The mean age of these Houses may play a determining role in decoding the tendency towards debating the matter of life and death by way of Private Members’ Bills. Therefore, with the average age around 51 in the House of Commons and 70 in the House of Lords, it is possible to infer matters of death may be closer to home for the latter group. Consequently, if age were to feature as an indicator of attitudes, then perhaps for members in the House of Lords the fragility of life and experience of death in their respective social circles may also influence (more so than for those in the Commons) the frequency of initiating debates of this kind.

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55 These percentages are established based on the number of votes involving the 1936 Bill (35/14), the 1997 Bill (234/89) and the 2015 Bill (330/118); thus, around 29%, 28% and 26% of voters supported the Bill.
56 Of the 19 documented introductions, only four moves have been made in the House of Commons with the remaining 15 originating in the House of Lords.
3.3. Assisted Dying Bills Under the Microscope

The timeline of Bills aimed at enabling hastened death between 1936 and 2021\(^{57}\) permits an onlooker to recognise the chronicled developing structure of what may soon become lawful death upon request. Nevertheless, by reference to the first\(^{58}\) and latest\(^{59}\) of Bills of this kind, there is a sense that, despite originating at opposing ends of an 85-year interval, the frameworks they prescribe – though adopting a different emphasis in harmony with the climate around the time of their respective introductions in Parliamentary – share similar underlying features.

*Comparing Parliamentary Debates Surrounding the 1936 and the 2021 Bills*

Reduced to the essential criteria they employ, the comparative snapshot for the 1936 (first) and 2021 (latest) Bills\(^{60}\) creates a parallel whereby ‘voluntary euthanasia’ (1936) became ‘assisted dying’ (2021), ‘fatal and incurable illness involving severe pain’ (1936) is now confined to ‘terminal illness’ (2021), and the need for a ‘euthanasia referee’ (1936) has been replaced by the ‘High Court Judge’ (2021) requirement. What is more, both Bills propose to introduce the choice of hastened death to be facilitated by medical professionals in charge of the process and delivery of assistance in the manner prescribed. For this discussion, the comparison speaks to the need to establish the extent of these measures to meet the definition of a good death as defined in Chapter One.

The 1936 Bill provided for the lawful administration of euthanasia in certain circumstances determined as ‘the termination of life by painless means’ for the purposes of putting an end to

\(^{57}\) See Table 7 - Unsuccessful Legislative Attempts in England and Wales in this chapter.

\(^{58}\) Voluntary Euthanasia (Legalisation) Bill 1936

\(^{59}\) Assisted Dying Bill 2021

\(^{60}\) Voluntary Euthanasia (Legalisation) Bill 1936 and Assisted Dying Bill 2020
‘unnecessary suffering’. Thus, the focus here is on the pain endured by individuals who would wish to have a hastened death. The introduction by Lord Ponsonby argued, although indirectly, that this would ‘unlock the door of compassion’ to allow those who linger in the agony of hopeless suffering to end their life in a dignified way. Yet, the warning from the Lord Archbishop of Canterbury was that the possibility for ‘illegitimate pressure’ lacking compassion, was not entirely avoidable. In fact, in his view, it was one thing to unlock the door and quite another to prevent the door from being ‘opened wide’. Thus, from this early stage, the relationship between adopting a more compassionate approach and establishing robust safeguards became the ingrained arbiter for achieving the most ideal framework. In the context of a House of Commons 2020 debate, the arguments pointed to the fallacious sustainability offered under the current system by reference to constituents who wish that Parliament also reconsider the matter in the name of ‘compassion and dignity’. That said, the risks of a potentially slippery slope in the event of law reform, persist as one of the most recognised arguments against change.

John Keown’s work on the issue demonstrates, by reference to other jurisdictions, the potential risks of unlocking the door to change. In essence, the slippery slope argument holds that if law reform for A is provided on the basis that this is morally acceptable, this should fail because it could potentially lead to B which is not considered morally acceptable. Thus, by reference to the ‘empirical’ (a clear line cannot be drawn therefore a slide is inevitable) and ‘logical’ (even a precise guideline would end up being relaxed because of the difficulties posed by

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61 Voluntary Euthanasia (Legalisation) Bill 1936 Section 1
62 HL Deb 1 December 1936, vol 103, cols 465-505 (Lord Ponsonby)
63 ibid, col 487 (The Lord Archbishop of Canterbury)
64 ibid, col 488
65 HC Deb 23 January 2020, vol 670, col 199 - Aaron Bell – 3.49pm
66 ibid, cols 203-204 - Imran Hussain and Karin Smyth
67 Keown (2018) 67-89
68 D Lamb, Down the Slippery Slope: Arguing in Applied Ethics (1988, New York, Croom Helm) Chapter 1
definitions and enforcement) arguments, Keown constructs convincing deontological and consequential arguments for continued prohibition. Nevertheless, in the context of law reform which thus far has been adopted by 27 jurisdictions (see Table 6 in Thesis Introduction), the available evidence has yet to persuade against change. In fact, jurisdictions with assisted dying laws such as Oregon, United States of America, where this has been an option for individuals since 1997, this domino effect in the form of a slippery slope has yet to materialise.

Thus, in line with Keown’s reasoning, in the context of the Assisted Dying Bill (‘2021 Bill’), which provides only for self-administered lethal medication, the slippery slope argument holds that by adopting change, the framework would, either through practice (empirical) or by way of relaxing definitions (logical), adapt to also provide assisted dying by way of doctor-administered lethal medication. However, in line with the definition of assisted dying as adopted by this thesis (to include both self-administered and doctor-administered lethal medication) the emphasis of strengthening an assisted dying framework would focus on developing the most robust safeguards to prevent abuse and enhance the protection of vulnerable individuals. In the context of the 2021 Bill, these measures are provided within the process of ascertaining the individual’s voluntary and uncoerced decision pursuant to a documented request freely entered by them, in the presence of witnesses, with the involvement of qualified medical professionals. As such, the devised process for assisted death would meet the requirements of compassionate assistance based on choice and self-determination.

69 ibid
70 Assisted Dying Bill 2021 Section 3
71 ibid
72 ibid Section 4
Moreover, in line with the ‘euthanasia referee’ envisioned by the 1936 Bill, the 2021 Bill provisions\textsuperscript{73} have (since 2014) been introduced to include the need for consent of a High Court Judge (Family Division).\textsuperscript{74} While the scope of this additional requirement as part of the framework is evaluated later in this chapter, its purpose seems to be intended as an extra layer of safeguards to prevent abuse. It is therefore designed to provide a screening-type process whereby an individual’s capacity to reach a voluntary, clear, settled and informed decision to end their life – as well as the authenticity of that decision – is confirmed at every stage of the assisted dying process.

Nevertheless, more recently, Assisted Dying Bills have adopted criteria that continue to be reflected within current introductions of this kind. The remainder of this section follows two elements of these criteria, by reference to their development as part of Bills of this kind.

\textit{Adopting and Adapting the Terminal Illness Criterion}

Despite a shift in emphasis of concepts of Bills over the years, the fundamentals of criteria for hastened death upon request remain largely unchanged since 1997. At that point, the first Bill that adopted the term ‘assisted dying’ made its way in Parliament.\textsuperscript{75} Although a copy of the

\textsuperscript{73} Assisted Dying Bill 2020 Clause 4(4) states that ‘In respect of a medicine which has been prescribed for a person under subsection (1), an assisting health professional may—
(a) prepare that medicine for self-administration by that person;
(b) prepare a medical device which will enable that person to self-administer the medicine; and
(c) assist that person to ingest or otherwise self-administer the medicine;
but the decision to self-administer the medicine and the final act of doing so must be taken by the person for whom the medicine has been prescribed.’

\textsuperscript{74} Assisted Dying Bill 2020 Clause 1(2) requires confirmation that the individual:
‘(a) has a voluntary, clear, settled and informed wish to end his or her own life;
(b) has made a declaration to that effect in accordance with section 3; and
(c) on the day the declaration is made –
(i) is aged 18 or over;
(ii) has capacity to make the decision to end his or her own life; and
(iii) has been ordinarily resident in England and Wales for not less than one year.’

\textsuperscript{75} Doctor Assisted Dying Bill 1997 - introduced by Joe Ashton MP via the Ten-Minute Rule
draft Bill is not available,76 the introduction by Joe Ashton MP signalled the move concerned ‘a Bill to enable a person who is suffering distress as a result of his terminal illness or incurable physical condition to obtain assistance from a doctor to end his life; and for connected purposes.’77 In clarifying the scope of the Bill, Joe Ashton noted the principle of the Bill was to be distinguished from the ‘definition of euthanasia’78 which, he explained, ‘is mercy killing’,79 whereas under his Bill ‘nobody will take a person’s life’.80

This distinction was drawn on account of evidence including the view of the Catholic Church that giving ‘a dying person sedatives and analgesics for the alleviation of pain, even though the drugs may deprive the patient of reason or shorten his life’ was not euthanasia.81 Also, the view of the House of Lords Select Committee on Medical Ethics, a couple of years earlier, regarding their position against euthanasia, distinguished ‘the double effect of relieving pain and shortening life’ as a ‘generally permissive approach’.82 The backdrop of information aimed to persuade that the 1997 Bill would provide much-needed safeguards against abuse and ‘would give the right to a voluntary, merciful shortening of life, giving dignity to an inevitable death.’83 On this point, Joe Ashton emphasised the safeguards under the Bill that ‘[t]wo doctors – a general practitioner and a specialist consultant on the illness – would have to sign a permission form. The patient would also have to be diagnosed terminally ill’.84 However, while the measures were defined to highlight the personal autonomy of individuals accessing the provisions, other aspects of the criteria proved more problematic.

76 The manner of the Bill’s introduction points to the possibility that the oral presentation of the move and its subsequent refusal for leave to be introduced did not justify it being printed.
77 Long Title for the 1997 Bill
78 The term ‘euthanasia’ formed the basis of an earlier introduction in the same House during the introduction of the Voluntary Euthanasia Bill 1993.
80 ibid
81 ibid, col 1026
82 ibid
83 ibid, col 1027
84 ibid, col 1026
In fact, the question of the most adequate medical condition to be adopted as part of eligibility requirements\(^85\) has challenged even those favouring change. This kind of dilemma was captured in 2005 when, having sponsored several such Bills,\(^86\) Lord Joffe declared he no longer supported certain factors of Bills he initially introduced in Parliament.\(^87\) Hence, whereas in 2003 Lord Joffe’s Bill was intended for those ‘suffering unbearably as a result of a terminal or a serious, incurable and progressive physical illness’,\(^88\) by 2005, he decided to only support assisted dying ‘for patients who are not terminally ill’.\(^89\)

Lord Joffe explained that ‘after three years of legislative effort on the subject, [he had] no intention of pursuing this issue beyond the ambit of the [2005] Bill’.\(^90\) Accordingly, the scope of his last Bill provided for assisted dying for ‘competent adults who are terminally ill’ where their condition is ‘(a) inevitably progressive, (b) cannot be reversed by treatment (although treatment may be successful in relieving symptoms temporarily), and (c) will be likely to result in the patient’s death within six months’.\(^91\) There were no further introductions of this kind in the Westminster Parliament until 2010, when Lord Falconer set up the Commission on Assisted Dying (‘CAD’) to consider ‘whether the current legal and policy approach to assisted dying in England and Wales is fit for purpose.’\(^92\)

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\(^{85}\) Katherine Sleeman and Iain Chalmers, ‘Assisted dying: restricting access to people with fewer than six months to live is discriminatory’ BMJ (2019) 367:36093

\(^{86}\) Between 2003 and 2006 Lord Joffe made four attempts to move Assisted Dying Bills.

\(^{87}\) HL Deb 12 May 2006, vol 681, col 1188 - Assisted Dying for the Terminally Ill Bill 2006 [HL]

\(^{88}\) Assisted Dying for the Terminally Ill Bill 2003 [HL]

\(^{89}\) HL Deb 12 May 2006, vol 681, col 1188

\(^{90}\) ibid

\(^{91}\) ibid

The ensuing 2011 Report,\textsuperscript{93} first mentioned in the House of Lords in 2013,\textsuperscript{94} proposed that future assisted dying frameworks define ‘terminal illness’ as ‘an advanced, progressive, incurable condition that is likely to lead to the patient’s death within the next 12 months.’\textsuperscript{95} Compared to previous Bills, it was the first time the word ‘advanced’ surfaced; also, the requirement of six months was replaced by 12 months to define the circumstances of a ‘terminally ill’ prognosis.\textsuperscript{96} What is more, for the purposes of assisted dying law reform, it was the first time that the combination of ‘advanced, progressive, incurable’ was employed.

Yet, the way the CAD had formed its conclusion for their suggested definition is worth considering. The inspiration came from the guidance provided by the General Medical Council (‘GMC’) in 2010.\textsuperscript{97} The definition within the guidance – entitled ‘Treatment and care towards the end-of-life’ – was discussed in the CAD Report as a practical approach to ‘identifying when a person might be considered “terminally ill” or otherwise potentially in need of end-of-life care’.\textsuperscript{98} The CAD Report explains that, based on the GMC guidance, ‘patients are “approaching the end-of-life” when they are likely to die within the next 12 months.’\textsuperscript{99} Indeed, this is what led to the CAD’s conclusion that future frameworks could define terminal illness by reference to 12 months.

\textsuperscript{93} ibid
\textsuperscript{94} Introduced in the House of Lords as Assisted Dying HL Bill (2013-14)
\textsuperscript{95} CAD Report 2011, 27, 30, 197, 304
\textsuperscript{96} CAD Report 2011
\textsuperscript{97} GMC, Treatment and Care towards the End-of-life: Good Practice in Decision Making, 8 <http://www.gmc-uk.org/guidance/ethical_guidance/end_of_life_care.asp> accessed 15 Feb 2021; The CAD Report 2011 refers to the origin of this definition at footnote 487, 197
\textsuperscript{98} CAD Report 2011, 197
\textsuperscript{99} ibid; The guidance goes on to explain: ‘This includes patients whose death is imminent (expected within a few hours or days) and those with:
- advanced, progressive, incurable conditions
- general frailty and co-existing conditions that mean they are expected to die within 12 months
- existing conditions if they are at risk of dying from a sudden acute crisis in their condition
- life-threatening acute conditions caused by sudden catastrophic events.’
The obvious setback in choosing to rely on the GMC guidance is that it had everything to do with precisely ‘treatment and care towards the end-of-life’ and nothing to do with ‘assisted death’. In the same way, ‘approaching the end-of-life’ – in itself a criterion entitling someone under the guidance to qualify for such treatment – should not be used interchangeably with being diagnosed as ‘terminally ill’, which for the purposes of other unrelated legislative provisions entitled someone to certain benefits (see discussion later in this chapter). Consequently, this element of the CAD Report is problematic. Not surprisingly, despite variations of the ‘terminal illness’ definition over the years, Assisted Dying Bills have continued to provide for individuals with six months or less left to live. One exception to this was the 2004 Bill provisions, which defined terminal illness as a condition ‘likely to result in the patient’s death within a few months at most’.100

**The Shortcomings of the ‘Terminal Illness’ Criterion**

The continuation of this trend to use the ‘terminal illness’ criterion was also picked up by the 2021 Bill, to reflect a slightly altered definition.101 Introduced in January 2021, the Bill aims to ‘[e]nable competent adults who are terminally ill to be provided at their request with specified assistance to end their own life; and for connected purposes.’102 Thus, in all post-2013 Assisted Dying Bills, ‘terminal illness’103 extends to individuals suffering from a ‘progressive condition which cannot be reversed by treatment’ and are ‘reasonably expected to die within six months’.104

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100 Assisted Dying for the Terminally Ill Bill 2004 [HL]
101 Assisted Dying Bill 2020 [HL]
102 ibid, Long Title
103 Assisted Dying Bill 2020 [HL] Clause 2 Terminal Illness
104 ibid
Contributions by Baroness Finlay and Baroness Campbell during the Committee Stage of the House of Lords for the Falconer Bill 2015 questioned the scope of defining the term within the bounds of an ‘inevitably progressive condition which cannot be reversed by treatment’. Baroness Campbell pointed out this ‘could equally apply to many disabilities, [her] own included’, suggesting that individuals with progressive medical conditions ‘will fall within the scope of the Bill’. This remark was an opportunity to reflect on what would be a more suitable term. That said, the structure of proposed Assisted Dying Bills points to the requirement that individuals have the capacity to reach a voluntary decision, free from coercion, to have an assisted death and sign a (witnessed) declaration to this end. Thus, the questions implied by Baroness Campbell – largely aimed at the need to safeguard vulnerable individuals who would (technically) qualify as being ‘terminally ill’ – suggested the automatic qualification when in fact, in the spirit of the Bill, it is the voluntary request that triggers the consideration of whether someone qualifies under the prescribed criteria.

Indeed, there are other reasons why, in time, this term could prove problematic. Despite its popularity among Bills of this kind, the term ‘terminal illness’ has its origins in legislation designed for a specific purpose. Initially, the term was adopted by the Social Security Act 1990 (‘1990 Act’). It came as an amendment to the Social Security Act 1975, which restricted eligibility for ‘attendance allowance’ to persons who had been ill for a minimum of six months. Therefore, in order to allow the qualification of such benefits, the 1990 Act introduced a definition which stated that ‘a person is “terminally ill” at any time if at that time he suffers from a progressive disease and his death in consequence of that disease can

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105 HL Deb 16 January 2015, vol 758, cols 1031-1037 - Baroness Finlay and Baroness Campbell
106 ibid, cols 1037-1038
107 Social Security Act 1990
108 Social Security Act 1975
109 ibid Section 35
reasonably be expected within 6 months’.\textsuperscript{110} During the Second Reading\textsuperscript{111} of what became the 1990 Act it was pointed out the definition was not aimed at widening the medical scope for terminal illnesses, but to cure an existing issue.\textsuperscript{112} Later, the very same definition was adopted by both the Disability Living Allowance in the Social Security and Benefits Act 1992\textsuperscript{113} and the Welfare Reform Act 2012.\textsuperscript{114} Evidently, the term seemed to have been almost effortlessly adopted by subsequent legislation requiring the terminally ill criteria.

Moreover, the matter of prognosis for the terminally ill is also a challenge for the purposes of the Bill in contemplation of the requirement under provisions for six months left to live. This is because comparatively, prognostication for the purposes of securing financial benefits from the Government does not appear to bear the same consequences as prognostication for the purposes of accessing assisted dying. In fact, some have warned of ‘limitations in prognostication’ when dealing with a terminal illness,\textsuperscript{115} especially as some individuals continue to live longer than indicated by their prognosis.\textsuperscript{116} On this account, individuals could potentially decide to end their life at an earlier point. At the same time, the advancements of medical practice make it increasingly difficult to indicate,\textsuperscript{117} with precision, how long a patient will live.\textsuperscript{118}

\textsuperscript{110} Social Security Act 1990 Section 1(2C)(a)
\textsuperscript{111} HC Deb 22 January 1990, vol 165, cols 625-715, col 628 - Social Security Bill 1990
\textsuperscript{112} ibid
\textsuperscript{113} Disability Living Allowance in the Social Security and Benefits Act 1992
\textsuperscript{114} Welfare Reform Act 2012 Section 82
\textsuperscript{116} Finlay and George (2011)
\textsuperscript{118} CAD Report 2011, 196; This was based on a statement by Dr Adrian Tookman, consultant physician in palliative medicine; Also see L Ganzini et al, ‘Oregon physicians’ attitudes about and experiences with end-of-life care since passage of the Oregon Death with Dignity Act’ Journal of the American Medical Association 285 (2001) 2363-2369, 2367
More recently, during other, unconnected, Parliamentary business dating back to July 2018, Madeleine Moon MP moved the Access to Welfare (Terminal Illness Definition) Bill 2017-19.\(^{119}\) The matter was aimed to ‘amend the definition of terminal illness in the Welfare Reform Act 2012’ (2012 Act),\(^{120}\) to make it easier for individuals to access the benefits they needed. Accordingly, the words ‘reasonable expectation of death within six months’\(^{121}\) were to be replaced with ‘the clinical judgement of a health care professional that the person has a progressive disease that can reasonably be expected to cause the person’s death.’\(^{122}\) With the Parliamentary Session coming to an end, this measure was picked up by Jessica Morden MP, who introduced the Welfare (Terminal Illness) by way of the Ten Minute Rule in 2020.\(^{123}\) Therefore, these types of introductions support the argument that redefining this term remains a contemporary and even future issue for Assisted Dying Bills.

Actually, in 2018\(^{124}\) the Scottish Government\(^{125}\) decided to take a different approach, redefining ‘terminal illness’ by removing the six-month time limit.\(^{126}\) The new definition, in line with that proposed in England and Wales, provides that an individual is regarded as having a terminal illness if a registered medical practitioner finds ‘that the individual has a progressive disease that can reasonably be expected to cause the individual’s death.’\(^{127}\) During the July 2020 move, Jessica Morden paid tribute to those involved in this movement, including the

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120 Access to Welfare (Terminal Illness Definition) Bill 2018 - Long Title
121 Welfare Reform Act 2012 Section 82 (4) States: ‘For the purposes of this section a person is ‘terminally ill’ at any time if at that time the person suffers from a progressive disease and the person’s death in consequence of that disease can reasonably be expected within 6 months.’
122 Access to Welfare (Terminal Illness Definition) Bill 2018 Clause 1(2)
123 HC Deb 22 July 2020, vol 678, col 2194 - Welfare (Terminal Illness) (Jessica Morden - 3.02pm)
125 Pursuant to Scotland Act 2016, matters of social security were transferred from the UK government to the Scottish government.
127 Social Security (Scotland) Act 2018 Schedule 5 Part 1 Chapter 1 Section (1)(2)
Motor Neurone Disease Association and Marie Curie for collaborating with the all-party Parliamentary group in generating a report which made inquiries into the legal definition of a terminal illness.\textsuperscript{128} With the Welfare (Terminal Illness) Bill 2019-2021 awaiting its Second Reading,\textsuperscript{129} the potential impact of adopting such a new legal definition may have a direct impact on Assisted Dying Bills. Consequently, the real footprint of the terminal illness definition resides with its prospect of being adopted or adapted as part of relevant statutes, before or even after an Assisted Dying Bill makes its way into the Statute Book.

Therefore, while the risks signalled by Baroness Finlay and Baroness Campbell cannot be ignored, it is conceivable that a new proposed definition for ‘terminal illness’\textsuperscript{130} presents a potential difficulty in influencing the eligibility of individuals to access assisted dying. If this materialises, the terminology will extend to people with a longer life expectancy, who suffer from a non-terminal progressive medical condition – ‘expected to cause the person’s death.’\textsuperscript{131}

What assisted dying Parliamentary debates have yet to address is that – given the requirement of the Convention that domestic legislation be in accordance with the law – the scope of the assisted dying criteria may encounter further difficulties in the event of law reform. In considering the eligibility criteria based on terminal illness and even unbearable suffering, Papadopoulou – who has written a detailed thesis on the eligibility criteria for assisted dying – questions their adequacy in upholding both the respect for Article 2 (right to life) and the right to self-determination under Article 8.\textsuperscript{132} In considering the issue of assisted suicide prohibition,

\begin{footnotes}
\item[128] All-Party Parliamentary Group for Terminal Illness, ‘Six months to live?’ <
\item[130] HC Deb 22 July 2020, vol 678, col 2194 - Welfare (Terminal Illness) (Jessica Morden 3.02pm)
\item[131] ibid
\end{footnotes}
the ECtHR emphasised that a decision to end one’s life by this means ought to be a matter of free will.\textsuperscript{133} Thus, on this point, Papadopoulou argues that provided the necessary safeguards against abuse are met, future Assisted Dying Bills ought to adopt provisions aimed at ascertaining the individual’s decision-making process as an expression of their own voluntary wishes stemming from their own self-determination to make an autonomous decision, free from coercion.\textsuperscript{134}

\textit{Developing the Mental Capacity Criterion}

Since 1936, Bills of this kind included the requirement that individuals seeking access to a hastened death are of ‘sound mind’ (1936 Bill),\textsuperscript{135} ‘mentally responsible’ (the 1969 Bill)\textsuperscript{136} and even ‘competent’ (2003 Bill).\textsuperscript{137} The latter explicitly defined the term competent as ‘having the capacity to make an informed decision’.\textsuperscript{138} This emphasis demonstrates the existence of a strong relationship between the issue of mental capacity and the individual’s competence to make a voluntary decision. Yet, the way in which this is ascertained is key to preventing abuse.

The coming into force of the Mental Capacity Act 2005 (‘MCA 2005’) prompted an immediate shift of approach in subsequent Assisted Dying Bills. Therefore, whereas before its enactment mental capacity under assisted dying provisions were meant to be confirmed by a doctor, the following 2005 Bill provided for the need to determine\textsuperscript{139} the individual ‘does not lack capacity’.\textsuperscript{140} While the 2005 Bill based this determination on whether the individual is ‘unable

\textsuperscript{133} Haas v Switzerland (2011) 53 EHRR 33 [16], [46], [54], and [58]
\textsuperscript{134} Papadopoulou (2017) Chapter 3
\textsuperscript{135} Voluntary Euthanasia (Legalisation) Bill 1936 Section 2(1)
\textsuperscript{136} Voluntary Euthanasia Bill 1969 Section 4(1)
\textsuperscript{137} Assisted Dying for the Terminally Ill Bill 2004 Section 1(2)
\textsuperscript{138} ibid
\textsuperscript{139} Assisted Dying for the Terminally Ill Bill 2005 Section 3
\textsuperscript{140} ibid Section 2(2)(b)
to make a decision for [themself]¹⁴¹ (in the more general sense), the 2014 Bill – and all succeeding Bills including the 2021 Bill – address the matter of capacity as when a person can ‘make the decision to end their own life’.¹⁴² Thus, post-2014 Bills explicitly indicate that the meaning of ‘capacity’ is to ‘be construed in accordance with the [MCA 2005]’.¹⁴³

In contemplation of assisted dying law reform, Casey and Choong advise against using the definition of mental capacity for instances where people seek an assisted death,¹⁴⁴ in the way provided under the MCA 2005. Alongside the nature of assumed mental capacity,¹⁴⁵ the MCA 2005 raises a strong but negative affirmation of patient autonomy.¹⁴⁶ Essentially, it imposes a duty on medical professionals to assess and confirm their findings because ‘without affirming the presumption [of capacity], a practitioner cannot know that the criteria supporting the default are not not met.’¹⁴⁷ (emphasis added)

Casey and Choong explain that, confirming lack of capacity (the first stage of the MCA 2005 test) and using it to validate the inability to make a final decision (the second stage of the MCA 2005 test) would fail to address a set of unique physical and psychological conditions which could only be explored and appropriately assessed through a function-specific test.¹⁴⁸ Accordingly – and contrary to the adoption of capacity in Bills of this kind as having the ability ‘to make the decision to end [one’s] own life’¹⁴⁹ – the determination reached by Casey and Choong suggests that a function-specific test would ensure the accuracy of the decision-making.

¹⁴¹ ibid Section 2(4)
¹⁴² Assisted Dying Bill 2014 Section 3(3)(b); Assisted Dying Bill 2021 Section 1(2)(c)(ii)
¹⁴³ Assisted Dying Bill 2014 Section 12; Assisted Dying Bill 2021 Section 12
¹⁴⁵ Mental Capacity Act 2005 Section 1(2)
¹⁴⁶ ibid, Section 3(1)
¹⁴⁸ Casey and Choong (2016) [49]
¹⁴⁹ Assisted Dying Bill 2020 Section 12
ability specifically tailored for assisted dying, while alleviating its potential association with any physical and psychological suffering or fear. The exploration of such a test is outside the scope of this thesis. Yet, in considering the possibility for a High Court Judge as a way of establishing the voluntary decision (for assisted dying), Lord Wilson rejected the idea that the courts could not possibly distinguish ‘between the expression of an intention which genuinely reflects the speaker’s wish and one which does not do so.’ This point is discussed further in section 3.4. of this chapter.

_A Right to Die at Home: An Alternative for Assisted Dying?

Most recently, a different approach has been reflected by provisions of a less popular Private Members’ Bill, the Right to Die at Home Bill. This motion is designed to enable individuals to die at home, if they so wish. Accordingly, the one-Clause Bill provides that an individual may inform their general practitioner (‘GP’) of their wish to die at home, and the GP ‘must clearly record this information in the person’s medical records’ so that ‘health and care staff […] implement and facilitate [that] wish’. On this premise, the individual becomes entitled to this right provided that ‘an attending doctor considers that the person is likely to die within three months’. Nevertheless, the manner in which this step is completed is not provided within the Bill.

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150 Casey and Choong (2016) [62]; Casey and Choong suggest that a function-specific test would ‘help abrogate the effects of pain, fear and psychological distress on the decision-making ability of adults who are contemplating an assisted death.’

151 _R (Nicklinson) v Ministry of Justice_ [2014] UKSC 38 [205] (Lord Wilson)

152 Right to Die at Home Bill 2021; The Bill was previously introduced in 2014, 2017 and 2020

153 ibid; The provision clearly states its aim as a Bill to ‘Create a right to die at home.’

154 Save for Clause 2 which provides details such as the ‘Extent, commencement and short title’.

155 Right to Die at Home Bill 2020 Clause 1(2)(a)

156 ibid Clause 1(2)(b)

157 ibid Clause 1(2)(e)
In fact, aside from the GP’s recording of an individual’s wish to die at home, there is no mention of an opportunity for the individual to confirm their wishes have not changed before death. That said, the brevity of the Bill relies on the drafting of subsequent statutory guidance for the effective implementation of the right by the Secretary of State.\textsuperscript{158} Nevertheless, although the Bill aims to give individuals control over their death at home, neither the host of possible complications which may arise, nor the need for safeguards in such circumstances – if prescription drugs are involved – seem to be addressed within the one-page Bill.

Given that all three introductions moved by Lord Warner have yet to reach the Second Reading stage, this means members of the House of Lords have not had the opportunity to reflect on and scrutinise the Bill. The limited scope in considering this Bill in this section is meant to highlight the lack of guidance within a move of such sensitive nature which, despite the reduced level of success for Private Members’ Bills, may, in the same way as the 2021 Bill, stand a chance of becoming law.

3.4. Assisted Dying Bill 2021 – Fitness for Purpose

At the time of writing, the Assisted Dying Bill 2021 has been scheduled for a Second Reading (in the House of Lords) on 22 October 2021. When the measure comes before the Westminster Parliament for debate, the criteria elements discussed earlier in this chapter may become relevant to the way in which the Bill is adopted. Therefore, in the spirit of this study regarding the improvement of safeguards to enable individuals to express their voluntary decision to have an assisted death, this section addresses one key measure which, while not problematic in nature, may later prove too onerous for individuals or may be reduced to a mere formality.

\textsuperscript{158} ibid Clause 1(2)(f)
within the process as provided under the 2021 Bill. The measure refers to the consent of the High Court which would enable access to assisted death.

**Consent of the High Court**

The introduction of judicial consent emerged as a key amendment intended to enhance the robustness of the assisted dying criteria. Yet, its origin may be traced back to the decision of the Supreme Court in the case of *Nicklinson*.\(^{159}\) Essentially, in agreement with Lady Hale’s suggestion,\(^{160}\) Lord Neuberger, the President of the Supreme Court at the time, indicated the possibility of developing a safeguarding measure for assisted death whereby ‘the risks to the weak and vulnerable could be eliminated or reduced to an acceptable level’, if a High Court judge is satisfied the individual’s decision to have an assisted death is uncoerced, thus ‘voluntary, clear, settled and informed’.\(^{161}\)

This safeguard became part of subsequent Bills following an amendment proposed by Lord Pannick, six months later.\(^{162}\) Thus, given the medical determination of two registered medical practitioners and a declaration signed by the individual seeking assisted death – and witnessed by another who is not related or directly involved with their care or treatment – the judge would confirm the individual’s decision. However, in other respects, this medico-legal arrangement is not sufficiently robust. Lord Carlile criticised Lord Pannick’s amendment for not achieving the level of ‘a robust, analytical, court-based, evidence-founded system’ because, as he went on to explain, it did not bear the character of a ‘merits-based assessment’.\(^{163}\)

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\(^{159}\) *R (Nicklinson) v Ministry of Justice* [2014] UKSC 38  
\(^{160}\) ibid [314]-[316] (Lady Hale)  
\(^{161}\) ibid [123] (Lord Neuberger)  
\(^{162}\) HL Deb 7 November 2014, vol 756, col 1852 (Lord Pannick - 10.06am)  
\(^{163}\) ibid, col 1854 (Lord Carlile - 10.15am)
Indeed, in its current form, the provision does not indicate whether the consent – presumably made by way of an application to the High Court\textsuperscript{164} – represents a safeguard that goes beyond its apparent administrative character or whether the decision-making process requires the individual requesting assisted death to demonstrate their autonomous decision based on their documents (declaration signed and witnessed)\textsuperscript{165} or whether this step would involve other undertakings in terms of establishing any potential vulnerabilities on the part of the requesting individual.

Therefore, while the issue of strengthening safeguards to protect vulnerable individuals is at the root of this provision – the practicalities of court costs and specific demands this step may entail for those seeking an assisted death – is not yet clear. Thus, when the issue comes before Parliament, the feasibility regarding the consent of the High Court ought to also be considered beyond its potential additional safeguards.

Yet, in terms of longevity and practicality of implementing this step, a recent development regarding a similar measure demonstrates that, in time, practice may determine whether such involvement may die out. This point is in relation to a Supreme Court decision which established that court applications regarding withdrawal of treatment – which leads to the individual’s death in instances where they are unable to express their wishes, established by \textit{Bland} in 1993\textsuperscript{166} – are no longer necessary.\textsuperscript{167} Consequently, so long as the doctors and family agree as to the course of action in those circumstances,\textsuperscript{168} the court’s involvement is no longer required.

\textsuperscript{164} Assisted Dying Bill 2021 Section (1)(2) indicates the High Court would consent by way of an order.
\textsuperscript{165} ibid Section 3 - Declaration
\textsuperscript{166} \textit{Airedale NHS Trust v Bland} [1993] AC 789
\textsuperscript{167} \textit{Re Y} [2018] UKSC 46
\textsuperscript{168} ibid; Alex Ruck Keene, ‘Supreme Court confirms that no need to go to court before treatment withdrawal where doctors and family agree’ (30 July 2018) <https://www.mentalcapacitylawandpolicy.org.uk/supreme-court-confirms-that-no-need-to-go-to-court-before-treatment-withdrawal-where-doctors-and-family-agree/> accessed 2 Jul 2021
On this account, it is not excluded that for the purposes of law reform a judicial-consent-safeguard may also have political implications, in the sense of enhancing the chances of the Bills’ successful passing through Parliament. Indeed, it is worth noting that over the years, various end-of-life decisions – such as palliative care, withdrawal of treatment, refusal of life-sustaining treatment or nutrition even where these lead to the death of the patient – have been left to the judgement of medical professionals. Therefore, while consent for the purpose of assisted dying criteria is an essential notion, the reliance on the High Court may have a negative impact on the individual who has the capacity to act autonomously to make this final request.

*An Alternative Safeguard*

Given the potential considerations as regards the mental capacity criterion (or any other criterion for that matter) and the relationship with safeguards, it may be more appropriate for medical professionals, as opposed to the High Court, to assess the individual’s voluntary decision to end their life. It is not inconceivable that in practice, the bureaucratic processes and court costs involved in achieving such consent, may be beyond the reach of some individuals, especially if they expect to die imminently.

Instead, one way of supporting the robustness of safeguards under the Bill, would be to consider replacing the need for the High Court consent with a measure capable of establishing the individual’s settled and informed decision by way of a requisite psychological assessment devised specifically for these purposes. In its current form, the matter of capacity falls on the ‘attending doctor’ and ‘independent doctor’, neither of which is identified as being in a position to undertake psychiatric assessments.\(^{169}\) Thus, the 2021 Bill could maintain and even enhance the level of safeguard intended to be achieved (by way of High Court consent) by introducing

\(^{169}\) Assisted Dying Bill 2021 Section 4 Assistance in Dying
a requirement that a voluntary decision for the purposes of assisted dying is ascertained by way of a psychiatric assessment.

If devised in a way that achieves a robust, transparent, and valid process with the individual seeking assisted death at the centre, the procedure may be drawn under the specific policy and subject to monitoring bodies. However, the consideration and even the development of such an assessment should not undermine the individual’s autonomy and self-determination under Article 8, while also conferring sufficient protection to identify vulnerable people in need of protection (where their decision may be the result of coercion) whose Article 2 rights must be upheld.

Achieving this level of safeguard would further enhance the achievement of a good death (Chapter One) by way of assisted dying. Thus, for claimants and those who would receive assisted death, the emphasis is on having access to a compassionate and painless (as far as possible) death upon request. For the purposes of law reform, the measures provided within an Act of Parliament ought to achieve the highest level of safeguards capable of preventing abuse, while the bounds of a good death would be reflected by medical professional intervention based on a voluntary decision, established by way of psychiatric assessment. The detailed process of such a safeguard is outside the scope of this thesis.

3.5. Parliamentary Process and the Assisted Dying Bill 2021

For Bills of this kind, ‘often […] a source of controversy’, the most appropriate introduction is by way of Private Members’ Bills. This is because taking the step towards

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170 Hansard Society, ‘Private Members’ Bills’ (Publications, Guides, 2019), 18
171 Parliament, ‘The Right to Die and Assisted Suicide’
adopting lawful assisted death requires a vote of conscience for Members of Parliament.\textsuperscript{172}

Thus, beyond the refinement of most robust criteria capable of achieving change through the Parliamentary stages, the sponsor of the 2021 Bill must also contend with the stark rates of success for this type of Bill which, without ‘extra-parliamentary support’,\textsuperscript{173} may become yet another Bill to be added to the list of unsuccessful legislative attempts since 1936 (\textit{Table 7}).

Over the years, the steady presence of Bills of this kind in both Houses demonstrates that for those in Parliament, the issue of assisted dying is a matter of great importance. However, by reference to the expected Parliamentary process, the prospect of securing a Royal Assent subsides. Submitting any Private Member Bill through the Ballot\textsuperscript{174} – the usual way of introduction, and relevant to the 2021 Bill – does not seem to offer a high chance of success.\textsuperscript{175} In fact, one compelling aspect of the Ballot procedure was summarised by Kevin McNamara MP, during a 1976 debate, who said:

As a back-bench Member I am in somewhat of a difficulty when constituents ask why, after 30 years, I am for the first time introducing a private-member’s bill on a Friday.

\textsuperscript{172} ibid


\textsuperscript{175} In the period 2010-2019 an average of 4.3\% of the total number of Private Members Bills (in both Houses) received their Royal Assent. Hansard Society, ‘Private Members’ Bills’ (Publications, Guides, 2019), <\url{https://www.hansardsociety.org.uk/publications/guides/private-members-bills#what-is-a-ten-minute-rule-bill}> accessed 11 Jan 2020 19; For more statistics re successful PMB in the HC and HL please see Sarah Priddy, ‘Successful private Members' bills since 1983’ House of Commons Library Number 04568, 5 July 2017 <\url{https://commonslibrary.parliament.uk/research-briefings/sn04568/}> accessed 2\textsuperscript{nd} Mar 2020; By comparison, Government Bills between 2010-2017 have registered 86.2\% rate of success. Of the total 196 Bills (including 20 Bills Carried Over from previous sessions) 169 received Royal Assent. PDF available at House of Commons Briefing Paper No 02283, Number of public bills introduced and gaining Royal Assent since 1997, 3 July 2017, PDF available at <\url{https://commonslibrary.parliament.uk/research-briefings/sn02283/}> accessed 30 Jul 2020
It is difficult to explain to them that the privilege of standing here on a Friday is the result of getting fifth prize in a raffle.\textsuperscript{176}

Against this background, more recently in 2016, the House of Commons Procedure Committee highlighted,\textsuperscript{177} among other things, the following challenges for Private Members’ Bills:

1. Friday sitting times may prove challenging in terms of attendance;
2. The lack of programming and time limit for speeches, facilitate filibustering which does not encourage effective debate and scrutiny;
3. Complex procedural and voting thresholds allow the slightest opposition to derail popular Bills while giving individual MPs the veto on the legislation which they may choose to talk out, or to simply run down the clock by tabling a few amendments.

Still, beyond these disadvantages, the potential to achieve a Royal Assent is a complex choreography of procedural orchestration. For an example of such an achievement, one need not look further than the Suicide Act 1961, which introduced the assisted suicide prohibition. The 1961 Act is proof that not only can a seemingly controversial Bill of moral and ethical implications make its way into the Statute Book, but it ‘passed through Parliament practically unnoticed.’\textsuperscript{178} Indeed, the passage of the 1961 Bill into law has been characterised as featuring ‘an excessively low profile’.\textsuperscript{179}

Therefore, the same circumstances regarding the passing of the 1961 Act including Friday Readings – ‘when attendance was normally extremely thin’\textsuperscript{180} – and scheduling of debates on

\textsuperscript{176} HC Deb 23 November 1979, vol 974, cols 741-833 (Mr Kevin McNamara - 11.10am)
\textsuperscript{177} HC Procedure Committee, ‘Private Members’ bills Third Report of Session 2015-16’ Published on 18 April 2016
\textsuperscript{178} HC Deb 28 July 1961, vol 645, cols 822-825 (Eric Fletcher MP - 1.12pm)
\textsuperscript{179} Sheila Moore, The Decriminalisation of Suicide, January 2000 (PhD Thesis, ProQuest LLC, 2009)
\textsuperscript{180} ibid
the Bill occurring in parallel with other important events,\textsuperscript{181} may be relevant to the 2021 Bill. This is because, during the COVID-19 pandemic the level of scrutiny the Bill withstands when it is presented for a Second Reading may be affected. What is more, the experience of COVID-19 appears to have injected a sense of immediacy to the question of how we could provide a good death to those in need. While this study advocates for the need to find an answer to this question, it also acknowledges the need for high quality debate on the issue before the eventual coming into force of such calculated and meticulously drafted provisions.

Nevertheless, it seems that the key for the successful passing of an Assisted Dying Bill 2021 into the Statute Book is, at least to some extent, dependent on a persistent sponsor and ‘well organised and determined allies both inside and outside the House of Commons’.\textsuperscript{182} However, it is important to note that unlike Assisted Dying Bills, the Suicide Act 1961 was introduced in Parliament as a Government Bill.

\textit{Law Reform and the Importance of Agency}

A long line of unsuccessful attempts to change legislation is testament to the unlikely chance of success for the 2021 Bill to become law. Even so, the assisted dying debate persists and continues to inspire the prediction of possible law reform in the future. Most recently in 2020, Andrew Mitchell,\textsuperscript{183} a Conservative Member of the House of Commons previously ‘opposed to assisted dying’, said he believes that based on ‘the very limited nature of these [assisted

\textsuperscript{181} In April 1961 Soviet cosmonaut Yuri Gagarin became the first man in space; also in April the Bay of Pigs invasion began; in July the British troops were deployed to Kuwait; in August East German soldiers put up the Berlin wall; in May George Blake, British diplomat and spy for the Soviet Union, was convicted and sentenced to 42 years in prison; in June Rudolf Nureyev defected to the west escaped his KGB bodyguards at Le Bourget airport and defected to the west.

\textsuperscript{182} Moore (2000)

\textsuperscript{183} UK Parliament, ‘Andrew Mitchell’ <https://members.parliament.uk/member/1211/contact> accessed 22 Aug 2020
[dying] proposals […] with very strong safeguards […] may command the support of parliament in the next four years.’

The need for an adequate understanding and management of Parliamentary processes in passing legislation has been adequately captured by Lord Jenkins in recounting his ‘five-year struggle’ to get the Obscene Publications Act 1959 through Parliament. In reflecting over the conclusion to be drawn regarding legislative reform he noted that ‘[l]ibertarian reform […] is undoubtedly a long and wearisome job for a private member. A determinedly liberal Home Secretary could do it much more quickly and much more surely.’ Within Lord Jenkins’ list of what he believed to be essential requirements for the successful passing of a Private Members’ Bill into the Statute Book, he also included the need for ‘some well organised and determined allies both inside and outside the House of Commons, and […] an articulate and impressive body of extra-parliamentary support.’ For now, this reflection is no more than a mere indicator of the sort of dedication necessary in negotiating a Bill’s passage through Parliament on its way to achieving Royal Assent.

That said, as already noted in Chapter One, legislative change seems slow to manifest until, suddenly, law reform emerges. Thus, in the context of the Assisted Dying Bill 2021, what is of the essence is for Parliamentary scrutiny to positively shape the safeguards within the current provisions, as opposed to rushing the Bill through Parliament. As regards a similar Bill introduced in Ireland in 2020, one commentator observed that with the country being...

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187 ibid

188 ibid

189 Dying with Dignity Bill 2020 (Ireland)
weighed down by the COVID-19 pandemic, rushing towards law reform without adequate scrutiny of criteria within its legal provisions ‘is an act unworthy of a healthy democracy’. However, it remains to be seen whether the debate on the 2021 Bill will close in on change.

3.6. Summary

This chapter investigated the effect of moving Private Members’ Bills aimed at introducing the means to accessing lawful hastened death between 1936 and 2021. On the premise that strong public support has been key for the continual introduction of moves of this kind, the exploration has (1) followed the path of unsuccessful legislative attempts highlighting the scope of criteria within the latest Bills of this kind. Nevertheless, available data reveals stark prospects of future success, while the historical context points to the importance of agency in overcoming the process of change. On that account, the chapter (2) focused on several problematic elements of assisted dying criteria as part of the 2021 Bill. The purpose of this exploration was meant to (3) expose the existing limitations within current provisions that require adequate scrutiny in the upcoming debate, to prevent, as far as possible, any potential unwanted consequences when the Bill makes its way into the Statute Book.

In considering the development of criteria within Bills of this kind over the years, the emphasis on the matters of capacity to make a voluntary decision and the ability to create robust safeguards to protect vulnerable individuals appears to take centre stage. Yet, the way in which capacity is ascertained is key to preventing abuse. Therefore, while consent for the purpose of assisted dying criteria is an essential notion, the reliance on the High Court may have a negative

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impact on the individual who has the capacity to act autonomously (by way of self-determination) to make this final request.

Given that, for the near future, there is a possibility that Parliament may continue to uphold the current system operating a so-called ‘blanket prohibition’, this thesis moves into the sphere of prosecutorial discretion. This step is meant to investigate whether, and if so to what extent, prosecutorial discretion, and the decision-making process – in connection with assisted suicide – contribute to the process of assisted dying law reform.
Chapter 4 – Section 2 Prohibition and Prosecutorial Discretion

4.1. Introduction

Chapter Three examined the reasons behind the continuous failure of Private Members’ Bills in achieving change aimed at enabling individuals to access lawful assisted death. In parallel to this series of legislative attempts, the prohibition on assisted suicide as provided by the Suicide Act 1961 (‘1961 Act’) continues to stand the test of time.

This chapter analyses the nature of a Section 2 offence which on the one hand appears to promote a ‘blanket ban’, while on the other hand it emphasises (through prosecutorial discretion) the possibility for compassionate-helpers to escape prosecution in the majority of referred instances of assisted suicide. Thus, in what seems to be a developing trend in contemplation of an assisted suicide abroad or at home (in England and Wales), individuals are increasingly undertaking strategic steps in producing tangible evidence to demonstrate their voluntary and uncoerced decision, in an attempt to protect their compassionate-helper, post-death.1 While this is a predictable by-product of the current system, this chapter argues this phenomenon has the potential to foster circumstances for abuse that may only be mitigated by way of assisted dying law reform.

The investigation follows three key developments: (1) the origins and scope of prosecutorial discretion regarding instances of assisted suicide, (2) the emergence of the Policy in Respect of Cases of Encouraging or Assisting Suicide (‘DPP Policy’) (see Appendix 2), and (3) the

1 See Table 8 in section 4.6. in this chapter
impact and side effects of this ‘informal legal change’ in practice\(^2\) – in an effort to evaluate their contribution to the path leading towards assisted dying law reform.

Reference to the terms ‘victim’ and ‘suspect’ reflect their use within the DPP Policy. The analysis within this chapter engages with the term ‘death-seeker’ to mean an individual who has formed a voluntary decision to end their life and needs assistance to achieve this, and the term ‘compassionate-helper’ to indicate an individual who is a willing participant and is wholly motivated by compassion to assist the death-seeker in achieving their goal to end their life.

The investigation in this chapter also extends to establishing the relationship between a death-seeker’s ability to act with autonomy and reach a voluntary decision to end their life with the help of a compassionate-helper and the law’s response to issues of potential vulnerability. This is set within the context of the current legislative arrangement, which was never designed, nor is it equipped to provide adequate safeguards, pre-death.

4.2. Understanding Prosecutorial Discretion Then and Now

As the 1961 Act marks 60 years since enactment, there is a sense that Section 2\(^3\) prohibition (related in full in Appendix 1) is more resilient than ever. This is because, by implementing Section 2(4) – which dictates that prosecutions in both private and public actions can only ‘be instituted […] by or with the consent of the Director of Public Prosecutions’\(^4\) (‘DPP’) – Parliament intended to ensure a certain level of ‘consistency’\(^5\) in dealing with instances of assisted suicide. Nevertheless, criticism on this point – particularly in relation to considering legislative change of the prohibition – indicates this arrangement is ‘wrong as a matter of

\(^2\) P Lewis, ‘Informal legal change on assisted suicide: the policy for prosecutors’ Legal Studies, March 2011 vol 31 No 1
\(^3\) Suicide Act 1961 Section 2
\(^4\) ibid Section 2(4) became Section 2(4) upon enactment.
\(^5\) HL Deb 2 March 1961, vol 229, col 246 – (The Lord Chancellor Viscount Kilmour – 4.4pm)
principle’ because it means ‘that the law [is] set to one side by one individual’. Indeed, the requirement for the DPP’s consent to prosecute, an exception from the norm, is afforded in specific cases such as assisted suicide. Thus, in the context of case law (Chapter Two), the authority afforded to the DPP by way of the decision-making process has come under scrutiny, leading to the clarification of the current approach.

The Origins of the DPP Authority

Historically, the office of the DPP was created by the Prosecution of Offences Act 1879 in contemplation of cases ‘sufficiently difficult to warrant the intervention of the DPP’. In the decades which followed, the importance of the work undertaken by that office grew but their ‘impact remained limited’ since the Royal Commission on Police considered it ‘undesirable that police officers should appear as prosecutors except for minor cases’. The need for independence, within the decision-making process, resurfaced as part of an Official Inquiry, prompting the Royal Commission on Criminal Procedure (‘RCCP’) to declare it unsatisfactory that the same person carrying out an investigation is also responsible for the prosecution of

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6 HL Deb 18 May 2009, vol 710, col 1222 – Coroners and Justice Bill 2009 (Lord Falconer – 4.17pm)
8 Prosecution of Offences Act 1879
12 Andrew Sanders, ‘The CPS - 30 years on’ 2016 Crim LR 2016, vol 2, 82-98, 82. At that time, evidence pointed to unfavourable treatment towards youths and the possibility their confessions had been coerced.
defendants. Thus, the RCCP recommended the establishment of an independent prosecution agency to cover every police force in England and Wales.

The coming into force of the Prosecution of Offences Act 1985 (‘1985 Act’) promised to solve this matter by instituting the Crown Prosecution Service (‘CPS’) with the DPP as its head. Under the 1985 Act, the CPS acquired the power to reverse decisions to prosecute, and inherited from the police the responsibility to initiate and conduct the prosecution of offences. Thus, under the 1985 Act, the DPP is accountable for promulgating a Code for Crown Prosecutors (‘Code’) which gives ‘guidance on general principles to be applied by them’ in connection with the decision-making process, including whether to initiate proceedings, also in instances of assisted suicide.

The coming into force of the Human Rights Act 1998 (‘HRA 1998’) – incorporating the European Convention on Human Rights, as amended (‘Convention’) – meant that pursuant to Section 6, the DPP (as a public authority recognised under the HRA 1998) may not act unlawfully ‘in a way which is incompatible with a Convention right.’ Thus, in the context of an assisted suicide offence under Section 2, application of prosecutorial discretion (under Section 2(4) of the 1961 Act), the DPP ‘act[s] so as to give effect to or enforce those

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13 Max Hill (2020), (6.24) – it was observed that in the Royal Commission on Criminal Procedure Report 1980, the Commission considered the separation of the roles of investigators and lawyers, noting that it was ‘[…] unsatisfactory that the person responsible for the decision to prosecute should be the person who has carried out or been concerned in the investigation.’

14 HC Deb 21 January 1981, vol 997, cols 396-404 – Criminal Procedure (Royal Commission’s Report) - Mr John Ryman


16 Prosecution of Offences Act 1985

17 ibid Section 1(1)(a) states ‘the Director of Public Prosecutions, […] shall be head of the Service’

18 ibid Section 10

19 ibid Section 10(1)

20 ibid Section 10(1)(a)(i)

21 Human Rights Act 1998

22 ibid Sections 6 (Acts of public authorities) and 7 (Proceedings)
provisions’. The remainder of this section analyses the relevance and value of prosecutorial discretion in connection with the way in which the so-called ‘blanket ban’, and the application of the law, contribute to paving the way towards assisted dying law reform.

The Decision Not to Prosecute in the Case of Daniel James

The implications for an individual assisting the suicide of another came into the spotlight following the lawful assisted suicide of Daniel James at Dignitas - To Live with Dignity - To Die with Dignity, in September 2008. An inquest was held into the circumstances surrounding Daniel’s death. This prompted his parents to make a statement defending Daniel’s choice to end his life in this manner. The following month, in what represented a unique undertaking to that point, the DPP made a public statement aimed at providing reasons for their decision not to prosecute in the case. However, the case of Daniel James was not the first case of this kind. To that point, over 90 Dignitas cases had been considered by the former DPP, Sir Ken Macdonald, and following considerations regarding the public interest, no prosecutions ensued.

The DPP explained that ‘[n]either [the parents] nor the family friend influenced Daniel […] to commit suicide. On the contrary, his parents tried relentlessly to persuade him not to commit suicide.’ Thus, the DPP established the evidence indicating Daniel possessed the capacity

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23 ibid Sections 6(2)(b)
28 Keir Starmer, ‘No charges following death by suicide of Daniel James’ (CPS, 9 December 2008)
and self-determination to make the final decision to end his life.\textsuperscript{29} This emphasised his mental capacity and personal autonomy in relation to his independent decision, free from interference, to make such a final choice. Despite acknowledging the ‘realistic prospect of conviction’, the DPP determined it was ‘very unlikely that a court would impose a custodial penalty on any of the potential defendants’ because, he continued, ‘in all probability the sentence would be either an absolute discharge or, possibly, a small fine.’\textsuperscript{30} In hindsight, these reasons went on to influence the emergence of a future DPP decision-making process in instances of assisted suicide.

\textit{Is There a ‘Moral Obligation to Obey the Law’?}\textsuperscript{31}

The sustainability of the relationship between Section 2 prohibition and the manner of application of the law by the DPP was raised during the 2019 Reith Lectures.\textsuperscript{32} Essentially, the moral bargaining exercise taking shape under the current prohibitive legislative arrangement – where ‘reluctant’\textsuperscript{33} participants hope to establish their act was ‘wholly motivated by compassion’\textsuperscript{34} – was criticised for representing the characteristics of a broken law. In deliberating whether the assisted suicide prohibition is a matter in need of law reform, Lord Sumption observed:

\begin{itemize}
\item \textsuperscript{32} Public Interest Factors Tending Against Prosecution [45.5]
\item \textsuperscript{33} Public Interest Factors Tending in Favour of Prosecution [44]
\end{itemize}
I think that the law should continue to criminalise assisted suicide and I think that the law […] should be broken from time to time. We need to have a law against it in order to prevent abuse, but it has always been the case that this has been criminal, and it has always been the case that courageous relatives and friends have helped people to die […] but I don’t believe that there is necessarily a moral obligation to obey the law.\textsuperscript{35}

Although the message comes as an address of a former Supreme Court judge, this unexpected articulation of the current law caused a controversial backlash in the media\textsuperscript{36} and in Parliament.\textsuperscript{37} In terms of the latter, the criticism came from Baroness Meacher who – in the context of Lord Sumption’s address – asked the Westminster Parliament: ‘does that not indicate that the law itself is broken and should be reformed?’\textsuperscript{38} Indeed, the status of the current system influenced Baroness Meacher to put forward the current Assisted Dying 2021 Bill in the hope of reforming the law and solving this imbalance.\textsuperscript{39}

What is more, the statement also fuelled the Dignity in Dying organisation to write a letter to Members of Parliament arguing that such views ‘expect – perhaps even encourage’ those apprehending them to break the law.\textsuperscript{40} This rationale was based on the premise that ‘for one of our most senior judges to say it is preferable for the law to be repeatedly broken than for it to

\textsuperscript{36} Bowcott (2019)
\textsuperscript{37} HL Deb 23 May 2019, vol 797, col 2076 – Suicide Act 1961: Prosecutions (Baroness Meacher)
\textsuperscript{38} ibid
\textsuperscript{39} Andrew Gregory, ‘Assisted dying bill aims to stop “unbearable suffering”: A proposed law to allow the terminally ill to choose how they die has the support of the public? and our new campaign’ (The Sunday Times (London), 23 May 2021) <https://www.thetimes.co.uk/article/assisted-dying-bill-aims-to-stop-unbearable-suffering-bb966pt8n> accessed 22 Jun 2021
be reformed cannot inspire confidence in [the English] legal system’. It is then possible that such a crescendo of opinions may have contributed to attitudinal changes regarding Members of Parliament who wish to support law reform when the opportunity for such a vote arises.

In an effort to justify Lord Sumption’s position, one public policy research organisation explained this approach was relevant in ‘exceptional circumstances where a person breaks the law for altruistic reasons’. Yet, beyond the obvious unorthodox connotation that Lord Sumption’s message embodies, there are layers of complexity arising under the current legislative orchestration. His Lordship’s position in relation to the nuances of the law, is consistent with those articulated in Hansard debates in 1961, in contemplation of enacting Section 2 (see Chapter One), that mercy killings were not to be punished by imprisonment. This is mirrored by his assertion that ‘it has always been the case that this has been criminal, and it has always been the case that […] courageous [individuals] have helped people to die’. For Lord Sumption, and indeed in light of the Westminster Parliament’s repeated decision not to reform the law, this binary configuration of the assisted suicide prohibition seems justified.

However, it is difficult to see how the normalisation of this coping mechanism – primarily devised to deal with ‘mercy killings’ – is still relevant within a democratic society where a former Supreme Court judge attests to there being no ‘moral obligation to obey the law’. Consequently, Lord Sumption’s rationale in defending the current status of the law because ‘[w]e need to have a law against it in order to prevent abuse’, is extremely flawed. This is because when, not if, the Westminster Parliament braves the step towards assisted dying law

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41 ibid
42 ibid
43 ibid
44 HC Deb 14 July 1961, vol 644, col 843 (Mr Peter Kirk - 3.56pm)
45 Lord Sumption (2019) Reith Lecture
46 HC Deb 14 July 1961, vol 644, col 843 (Mr Peter Kirk - 3.56pm)
47 Lord Sumption (2019) Reith Lecture
reform, the measure – in the way captured within Assisted Dying Bill 2021 – would become an exception to the Section 2 prohibition (as opposed to the law being repealed) by way of an intervention by a medical professional and with the necessary safeguards.

4.3. The Policy in Respect of Cases of Encouraging or Assisting Suicide

Whether assistance with suicide occurs within the territory of England and Wales or is carried out in connection with a lawful assisted suicide abroad, such involvement amounts to an offence under Section 2 of the 1961 Act. However, in following the DPP application of the Policy (Appendix 2), involvement with assisted suicide abroad is frequently not prosecuted, while assisting in different circumstances may lead to protracted investigations and potential prosecution.

Since introducing the DPP Policy in 2010, identifying evidence of compassion or undue influence as a precursor for the assistance, have become essential in establishing the motive for involvement with assisting another’s suicide, to decide the matter of prosecution. The DPP Policy identifies 16 public interest factors in favour of and six public interest factors

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48 On the territory of England and Wales.
49 The type of assisted suicide lawfully provided in those jurisdictions.
50 Investigations are carried out and may last for months even if eventually there is no prosecution.
51 R (Nicklinson) v Ministry of Justice [2014] UKSC 38 [109] (Lord Neuberger)
52 See Table 8 in section 4.6. in this chapter
53 R v Bipin Desai 17 November 2017 Guildford Crown Court (Mr Justice Green) - The defendant received a 9-month suspended sentence for assisting his father to die by giving him a lethal smoothie followed by an insulin injection, despite initially being charged with murder.
54 Lewis (2011), 131
55 See section 4.2. in this chapter regarding the matters of ‘compassion’ and ‘undue influence’ in the case of Daniel James as established by the DPP in his statement.
56 DPP Policy
57 ibid [43]
against prosecution – essentially crystallising a practice already applied for some time – and the DPP Policy has attracted much academic attention.

The DPP Decision-Making Process

In instances of encouraged or assisted suicide (distinguished in Chapter One) – like the application of the Full Code Test in other criminal proceedings – the decision to prosecute is triggered in the aftermath of the offence. Therefore, while the DPP’s responsibility does indeed extend to assisted suicide death-seekers, as highlighted by Sanders, owing to the legislative arrangements and authority granted to the DPP under Section 2(4), this duty is only relevant post- rather than pre-offence. Hence, any measure capable of safeguarding and protecting potentially vulnerable groups before an assisted suicide is committed remains a matter for the Westminster Parliament.

58 ibid [45]
60 DPP Policy
62 See section 1.6. ‘Assistance Distinguished from Encouragement’ in Chapter One; This is further highlighted in section 4.4. ‘Judicial Reasoning in Prosecutions for Assisted Suicide’
63 DPP Policy
64 ibid
65 Andrew Sanders (2016) 94-95
The DPP’s decision-making process is a two-stage test.\textsuperscript{67} Where the evidential (first) stage\textsuperscript{68} is passed, prosecutors deliberate whether bringing legal proceedings is in the public interest\textsuperscript{69} (second stage).\textsuperscript{70} By giving consent to prosecute an offender, the DPP’s decision indicates they are satisfied that the Full Code Test has been met.\textsuperscript{71}

**Effect of Operating Prohibitive Laws – Death-Seeker and Compassionate-Helper**

For anyone considering involvement with an assisted suicide – whether as victim or suspect (terms employed by the Policy) – the nature of criminal liability of a Section 2(1) offence forces participants into a secretive and isolated decision.\textsuperscript{72} In line with the terms developed within this study and for the purposes of this section, reference will continue to be made to the death-seeker (victim) and the compassionate-helper (suspect).

Thus, for those in the position of a death-seeker, the predicament offered by this prohibition does two things. First, it prevents the death-seeker from openly expressing their autonomous and voluntary decision to end their life, pre-death.\textsuperscript{73} In fact, what it does is to encourage the secrecy of this wish in order to protect the compassionate-helper and prevent any potential investigations before the assisted suicide is carried out. Second, it empowers the compassionate-helper to convey the death-seeker’s wishes post-death.\textsuperscript{74} As such, it is not

\textsuperscript{67} DPP Policy [13]-[14] 
\textsuperscript{68} ibid [15]-[31] 
\textsuperscript{69} ibid [36]-[42] 
\textsuperscript{70} ibid [16] ‘Where the act of encouragement or assistance occurred on or after 1 February 2010, section 2 of the Suicide Act 1961 as amended by section 59 and Schedule 12 of the Coroners and Justice Act 2009 applies.’ 
\textsuperscript{71} ibid [14] 
\textsuperscript{72} Any intention to engage with assisted suicide surfacing before the event triggers police investigations. 
\textsuperscript{73} *The Times*, ‘Dignitas widow calls for change in assisted dying law’ (21 May 2019) <https://www.thetimes.co.uk/article/dignitas-widow-calls-for-change-in-assisted-dying-law-wb9f9lk15> accessed 22 June 2020 
\textsuperscript{74} The narrative of the case by prosecution pointed to the intention for the suspect to conceal his involvement with his father’s death, acting as though it was a natural one. See *The Telegraph*, ‘Pharmacist murdered his father with lethal fruit smoothie then said it was assisted suicide, court hears’ (6 November 2017) <
unreasonable to consider the possibility this may enable wrongdoers to escape prosecution. Thus, because of this arrangement in the law, death-seekers and compassionate-helper alike have made attempts to choreograph evidence, to minimise or prevent the risk of prosecution, post-death.\textsuperscript{75} Thus, in this sense, the DPP Policy has encouraged a tick-box approach, undertaken pre-death,\textsuperscript{76} as an attempt to safeguard compassionate-helpers.

\textit{The DPP Policy and Adequacy of Principles}

While the DPP’s decision-making process does not devise a way of ascertaining an individual’s voluntary decision to end their own life – a pre-death test – in practice, the application of public interest factors on a case-by-case basis appears to be the compromise to a pre-death test. However, this approach comes with its own limitations. In fact, White and Downie have criticised the Policy for being inadequate in four respects,\textsuperscript{77} three of which stand out. The relevance of these arguments highlights the limitations within the powers conferred to the DPP and CPS (by Parliament) as regards their approach to dealing with Section 2 offences.

First, the measure is said to lack ‘a set of coherent guiding principles’.\textsuperscript{78} However, in providing evidence to the Commission on Assisted Dying\textsuperscript{79} regarding the ‘underlying principle’ for the Policy, Sir Keir Starmer expressed his reluctance to employ a schematic approach on account

\textsuperscript{75} Beryl Taylor and Mr Ninian are two examples of this.
\textsuperscript{76} In \textit{R (Purdy) v Director of Public Prosecutions} [2009] UKHL 45 [64] Lady Hale observed that the contemplated Policy ‘will be important, not only in guiding the small number of Crown Prosecutors who decide the small number of cases which are actually referred to them by the police, but also in guiding the police and thus the general public about the factors to be taken into account in deciding whether a prosecution will or will not be in the public interest.’
\textsuperscript{78} ibid
\textsuperscript{79} Commission on Assisted Dying, ‘About the Commission on Assisted Dying’ < http://www.commissiononassisteddying.co.uk/about-the-%20commission-for-assisted-dying > accessed 24 Feb 2021
of the possible danger that, ‘unless it’s very carefully constructed, [it would undermine] Parliament’s intention that this should be an offence’.80 This is because the reason for adopting crime-specific Policy was directly linked to the argument that ‘the notion of personal autonomy is an important principle underlying the interpretation’81 of Article 8.82 More specifically, the aim was ‘to protect the right to exercise a genuinely autonomous choice’ and self-determination.83 In Nicklinson, the issue of a medical professional in connection with Martin’s predicament (Chapter Two) arose on the basis that he had no one else to help with the necessary arrangements to have a lawful assisted suicide at Dignitas. Thus, under the current constitutional arrangements – and because the Westminster Parliament has yet to provide a ‘blanket right’ to assisted suicide – those in the position of the DPP and CPS would be acting beyond their powers, or they would risk an action of Judicial Review if they did not recognise that power to make such determinations rests with Parliament.

Second, the Policy fails to stipulate the significance and relationship between the public interest factors.84 Essentially, the argument advanced by White and Downie points to a failure to differentiate between public interest factors that amount to considerations in their own right and those which are merely of evidential value (proving or disproving other factors). Yet, in considering the public interest factors, the DPP’s ‘overriding proviso [is] that no one factor outweighs others’.85 This is because to state otherwise would not only undermine the Section 2 prohibition but would go beyond the realm of the DPP authority in enforcing the law.

81 Pretty v United Kingdom (2002) 35 EHRR 1
82 R (Purdy) v Director of Public Prosecutions [2009] UKHL 45 [60] (Lady Hale)
83 ibid [65] (Lady Hale)
84 White and Downie (2012), 668-669
85 R (Nicklinson) v Ministry of Justice [2012] EWHC 2381 (Admin) [132] (Lord Justice Toulson)
However, in practice, the decision-making process reveals a certain level of emphasis on the fact that ‘the victim had not reached a voluntary, clear, settled and informed decision to commit suicide’. Moreover, where the available evidence supports the notion that the compassionate-helper ‘pressured the victim to commit suicide’, this would affect the findings as regards the voluntary decision to commit suicide. Another example could be the DPP Policy (public interest factor) [43.6] which raises the issue that ‘the suspect was not wholly motivated by compassion’; this could be substantiated by the compassionate-helper’s efforts ‘to dissuade the victim from taking the course of action’ or evidence pointing to the ‘reluctant encouragement or assistance in the face of a determined wish on the part of the victim’. Thus, maintaining the fluidity of public interest factors within the Policy enables the DPP to apply them on a case-by-case basis in line with their relevant application.

Third, White and Downie argue that the Policy characterises the compassionate-helper’s behaviour as non-professional, ‘compassionately-motivated, one-off assistance’. Indeed, the DPP Policy takes this position as, historically, offences under Section 2 were expected to, and indeed have tended to, involve assistance by family and friends.

In conclusion, the principles of the Policy, although not aligned with the concept of a better and more accessible Policy in the way advocated by White and Downie, appear to maintain a

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86 DPP Policy [43.3]
87 ibid [43.7]
88 ibid [43.6] indicates the making of an aggravating circumstance where the compassionate-helper ‘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’.
89 ibid [45.4]
90 ibid [45.5]
fair balance as regards the more specific deliberation of provisions that could only be passed by the Westminster Parliament.

Public Interest Factors Under the Microscope

Thus far, this chapter engaged with the overall application of the Policy by the DPP in applying the 16 public interest factors in favour of and six factors against prosecution for involvement with assisted suicide. To the extent that the DPP Policy is also a tool for individuals (in contemplating assisted suicide) and judges (in establishing the culpability of compassionate-helpers) this part distinguishes four inconsistencies within the Policy, which in and of themselves are problematic:

1. **Emotional Difficulties**

   In support of compassion-driven assistance, two public interest factors tending against prosecution of the compassionate-helper point to the need for evidence signalling that ‘the suspect had sought to dissuade the victim from taking the course of action which resulted in his or her suicide’\(^{92}\) and the compassionate-helper’s involvement ‘may be characterised as reluctant encouragement or assistance in the face of a determined wish on the part of the victim to commit suicide’\(^{93}\).

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\(^{92}\) DPP Policy [45.4]
\(^{93}\) DPP Policy [45.5]
As indicated by Lewis, these suggest ‘how the ideal suspect should react to [an individual’s] decision’ to have an assisted suicide, based on their relationship with the death-seeker.\(^\text{94}\) Therefore, proving the existence of both, places the assistor in ‘conscience-driven emotional difficulties’.\(^\text{95}\) Yet, the Policy fails to explore the extent of the attempt to dissuade the death-seeker from taking their own life, nor does it indicate what level of reluctance on the part of the assistor is adequate to meet this requirement.

That said, with a Policy to be applied on a case-by-case basis, it is only relevant that the DPP is satisfied these two are or are not met. Thus, the emotional and factual implications of their relationship aim to also support the notion that the compassionate-helper was ‘wholly motivated by compassion’.

However, for Lewis, including these features within the Policy is not justified, since ‘emotional difficulties’ may also arise in instances where the compassionate-helper approves of their loved one’s decision.\(^\text{96}\) Does this mean that failure to dissuade is set to increase the likelihood of prosecution? What of the calm and collected assistors who fail to demonstrate emotional difficulties owing to the prolonged suffering of the deceased or other similar reasons? Also, how do these policy factors apply?

Indeed, the decision-making process undertaken in contemplation of whether to prosecute the offender would be taken as a whole. The existence of other public interest factors against this approach would favour prosecutorial discretion.

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\(^{94}\) P Lewis (2011), 131  
\(^{96}\) P Lewis (2011), 131
2. **Medical Professionals**

While seemingly endorsing assisted suicide involving family and friends, the Policy takes the opposite approach\(^{97}\) (Appendix 2) towards medical professionals.\(^{98}\) Thus, the fact that the compassionate-helper is acting in their capacity as a medical doctor, nurse, another healthcare professional, or a professional carer, increases the risk of prosecution. Ordinarily, owing to constitutional arrangements, the ‘close construction of the terms of the […] policy’ is not appropriate for any court,\(^{99}\) however, in *Nicklinson*\(^{100}\) the Supreme Court pointed to the need to clarify the imposition under paragraph [43.14]\(^{101}\) (discussed elsewhere in this chapter) as it did not extend to a ‘professional carer who, with no earlier responsibility for the care of the victim, comes in from outside to help.’\(^{102}\) This interpretation was based on the notion that such an individual would not be doing more than a loved one would,\(^{103}\) therefore, should not be more likely to be prosecuted.

Judicial opinion in the case observed this ‘opaque’ position led medical professionals and carers to ‘almost always […] refuse’ even to volunteer information of guidance when approached by individuals who wish to end their life.\(^{104}\) Generally speaking, albeit appearing less inclined to coerce or persuade people to end their life in the way family and loved ones might, the Policy singles out medical professionals, who are often at the heart of assisted dying frameworks of other jurisdictions,\(^{105}\) including that devised under the current Assisted Dying

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\(^{97}\) The Policy [43.13] - since *Nicklinson* this was clarified in a footnote

\(^{98}\) P Lewis (2011); E Delbeke, ‘The Way Assisted Suicide Is Legalised: Balancing a Medical Framework against a Demedicalised Model’ (2011) 18 EJ Health Law 149

\(^{99}\) *R (Nicklinson) v Ministry of Justice* [2014] UKSC 38 [287] (Lord Hughes)

\(^{100}\) ibid [250]

\(^{101}\) DPP Policy [43.14]

\(^{102}\) *R (Nicklinson) v Ministry of Justice* [2013] EWCA Civ 961 [185] (Lord Judge)

\(^{103}\) ibid

\(^{104}\) *R (Nicklinson) v Ministry of Justice* [2014] UKSC 38 [136]-[137]

\(^{105}\) See Chapter Five for reference to the involvement of medical professionals in Assisted Dying frameworks in Canada, Victoria (Australia) and New Zealand.
Bill 2021. Nevertheless, it should be noted, thus far, court challenges have only explored this public interest factor in connection with assisted suicide abroad. Therefore, it is unclear whether the same argument may be made in instances of assisted suicide at home (in England and Wales). This scenario may not be unlikely if, for various reasons, a death-seeker has a modest social circle.\textsuperscript{106} In fact, it is on this basis that providers of Medical Assistance in Dying (MAiD) in Canada trained volunteers to become witnesses for individuals requesting assisted death.\textsuperscript{107} Hence, for an individual who has outlived their loved ones, specific discouragement as regards the involvement of medical professionals may impede such assistance, unlike the circumstances involving a loved one (family or friend).

3. \textit{Mental Capacity}

The compassionate-helper’s level of culpability increases if the evidence supports the fact that the death-seeker ‘did not have the capacity (as defined by the [MCA 2005])\textsuperscript{108} to reach ‘a voluntary, clear, settled and informed decision’\textsuperscript{109} to end their life. This notion is intended to draw a line between legally effective and legally ineffective decisions.\textsuperscript{110} This approach is problematic for several reasons.

\textsuperscript{106} This notion of restricted social circles came to light in the aftermath of MAiD legislation (in Canada) which pointed to a need to train volunteers to act as witnesses. See Zuzana Praslickova, Michaela Kelly and Ellen Wiebe, ‘The experience of volunteer witnesses for Medical Assistance in Dying (MAiD) requests’ 2020 Death Studies; While highlighting the challenges faced by volunteer witnesses, the study notes the need to have such volunteers is because ‘many patients have outlived all their friends […] or their lives have narrowed to such an extent that only family and caregivers are part of their lives.’


\textsuperscript{108} DPP Policy [43.2] – ‘the victim did not have the capacity (as defined by the Mental Capacity Act 2005) to reach an informed decision to commit suicide’

\textsuperscript{109} ibid [45.1]

As already explored in Chapter Three, in the absence of an appropriate assessment by means of a function-specific test in line with the unique physical and psychological conditions created by considerations of involvement with assisted suicide, the mental capacity as provided under the MCA 2005 seems to be the wrong tool. The role of mental capacity as defined by the MCA 2005 is employed as a safeguarding measure intended to protect patients and allowing for refusal of treatment. This before-the-event protection is not the kind capable of being extended by the Policy because its application arises post-death. Indeed, evidence that the death-seeker lacked competence would serve as an aggravating factor in favour of prosecution of the compassionate-helper. Inevitably, this would be of direct relevance for a judge in deliberating the matter of the death-seeker’s vulnerability in connection with their ability to have reached a free and uncoerced decision, and in the circumstances in which the assistance with suicide was given.

While this public interest factor assists to rebut the argument of a voluntary decision, it is not clear whether the very fact of its absence is capable of confirming that ‘the victim had reached a voluntary, clear, settled and informed decision’ (emphasis added), and this was therefore uncoerced. One preliminary principle of the MCA 2005 is that a person is, by default, considered to have mental capacity unless evidence proves the contrary. For the compassionate-helper this means that, without evidence rebutting the preliminary principle for mental capacity, his risk of prosecution is reduced. Thus, by simply adopting the mental capacity requirement in the way that it did, the Policy encompasses an artificial impression of safeguarding a potentially vulnerable death-seeker. For those involved with the offence, this

111 Casey and Choong (2016), [49]
112 Mental Capacity Act 2005
113 DPP Policy [45.1]
114 Mental Capacity Act 2005 Section 1(2) provides that ‘[a] person must be assumed to have capacity unless it is established that he lacks capacity.’
public interest factor may, for example, prompt a death-seeker to produce a video recording – aimed at protecting their compassionate-helper – moments before an assisted suicide, confirming the death-seeker’s voluntary decision to end their life in this way, with the help of the compassionate-helper.\footnote{115 Beryl Taylor, 70 years of age, recorded herself before she took her own life with some assistance from her husband. \textit{BBC News}, ‘Rattlesden woman's death was suicide not murder, inquest hears’ (17 October 2018) <\url{https://www.bbc.co.uk/news/uk-england-suffolk-45891508} > accessed 17 Apr 2020}

4. \textit{Physical Ability}

Under the DPP Policy, the fact that the death-seeker was ‘physically able to undertake’ the final act themselves is a public interest factor in favour of prosecution.\footnote{116 The Policy at [43.10]} Yet, as discussed elsewhere in this thesis, the jurisprudence of the ECtHR exploring matters of assisted suicide in connection with Article 8 and Convention principles, does not support this construct. Instead, it does indicate that the individual who contemplates ending their life in this way may do so if they are ‘capable of freely reaching a decision on this question and acting in consequence’ – without any specific mention as to the individual’s physical condition.\footnote{117 \textit{Haas v Switzerland} (2011) 53 EHRR 33 [51]}

Therefore, the construction of the DPP Policy reflects a type of legislative measure designed to enable the navigation of prosecutorial discretion as opposed to reflecting the response to the imposition of a blanket ban.

\textit{A Blanket Ban?}

While in theory Section 2 is promoted as a blanket ban, the low number of prosecutions for offence of this kind tells a different story. The CPS website provides that:
From 1 April 2009 up to 31 July 2021, there have been 171 cases referred to the CPS by the police that have been recorded as assisted suicide. Of these 171 cases, 111 were not proceeded with by the CPS and 32 cases were withdrawn by the police. There are currently 11 ongoing cases. Three cases of encouraging or assisting suicide have been successfully prosecuted. One case of assisted suicide was charged and acquitted after trial in May 2015 and eight cases were referred onwards for prosecution for homicide or other serious crime.\textsuperscript{118}

Therefore, of the total of 171 referred instances of assisted suicide,\textsuperscript{119} only in three such cases were defendants successfully prosecuted. This indicates that for the purposes of the decision-making process, the Policy enabled the death-seeker’s compassionate-helper to escape prosecution in a high number of cases. However, for Sanders, the Policy which he labels as a ‘bizarre mixture’ of victim-focused and suspect-focused components,\textsuperscript{120} fails to protect\textsuperscript{121} victims, who ‘should be at the heart of the [criminal] system’.\textsuperscript{122} Yet, if the DPP Policy is to be treated in the way identified by Lewis as an ‘informal legal change’\textsuperscript{123} – which sits within the scope afforded to the DPP without acting or going beyond the powers vested in them by Parliament – then the Policy appears to achieve a certain balance akin to informal reform.

What is more, the data collection of assisted suicides indicates it started on 1 April 2009.\textsuperscript{124} Indeed, the year 2009 coincides with a time when the executive (DPP statement in the case of Daniel James),\textsuperscript{125} the legislator (Coroners and Justice Bill 2009)\textsuperscript{126} and the judiciary (the case

\textsuperscript{118} CPS, ‘Assisted Suicide’ (17 August 2020) <https://www.cps.gov.uk/publication/assisted-suicide> accessed 10 Sep 2021
\textsuperscript{120} Andrew Sanders (2016), 94-95
\textsuperscript{121} ibid, 95
\textsuperscript{123} Lewis (2011)
\textsuperscript{124} CPS website uses 1 April 2009 as the start date
\textsuperscript{125} See section 4.2. in this chapter
\textsuperscript{126} See section 1.4. in Chapter One
of Purdy)\textsuperscript{127} were dealing with issues connected with the manner of application of Section 2 of the 1961 Act. Yet, seeing as the CPS website does not provide a reason for this date, there is some indication this may have been a reaction ‘in response to the high number of FOI [Freedom of Information] requests […] received on this topic.’\textsuperscript{128}

**4.4. Judicial Reasoning in Prosecutions for Assisted Suicide**

For judges dealing with the issue of sentencing in cases of assisted suicide, the seriousness\textsuperscript{129} of the offence\textsuperscript{130} has triggered reference to the public interest factors of the Policy, to distinguish genuine assistance based on compassion\textsuperscript{131} – warranting a lower\textsuperscript{132} or suspended sentence\textsuperscript{133} – from malicious encouragement, including evidence of potential to gain from the crime\textsuperscript{134} – which justifies the handing down of a custodial sentence.\textsuperscript{135} Consequently, the ‘informal legal change’\textsuperscript{136} by way of the DPP Policy influences the judicial reasoning of defendants in such cases.

\textsuperscript{127} See sections 4.2. in this chapter and 2.2. in Chapter Two
\textsuperscript{128} Personal email correspondence (12 Nov 2020) with the CPS Senior Policy Adviser, Special Crime and Counter Terrorism Division, regarding the reason for the 1 April 2009 starting date for data collection observed that ‘[w]hile we cannot be sure of the exact reason we started publishing figures given this was some time ago, we think this was in response to the high number of FOI [Freedom of Information] requests we started to receive on this topic.’
\textsuperscript{129} Criminal Justice Act 2003 Section 143(1) provides that ‘[i]n considering the seriousness of any offence, the court must consider the offender’s culpability in committing the offence and any harm which the offence caused, was intended to cause or might foreseeably have caused.’
\textsuperscript{130} Suicide Act 1961
\textsuperscript{131} Established in instances of assistance where the DPP decides that prosecution is not in the public interest and present in judicial evaluation of the defendant’s actions in \textit{R v Bipin Desai} 17 November 2017 Guildford Crown Court (Mr Justice Green)
\textsuperscript{132} \textit{R v Howe} [2014] EWCA Crim 114; By reference to Lord Lane CJ’ statement in \textit{R v Hough} [1984] 6 Cr App R (S) 406, Lord Justice Treacy (\textit{Howe [13]}) emphasised that ‘[i]n terms of gravity [assisted suicide] can vary from the borders of cold blooded murder down to the shadowy area of mercy killing or common humanity.’
\textsuperscript{133} \textit{R v Bipin Desai} 17 November 2017 Guildford Crown Court (Mr Justice Green) [45]
\textsuperscript{134} \textit{R v Howe} [2014] EWCA Crim 114 [27]
\textsuperscript{135} ibid and \textit{R v Natasha Gordon} 19 January 2018 Leicester Crown Court (\textit{R v Natasha Gordon})
\textsuperscript{136} Lewis (2011)
While the DPP has given their consent to prosecute in a small number of cases, leading to three successful prosecutions, a fourth was acquitted after a trial in May 2015. Together, the judicial deliberations on sentencing provide a brief overview of the emphasis afforded to public interest factors in the Policy, to establish an adequate level of punishment in cases of assisted suicide. Two of the three successfully prosecuted cases present circumstances where the death-seekers were deemed to be particularly vulnerable. More specifically, the level of culpability was influenced by evidence that the defendants exploited the death-seeker’s vulnerability.

The Death-Seeker and Issues of Vulnerability

Similar to the application of the DPP Policy by the DPP and CPS, the litmus test for judges is whether, on the facts, ‘the victim had a settled, voluntary and informed intention to commit suicide’. Hence, the absence of such a voluntary decision – otherwise established in connection with compassionate assistance – is refuted if the death-seeker was deemed to be vulnerable at the time when the offence was committed. That said, the level of culpability may be reduced if the activities between the death-seeker – a vulnerable individual – and the compassionate-helper, are consensual. Thus far, in exploring the issue of vulnerability, judges justify a higher level of punishment where the type of assistance is given by a

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137 R v Howe [2014] EWCA Crim 114; R v Bipin Desai 17 November 2017 Guildford Crown Court; R v Natasha Gordon 19 January 2018 Leicester Crown Court
140 R v Natasha Gordon 19 January 2018 Leicester Crown Court [14]
141 R v Howe [2014] EWCA Crim 114 [28]; The relevant Policy public interest factors are considered against the facts of the case.
142 In Attorney General’s Reference No 85 of 2006 (Workman) [2007] 1 Cr App R (S) 104 [12], the application (under Section 36 of the Criminal Justice Act 1988) regarding an unduly lenient sentence of 18 months’ imprisonment for aiding and abetting an attempted suicide was declined on the basis that the activities between the two involved (victim and defendant) were ‘essentially consensual’. Yet, in McGranaghan [1987] 9 Cr App R (S) 447, the culpability of a prisoner who convinced his vulnerable cellmate ‘to strangle himself with a sheet’, prompted a different outcome as there was no indication of compassionate circumstances.
143 In R v Howe [2014] EWCA Crim 114, the purchasing and providing the victim with a petrol can and lighter for the purposes of carrying out a suicide were aggravating factors for sentencing purposes.
defendant who was aware that (1) the death-seeker ‘suffered from mental health problems’ or (2) had previously attempted to take their own life. Of these two key factors, the first (in connection with the death-seeker’s mental capacity to make such a voluntary and uncoerced decision to end their life) appears to be given primacy. This is because only a lack of mental capacity (the first key factor) requires the consideration of the second key factor.

That said, in terms of the second key factor (previous attempts to commit suicide) as regards the case of Daniel James – before the publishing of the DPP Policy – the fact of several attempted suicides by the death-seeker prompted the DPP to decide not to prosecute. Thus, the evidence supported the conclusion that Daniel possessed the requisite mental capacity to make an autonomous decision to have an assisted suicide. Accordingly, evidence of personal autonomy by way of self-determination, seems to be capable of demonstrating not only a lack of vulnerability but also a voluntary and uncoerced decision to be assisted with suicide.

In matters of judicial reasoning, the first key factor (the death-seeker ‘suffered from mental health problems’) appears to place a duty on the defendant to establish whether the death-seeker was ‘particularly vulnerable’. That the death-seeker was able to make a voluntary decision at the time of the assistance is contingent on the defendant’s perception. In fact, in Nicklinson, Lord Sumption indicated that:

144 ibid [3]; Lord Justice Treacy pointed out [13] that ‘[i]n that case the Court identified a non-exhaustive list of factors with possible significance to sentence. In relation to harm; a distinction was to be drawn between cases leading to death and cases not leading to death. In relation to culpability; a sentencing court should consider such factors as whether the assistance was premeditated or planned, the degree of persistence of the conduct in question, the extent of the defendant’s engage with the deceased, whether there is evidence of settled voluntary and informed intention on the part of the deceased to die, whether the deceased solicited support and assistance and whether the defendant sought to resist those requests for help and any evidence of vulnerability on the part of the deceased and exploitation of that vulnerability.’
145 See Part 4.4 in this Chapter
146 See Part 4.3. in this Chapter
148 DPP Policy
The various listed factors for and against prosecution set out in the existing published policy are concerned with two main matters: (i) whether the assister was entitled to believe that the patient had made a free, settled and unpressured decision to die, and (ii) whether the assister was motivated wholly by compassion.\textsuperscript{149}

This was also an essential point for Mrs Justice Cheema-Grubb, who found the defendant’s involvement – in what appeared as a genuine suicide pact – was equivalent to ‘intentionally encouraging a man […] to commit suicide’.\textsuperscript{150} Consequently, the impact of the defendant’s act in connection with the death-seeker’s trust, justified the handing down of a custodial sentence.\textsuperscript{151}

\textit{The Compassionate-Helper and Issues of Capacity}

While in the above two\textsuperscript{152} cases the defendants were found to have passed the custodial sentencing threshold,\textsuperscript{153} a third – the case of Bipin Desai – prompted Mr Justice Green to take a different approach.\textsuperscript{154} Deemed to have been ‘wrongly charged with murder’ in the interim,\textsuperscript{155} the defendant was awarded a nine-month custody sentence, suspended for 9 months.\textsuperscript{156} The

\textsuperscript{149} R (Nicklinson) v Ministry of Justice [2014] UKSC 38 [252] (Lord Sumption)
\textsuperscript{150} R v Natasha Gordon 19 January 2018 Leicester Crown Court [1]; The court established that the defendant’s propensity to participating in on-line discussions with vulnerable individuals who expressed their intentions to commit suicide was also an aggravating factor which contributed to indicate the potential exploitation of the vulnerability of those involved.
\textsuperscript{151} ibid [3]
\textsuperscript{152} R v Natasha Gordon 19 January 2018 Leicester Crown Court and R v Howe [2014] EWCA Crim 114
\textsuperscript{153} Sentencing Council, ‘Custodial Sentences’ provides that ‘[a] custodial sentence must not be imposed unless the offence or the combination of the offence and one or more offences associated with it was so serious that neither a fine alone nor a community sentence can be justified for the offence.’ Available at <https://www.sentencingcouncil.org.uk/droppable/item/custodial-sentences/> accessed 17 Apr 2021
\textsuperscript{154} R v Bipin Desai 17 November 2017 Guildford Crown Court
\textsuperscript{156} R v Bipin Desai 17 November 2017 Guildford Crown Court [49]
circumstances in the case were distinguished from instances where a defendant ‘target[s] a vulnerable man who was contemplating suicide’. In fact, in handing down the sentence it was concluded the defendant’s acts in assisting his father’s suicide ‘were acts of pure compassion and mercy’. In emphasising the meaning behind the defendant’s act of assistance – preparing and dispensing a lethal smoothie followed by an insulin injection – Mr Justice Green said to the defendant: ‘[y]ou knew, and you believed, that this would be a humane and comfortable way for your father to die’.

Yet, the nature of this offence highlights a sense of bias that may be built into the current system. In the absence of evidence indicating potential issues of vulnerability or mental capacity, it was not only determined the death-seeker had reached ‘a firm, settled and informed wish to die’, but that ‘[f]or him being assisted to die was a blessing’. However, in the absence of evidence other than that provided by the compassionate-helper, the voluntary decision of the death-seeker is not a fact, as much as it is an inferred conclusion. This is largely because in matters of sentencing judges must consider facts that they are ‘sure of’ and ‘[w]here there is uncertainty […] relevant to [the] sentence’ the defendant is entitled to the benefit of the doubt.

It is worth reiterating that prior to the sentencing stage, involvement with a Section 2 offence would encounter prosecutorial discretion and even jury verdict stages, which in and of

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157 ibid [41]
158 ibid [29]
159 ibid [19]
160 ibid [21]
161 ibid [16]
162 ibid [29]
163 ibid [2]
164 Suicide Act 1961 Section 2(4); DPP Policy
165 Mavis Eccleston (The Times, Stafford Crown Court, Judge Michael Chambers QC, 19 September 2019) – Following a two-week trial, the defendant was unanimously acquitted by a jury of murder and manslaughter following the death of her husband, who did not survive a suicide pact. For a more in-depth discussion
themself may permit wrongdoers (other than compassionate-helpers) to walk away without prosecution. This is clearly supported by the ratio of referred cases to the cases where the defendant was successfully prosecuted (discussed earlier in this chapter). As such, in terms of punishment, the judiciary is the last resort for the law to achieve the desired effect in relation to the defendant’s culpability. Thus, the sentencing stage – for those who ought not to have ‘faced charges and punishment where someone else in the same position […] would not have’ – allows judges to apply their discretion in maintaining the balance between compassionate and malicious involvement. Only the former is likely to warrant an unconditional discharge or a suspended sentence.

Nevertheless, it is not inconceivable that in a similar set of circumstances to those in the Bipin Desai case, a non-death-seeker may consume the lethal concoction without awareness of the actual effects, leading to a similarly characterised ‘humane and comfortable’ death. This would be an unwanted death, attributed to the subjective approach enabled under the current system.

As already depicted here, and throughout this chapter, the emphasis of involvement with assisted suicide, as demonstrated by reference to the three stages, moves away from the death-

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regarding jury verdicts and sentencing attitudes see Julia Shaw, ‘Recent Developments in the Reform of English Law on Assisted Suicide’ European Journal of Health Law (2009) 16(4) 333, 336-337


167 R v Webb [2011] EWCA Crim 152 [24] - The defendant received a 12-month suspended sentence for ‘manslaughter committed as a mercy killing intended by the appellant to help his wife achieve her settled intention to end her own life.’; R v March (Unreported, Central Criminal Court, Barker J, 19 October 2006) - The defendant was given a 9 month suspended sentence for aiding and abetting the suicide of his wife, despite initially being charged with murder. See Matthew Taylor, ‘Devoted husband gets suspended sentence for helping wife to die’ (The Guardian, 20 October 2006) <https://www.theguardian.com/society/2006/oct/20/health.medicineandhealth> accessed 20 Apr 2021; R v Bipin Desai 17 November 2017 Guildford Crown Court (Mr Justice Green) - The defendant was given a 9 month suspended sentence for assisting his father to die by giving him a lethal smoothie followed by a lethal insulin injection, despite initially being charged with murder.

168 R v Bipin Desai 17 November 2017 Guildford Crown Court [38]

169 ibid [46]

170 ibid [16]
seeker’s interests. Indeed, the application of the law in connection with this offence is tailored to prospective compassionate-helpers, not death-seekers. For the protection of death-seekers to go beyond the obvious prevention of crime, the death-seeker’s voluntary decision to commit suicide would need to be obtained pre-death.

However, the narrative of the cases in this section also demonstrates that it is one thing to determine the matter of a death-seeker’s mental capacity as a contributing mitigating factor relevant to sentencing, and quite another to determine the same as being a fact. Therefore, while for the purposes of sentencing this interpretation is sound, further down the line this may prove problematic. As already explored in Chapter Three, the test for mental capacity as relied upon in these sentencing remarks – in the manner provided in the DPP Policy at [43.2] in connection with the MCA 2005 – was designed for a purpose that is yet to be extended as a measure to confirm the existence of an ‘informed decision’ for the purposes of being assisted to commit suicide.\(^\text{171}\) Thus, the validity of a decision of this kind may only be determined by an additional assessment of the death-seeker’s decision, pre-death.

\textit{Self-made Safeguards for Compassionate-Helpers}

As the CPS attempts to combat the difficulty of record-low rape convictions by advising victims to ‘pre-record evidence’ to avoid trauma,\(^\text{172}\) it is possible to see how the same could also apply to death-seekers contemplating assisted suicide to protect a compassionate-helper from being prosecuted. Thus, in what seems to be a developing trend in contemplation of an

\(^{171}\) D Casey and K Choong (2016), 55

\(^{172}\) Mark White, ‘Rape convictions hit record low as just 2,100 cases make it to court’ (SkyNews, 30 July 2020) <https://news.sky.com/story/more-rape-victims-should-pre-record-evidence-to-avoid-trauma-of-trial-cps-says-12038838> accessed 28 Apr 2020
assisted suicide abroad\textsuperscript{173} or at home,\textsuperscript{174} individuals are increasingly undertaking strategic steps in producing tangible evidence,\textsuperscript{175} to demonstrate their voluntary and uncoerced decision in order to protect their compassionate-helper. While this is a predictable by-product of the current system, this phenomenon has the potential to foster auspicious circumstances for abuse that may only be mitigated by way of assisted dying law reform.

4.5. Pragmatic Side Effects of Prohibitive Legislation

The Government’s failure to bring forward legislative provisions of medically assisted dying has produced side effects. Since being published in 2010, the Policy has been applied as the DPP intended.\textsuperscript{176} Yet, while the public interest factors are not meant to replicate a points-based scale for determining prosecutorial discretion, this chapter demonstrates an apparent emphasis on two aspects of the Policy. The first is whether the compassionate-helper’s involvement ‘was wholly motivated by compassion’.\textsuperscript{177} The second, based on the facts, is whether the evidence indicates the death-seeker had ‘reached a voluntary, clear, settled and informed decision to commit suicide’.\textsuperscript{178}

Based on the manner of its application, the DPP Policy – characterised as a measure which ‘effectively decriminalised’\textsuperscript{179} – is a way of distinguishing between genuine decisions to have

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\textsuperscript{173} Ninian v Findlay & Ors [2019] EWCH (297) Ch
\textsuperscript{174} Ralph Snell, 94, was assisted by his wife, Molly, as well as his son, Richard Snell, who ‘told the inquest in Winchester that he helped his father open a bottle of medication because he was not strong enough to do it, and bought him some chocolate cake and whisky to enjoy before he died.’ See Steven Morris, ‘Wife and son arrested for assisting suicide of husband, inquest hears’ (The Guardian, 21 Aug 2019) \texttt{<https://www.theguardian.com/uk-news/2019/aug/21/wife-and-son-arrested-on-suspicion-assisting-suicide-ralph-snell-inquest-hears> accessed 3 Apr 2020}
\textsuperscript{175} Beryl Taylor, 70 years of age, recorded herself before she took her own life, having received some assistance from her husband. BBC News, ‘Rattlesden woman's death was suicide not murder, inquest hears’ (17 October 2018) \texttt{<https://www.bbc.co.uk/news/uk-england-suffolk-45891508> accessed 17 Apr 2020}
\textsuperscript{176} See sections 4.3. and 4.6. in this chapter.
\textsuperscript{177} DPP Policy Public Interest Factors [43.6] and [45.2]
\textsuperscript{178} ibid [43.3] and [45.1]
\textsuperscript{179} A Mullock (2010), 442
an assisted suicide (stemming from personal autonomy and self-determination), and instances of malicious involvement (lacking the death-seeker’s uncoerced voluntary decision to end their life) – hinting at an unwanted death. For individuals contemplating involvement with a Section 2(1) offence, the Policy is meant to enable them to exercise their Article 8(1) right and approach a compassionate-helper with the confidence that their involvement with this act of compassion is more likely than not, not to lead to prosecution in the aftermath of their successful assisted suicide.180

For the purposes of applying the law, the Policy is meant to guide the police, the prosecutors and the DPP in their decision-making process in establishing whether, on the facts, consent to prosecution is likely (the police) or whether it should be given (the CPS and the DPP). Yet, the nature of this decision-making process is not equipped to solve other issues which may arise in connection with such an offence. This is because, by design, any breach of a Section 2 offence sets in motion an inevitable chain of events embedded within the nature of a prohibitive legislation.

The law’s unpredictable response in instances of assisted suicide was captured in the aftermath of Beryl Taylor’s death.181 As already noted elsewhere in this chapter, in the hope of allaying any doubts regarding potential abuse by her husband, Ms Taylor prepared a video recording in the moments prior to ending her life, explaining the voluntary nature of her decision.182 Upon viewing the recording, the police nevertheless concluded the husband had been involved in the murder or assisted suicide of his late wife. By contrast, the very same evidence led the coroner

180 R (Purdy) v Director of Public Prosecutions [2009] UKHL 45 [75] (Lord Brown)
182 ibid; There was no prosecution of the victim’s husband.
to adopt the opposite view and establish the death-seeker ‘had a settled, voluntary and informed intention to commit suicide’. Consequently, the compassionate-helper was not prosecuted.

Indeed, this procedural yo-yo effect indicates that not only does the current system have a psychological and emotional impact over the involvement with assisting another to end their life in secret – due to the very fact of a prohibition – but it also places additional strain on those willing to assist someone they love. Thus, from police arrests to protracted investigations, and even trials, especially at a point where the individual is grieving the death of their loved one, the remainder of this section aims to highlight the side effects of Section 2(4). Three such examples stand out.184

Mrs Ninian

The first case highlights potential complications faced by compassionate-helpers who are set to benefit financially from the deceased.185 Nevertheless, in connection with a Section 2(1) offence, the DPP Policy states that where evidence shows ‘compassion was the only driving force behind [the compassionate-helper’s] actions, the fact [of having] gained some benefit will not usually be treated as a factor tending in favour of prosecution.’186 Yet, even though the

183 ibid
185 Ninian v Findlay and Others [2019] EWCH 297 (Ch) (Chief Master Marsh)
186 DPP Policy Public Interest Factors Tending in Favour of Prosecution [44]
DPP decided not to prosecute Mrs Ninian, for the purposes of forfeiture the court had to establish the effect of this matter once again.

Thus it was observed that the involvement with her husband’s death at Dignitas made it impossible ‘to characterise Mrs Ninian’s actions as [...] “minor assistance” [because] the suicide could not have taken place without her assistance’.\textsuperscript{187} Indeed, in clarifying the issue of criminal liability for the purposes of relief against forfeiture, Chief Master Marsh attributed weight to the fact that the DPP decided not to prosecute Mrs Ninian in connection with Section 2 and granted her the application.\textsuperscript{188} For now, this additional pressure is accepted as a safeguard against wrongful gain. However, for anyone in Mrs Ninian’s position, once the DPP decides not to prosecute, should the law enable the emergence of yet another barrier by way of civil proceedings?

Mrs Eccleston

The second case involved the defendant who identified herself as the survivor of a suicide pact. Mr and Mrs Eccleston took lethal doses of prescription medication to end their lives.\textsuperscript{189} Upon being found at home, they were rushed to the hospital. Because Mrs Eccleston, then aged 80, recovered, she had to endure an eighteen-month long investigation at a time when she was grieving for her late husband. Following a two-week trial, Mrs Eccleston was found not guilty of the murder and manslaughter of her late husband.\textsuperscript{190} Yet, within a system offering the option

\textsuperscript{187} Ninian v Findlay and Others [2019] EWCH 297 (Ch) [50]
\textsuperscript{188} ibid [1]-[2]
\textsuperscript{189} Phoebe Southworth, ‘Mavis Eccleston, 80, cleared of murdering husband was ‘hung, drawn and quartered’ by police, family say’ (The Telegraph, 22 Sep 2019) < https://www.telegraph.co.uk/news/2019/09/22/family-80-year-old-cleared-murdering-husband-mercy-killing-claim/> accessed 22 Nov 2019; Mr and Mrs Eccleston left a suicide note explaining that final decision based on ‘ill-health, harassment and neighbourhood tensions’.
\textsuperscript{190} ibid
of a safeguarded assistance to end one’s own life under a prescribed framework, and under specific criteria, such cases would cease to come before the courts.

Mrs Whaley

The third case involved Mrs Whaley who, despite not being prosecuted under Section 2, faced the threat of criminal proceedings and weeks of interviews under caution following the death of her late husband at Dignitas.\(^{191}\) An anonymous telephone call to the police pointing to Mr Whaley’s intention to have an assisted suicide abroad prompted investigations of the couple at their home. At the same time, her husband’s wish to have an assisted suicide abroad attracted a great deal of attention from the media. The confusion of the law’s construction means that in the face of a blanket prohibition, the police have a duty to respond to a potential breach of Section 2. This side effect is inconsistent with the overwhelming outcome in instances of assisted suicide at Dignitas, which over the years have been ‘routinely not prosecuted’.\(^{192}\)

In conclusion, so long as the law prohibits assisted suicide, the law will continue to give rise to these side effects. For this reason, as depicted in this chapter, individuals cannot but orchestrate supporting evidence\(^{193}\) intended to eliminate the risk of prosecution, and even


\(^{192}\) In *R (Nicklinson) v Ministry of Justice* [2014] UKSC 38 the court heard that assistance in connection with Dignitas was ‘routinely not prosecuted’ [109] (Lord Neuberger); Before the publishing of the DPP Policy, Sir Kenneth Macdonald – in post prior to, Sir Keir Starmer, the DPP who published the Policy – admitted dealing with over 90 Dignitas cases where, after considering the available evidence and assessing the question in the public interest, no prosecutions ensued. See *The Economist*, ‘In the public interest’ (11 December 2008) <https://www.economist.com/britain/2008/12/11/in-the-public-interest> accessed 2 Oct 2020; By the time *Purdy* was before the House of Lords this number had risen to 115 – see *R (Purdy) v Director of Public Prosecutions* [2009] UKHL 45 [30] (Lord Hope); Meanwhile, available data from Dignitas indicates that as of 31 December 2020, a total of 475 individuals from Great Britain have died by assisted suicide. See Dignitas – To live with dignity – To die with dignity, ‘Accompanied Suicides per Year and Country of Residence’ <http://www.dignitas.ch/images/stories/pdf/statistik-ftb-jahr-wohnsitz-1998-2020.pdf> accessed 15 Mar 2021.

\(^{193}\) See Beryle Taylor above
preserve the compassionate-helper’s right to inheritance in the aftermath of a death. In this way, their efforts may be accepted as proof of their voluntary decision. In the meantime, those willing to assist a loved one are sure to become the subject of an inevitable process triggered by the so-called blanket prohibition.

4.6. Voluntary Decisions and Compassion for Prosecutorial Discretion

For over a decade, the enforcement of Section 2(1), by way of the DPP Policy under Section 2(4), promotes the public interest factors as a means of identifying (on a case-by-case basis) instances of assisted suicide when the offender ought to be prosecuted. Yet, the limited number of cases where the DPP has given their consent to prosecute under Section 2(4), point to an emphasis on two individual public interest factors.

Thus, the notions of compassionate assistance with suicide and the death-seeker’s voluntary decision, appear to take centre stage in the decision-making process.

Published Decisions in Instances of Assisted Suicide

The application of the law in relation to a Section 2 offence indicates the facts must be related to assistance with someone’s suicide. Thus, the act which brings about the death of the death-seeker should be their own, not of the compassionate-helper. Hence, a decision to assist an individual who is not capable (physically able) of undertaking the final act for themselves, causes a compassionate-helper – who undertakes a more active role in administering a lethal substance to the death-seeker – to risk being charged with murder or manslaughter.

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194 Ninian v Findlay & Ors [2019] EWCH (297) Ch
This is what happened to Kay Gilderdale and Bipin Desai, whose criminal actions appeared to go beyond that of assisting suicide. Essentially, they injected their loved ones with lethal medicine to speed up the already mustered dying process.\textsuperscript{195} Under the current system, the law’s response is such that even though it is likely that a compassionate-helper will not be prosecuted, they may nevertheless be subject to a police investigation in relation to a Section 2 offence.

However, in practice, there is considerable evidence (see Table 8 below) indicating that in certain circumstances, and regardless of the available evidence, prosecuting the compassionate-helper may not be in the public interest. Based on the DPP published decisions and judicial reasoning in cases of assisted suicide in this chapter, it is possible to determine a set of circumstances that appear to have significantly reduced the likelihood of prosecution at home.

\textit{Table 8 - DPP Reasons Regarding Consent to Prosecute in Instances of Assisted Suicide}\textsuperscript{196}

<table>
<thead>
<tr>
<th>No.</th>
<th>Date</th>
<th>Facts of the Case</th>
<th>Consent</th>
<th>Reasons for Decision</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.</td>
<td>09/12/08</td>
<td>Daniel James’ Death at Dignitas:\textsuperscript{197} Parents helped Daniel to achieve his wish to have an assisted suicide abroad.</td>
<td>No</td>
<td>The DPP established Daniel’s parents tried to persuade him not to commit suicide but Daniel – ‘a mature, intelligent and fiercely independent young man with full capacity’ – made an informed decision to end his life at Dignitas.\textsuperscript{198}</td>
</tr>
<tr>
<td>2.</td>
<td>26/01/10</td>
<td>Kay Gilderdale helps daughter to die:\textsuperscript{199} Conduct began as assisted suicide, then progressed to attempted murder (by administering morphine to introduce an air embolism) after daughter lost consciousness.</td>
<td>Yes</td>
<td>The CPS was satisfied the evidence supported a charge of attempted murder. The seriousness of that charge deemed it in the public interest to bring the case before a jury for a verdict. Sentence: 12 months conditional discharge</td>
</tr>
</tbody>
</table>

\textsuperscript{195} See Table 8 below – Row Numbers 2 and 11

\textsuperscript{196} Reference to ‘at Home’ in this table indicates the assistance was provided in England and Wales – including but not limited to the death-seeker’s home.


<table>
<thead>
<tr>
<th>Date</th>
<th>Description</th>
<th>Outcome</th>
<th>Notes</th>
</tr>
</thead>
<tbody>
<tr>
<td>19/03/10</td>
<td>Sir Edward and Lady Downes’s death at Dignitas. Their son, Mr Downes, booked a hotel room for them to use in Switzerland.</td>
<td>No</td>
<td>The DPP said the parents had reached a voluntary, clear, settled and informed decision to take their own lives and in assisting them, Mr Downes was wholly motivated by compassion.</td>
</tr>
<tr>
<td>24/05/10</td>
<td>Mrs Bateman’s death. Michael Bateman helped his wife die by way of inhaling gas, which caused death by oxygen starvation.</td>
<td>No</td>
<td>The DPP found that Mrs Bateman had a clear and settled wish to commit suicide. Also, Mr Bateman was wholly motivated by compassion.</td>
</tr>
<tr>
<td>25/06/10</td>
<td>Raymond Cutkelvin’s death at Dignitas. Dr Irwin helped him with the travel and some financial assistance in relation to the assisted suicide at Dignitas.</td>
<td>No</td>
<td>The DPP established Mr Cutkelvin had a clear intention to commit suicide. Dr Irwin did not gain for himself and fully co-operated with police enquiries. It was likely a court would only impose a nominal penalty.</td>
</tr>
<tr>
<td>16/08/10</td>
<td>Death of Caroline Loder at her home in Surrey. Dr Elisabeth Wilson gave advice to Caroline Loder on how to end her life.</td>
<td>No</td>
<td>The DPP established the act was sufficient to provide a realistic prospect of conviction. Assistance was minimal. Ms Loder had plainly intended to commit suicide. Prosecution was not required in the public interest.</td>
</tr>
<tr>
<td>02/02/10</td>
<td>Death of Jane Hodge at her home in Sussex. overdose of prescribed drugs.</td>
<td>No</td>
<td>The DPP established Mrs Hodge acted independently: (1) no suggestion anyone procured or assisted in the administration of the drugs, and (2) insufficient evidence to proceed with the offence of assisting a suicide.</td>
</tr>
<tr>
<td>27/08/13</td>
<td>Kevin Howe faced charges for providing the injured victim with the means to set himself on fire.</td>
<td>Yes</td>
<td>The DPP found that Kevin Howe deliberately encouraged a vulnerable victim to set himself alight (attempt to commit suicide) Sentence: 12 years detention in a Young Offender Institution</td>
</tr>
<tr>
<td>15/01/14</td>
<td>Dr David Arnold and his wife Elizabeth were assisted by their daughter Georgina to die by using lethal drugs.</td>
<td>No</td>
<td>The DPP found that Georgina Roberts’ parents had clearly communicated their decision to her, and she was acting out of compassion.</td>
</tr>
</tbody>
</table>

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First, the compassionate-helper cooperates with police investigations.\(^{214}\) Second, their act must have been capable of indicating they were ‘wholly motivated by compassion’\(^{215}\) at the time of the offence as opposed to being driven by other factors, such as financial gain.\(^{216}\) That said, the latter does not automatically become a matter in favour of prosecution.\(^{217}\) For a trial jury, the character witnesses are likely to influence the decision regarding the motivation behind the

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\(^{210}\) R v Bipin Desai 17 November 2017 Guildford Crown Court

\(^{211}\) The Telegraph, ‘Pharmacist murdered his father with lethal fruit smoothie then said it was assisted suicide, court hears’ (6 November 2017) <https://www.telegraph.co.uk/news/2017/11/06/pharmacist-murdered-father-lethal-fruit-smoothie-said-assisted/> accessed 1 May 2021


\(^{214}\) This point continues to appear in the DPP published decisions of cases in the above Table 8.

\(^{215}\) Key factor for justifying doing without prosecution. See Table 8 – Row Numbers 1, 3, 4, 5, 9 and 11 (in R v Bipin Desai 17 November 2017 Guildford Crown Court, in spite of a conviction, the judge noted the defendant ‘faced charges and punishment where someone else in the same position […] would not have’ [38] for acts stemming from ‘pure compassion and mercy’ [29]).

\(^{216}\) This matter was clarified in numerous cases including the issue of forfeiture in Ninian v Findlay and Others [2019] EWCH 297 (Ch) (Chief Master Marsh)

\(^{217}\) DPP Policy [44]
assistance. Third, there must not be evidence that the death-seeker was vulnerable – including a lack of mental capacity to reach a voluntary decision to commit suicide – at the time the assistance was carried out. Alternatively, it would be helpful to the defendant’s case to demonstrate their involvement could not be characterised as having exploited the death-seeker’s vulnerability. The conclusions on this point may also be influenced by whether the compassionate-helper encouraged (requiring prosecution) or assisted in suicide (attracting prosecutorial discretion).

Fourth, the act of assistance is provided in connection with the death-seeker’s act which causes their death, by way of suicide. Conversely, involvement characterised as more ‘active’ in nature – similar to acts in cases involving Kay Gilderdale and Bipin Desai – is capable of amounting to charges of murder or manslaughter.

For the purposes of a Section 2 offence for which prosecution may not be required in the public interest, the act of assistance may be defined as the assistance by a compassionate-helper who (1) was wholly motivated by compassion, who (2) acted in accordance with the voluntary decision of the death-seeker to end their own life, by (3) preparing the means used by the death-seeker to take their own life. Under the current application of the law, this amounts to compassionate assistance in suicide, and is highly likely not to require prosecution on public interest grounds. Thus, as the construction of this definition is based on the practical aspects within the current application of the law, it becomes apparent that the DPP Policy represents

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218 This appeared to be a matter of great importance for the judge (in R v Bipin Desai 17 November 2017 Guildford Crown Court) establishing the relationship between the defendant and his father demonstrating the matter of compassion and voluntary decision. However, the same relationship of trust is open to abuse by a defendant in a different or similar setting.

219 In both R v Natasha Gordon 19 January 2018 Leicester Crown Court and R v Howe [2014] EWCA Crim 114 the issue of vulnerability of victims was central to the question of criminal responsibility for the offence.

220 The absence of evidence to this end can support the notion that the victim reached a voluntary decision to end their life.

221 See section 4.4. in this chapter.

222 See Table 8 Row Numbers 6, 7, 9 and 4; In the latter case, the defendant, Michael Bateman, assisted his wife by placing a bag over her face causing her to die by inhaling gas and being starved by oxygen. Importantly, it was Mrs Bateman who tightened the strings of the bag and turned on the helium supply. See BBC News, ‘No charges in West Yorkshire assisted death case’ (24 May 2010) <http://news.bbc.co.uk/1/hi/england/bradford/8701173.stm> accessed 4 May 2021
an established ‘informal legal change’,\textsuperscript{223} recognised through its application in response to compassionate assistance in suicide.

\textit{Framing a Voluntary Decision Pre-Death}

As examined in the previous section, despite denying the public interest factors act as a points-based approach, the DPP has repeatedly focused on two issues when giving their reasons for the decision not to prosecute: (1) whether the compassionate-helper was wholly motivated by compassion and (2) whether the death-seeker had reached a voluntary decision to commit suicide. This is also evident by way of judicial sentencing remarks in cases of this kind (see sections 4.4. and 4.5. in this chapter). That said, there is a great limitation to what can be achieved in terms of generalising the findings in those decisions. Nevertheless, thus far, these cases have focused on proving or disproving the two notions based on evidence.

The apparently balanced emphasis of the two key factors, as being assigned equal weight, is deceiving. Primarily, the chronology of application of Section 2(4) authority, in the aftermath of the offence, makes it difficult to ascertain the death-seeker’s actual wishes. As such, in the absence of evidence – such as video recording as in the case of Mrs Beryl Taylor or expressed in writing as Mr Ninian did to enable his wife to inherit his estate (discussed elsewhere in this chapter) – the compassionate-helper becomes the sole source of evidence. Nevertheless, this evidence is gathered with the intention to build a case against prosecution.

However, unless the evidence points to the contrary, the finding that the compassionate-helper was motivated by compassion will also point to and even contribute to the conclusion that the death-seeker may have reached a voluntary and uncoerced decision. This compromise by way

\textsuperscript{223} Lewis (2011)
of an ‘informal legal change’,\(^{224}\) as opposed to reforming the law based on a transparent and monitored framework, forces the involvement with assisted suicide behind closed doors. This means death-seekers are silenced while compassionate-helpers are empowered.

In any event, the DPP Policy has emerged in response to the need to clarify the decision-making process as regards lawful assistance with suicide abroad;\(^{225}\) this is now commonly referred to as the kind of involvement (in the form of help with travel arrangements and accompaniment abroad) which is ‘routinely not prosecuted’.\(^{226}\) Yet, as regards assisted suicide at home (in England and Wales), the prosecutorial discretion is not as clear. This may also be because the process of assistance abroad involves a prescribed process of assisting someone to end their life. Conversely, in case of assistance in circumstances other than at a recognised organisation abroad (where individuals may not be able or physically capable to go abroad)\(^{227}\) compassionate assistance by family and friends may lead to psychological and emotional impact of such involvement.

That which Lord Sumption identifies as an ‘untidy compromise’ (that friends and relatives help death-seekers) within the law,\(^{228}\) is in fact a coping mechanism devised to navigate a law which, owing to the nature of this very intervention, invalidates the notion that a blanket ban exists. Therefore, as individuals continue to contemplate involvement with assisted suicide, the Westminster Parliament ought to step in and own up to the current unsustainable and ‘untidy compromise’ that its population is facing. The need for law reform by way of a good death deepens further following the COVID-19 experience, which is the focus of the next chapter.

\(^{224}\) Lewis (2011)
\(^{226}\) R (Nicklinson) v Ministry of Justice [2014] UKSC 38 [109] (Lord Neuberger)
\(^{228}\) Bowcott (2019)
4.7. Summary

Since the enactment of the Suicide Act 1961, the DPP’s decision-making process as regards consent to prosecute under Section 2(4) has been exercised as a means of safeguarding compassionate-helpers in instances of a Section 2(1) offence. With the high majority of referred instances of assisted suicide not being prosecuted, the law seems to be enforced by the DPP in the manner envisioned by Parliament during the time of debating the Suicide Bill.\(^{229}\)

Given the coming into force of the Human Rights Act 1998, the response of the DPP as regards their decision-making process and rationale in connection with prosecutorial discretion, led to the development and publishing of the DPP Policy to enable individuals ‘to exercise a genuinely autonomous choice’ and self-determination to have an assisted suicide.\(^{230}\) Thus, the reason for adopting a crime-specific Policy was directly linked to the argument that ‘the notion of personal autonomy is an important principle underlying the interpretation’\(^{231}\) of Article 8 of the Convention.\(^{232}\) However, in practice, the Policy falls short of meeting the side effects of prohibitive jurisdiction while operating to enable prosecutorial discretion as opposed to reflecting the imposition of a blanket ban on assisted suicide.

However, while in the past decade the DPP has offered some level of transparency into the decision-making process as regards individual cases, this is not enough for a population where the option for a good death rests with the ‘untidy compromise’ faced by death-seekers and compassionate-helpers willing to risk being prosecuted. Indeed, it is difficult to see how the normalisation of this coping mechanism – primarily devised to deal with ‘mercy killings’\(^{233}\) –

\(^{229}\) HL Deb 2 March 1961, vol 229 – (Lord Denning – 5.3pm)
\(^{230}\) *R (Purdy) v Director of Public Prosecutions* [2009] UKHL 45 [65] (Lady Hale)
\(^{231}\) *Pretty v United Kingdom* (2002) 35 EHRR 1
\(^{232}\) *R (Purdy) v Director of Public Prosecutions* [2009] UKHL 45 [60] (Lady Hale)
\(^{233}\) HC Deb 14 July 1961, vol 644, col 843 (Mr Peter Kirk - 3.56pm)
is still relevant within a democratic society whereby a former Supreme Court judge attests to there being no ‘moral obligation to obey the law’. Consequently, despite operating a blanket prohibition, the current system enables compassionate-helpers to assist death-seekers in ending their life. This is the point at which investigations are deployed to establish whether the death-seeker was competent enough to act with autonomy and reach an uncoerced voluntary decision. At the same time, these findings can influence the question of whether indeed the compassionate-helper was motivated by compassion as opposed to taking advantage of potential vulnerabilities of the death-seeker. Yet, as depicted in this chapter, legislative arrangements and application of the law in this area are ill-equipped to address the death-seeker’s need for safeguards, pre-death.

Therefore, when the Westminster Parliament braves the step towards assisted dying law reform, the measure – in the way captured within the Assisted Dying Bill 2021 (examined in Chapter Three) – would be capable of providing a set of safeguards not available under the current system for death-seekers. Thus, by way of an intervention by a medical professional and with the necessary safeguards, death-seekers would be able to express, pre-death, their voluntary and non-coerced decision to end their life.
Chapter 5 – COVID-19: The Struggle for a Good Death

5.1. Introduction

The previous chapter analysed the duality promoted under the current system, where on the one hand the law promotes a ‘blanket ban’ on assisted suicide – prohibiting individuals from choosing the time and manner of their death and being assisted to achieve this wish – while on the other hand (through prosecutorial discretion) it enables the possibility for brave loved ones (compassionateelpers) to assist with suicide, though not without the risk of prosecution. Despite the effective application of the law in line with Parliament’s wishes, the chapter argued this phenomenon silences the autonomous wishes of individuals and has the potential to foster circumstances for abuse that may only be mitigated by way of assisted dying law reform.

In 2020, the struggle for a painless and good death took on new meaning. Bringing with it unprecedented challenges as social distancing, lockdown restrictions, and high mortality became part of everyday life, the coronavirus disease (COVID-19)\(^1\) spread at a phenomenal rate causing consternation amongst governments around the world.\(^2\) In the UK,\(^3\) travel restrictions and lockdown rules were broadcasted by the Prime Minister on 23 March 2020, who announced: ‘[f]rom this evening I must give the British people a very simple instruction


\(^3\) Institute for Government, ‘Coronavirus lockdown rules in each part of the UK’ <https://www.instituteforgovernment.org.uk/explainers/coronavirus-lockdown-rules-four-nations-uk> accessed 20 Aug 2021; England, Scotland and Wales introduced first lockdown restrictions on 26 March 2020, and Northern Ireland on 28 March with slight differences in their approaches. However, at various points during the pandemic, the governments in each part of the UK have taken different approaches and adopted different social distancing rules and restrictions.
– you must stay at home. Because the critical thing we must do is stop the disease spreading between households. 4

Within months, those seeking lawful assisted suicide abroad received the Government’s permission to travel abroad. 5 Yet, as this chapter reveals, a more disturbing and unsettling reality revealing the inadequacy of the current system’s relationship with death and dying was cropping up. Indeed, issues of safety in connection with vulnerable individuals and their ability to make end-of-life decisions and act with autonomy became the lens through which compassionate medical assistance was not only perceived but also justified.

This chapter investigates the effect of emergency powers adopted by the UK Parliament as regards the lives of dying people in their struggle for a painless and good death. Thus, its purpose is to explore the potential meaning and lessons that COVID-19 has likely brought to the fore to inform the future debate on the autonomous choice to have a good death as part of the Assisted Dying Bill 2021 in contemplation of law reform.

5.2. Consequences of Emergency Powers

The imposition of lockdown led to the closure of non-essential businesses, restrictions on travel, isolation of individuals testing positive, and quarantine restrictions for those who had been exposed to the virus. 6 The need to prevent the spread of the virus in the early stages of this crisis called for the adoption of emergency powers.

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5 HC Deb 5 Nov 2020, vol 683, col 475 - Coronavirus Regulations: Assisted Deaths Abroad (Matt Hancock - The Secretary of State for Health and Social Care)
6 Boris Johnson (23 March 2020)
Pursuant to the European Convention for the Protection of Fundamental Freedoms and Human Rights (Convention), the pandemic restrictions are a direct interference with Article 8 (Right to respect for private and family life).\(^7\) However, contrary to ordinary circumstances,\(^8\) the context of a pandemic allows Member States to engage Article 15\(^9\) of the Convention\(^10\) and derogate from Article 8 obligations in time of emergency ‘threatening the life of the Nation’.\(^11\) Between March and April 2020, several signatories to the Convention had invoked\(^12\) this derogation clause to deal with the ongoing pandemic. The UK, Germany and France did not.\(^13\)

Therefore, for the UK, any emergency measures introduced to manage the pandemic response

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\(^7\) See Chapter Two section 2.2. for a discussion on this restriction in the context of assisted suicide prohibition.


\(^9\) Article 15 text is based on the draft Article 4 of the United Nations draft Covenant on Human Rights, which later became Article 4 of the International Covenant on Civil and Political Rights (ICCPR)


ought to adhere to the Convention rights and be capable of being justified under Article 8(2) as ‘necessary in a democratic society’.\textsuperscript{14}

In the interim, the pandemic regulations were provided under the Public Health (Control of Disease Act) 1984,\textsuperscript{15} and were supplemented by The Health Protection (Coronavirus) Regulations 2020. These were swiftly replaced by the Coronavirus Act 2020.\textsuperscript{16}

\textit{Coronavirus Act 2020}

Fast-tracked through Parliament with its introduction on 23 March 2020 and its Royal Assent on 25 March 2020, the Coronavirus Act 2020 (CA 2020) – 259 pages of legislation comprising a set of provisions covering 102 Sections and 29 Schedules – was designed to enable the UK to deal with the difficulties caused by the pandemic. Indeed, the maxim that the measure is ‘necessary and proportionate’ crops up throughout the CA 2020, as it did at the time of its introduction by the Government on the premise that ‘[t]he measures in the Coronavirus Bill are temporary, proportionate to the threat we face’ and ‘will only be used when strictly necessary and be in place for as long as required to respond to the situation.’\textsuperscript{17}

Furthermore, the provisions of the CA 2020 have altered many aspects of the fabric of the pre-COVID life. These changes extend to emergency registration of health professionals.\textsuperscript{18}

\textsuperscript{15} As amended by the Health and Social Care Act 2008
\textsuperscript{16} Coronavirus Act 2020
\textsuperscript{18} Coronavirus Act 2020 Sections 2-5
registration of deaths,\textsuperscript{19} inquests,\textsuperscript{20} investigatory powers,\textsuperscript{21} the use of live links in courts and tribunals,\textsuperscript{22} mental health and mental capacity legislation,\textsuperscript{23} care and support,\textsuperscript{24} powers in relation to transportation, storage, and disposal of dead bodies,\textsuperscript{25} to name but a few.

Yet, for vulnerable individuals, including those at the end-of-life, requirements of isolation and shielding during lockdown forced them to be trapped in care homes or hospitals, seeing their families only dimly through windows, with no physical contact allowed, and the law forbidding families from being with them in their dying days.

5.3. Managing Death and Dying During the Pandemic

The experience of the pandemic between 2020 and 2021 in the UK tells of a real struggle to manage death and the dying. While for some this meant dying at home `surrounded by [their] unglowed, unmasked loved ones’, for individuals in UK hospitals, the imposition of restrictions from seeing or being visited by any loved ones meant they were forced to die and `never to set eyes on an unmasked human face again’.\textsuperscript{26} This tragic and lonely experience of death is certain to cause any legal system to question its approaches which led to the abandonment of dying individuals at a time when they needed compassion the most.\textsuperscript{27} Indeed, the circumstances that

\begin{itemize}
  \item \textsuperscript{19} ibid Sections 18-21
  \item \textsuperscript{20} ibid Sections 30-32
  \item \textsuperscript{21} ibid Sections 22-23
  \item \textsuperscript{22} ibid Sections 53-56
  \item \textsuperscript{23} ibid Section 10
  \item \textsuperscript{24} ibid Sections 14-15
  \item \textsuperscript{25} ibid Section 58
some have had to endure are far removed from what end-of-life researchers would deem as a ‘good death’.28

Nelson-Becker suggests that in a historical context a good death is ‘where one can exercise final control to die at home accompanied by friends or family’, which he argues is a notion that has been preserved as part of the present.29 Thus, he concludes, it is the fact of not being alone at the end of a long life that forms the very construct of a good death.30 At the same time, Kanaris argues that the circumstances of the pandemic have also put into perspective the notion of a good death and its importance for healthcare professionals, which ought not to be underestimated.31 For them, the guilt that somehow they were ‘complicit in allowing […] patients to die alone’, with only the choice to substitute ‘human, familial touch’ with ‘[m]orphone and midazolam’, caused moral distress.32

Indeed, the maelstrom of events brought to the surface issues of kindness, compassion and dignity in connection with the fight for living and the struggle for having a painless death. Whether the subject of dying at home, palliative or end-of-life care – individuals, their loved ones and the medical professionals alike, were cast into unchartered waters.

30 ibid
32 ibid, 142
Palliative Care and Hastening Death

In 2018, the World Health Organisation (‘WHO’[^33]) published a guide on ‘Integrating palliative care and symptom relief into the response to humanitarian emergencies and crises’ – the first international authority to do so.[^34] The document, however, failed to recognise the circumstances of limited resources which inevitably could, and indeed did lead to the making of ‘hellish choices’ by healthcare professionals as regards palliative care during the pandemic.[^35]

To this end, while not explicitly engaging with the term ‘euthanasia’, WHO uses the term ‘hastening death’ as a potentially foreseeable but unintentional consequence of attempts to ensure a patient’s comfort in instances of ‘severe, refractory symptoms in a patient with a terminal illness or mortal injury’.[^36] What is more, the advice contends the act is ‘medically and ethically appropriate as well as compassionate’.[^37] Indeed, as indicated by Wynne as regards the context of the pandemic, resource-scarce environments force healthcare professionals to conserve medication by giving patients a single ‘large dose of barbiturates’ to hasten death, as opposed to small doses to only address pain relief over a longer period.[^38]

[^33]: The UK is the second highest supporter and donor (2018-2019) of the work undertaken by WHO and have worked closely during the pandemic ‘to tackle some of the biggest health challenges problems of our time’ – See WHO, ‘United Kingdom of Great Britain and Northern Ireland’ (28 April 2021) <https://www.who.int/about/funding/contributors/gbr> accessed 5 Jul 2021


[^36]: A WHO Guide (2018) 16, also 26, 40, 61

[^37]: ibid 61

[^38]: Wynne (2020) 521
More recently, palliative care organisations clarified their position against euthanasia, while distinguishing refusal or stopping of treatment, withdrawal of futile treatment and palliative sedation as lawful. Yet, in the context of COVID-19, limited resources and patient prioritisation have led to moral predicaments. Published in response to the pandemic, the COVID-19 Rapid Guidance released by the National Institute of Clinical Health and Excellence (NICE) emphasises the use of the Clinical Frailty Scale (CFS) for triage when admitting individuals into hospital to enable patients, medical professionals, and families to make difficult decisions regarding care. Effectively, this is because an increased level of frailty is linked to higher mortality in critical care. In terms of palliative care, the Association of Palliative Medicine issued guidance attributing authority to those with expertise in withdrawal of ventilation. While ordinarily this endeavours to provide individuals with high-quality end-of-life care, it would not be inaccurate to estimate that many may have fallen short of experiencing a ‘good death’. Still, as observed in the available literature and guidance, in the midst of the pandemic, the ability to provide the best end-of-life care has suffered significant adjustments and expectations have been lowered.

40 Wynne (2020) 520
End-of-life Care

There are several issues as regards end-of-life care and being accompanied by others at the end-of-life. Before COVID-19 these were considered in line with the needs of claimants in case challenges which, owing to the construction of the law and constitutional arrangements, could only be assessed in the context of a claimant’s medical condition. During the pandemic, the NICE guidance extended to end-of-life care decision-making and advanced care planning\(^46\) for individuals who are most at risk during the pandemic.\(^47\) Studies conducted early on confirmed that individuals suffering from underlying diseases were disproportionately affected when compared with non-severe patients.\(^48\) On this premise, the healthcare system made further changes as regards anticipatory prescribing (AP) of end-of-life medication. AP enables healthcare professionals to administer the medication as required to address various symptoms.\(^49\)

Consequently, recent studies suggest that ‘[c]oncerns over shortages of nurses and doctors to administer subcutaneous injections led 37% [of patients] to consider drug administration by family or social caregivers’.\(^50\) Thus, whereas pre-COVID-19 this led to concerns of

\(^{46}\) NICE (2020)
responsibility for family members and their mental well-being,\textsuperscript{51} the circumstances of the pandemic have deepened the issues related to this approach.

For instance, while for some their family members have been willing to assist with end-of-life medication administration, it is conceivable to see how pandemic restrictions have impacted those with family members who – for religious, ethical, or moral reasons – (and despite a justified scarcity of resources, such as medical staff shortages) have still not been able to help.

On this point, Yardley and Rolph noted that ‘[d]ying alone or leaving a death unmarked is a major societal wrong, as evidenced by the emotional labour expended by professionals when bearing witness in the absence of family or friends.’\textsuperscript{52} Indeed, the imposition of restrictions is largely aimed at public health and survival, the common good, and ‘shielding’ vulnerable individuals. Nevertheless, for Yardley and Rolph the circumstances have led to the need for some to make sacrifices for their communities, including deeply felt changes in the way that ‘people who are dying and those they leave behind’ have been treated.\textsuperscript{53} It is against this notion that they urge that action ought to be taken now to ‘create new expressions of humanity at the end-of-life’ which has the potential to ‘prevent some of the downstream harms to mental health and well-being associated with the “difficult death” of a loved one and the complicated bereavement that may follow.’ Indeed, the nuances of this struggle may go on to take the form of Government recommendations in the wake of the COVID-19 experience.

\textsuperscript{52} Sarah Yardley and Martin Rolph, ‘Death and dying during the pandemic’ (15 April 2020) BMJ (2020) 369:m147; Sarah Yardley is a consultant in palliative medicine, Martin Rolph is a member of the public with experience of emergency and end-of-life care
\textsuperscript{53} ibid
Dying at Home

A 2018 research study predicted that with the increasing number of deaths expected within the next two decades, the community palliative care workforce would need to double unless there was a significant change as regards overall hospital capacity. On this premise, it was noted that the pressure on community capacity regarding palliative and end-of-life care increased significantly during the pandemic, reaching ‘levels of need not expected until 2040.’ Thus, given the scarcity of resources, the evidence supports the argument that there is ‘an urgent need to grow and train community clinicians skilled in palliative care.’

5.4. The Pandemic Changed Dying

Since the beginning of the pandemic, death has provoked suffering both for the dying and their loved ones. Yet it is the circumstances around dying that will weigh heavily on the nation’s mind. One such example was related by writer and teacher Kate Clanchy regarding her efforts to prevent heroic medical interventions during her parents’ final days despite advance care plans stipulating ‘no hospital, no ventilation’ and in case of contracting the virus, that no active treatment is given to them. She explained:

They did not want to combat death: they were trying to let it in, to find a human way to go. It was extraordinary and revealing of the values of the NHS that in the middle of a pandemic, their hospital did not hesitate to give a hi-tech emergency operation and three

55 I Higginson, D Brooks, S Barclay, ‘Dying at home during the pandemic: Increase in home deaths could be because of preference or pressure’ BMJ (2021) 373:n1437
56 ibid
days on a ventilator to someone as frail as my mother, but also indicative of our norms around death that no one stopped to ask if she had an advance decision in place.\textsuperscript{58}

In the end, Kate Clancy’s mother died alone, after becoming infected with COVID-19. This story mirrors the traditional approaches within the current system whereby the autonomous decisions of individuals came second, behind the instinct to prolong life. Indeed, as the pandemic unfolded, doctors were the ones to decide who should be given a chance to live and who was left to die.\textsuperscript{59} In contemplation of law reform, two aspects of Kate Clancy’s story are sure to appear during the Government’s inquiry in the wake of COVID-19: the realities of dying alone and the pressure from the pandemic on the ability to provide a ‘good death’.

\textit{Dying Alone}

Given the CA 2020 restrictions and imposition of lockdown, one crucial aspect of dying within the context of the pandemic became more prominent: the harrowing experience of dying alone. In the absence of empirical evidence on the issue of dying alone, Nelson-Becker and Victor\textsuperscript{60} draw on the findings of the best-known historians on death and mourning.\textsuperscript{61} Thus, historically, death was seen as a ‘communal or societal-level affair’ in a way that the ‘individual and society had an expected relationship with death. Death lived alongside life.’\textsuperscript{62} While this is increasingly becoming the case in some jurisdictions that brave the step towards adopting assisted dying laws, these “healthy” social goals\textsuperscript{63} have yet to be achieved within the context of English law.

\textsuperscript{58} ibid
\textsuperscript{59} Clarke (2021)
\textsuperscript{60} Nelson-Becker (2020)
\textsuperscript{61} P Aries, \textit{The hour of our death} (New York, Alfred A Knopf, 1981)
\textsuperscript{62} Nelson-Becker (2020)
\textsuperscript{63} ibid
Thus, as regards the existing views, dying alone during the pandemic either at home or elsewhere without the ability to be surrounded by loved ones ‘may be considered a bad death.’

Furthermore, the fact of dying alone is considered to reflect society’s failure to recognise the need and to provide for a duty of care. Adopted by Nelson-Becker and Victor, the term ‘dying alone’ tells of ‘approaching death while living alone or dying in a place where significant others are unable to be near.’ In an attempt to deal with the potential mitigation of dying alone, Corpuz concludes there is ‘an urgent need to address the fear of dying alone during and after the COVID-19’. Similarly, dying alone remains a so-called ‘option’ increasingly chosen by individuals opting for an assisted suicide abroad for fear their loved ones may be prosecuted.

**Pressure from COVID-19 on ‘Good Death’**

One instance that breached Article 2 (right to life) or the inviolability principle early on in the fight with the coronavirus stands out. As the government prepared to launch emergency legislation to deal with the COVID-19 crisis, a sudden and sharp rise in care home deaths begged the question of safeguarding measures regarding vulnerable individuals. In April 2020, the Care Quality Commission (CQC) circulated a statement aimed at reminding health care providers that it is unacceptable to apply advanced care plans with or without Do Not Attempt Cardiopulmonary Resuscitation decisions (DNRs) to groups of people. Ordinarily, DNR decisions follow a specific process and are recorded on a special form; they are often printed

64 ibid
66 Nelson-Becker (2020)
for individuals to keep with them at home or at the place where they are being cared for. In October 2020, the CQC was asked to undertake a review of the use of DNRs during the pandemic. The interim report concluded that ‘confusion and miscommunication about the application of [DNRs] at the start of the pandemic, and a sense of providers being overwhelmed’ had led to their blanket application for the elderly, and vulnerable groups, including people with learning disabilities, during both the first and the second waves of the pandemic.

In fact, the CQC found evidence that ‘unacceptable and inappropriate’ DNRs were being dictated by clinicians’ own ‘subjective view of a person’s quality of life’, without involving the individuals concerned, thereby going against their protected human rights. Even more concerning was that the CQC has admitted the possibility that some inappropriate DNRs remain in place.

However, due to this ‘confusion and miscommunication’ coupled with inexperienced health professionals registered under emergency powers, the attack on human rights went further

71 CQC, ‘CQC finds that combination of increasing pressures and rapidly developing guidance may have contributed to inappropriate advance care decisions’ (3 Dec 2020) <https://www.cqc.org.uk/news/releases/cqc-finds-combination-increasing-presures-rapidly-developing-guidance-may-have> accessed 19 Mar 2021
75 ibid 4
76 ibid
77 Coronavirus Act 2020 Sections 2-5
still. In recounting finding her father collapsed in bed, having suffered a stroke or heart attack, Kate Clanchy tells of the resistance she encountered when trying to comply with her father’s clearly documented DNR decision, instead being repeatedly told ‘You have to call 999 with a stroke’.78

A recent study found that autonomy and non-maleficence were reported as being ‘the most important ethical values when dealing with the DNR status’.79 Yet, fostering autonomy includes acknowledging and acting in accordance with such a signed decision which ought to ‘re-assure [medical professionals] of the patient’s understanding and thus volunteerism’ as regards the implications and consequences of signing such a form.80 Conversely, deciding on behalf of a patient who is competent to make their own decision as regards choosing or refusing to make a DNR ‘exemplifies a paternalistic and professional nihilism that contradicts autonomy’.81 Thus, regardless of a strong instinct to save lives, the Government will need to face the extent of individual autonomy through self-determination in the context of Article 8 of the Convention as regards DNR decisions. These will, no doubt, reveal the damaging footprint within the COVID-19 chaos and call for a better understanding of patients’ choices at the end of their life.

78 Clanchy (2021)
80 ibid
81 ibid, citing J Headley, ‘The DNR decision - Part II. Ethical principles and application’ Dim Oncol Nurs (1991) 5(2) 34-37
John Keown, one of the strongest commentators, who analyses the law from religious and ethical perspectives, argues against the legalisation of any form of assisted death. Indeed, in the context of assisted dying law reform, this thesis endeavours to offer an alternative view. Keown links his argument on the value of human life to be linked to three schools of thought: ‘vitalism’, ‘sanctity/inviolability of life’ and ‘quality of life’. First, vitalism holds that ‘life is an absolute moral value’ (emphasis in original). Thus, Keown argues that it is wrong to shorten or fail to prolong life regardless of the medical condition. On this premise, the reaction of medical professionals during the pandemic to undertake heroic interventions meant to preserve human life, were a direct translation of ‘vitalism’. One example of how this was the decision by medical professionals to carry out an operation (followed by ventilation) on Kate Clanchy’s mother despite having a DNR.

Second, sanctity or ‘inviolability’ of life holds that an individual has the right not to be intentionally killed regardless of inability or disability. Indeed this ideal is expected in any democratic setting providing that life may not be taken away unlawfully. However, the pandemic responses which also led to the imposition of blanket DNRs (see above in this chapter) demonstrate that in times of chaos and panic, the system weakened the protection to the right to life. Indeed, while Keown observes this doctrine ‘does not require the preservation

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84 ibid, 37-49 (Chapter 3)  
85 ibid, 37  
86 ibid  
87 Clanchy (2021)  
of life at all costs’ (emphasis in original)\textsuperscript{89} the blanket DNRs go beyond the exceptions advocated by him (this includes the principle of ‘double effect’, discussed in Chapter One). Thus, the decision (by medical professionals) to impose DNRs – without the necessary consultation with the patients and their families – represented a violation of Article 8 as it directly interfered with a patient’s right to self-determination to make an informed decision for themselves (or their family) if they had the requisite mental capacity to do so.

Third, ‘Quality of life’ (big ‘Q’) (different from ‘quality of life’ (small ‘q’) which is linked to considering the patient’s condition as regards benefit of treatment proposed) assessment is meant to establish the worthwhileness of the patient’s life.\textsuperscript{90} Keown distinguishes this from the inviolability principle, which instead takes the patient’s medical condition into account to determine ‘the worthwhileness of a proposed treatment’.\textsuperscript{91} The COVID-19 chaos seems to have engaged both ‘Quality of life’ considerations (as regards imposition of blanket DNRs without consulting patients and their families) and responses regarding ‘quality of life’ deliberations evidenced by heroic interventions despite patients having a DNR in place.

While the three competing views on the value of human life depicted by Keown assist in understanding the complexities of the difficult decisions as regards the moral, ethical, and religious values to be considered in contemplation of ending life in typical circumstances, the pandemic maelstrom revealed the weaknesses of the current approaches. For the dying, the practical implications of this revealed their real struggle to be able to achieve a good death. Essentially, the pandemic experience has exposed the damaging effects on patients and their families, as their wishes came second to the decisions of medical professionals.

\textsuperscript{89} Keown (2018) 40
\textsuperscript{90} ibid, 42
\textsuperscript{91} ibid
COVID-19 has caused irreparable damage to societal consciousness. Scarcity of resources and restrictions under emergency powers have given rise to a reality where managing death was a challenge even for medical professionals, and patients were dying alone\textsuperscript{92} without their loved ones by their side. At the same time, the response to this crisis within systems such as the UK was to strive to defer and defy death,\textsuperscript{93} even if that was against the patient’s clearly documented wishes. Moreover, dying from COVID-19 has also affected the possibility for end-of-life discussions due to restrictions, causing patients and their families to be apart in a time of emotional turmoil.\textsuperscript{94} Thus, the pursuit of a good death slipped further away from people. In capturing the tragic circumstances surrounding the chance of ‘saying goodbye’\textsuperscript{95} to a loved one before, during and following their death, Selman concluded COVID-19 was deeply disruptive to these rituals.\textsuperscript{96}

Clarke observes that the ‘hubris of modern medicine’ has caused three perspectives: (1) humanity has had to face its fundamental powerlessness and mortality, (2) COVID-19 has further highlighted the inequalities between poor and good health, (3) the pandemic has exposed the ‘harms of failing to consider how we wish to die.’\textsuperscript{97} As the Assisted Dying Bill 2021 is awaiting its Parliamentary scrutiny, society is moving closer to engaging with the third consideration in an effort to overcome the struggle for law reform that leads to a good death.

\begin{flushleft}
\textsuperscript{93} Clarke (2021)
\textsuperscript{94} Strang et al (2020)
\textsuperscript{97} Clarke (2021)
\end{flushleft}
5.5. The Notion of ‘Good Death’

The initial stages of this research involved, among other points, the exploration of the notion of a ‘good death’ as depicted within the assisted dying debate. This involved the use of the NVivo software system to observe the recurrence of themes and terms within chosen peer-reviewed articles. As such, the software generated a list of words and phrases of interest which guided the rest of the research project. Given their significantly higher number of appearances within the literature, the top 25 terms formed the lens through which the research was guided. These were separated in two groups with the first comprising of seven notions within the debate (assisted suicide, assisted dying, double effect, euthanasia, mercy killing, murder, terminal illness) which were defined for the purpose of setting out the framework for this study.

The second group – autonomy, capacity, choice, coercion, compassion, competent, consent, dignity, kindness, mental illness, pain, protection, safeguard, self-administration, self-determination, suffering, voluntary decision, vulnerability – went on to become common threads of this qualitative study. Their significance in connection with the idea of a ‘good death’ by way of assisted dying, as depicted in the debate, and the various relationships they generated, are at the very core of this research.

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Thus, at the outset, this thesis determined a good death as the deliberate and compassionate intervention – under strict safeguards and lawful provisions – by a medical professional that facilitates, as far as possible, a painless and easy passage from life pursuant to a genuine


and freely reached request\textsuperscript{102} of an adult person,\textsuperscript{103} where a precarious and burdensome prolongation of life\textsuperscript{104} is not wanted (see Chapter One).

Consequently, the triangulated analysis as to the separation of powers involving the judiciary, the legislative and the executive undertaken in this study, led to the discovery of the notion of a good death as depicted within the assisted dying debate as being represented in the above two-layer circle diagram. Thus, the \textit{Good Death Diagram} depicts six essential elements (inner layer: autonomy, capacity, compassion, safeguard, voluntary decision, vulnerability) and their influencing factors (outer layer), inspired by the narrative surrounding the notion of a good death in contemplation of law reform.

Thus, the thesis exploration developed the argument that by navigating the assisted dying debate through the lens of the six elements and their influencing factors, the journey to a compassionate good death by way of assisted dying law reform can lead to the achievement of a more robust and compassionate framework. The remainder of this section explores a range of relationships between the essential six elements and their influencing factors.

\textit{Capacity}

This study engaged the notion of mental capacity as a matter pertaining to the competence of the individual in connection with making the final and voluntary decision to end their life. Thus, judicial reasoning in both civil and criminal contexts focuses on the capacity of the individual wishing to end their life as an indicator of a lack of coercion (Chapters One (sections 1.5. and 1.6.) and Two (sections 2.2. and 2.3.)). This is particularly observed against the

\textsuperscript{102} The Law Commission, Murder, Manslaughter and Infanticide: Project 6 of the Ninth Programme of Law Reform: Homicide, Com No 304, Part 7 [7.12]-[7.17]

\textsuperscript{103} This thesis confines the matter of a good death within the context provided by the Assisted Dying Bill 2021 criteria concerning only individuals who are over 18 years of age.

\textsuperscript{104} HL Deb 09 May 1994, vol 554, cols 1344-412 (The Lord Bishop of Oxford 4.48pm)
backdrop of convincing statements of claimants in the English courts whose persistent efforts focus on demonstrating their competence to make such final decisions (Chapter Two section 2.3.). Indeed, the fact of being competent enables a person to make their wishes known thereby swaying the manner of application of the law in a way that is capable of absolving a compassionate-helper from prosecution (Chapter Four sections 4.3. and 4.4.). However, without a transparent and lawful framework, and despite clear wishes of individuals who are able to express their wishes to have assistance to end their life, the effect of the current system is to respond by deploying aftermath investigations which may lead to months of insecurity as regards the compassionate-helper’s involvement with assisted suicide.

At the same time, contemplation of legislation has influenced the Assisted Dying Bills to adopt the element of capacity in the same way as that implemented by the Mental Capacity Act 2005. Casey and Choong explain that, confirming lack of capacity (the first stage of the MCA 2005 test) and using it to validate the inability to make a final decision (the second stage of the MCA 2005 test) fails to address a set of unique physical and psychological conditions which can only be explored and appropriately assessed through a function-specific test, specifically designed for an assisted dying framework. As such, this notion is essential in influencing the development of a more robust tool designed to attest and confirm an individual’s capacity in connection with assisted dying laws. Thus, this study argues that the 2021 Bill could maintain and even enhance the current level of safeguard intended to be achieved (by way of High Court consent – see Chapter Three section 3.4.) by introducing a requirement that a voluntary decision for the purposes of assisted dying is ascertained by way of a psychiatric assessment tailored to focus on establishing capacity for the purpose of providing assisted dying.

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105 Casey and Choong (2016) [49]
**Voluntary Decision**

The genuineness of a decision to have an assisted death is rooted in the ability to establish whether the individual is able to consent to the assistance (Chapter Two section 2.3.) which leads to their hastened death and this is demonstrably free from coercion (Chapter One sections 1.3. and 1.4.). Within the current construct of the law, prosecutorial discretion is set to test the evidence in the aftermath of an assisted suicide in a way that determines the nature of the death-seeker’s decision (Chapter Four section 4.3.). Yet, the aftermath prosecutorial discretion is concerned with the compassionate-helper and by design it is not interested in death-seeker’s need for safeguards, pre-death.

Nevertheless, the Assisted Dying Bill 2021 criterion regarding the consent from a judge (Chapter Three section 3.4.), as argued in the earlier section on capacity, may not be offering the most sustainable approach in terms of reform longevity (Chapter Five section 5.7.). Thus, the voluntariness of the decision may be better addressed by way of a psychological assessment conducted by specialist medical staff which in turn acts to support the individual’s autonomy to request assisted death while demonstrating the conviction of their decision, pre-death.

This approach means that future debates ought to uncover the value of simplifying and strengthening the process meant to be navigated by death-seekers, at a time when they are faced with a kind of pain and suffering that led them to make this final decision in the first place.
Autonomy

Within the current construct of the law, an individual’s autonomous decision to end their own life without assistance is not prohibited (Chapter One). This brings to the surface the importance of the apparent relationship between autonomy expressed through choice and carried out by way of self-determination (Chapter Four section 4.3. and 4.4.). However, for the purposes of assisted dying the nuances of the latter remain a matter for legislative provisions if or when they are enacted through an Assisted Dying Act (Chapter Three sections 3.4. and 3.5.). Until then, the current prohibition appears to hinder autonomy in a way that encourages the secrecy of an assisted suicide. However, it is only by keeping this matter behind closed doors that allows for the planned assistance to happen (and prevent any potential investigations before the event). This also makes it possible (to some extent) to protect the compassionate-helper post-death (Chapter Four sections 4.5. and 4.6.).

Indeed, this study demonstrates that a more transparent approach is required to combat potential abuse of vulnerable individuals, where the act of compassion may not be entirely motivated by compassion. Thus, the death-seeker’s autonomy would be better preserved by enabling and empowering them to act by way of self-determination, pre-death (Chapter Five sections 5.6. and 5.7.). However, the point of self-determination for the purposes of the Assisted Dying criteria (as advocated in this research) is meant to encompass both self-administration and doctor-administered lethal medication, in accordance with the needs of claimants in civil cases challenging the current prohibition (Chapter Two section 2.2.).

Compassion

The notion of compassion is a key consideration in contemplating change of legislation. Within the current prohibitive legislative arrangement this element crops up in the aftermath
of an assisted suicide (Chapter One section 1.3.), when the law, through prosecutorial discretion, combined with jury verdicts and judicial discretion regarding sentencing, responds in a way that absolves compassionate helpers from an otherwise chargeable offence (Chapter Four section 4.6.). However, in spite of a demonstrably ‘workable’ system (enabling prosecution that is in the public interest) this approach is ill-equipped to provide the compassion owed to death-seekers, pre-death.

During the pandemic, the maelstrom of events deepened the issues of kindness, compassion and dignity in connection with the fight for living and the struggle for having a painless death (Chapter Five sections 5.3. and 5.4.). Therefore, this study demonstrates that in light of the needs expressed by claimants in civil proceedings as regards their wish to have dignified death (Chapter Two section 2.2.), and the apparent kindness and compassion death-seekers are thought to be afforded by compassionate helpers (Chapter Four section 4.6.), it is a matter of urgency that Parliament considers the shades of compassion within the debate (Chapter One section 1.3.). This exploration is capable of unearthing the true value of compassion (within the step towards change) in a way that upholds and establishes matters of dignity and kindness in close relationship as regards the consideration for assisted dying pre-death.

**Vulnerability**

The question of vulnerability in connection with individuals seeking a hastened death arises in connection with civil (Chapter Two section 2.2.) and criminal matters (Chapter Four section 4.4.) in the context of the assisted suicide prohibition and the assisted dying debate (Chapter Three sections 3.4. and 3.5.). On the one hand, as depicted throughout judicial considerations on this point, any pain and suffering endured by the victim of an assisted suicide – especially those with a mental illness – tend to compound the defendant’s sentence for involvement with
assisted suicide (Chapter Four section 4.4.). Thus, it may enhance the likelihood of a custodial as opposed to a suspended sentence. Yet, the contemporary general approach to vulnerability is largely based on a presumed need for protection (Chapter Five sections 5.4. and 5.7.).

Indeed, a different take on vulnerability, particularly in terms of the pain and suffering caused to claimants and aspiring death-seekers by their medical condition, receives little to no exploration within the context of Parliamentary debates (Chapter Three sections 3.2. and 3.3.). For these reasons, the relationship of vulnerability element with the notions of pain, suffering and the question of whether an individual wishing to end their life has no mental illness that may impair their judgement, ought to be explored in a way capable of exposing the current system’s failure to ascertain an individual’s potential vulnerabilities pre-death (Chapter Four sections 4.3. and 4.4.).

_Safeguards_

This research maintains that legislative arrangements and application of the law in connection with assisted suicide offences (Chapter One sections 1.3. and 1.4.) is ill-equipped to address the death-seeker’s need for safeguards, pre-death (Chapters Four (section 4.4.) and Five (sections 5.3. and 5.4.)). Therefore, while the CPS investigative process – as understood to be in practice – leads to the understanding that five of the essential elements in the diagram (inner layer: capacity, voluntary decision, autonomy, compassion, vulnerability) are addressed, it is the inability to provide for the last element (inner layer: safeguards (pre-death)) which ought to bring the matter of assisted dying legislative reform to the forefront. That assisted dying legislation is set to weaken the protection of individuals compared to the current state of affairs is an argument that must fail. Instead, informed debates are set to highlight the lack of
protection under the assisted suicide prohibition. This was demonstrated in Chapter Four (section 4.6.) through the DPP’s tendency not to prosecute such offence frequently.

Moreover, as to the Assisted Dying Bills introduced on the basis that reform should only encompass the ‘six-months’ and the ability to ‘self-administration’ criterions are not in themselves capable of establishing a robust or long-lasting framework due to the issues identified in Chapter Three (section 3.3.). The six-months criterion is historically linked to legislation designed to offer access to benefits. The focus on self-administration is capable of discriminating against Nicklinson-like individuals (Chapter Two sections 2.3. and 2.4.) and risking the need for interpretation of such provisions to include those who may need to have an apparatus set up, allowing them to end their life at the flick of a switch, even if done by way of an eye blink computer.

For these reasons, debates on the element of safeguards must be considered in conjunction with the influencing factors as regards protection and self-administration to methodically, and before the provisions are enacted, establish where the emphasis for safeguards should be placed. Should this lay with the limited availability based on qualifying criteria for six-months and self-administration only, or should it stand by the needs of death-seekers alike and ensure the start of a conversation within a safe and compassionate environment as opposed to leaving these discussions behind closed doors and away from the eyes of the law.

As such, for the purposes of debate within the context of Assisted Dying Bills, the six essential elements and their 12 influencing factors should not be considered as an exhaustive list of matters to be considered. The position taken by this study is that by properly addressing their significance within the ideal framework, the Westminster Parliament can ensure the robustness and as far as possible the longevity of enacted provisions in this area. If this happens, the law will demonstrate it has come full circle. This is because only by creating robust safeguards to
protect vulnerable individuals pre-death, could England and Wales ensure the framework provides access to a good death by way of lawful assisted dying.

5.6. Assisted Dying Law Reform after COVID-19

As analysed thus far in this chapter, the COVID-19 experience has significantly increased the struggle for a good death as part of the reality of patients, their families, their care providers, and the communities. At the same time, ‘[t]he disease has wreaked havoc on health systems’ highlighting the need to ‘improve access to essential medicines, particularly opioids for the relief of breathlessness and pain.’ At this point in time, now more than ever, the pandemic has caused new insights into how death and dying are perceived. In terms of assisted dying, between 2020-2021 a further six countries have adopted some form of assisted dying, four of which (Spain, South Australia (AU), Tasmania (AU), Queensland, (AU)) are based on making both self-administered and doctor-administered lethal medication available to certain individuals (see Table 6 in Thesis Introduction).

In England, the timing of the current Assisted Dying 2021 Bill promises the possibility of an unprecedented debate, and the passing of such provisions into the Statute Book. Yet, despite the Bill resembles the introduction of other preceding measures of this kind, there seems to be an increasing sense the opinions are changing in favour of law reform among Members of the Westminster Parliament (MPs). Several MPs who were previously opposed to assisted dying laws have taken active steps to support the debate. The 2021 Bill was scheduled for its

Second Reading on 22 October 2021. In 2020, one MP predicted that change could be achieved ‘within four years’.[108] While the specificity of this period was not elaborated beyond the emphasis of the logistical need for support to carry such a Bill through the Parliamentary process, the reason behind the changing attitudes of those who previously opposed change is of particular interest. In fact, in its latest report, the Dignity in Dying organisation announced that overall ‘MP opinion has shifted’, indicating their work between 2020-2021 has contributed to changing the views of over 100 MPs.[109] On this premise, and in light of change in several countries in recent years which brought the total to 27 jurisdictions, it is anticipated this will bring additional influence to the assisted dying debate in Westminster Parliament.

However, if such a development leads to the determination that further investigation and evidence on the matter are required, it is worth considering the assisted dying pathways undertaken by jurisdictions around the world. This section aims to inform decision-makers of available approaches to adopting law reform and to enable this research to offer possible lessons for England and Wales.

[109] Dignity in Dying, ‘Together we will change the law: Our Impact 2020-2021’ <https://features.dignityindying.org.uk/impact/?fbclid=IwAR08A95NiNsu6JcGvI71_oBWuz88m8ao5KbrwoVck5BnKsrGxKUscuf8pc> accessed 24 Jul 2021
Despite a similar prohibition on assisted suicide\(^\text{110}\) and a rising number of failed attempts to influence change, within a short period of one another Canada,\(^\text{111}\) Victoria (AU)\(^\text{112}\) and New Zealand\(^\text{113}\) implemented assisted dying measures involving comparable principles of practice.\(^\text{114}\) By allowing both assisted suicide and voluntary euthanasia as part of their frameworks, the three joined an exclusive group of countries.\(^\text{115}\) Their regimes promote personal autonomy and transparent decision-making for those seeking voluntary assisted death available under strict criteria.\(^\text{116}\) Another alternative is also provided by the State of Jersey, which has passed on the difficult question to a citizens’ jury, prompting deliberations that

\(^{110}\) In Canada - Criminal Code, RSC 1985, c C-46, s 241(1) prohibits counselling or aiding suicide; In Victoria - Common Law and Section 3A of the Crimes Act 1958 (Vic) provided that an act which brought about the death of another person was murder; In New Zealand - Crimes Act 1961 Section 179 prohibits the offence of inciting, counselling, procuring, aiding, or abetting suicide, regardless of whether the suicide occurs.


\(^{112}\) Medical Treatment (Physician Assisted Dying) Bill 2008 (Vic); Similar unsuccessful Bills have been introduced in South Australia, Australian Capital Territory, Tasmania, Northern Territory, New South Wales and the Commonwealth of Australia.


\(^{115}\) The Netherlands, Belgium, Luxembourg

\(^{116}\) In Victoria this option requires certain evidence which qualifies the individual for this type of assistance, unlike Canada where this is an option available if the individual favours this over self-administration.
reflect similar principles of practice (of a potential assisted dying framework) to those presented in the previous three jurisdictions.

The examples of different approaches to adopting assisted dying law reform are: (1) the handing down of a Supreme Court judgment (Canada), (2) the dedication to an exhaustive number of hours of Parliamentary debate (Victoria, Australia), (3) the impact of public opinion in an assisted dying referendum (New Zealand), and (4) the deliberations of a citizens’ jury (State of Jersey).

*From Court Judgment to Medical Assistance in Dying: Canada (2016)*

In Canada, the shift from prohibition to legalising Medical Assistance in Dying (MAiD) was achieved in June 2016.117 This appears to have materialised following significant public support in favour of change,118 a long record of failed attempts to reform the law,119 as well as a Supreme Court case120 challenging the prohibition under the Canadian Charter of Rights and Freedoms.121 Three pivotal developments – by means of law reform in Québec,122 the Supreme Court judgment in the case of *Carter v Canada (Attorney General)* [2015] (Carter),123 and the passing of a federal Act124 – created a ripple effect that gave rise to the MAiD framework.125

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118 In a 2014 poll 84% of Canadians said they agreed that ‘a doctor should be able to help someone end their life if the person is a competent adult who is terminally ill, suffering unbearably and repeatedly asks for assistance to die.’ See CBC News, ‘Doctor-assisted suicide supported by majority of Canadians in new poll’ (8 October 2014) <https://www.cbc.ca/news/health/doctor-assisted-suicide-supported-by-majority-of-canadians-in-new-poll-1.2792762> accessed 21 May 2020
120 *Rodriguez v British Columbia (Attorney General)* [1993] 3 SCR 519
121 Canada Act 1982 (UK) c 11, Sch B Pt 1 - Canadian Charter of Rights and Freedoms
122 An Act Respecting End-of-Life Care, RSQ c S-32.0001
123 *Carter v Canada (Attorney General)* [2015] 1 SCR 331
124 C-14
125 ibid
While the implementation of Québec’s legislation to provide ‘end-of-life care’ came before the Supreme Court judgment in *Carter*, it was the latter that influenced the eventual passing of MAiD provisions by the Canadian Government. However, unlike the level of authority available to the Canadian courts, the courts of England and Wales do not possess such power. In fact, owing to constitutional arrangements, a similar decision of the UK courts may never force Parliament to reform the law.

*From Parliamentary Debate to Voluntary Assisted Dying: Victoria, Australia (2017)*

In November 2017, owing to public support in favour of change, Victoria became the first state to legalise voluntary assisted dying in Australia. Victoria’s ground-breaking

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126 An Act Respecting End-of-Life Care, RSQ c S-32.0001
127 ibid Section 3(3) defined ‘end-of-life care’ as ‘palliative care provided to end-of-life patients and medical aid in dying’
129 C-14, Bill stages available at <https://www.parl.ca/LegisInfo/BillDetails.aspx?Language=E&billId=8177165&View=0> accessed 19 May 2020
130 See Chapter Two
133 Medical Treatment (Physician Assisted Dying) Bill 2008
134 In 1995 the Northern Territory implemented Rights of the Terminally Ill Act 1995 (NT) for a short period as it was established to have no force following the enactment of Euthanasia Laws Act 1997 (introduced as a Private Member Bill – known as the Andrews Bill).
135 In December 2019, the Western Territory became the second state to pass similar laws. While the Western Territory awaits the coming into effect of assisted dying provisions, expected ordinarily to take place 18 months following its Royal Assent. This period accrues mid-2021. *BBC News*, ‘Assisted dying: Western Australia passes legislation’ (10 December 2019) <https://www.bbc.co.uk/news/world-australia-50733018> accessed 21 May 2020
shift\textsuperscript{136} means that its citizens and residents\textsuperscript{137} have access to lawful assisted death\textsuperscript{138} pursuant to the Voluntary Assisted Dying Act 2017 (2017 Act) in force since June 2019.\textsuperscript{139}

The change was realised following more than one hundred hours of debate, including two all-night sittings.\textsuperscript{140} This would not have been possible without the an Inquiry into End-of-life Choices,\textsuperscript{141} which concluded the Victorian Government ought to enact legal provisions for assisted dying.\textsuperscript{142} The Ministerial Advisory Panel was tasked with the delivery of the framework which sits at the heart of the Voluntary Assisted Dying Bill 2017.\textsuperscript{143} The dedication demonstrated by those debating the merits of law reform in Victoria has yet to be achieved by the Westminster Parliament debates. However, despite considerable levels of dedication demonstrated in Parliament by the surmounting number of hours dedicated to the Brexit debates,\textsuperscript{144} the same cannot be said about the interest for a similar commitment to debating the issue of assisted dying law reform.

\textsuperscript{137} The individual must have resided in Victoria for at least 12 months at the time of making a First Request – Voluntary Assisted Dying 2017 Pt2 Section 9(1)(b)(iii).
\textsuperscript{138} This is based on the individual meeting strict eligibility criteria. The system boasts of 68 safeguards and has been considered the most conservative scheme in the world. See The Guardian (22 November 2017)
The year 2019 was fruitful for assisted dying law reform with six jurisdictions adopting change around the world (See Table 6 in Thesis Introduction). Of these, New Zealand undertook the most radically different approach to reforming the law, giving its citizens the power to vote in a referendum. Thus, while the New Zealand Parliament had already passed the End-of-life Choice Act 2019 (2019 Act),\(^{145}\) it was the vote of the people in the October 2020 referendum that became the deciding factor which led to law reform.\(^{146}\) The official referendum results revealed 65.1\% of voters supported the coming into force of the 2019 Act.\(^{147}\) Compared to Canada and Victoria, provisions within New Zealand’s 2019 Act encourage the individual to discuss their end-of-life decision with their loved ones,\(^{148}\) if they so wish, while the attending medical professional needs to ‘ensure that the person expresses their wish free from pressure’\(^{149}\) including consulting with the individual’s known health practitioner and any family members ‘approved by’ the individual.\(^{150}\)

A different approach was adopted closer to home. Following a 2018 petition calling for the States Assembly to reform the law on assisted dying, the State of Jersey established an Assisted Dying Citizens’ Jury formed of 23 residents, in spring of 2021.\(^{151}\) The jury heard the evidence

\(^{148}\) End-of-life Choice Act 2019 Section 11(2)(e)
\(^{149}\) ibid Section 11(2)(h)
\(^{150}\) ibid Section 11(2)(h)(i) and (ii)
on the issue of assisted dying\textsuperscript{152} and they were tasked to deliberate one overall question: ‘Should assisted dying be permitted in Jersey, and if so, under what circumstances?’\textsuperscript{153} The majority (78\%) of the panel answered in favour of change. Initial recommendations provided an overview of results in connection with several sub-questions to determine the scope of potential assisted dying reform (see Table 9 below).

\textit{Table 9 - Jersey Assisted Dying (AD) Citizens’ Jury Deliberations}\textsuperscript{154}

<table>
<thead>
<tr>
<th>No.</th>
<th>Questions for Voters</th>
<th>Favoured Option</th>
<th>%</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.</td>
<td>Should AD be legal in Jersey?</td>
<td>Tend to/Strongly Agree</td>
<td>74</td>
</tr>
<tr>
<td>2.</td>
<td>Should AD only be for Jersey residents?</td>
<td>Yes</td>
<td>81</td>
</tr>
<tr>
<td>3.</td>
<td>Who should be eligible for AD related to health?</td>
<td>Either terminal illness or unbearable suffering</td>
<td>69.6</td>
</tr>
<tr>
<td>4.</td>
<td>Should it include suffering from a mental condition?</td>
<td>No</td>
<td>59.1</td>
</tr>
<tr>
<td>5.</td>
<td>Who should be eligible for AD relating to age?</td>
<td>Over 18s (42.9)/Anybody of any age (28.6)</td>
<td>71.5</td>
</tr>
<tr>
<td>6.</td>
<td>What mode of AD should be permitted?</td>
<td>Both PAS and Euthanasia</td>
<td>65</td>
</tr>
<tr>
<td>7.</td>
<td>Court or tribunal involvement?</td>
<td>Yes</td>
<td>77.3</td>
</tr>
<tr>
<td>8.</td>
<td>Who can assist/administer AD?</td>
<td>Doctors and Nurses</td>
<td>68.4</td>
</tr>
<tr>
<td>9.</td>
<td>Should there be a cooling-off period?</td>
<td>Yes, this is necessary</td>
<td>60</td>
</tr>
<tr>
<td>10.</td>
<td>AD even with advance decision after losing capacity?</td>
<td>Yes/Yes, but under certain circumstances</td>
<td>85.7</td>
</tr>
<tr>
<td>11.</td>
<td>Should AD be permitted in Jersey?</td>
<td>Yes</td>
<td>78.3</td>
</tr>
</tbody>
</table>

The Final Report\textsuperscript{155} provides valuable insight for ‘Assembly members who will ultimately determine how to proceed’.\textsuperscript{156} Thus, it will be for the States Assembly to decide whether ‘they

\textsuperscript{152} These were provided by various individuals expert in their fields, including academics such as Professor Richard Huxtable, Professor Emily Jackson, Professor David Jones, Dr Alexandra Mullock, Professor Suzanne Ost, Professor Jocelyn Downe. Presentations available at <https://www.youtube.com/playlist?list=PL4aZ9DqBy0lc3pFcc50jwRRfMS5GvE115> accessed 29 Aug 2021


\textsuperscript{154} PAS - Physician Assisted Suicide. The age-related question (row 5 in Table 9) led to the conclusion that further consultation is required.


agree in principle, with the Jury that assisted dying should be permitted in Jersey subject to appropriate safeguards.'

Nevertheless, while this decision may ultimately lead the State of Jersey to reform their laws in the next couple of years, for residents of England and Wales this may not be of direct interest. Essentially, the jury favoured exclusivity of assisted dying provisions for Jersey residents only (Table 9 row Number 2).

5.7. Lessons for England and Wales

As identified in section 5.5 in this chapter, before adopting legal reform, Canada, Victoria, and New Zealand enforced blanket prohibitions on assisted suicide similar to those imposed by the English legal system. In fact, for Canada and Victoria, where the legislation is already in force (the New Zealand framework comes into force in November 2021), the same prohibition features alongside the exception to access ‘assisted dying’ in certain circumstances, through the availability of Medical Assistance in Dying (‘MAiD’) and Voluntary Assisted Dying (‘VAD’) respectively.

Thus, in light of this arrangement, contrary to Lord Sumption’s rationale that the law should remain unchanged – because ‘[w]e need to have a law against it

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157 ibid
159 In Canada - Criminal Code, RSC 1985, c C-46, s 241(1) prohibits counselling or aiding suicide; In Victoria - Common Law and Section 3A of the Crimes Act 1958 (Vic) provided that an act which brought about the death of another person was murder; In New Zealand - Crimes Act 1961 Section 179 prohibits the offence of inciting, counselling, procuring, aiding, or abetting suicide, regardless of whether the suicide actually occurs.
160 MAiD Section 241.1 defines assistance as ‘(a) the administering by a medical practitioner or nurse practitioner of a substance to a person, at their request, that causes their death; or (b) the prescribing or providing by a medical practitioner or nurse practitioner of a substance to a person, at their request, so that they may self-administer the substance and in doing so cause their own death.’; VAD 2017 Section 3 (Definitions) Stipulates that ‘voluntary assisted dying’ is ‘the administration of a voluntary assisted dying substance and includes steps reasonably related to such administration’.
161 ibid - While MAiD resolves to identify further definitions only for the doctor, nurse and pharmacist involved in provision of assistance, VAD provides a non-exhaustive list of definitions for all notions introduced by the Act including ‘voluntary assisted death substance’ which refers to “a poison or controlled substance or a drug of dependence specified in a voluntary assisted dying permit for the purpose of causing a person’s death”
in order to prevent abuse’162 (Chapter Four) – these jurisdictions are evidence that assisted
dying laws may exist in harmony to offer the requisite protection to Article 2 rights, as well as
allowing individuals the autonomous choice to self-determination (Article 8) to end their own
life with dignity, in a compassionate and professional way. Consequently, when – not if – the
Westminster Parliament braves the step towards assisted dying law reform, the provisions in
the way captured within the Assisted Dying Bill 2021, would become an exception to the
Section 2 prohibition (as opposed to the law being repealed). This means the safeguards said
to be offered under section 2 would persist. As such, the law would carve out an exception
from the prohibition exclusively delivered by way of medical professional intervention. This,
in turn, is expected to prevent abuse and potential coercion by identifying the death-seeker’s
voluntary wish to have an assisted death. This in turn would enhance the protection afforded
to prospective death-seekers, pre-death.

The Choice of Language

As indicated by their statutory titles,163 as well as the context of legal provisions,164 the
frameworks considered in section 5.5. in this chapter feature the adjective ‘dying’ – a term also
employed by Bills before the Westminster Parliament since 1997 – which extends to the 2021
Bill. Essentially, for the three jurisdictions, the term ‘assisted dying’ is an umbrella appointed
to cover both self-administered165 and practitioner-administered166 assisted death under MAiD
and VAD. Comparatively, the 2021 Bill provides for assisted dying in a way that allows the

162 Lord Sumption (2019) Reith Lecture
163 As seen from MAiD and VAD in Canada and Victoria
164 Despite New Zealand law reform being introduced by the End-of-life Choice Act 2019, Par 2 of the Act is
titled and refers to ‘assisted dying’ throughout its provisions.
165 MAiD Section 241.1(b) and VAD 2017 Section 45
166 MAiD Section 241.1(a) and VAD 2017 Section 46
individual to self-administer lethal medication\textsuperscript{167} and does not provide for a doctor-administered alternative. However, in time, this restriction may require further clarification or amendment. This is because the 2021 Bill self-administration criterion is capable of discriminating against \textit{Nicklinson}-like individuals and risking the need for interpretation of such provisions to include individuals who may use a machine which allows them to end their life at the flick of a switch, even if done by way of an eye blink computer. It is arguable if this too would be deemed to be self-administration of the lethal medication.

Beyond their respective framework structures, there may be value in considering one compelling aspect of the New Zealand approach, distinguished from Canada and Victoria. New Zealand’s provisions refer to the term ‘assisted dying’ throughout, yet the distinct construction of the title – End-of-life Choice Act 2019 (‘2019 Act’) – did not reflect this formulation. Thus, it is unclear whether favouring ‘choice’ at the ‘end-of-life’ over ‘assisted dying’ was a tactical move in view of the imminent referendum. Thus, one question arises. Could the choice of language in a move similar to that in New Zealand, lead to a different advantage in terms of referendum votes?

\textit{Reflections on Suitable Assisted Dying Criteria}

In Chapter Three (section 3.4.) this thesis investigated the criterion as regards the requirement of the consent of a High Court judge in the assisted dying process, as proposed under the Assisted Dying Bill 2021. Thus, it was concluded that this safeguard could (in the interest of further certainty of the decision to end one’s own life) be strengthened with a measure capable of establishing the individual’s voluntary, settled and informed decision by way of a requisite psychological assessment devised specifically for these purposes.

\textsuperscript{167} Assisted Dying Bill 2021 Section 4(4)
However, when asked whether they would favour the involvement of a court or tribunal as a safeguarding measure as part of potential assisted dying provisions, 77% of the Citizens’ Jury (see Table 9 above) answered in favour. That said, the value of a psychological assessment may point to a more robust safeguard in terms of the ability to ascertain the individual’s voluntary and uncoerced decision to end their life. The question is whether, in comparison, one is more capable of strengthening the overall assisted dying process and sustainability of law reform in this area.

Another factor that may favour the adoption of assisted dying law is to shorten the current sunset clause provided under Section 13(4) of the 2021 Bill.168 In its current form, the clause provides ‘[a]t any time during the period of 12 months beginning on the day 10 years after the provisions […] come into force, this Act may be repealed by a resolution of each House of Parliament.’169 While debates have yet to indicate this point is high on the list of concerns, the commitment to providing adequate safeguards can be justified by adopting a different shorter period and approach.

For instance, Victoria’s Voluntary Assisted Dying Act 2017 (2017 Act) provides for the requirement that a ‘review must be conducted in the fifth year of the operation of the Act and be a review of the first 4 years of operation of the Act.’170 Thus, to monitor the effectiveness of the measures upon its coming into force, the Bill could benefit from shortening the sunset period to fewer than ten years and imposing the requirement of a review at specific intervals. Consequently, those committed to a vote of conscience on the 2021 Bill, would have the additional confidence the reformed law may be repealed sooner (although such reversal has

168 Assisted Dying Bill 2021 Section 13(4)
169 ibid
170 Voluntary Assisted Dying Act 2017 Section 116(2)
yet to occur in any of the countries with assisted dying laws). Thus, the ensuing reviews as part of the 2021 Bill may further strengthen existing monitoring measures.

Possible Changes in Perceptions

The last time the Westminster Parliament debated the issue of law reform based on a proposed Bill was in 2015. At that time, the House of Commons considered the Assisted Dying (No 2) Bill moved by Rob Marris. The legislative attempt was defeated by 330 votes to 118. During the Bill’s Second Reading one contribution in support of the Bill stands out. It came from Sir Keir Starmer, the former DPP whose responsibility as regards instances of assisted suicide under Section 2(4) were reflected in the reasons given in favour of adopting law reform. Thus, in relation to the current ‘untidy compromise’ within the law Sir Keir Starmer said:

[We] have arrived at a position where compassionate, amateur assistance from nearest and dearest is accepted but professional medical assistance is not, unless someone has the means and physical assistance to get to Dignitas. That to my mind is an injustice that we have trapped within our current arrangement.

Indeed, as Sir Keir Starmer was the architect of the current DPP Policy and authority in dealing with instances of assisted suicide for several years, his message ought to carry considerable weight in the assisted dying debate. Thus, while it provides yet another compelling reason for Westminster to adopt change, the value of such a statement does more than simply adding to the complex layers of the issue faced by death-seekers, especially as this was given at a time

171 Assisted Dying (No 2) Bill 2016
173 HC Deb 11 September 2015, vol 599, col 674 (Sir Keir Starmer)
174 ibid
when academics would note the mounting public opinion and media coverage of the impact made by the *Nicklinson* judgment.\textsuperscript{175}

More recently, the experience of COVID-19 has left an undeniable footprint on how death is perceived, especially in circumstances of pain and suffering. Thus, the crescendo of changing attitudes in all the spheres of the debate investigated in this study continues. In search of a catalyst for change, it becomes clear that the views of only a few unconventional judges, such as Lady Hale and Lord Kerr, are not sufficient.\textsuperscript{176} This is also the case with enthusiastic movers of Assisted Dying Bills, such as Lord Falconer whose contribution continued to keep the debate relevant and in the public eye.\textsuperscript{177} Not even Sir Keir Starmer as the former DPP (whose responsibility extended to devising and publishing the DPP Policy) could address the current ‘untidy compromise’ to alleviate objections to law reform. Indeed, while the expression of the decision-making process became the ‘compromise’, the ‘untidy’ nature of the current law grows exponentially.

As of late, more MPs share the stories of the incidents which contributed to their shift in attitude from opposing assisted dying law reform to supporting the quest for change. During the 2020 debate Daniel Kawczynski admitted, ‘[a]s a Roman Catholic, [he] recently changed [his] mind on the issue because of [his] constituent Mr Noel Conway’.\textsuperscript{178} When asked whether Mr Conway would want to go to Dignitas, Mr Conway’s answer, as Mr Kawczynski confessed, ‘will stay with me forever. “No. I’m an Englishman. I want to die in England.”’\textsuperscript{179} In addressing the All Party Parliamentary Group for Choice at the End-of-life, Matt Hancock said he ‘had been affected by speaking to Sir Paul Cosford, the medical director of Public Health England

\textsuperscript{175} Lisa Claydon, ‘Should there be a right to die with dignity in certain medical cases in the United Kingdom?’ *Jahrbuch Für Wissenschaft und Ethik* (2015) 91-106

\textsuperscript{176} See Chapter Two

\textsuperscript{177} See Chapter Three

\textsuperscript{178} HC Deb 5 November 2020, vol 683, col 480 (Daniel Kawczynski)

\textsuperscript{179} ibid
who suffered from cancer and died aged 57 earlier [that] month." An even more powerful confession came from Andrew Mitchell, who decide to openly explain his own attitudinal shift on the issue. In a 2020 article he said: ‘[w]hen I entered the House of Commons in 1987, I was adamantly opposed to all forms of assisted dying. But over the years (perhaps it is part of the ageing process) I have completely changed my mind.’

Indeed, a strong sense of agency was realised on 31 March 2021, when 56 MPs and peers addressed the need to ‘instigate’ a review on assisted dying in a joint letter to Justice Secretary Robert Buckland. The letter was prompted by the news that Paul Lamb had lost another legal challenge (see Chapter Two section 2.2. on his 2019 oral hearing before the High Court). Furthermore, recent polls conducted by YouGov in May/June 2021 indicate the steady public support in favour of reforming the law (73%) while MPs continue to be out of step with those views (35%). Nevertheless, given the rapidly changing attitudes and willingness to contribute to the debate at a time when being given the choice of a good death takes centre stage, it is no longer unfathomable that England is soon to experience the possibility of assisted

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180 Christopher Hope, ‘Matt Hancock takes first steps towards legalising assisted suicide’ (The Telegraph, 1 May 2021) <https://www.telegraph.co.uk/politics/2021/05/01/matt-hancock-takes-first-steps-towards-legalising-assisted-suicide/> accessed 6 May 2021
181 See section 5.5. in this chapter re Andrew Mitchell, Daniel Kawczynski and Matt Hancock
184 A copy of the letter was made public by Humanism.org.uk available at <https://humanism.org.uk/wp-content/uploads/Joint-letter-from-MPs-and-peers-on-assisted-dying-.pdf> accessed 1 Apr 2021
185 YouGov, ‘Three quarters of Britons support doctor-assisted suicide. Just one in three MPs say the same’ (4 August 2021) <https://yougov.co.uk/topics/health/articles-reports/2021/08/04/three-quarters-britons-support-doctor-assisted-sui> accessed 2 Sep 2021
dying debate leading to law reform. Indeed, using a different analogy, it was noted that change could transpire ‘[in four years] because you only need some influential people to start speaking out in [favour], and it can have a sort of domino effect.’¹⁸⁸

In the wake of the COVID-19 experience, Government inquiries into how the pandemic was navigated are bound to lead to recommendations that highlight the impact of care home deaths on the population. Thus, while traditionally Government support of assisted dying reform was unimaginable, following the traumatic events of the pandemic there may be a tendency to implement laws that address the difficult paradox of being able to choose a good death. Therefore, almost unexpectedly, the potential to overcome the painful process that leads to a painless and good death is conceivable.

5.8. Summary

The experience of the pandemic in 2020 and 2021 depicted the real struggle in the ability to manage death and dying. While for some this meant dying at home surrounded by their loved ones, for those in British hospitals and care homes, the imposition of restrictions on seeing or being visited by any loved ones meant they were forced to die alone. This tragic and lonely experience of death is certain to bring any legal system to reconsider the abandonment of people at a time when they needed compassion the most. Indeed, the circumstances endured by some are far removed from what end-of-life researchers would deem as ‘a good death’.

In anticipation of Parliamentary scrutiny on the Assisted Dying Bill 2021, this chapter has considered how Canada, Victoria (Australia) and New Zealand achieved change. These approaches, coupled with the undertaking by the State of Jersey to deliberate on whether

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assisted dying should be adopted, are aimed at providing some insight into pathways towards change. By reference to similarities and differences of prohibiting legislation and assisted dying provisions as adopted by these jurisdictions, the chapter indicates that, while constitutional arrangements (Chapter Two) are such that Parliament is the only option to achieve the introduction of assisted dying laws into the Statute Book, there is value in considering the impact of the notion of a good death in the wake of the pandemic. However, this means that the considerations regarding the meaning of a good death within the current narrative of the assisted dying debate must come full circle to address, in depth, the six essential elements and their influencing factors in connection with the needs expressed by aspiring death-seekers.

Historically, debates in both Houses of Parliament on introductions and vote outcomes on Bills of this kind (Chapter Three) indicate both that the matter of assisted dying is a contentious one and that it is not going away. Yet, the pandemic experience has brought to the surface the need to recognise the current system could do more for the dignity of the dying and their loved ones by considering how, as a society, we can overcome the process that leads to a painless and good death.
6.1. Introduction

This thesis has investigated the matter of assisted dying law reform in the form of five chapters. Chapter One set out the foundation of this study and examined the historical underpinnings of criminal law as regards involvement with assisted suicide, intentional killing and the juncture with the assisted dying debate. Chapter Two analysed judicial responses to a series of legal actions by claimants who, like others, are concerned ‘that they should not be forced to linger on in old age or in states of advanced physical or mental decrepitude which conflict with strongly held ideas of self and personal identity.’ Chapter Three investigated the significance and effect of moving Private Members’ Bills aimed at introducing the choice of lawful hastened death between 1936 and 2021, and focused on the Assisted Dying Bill 2021 currently awaiting its Second Reading. Chapter Four undertook a critical analysis of the manner of application of a Section 2 offence (Suicide Act 1961 (‘1961 Act’)) which, on the one hand, appears to promote a ‘blanket ban’, while on the other hand, it emphasises (through prosecutorial discretion) the possibility for compassionate-helpers to escape prosecution following involvement with assisting a death-seeker to commit suicide. Chapter Five investigated the effect of emergency powers adopted by the UK Parliament to deal with the COVID-19 pandemic, to highlight the potential impact of recent events as regards the lives of dying people in their struggle for a painless and good death.

This chapter sets out the main conclusions of this thesis in four parts. The findings have revealed a host of questions that require further exploration. These have been captured in

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1 Pretty v United Kingdom (2002) 35 EHRR 1 [65]
themes for future research. Next, the chapter considers the question of the assisted dying law reform in the context of life after COVID-19, by reflecting on the ‘Personal Lens’ (see Thesis Introduction). This chapter culminates by offering some final remarks on the development of this research as an academic and personal journey of becoming.

6.2. Research Questions

This thesis investigated the factors considering assisted dying law reform. Given the Supreme Court decision in the matter of Conway (2018), it was revealed that even judicial support for a change in the law is not enough to alter the current system. Despite several unsuccessful legislative attempts of this kind, as the Westminster Parliament awaits the Parliamentary deliberations regarding the Assisted Dying Bill 2021 (‘2021 Bill’), there is a sense that the need for change is now more evident than ever. Indeed, a pessimistic conclusion might be that those wishing to have an assisted death ought to be the responsibility of their loved ones or medical professionals, or for their wishes to be estimated in the aftermath of their successful assisted suicide by way of prosecutorial discretion, potentially afforded to their compassionate-helper. However, the experience of COVID-19 is changing the narrative and the way society perceives and engages with death and dying. While the deepest and widest impacts of the pandemic have yet to be assessed, the struggle for a good death and the inadequacy of responses to achieve this during the pandemic have already changed the tone of Parliamentary debates (Chapter Five).

In comparison to other forms of reform referred to in this thesis as specific to certain groups of people (abortion and same-sex relationships), assisted dying legislation and the ability to choose a good death may gradually become a matter that touches the lives of us all. Thus, the pressures of the pandemic on death and dying, including the horrific realities of dying alone
without the ability to say goodbye to loved ones, have caused significant pain within societal consciousness. Law reform is a cautious endeavour; however, the pandemic experience indicates that change may be near, and when this shift happens, it will be anything but sudden. It is against this backdrop that the thesis has reached its conclusions on four grounds.

Conclusion 1: Court Challenges Have Shaped the Assisted Dying Debate

Since 1936, unsuccessful legislative attempts to reform the law of assisted death proved that Parliament’s resistance to change endures. With the coming into force of the Human Rights Act 1998\(^2\) (‘HRA 1998’), the courts became a powerhouse for difficult questions brought by claimants seeking a lawful means of achieving medically provided painless and good death. Thus, since 2000, with the judgments\(^3\) in Pretty (2002), Purdy (2009), Nicklinson (2015) and Conway (2018), it appears as though judicial analysis has exhausted the matters with which courts are willing to contend. This is confirmed by High Court decisions in both applications for Judicial Review advanced by Newby (2019) and Lamb (2019). Hence, for now, the courts seem reluctant to go beyond the Nicklinson decision, which remains the authority on the issue of compatibility of Section 2 of the Suicide Act 1961 (see Appendix 1) with Article 8 of the Convention (see Appendix 3).

Alongside unsuccessful attempts to pass Assisted Dying Bills into the Statute Book, the judicial analysis of the law in connection with the individuals’ wish to have an assisted death have contributed to shaping the wider debate, all the while keeping the question of decriminalisation at the surface. In this way, the public witnessed the struggles, pain, suffering, and indignity forced upon individuals condemned to a life they no longer want. As such, the medical

\(^2\) Human Rights Act 1998

\(^3\) The year represents the time when the latest judgment/decision was made on the issue in the case.
conditions of the individuals in these cases become known. Their stories, conveyed by the media at each stage of their path through the court system, evoke a strong sense of sympathy for their ordeal as well as the well-being of their loved ones.

For individuals in the same position as that of the claimants in these cases, the first step is for their difficult position to be acknowledged by Parliament. Indeed, courts have provided the platform for this sensitive issue to be unpacked in a way that reveals the connection between the type of assistance required as part of proposed assisted dying frameworks and the limits within the current construct of the law. Yet, it is the humanity of their ordeal that continues to shine through judicial findings, although courts (by way of constitutional arrangements) have demonstrated a pronounced deference to Parliament.

As judges continue to articulate reasons for their findings, we gain an insight into the ways in which those at the apex of the legal system come to weigh their arguments in the balance. This is reflected in recent judicial deliberations (compared to initial judicial attitudes in Pretty) which seem to justify change in connection with Nicklinson-claimants (Chapter Two), whereas legislative introductions before Parliament provide for legislative change as regards Conway-claimants (Chapter Three). This is because, the judicial assessment for an exception from the current prohibition – in the form of medical intervention by way of assisted death for individuals who are unable to end their own life without assistance – is confined to the investigation of whether the current prohibition can be interpreted under Section 3 of the HRA 1998 (see Appendix 4). Yet, as noted by Lady Hale in Nicklinson,⁴ the nuances of judicial deliberations on this point develop despite the premise that ‘[n]one of [the judges in the case] consider that [Section 2 of the 1961 Act] can be read and given effect, under [Section 3(1)] of

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⁴ R (on the application of Nicklinson and another) v Ministry of Justice; R (on the application of AM) (AP) v DPP [2014] UKSC 38
the Human Rights Act 1998, in such a way as to remove any incompatibility with the rights of those who seek the assistance of others in order to commit suicide.\textsuperscript{5}

That said, the context of judicial exploration has moved sideways beyond this point, into the realm of potential criteria of an assisted dying framework. One specific example stands out. In \textit{Nicklinson} it was indicated that it would be possible to devise a means by which a High Court judge or an independent assessor would be able to provide additional safeguards in the assisted dying process. Thus, the additional safeguard is said to be capable of identifying vulnerable individuals in need of protection from coercion before an assisted death, while allowing those with a voluntary, settled, and informed decision to end their life to exercise their self-determination by choosing lawful assisted dying. Indeed, this recommendation was introduced in Parliament by Lord Pannick in the form of an amendment to the Assisted Dying Bill 2014 during the second day of the Committee Stage.\textsuperscript{6} This safeguard was adopted by the following Assisted Dying Bills\textsuperscript{7} and remains part of the currently proposed criteria within the 2021 Bill.\textsuperscript{8}

However, since then, and before the outbreak of the pandemic, judicial deliberations on the issue seem to have come to a halt as judges are not prepared – and those who are, do not seem able to muster the support of other judges – to trigger the democratic dialogue between citizens and Parliament, by giving a declaration of incompatibility under Section 4 of the HRA 1998 (see Appendix 4).\textsuperscript{9} In fact, in 2019, the court decisions refusing the applications for Judicial Review (in \textit{Newby} and \textit{Lamb}) were largely based on the notion that the 1998 Act ‘does not of itself impart or ascribe to the court expertise or legitimacy in the controversial questions of

\textsuperscript{5} ibid [300] (Lady Hale)
\textsuperscript{6} HL Deb 7 November 2014, vol 756, col 1852 (Lord Pannick - 10.06am)
\textsuperscript{7} Sarah Barber, Sally Lipscombe, Joanna Dawson, ‘The Assisted Dying (No 2) Bill 2015’ Briefing Paper Number 7292, 4 September 2015, 20
\textsuperscript{8} Assisted Dying Bill 2021 Section (1)(2) indicates the High Court would consent by way of an order.
\textsuperscript{9} Human Rights Act 1998 Section 4
ethics and morals regarding the sanctity of life’;\textsuperscript{10} thus, it was concluded that ‘the court is not an appropriate forum for the discussion of the sanctity of life’.\textsuperscript{11} Consequently, deference to the current construct of the law and Parliament’s repeated decision not to reform the law persists.\textsuperscript{12} For claimants who engage in the democratic dialogue with the Westminster Parliament, this position of stasis has prevented them from reaching a meaningful outcome.

\textit{Conclusion 2: The Current System is Not Equipped to Meet the Needs for a Good Death}

In Parliament, alongside a legislative process that does not seem to favour the passing of Bills of this kind into law, debates on the issue indicate that fear of potential abuse (if the law is reformed to allow assisted death) is enough to prevent the first step towards reform. As such, investigation of a potential halfway house led to the decision of the House of Lords in \textit{Purdy} (2009), moving the English legal system towards the recognition of compassionate assistance in suicide. This construct is based on the ability of the prosecutorial decision-making process to establish the voluntary decisions of death-seekers, which then allows compassionate-helpers to escape prosecution (though not without criminal investigation). Effectively, this discretionary approach protects loved ones and certain medical professionals from the criminal law’s response to liability for assisted suicide.

Thus, despite operating a blanket ban on assisted suicide, Section 2 offences are routinely not prosecuted (Chapter Four).\textsuperscript{13} While the adoption of the DPP Policy in 2010 clarified the decision-making process within one document, historically, this arrangement emerged during the enactment of Section 2 of the Suicide Act 1961 (Chapter One) in response to the need to

\textsuperscript{10} \textit{The Queen on the Application of Philippe George Newby v The Secretary of State for Justice} [2019] EWHC 3118 (Admin) [38]
\textsuperscript{11} ibid [50]
\textsuperscript{12} ibid [43]
\textsuperscript{13} \textit{R (Nicklinson) v Ministry of Justice} [2014] UKSC 38 [109] (Lord Neuberger)
protect vulnerable individuals from being assisted with the act of suicide, which was to be no longer illegal. Thus, the DPP Policy simply encapsulated, and made available to the public, a decision-making process that emerged as part of the legislative construct by way of Section 2(4) of the 1961 Act. Consequently, aside from potential preventative characteristics, prosecutorial discretion seems to reflect the emergence (through practice) of a coping mechanism. However, coping is the opposite of change. Thus, the current arrangement is unsatisfactory, and the current law is in shambles. In fact, in 2019 the recently retired Supreme Court Judge, Lord Sumption, answered a question on the matter of law reform in this area, by admitting he does not consider ‘there is necessarily a moral obligation to obey the law.’\textsuperscript{14} At this point, it became evident that the relationship between law on the books and the way it applies in practice is absurd.

For now, the assisted suicide prohibition, including the ability to choose a painless, dignified, and good end-of-life, forces individuals into a grim compromise. As evidenced by cases in the civil actions (Chapter Two) as well as matters in connection with criminal liability under Section 2 (Chapter Four) death-seekers are most concerned about the well-being of their loved ones, especially the potentially traumatic effects their death may bring them. On this point, the tragedy of dying alone and the struggles of dying well in the pandemic has put this into perspective; thus, lawful assisted death under strict safeguards is also about choosing the experience of a good death with the well-being of others in mind.

However, in the absence of change, the application of the law – despite evidence of an intention to help another to end their life by way of assisted suicide – by way of prosecutorial

discretion, judicial interpretation, and even jury verdicts enable compassionate helpers to walk free, without prosecution. Indeed, the DPP Policy was published in response to the need to manage the current prohibition in two ways. First, it brought the enforcement of the law under Section 2(4) in accordance with the Convention principles. Second, it reinstated the resilience of Section 2(1) by recognising prosecutorial discretion as a coping mechanism to meet the shortfalls of a system that was not ready to adopt formal legal reform.

Consequently, for over ten years, the decision-making process has increasingly been applied in a way that reflects informal reform. However, this ‘untidy compromise’ (Lord Sumption) appears to silence death-seekers and compromises the well-being of compassionate helpers, without any regard for the potential risks and safeguards for those involved with such an offence. Therefore, while the Westminster Parliament turns a blind eye to this blanket normalisation of prosecutorial discretion for compassionate assisted suicide, it becomes increasingly evident this approach (1) by design, is concerned with safeguarding compassionate helpers from prosecution (2) while not being equipped to address any safeguarding issues in connection with vulnerable individuals. Thus, for law reform of the kind that the English legal system can achieve, this approach does not hold the answer to a good death. Indeed, the prevailing phenomenon of dying alone, and the isolated suffering of loved ones, is at odds with a system capable of providing a good death with compassion.

15 Suicide Act 1961 Section 2(4); DPP Policy
16 R v Bipin Desai 17 November 2017 Guildford Crown Court (Mr Justice Green) [36]
17 Mavis Eccleston (The Times, Stafford Crown Court, Judge Michael Chambers QC, 19 September 2019) – Following a two-week trial, the defendant was unanimously acquitted by a jury of murder and manslaughter following the death of her husband, who did not survive a suicide pact.
Conclusion 3: A Robust and Transparent Framework can Address the Fears of Abuse

The investigation of this thesis has offered a chronicled account of the matters that have contributed to the assisted dying debate since 1936. More recently, the COVID-19 experience has impacted attitudes on death and dying alone without loved ones. Yet, by definition, a pandemic concerns all individuals. As such, this phenomenon is expected to have wide-ranging implications, transcending political borders. At the time of writing, the number of jurisdictions allowing individuals to choose assisted dying has risen to 27 (see Table 6 in Thesis Introduction). Of these, six have adopted change in 2020-2021. Paradoxically, while defenders of the current state of the law in England and Wales indicate that any proposed assisted dying framework is not robust enough to safeguard against abuse, other jurisdictions have embraced change without any difficulty in establishing and providing assisted dying under prescribed safeguards.

Before COVID-19, even Parliament was aware of the impact of isolated decisions for a self-inflicted hastened death.\(^\text{18}\) Under the current law, the inability to discuss the desire for an earlier death with an open mind, in a safe environment, gave rise to the need to plan involvement with assisted suicide in secrecy, in the interest of protecting loved ones (Chapter Four). Thus, under the current legislative construct, the only option to avoid ‘the indignity of a lingering death’\(^\text{19}\) was to stage a secret do-it-yourself suicide meant to bring a swift death and prevent loved ones from facing the potential risk of prosecution. For others who brave involvement with a Section 2 offence,\(^\text{20}\) the answer on prosecution may come, not before an inquest,\(^\text{21}\) police

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\(^{18}\) HC Deb 4 July 2019, vol 662 col 1412
\(^{19}\) ibid col 1417 – Assisted Dying (Paul Blomfield – 2.43pm)
\(^{20}\) R v Bipin Desai 17 November 2017 Guildford Crown Court (Mr Justice Green) [19], [21]; The preparing and dispensing of a lethal smoothie followed by an insulin injection
\(^{21}\) ibid. The involvement came to light as the defendant learned of the need for the coroner to carry out a post mortem on his deceased father.
investigations,\textsuperscript{22} or court proceedings,\textsuperscript{23} even if a judge eventually finds that for the deceased ‘being assisted to die [by his son, Bipin Desai] was a blessing’.\textsuperscript{24}

That individuals ‘should not be forced to linger on in old age or in states of advanced physical or mental decrepitude which conflict with strongly held ideas of self and personal identity’\textsuperscript{25} (\textit{Pretty} case 2002), was true before the pandemic; in its wake, new perceptions on death and dying are set to add to this rationale in a way that is capable of influencing assisted dying law reform. For Parliament, it is paramount that a robust and transparent framework can address any concerns and fears of potential abuse. Yet, historically, it has not been possible to enact legislation that guarantees a risk-free system; indeed, it is not possible to eliminate risk entirely. Thus, in contemplation of change, the focus ought to be shifted to constructing the most sustainable approach that provides individuals with sufficient safeguards, pre-death. In this way, Parliament would approach the predicament in which death-seekers find themselves by committing to treating the issue with the utmost levels of scrutiny, compassion, and urgency.

\textit{Conclusion 4: Considerations Favouring Assisted Dying Law Reform}

Since the pandemic outbreak, the accounts of care home deaths, hospital deaths and dying alone in isolation and lockdown have added to the weight set to influence law reform. While considered to be a necessary measure in the extreme circumstances of the pandemic, witnessing the isolation of those dying alone has led to the conclusion that such inhumane conditions are detrimental for the consciousness of the dying, their loved ones, and society. Indeed, the Government’s slogan regarding Brexit – ‘Taking back control’ – applies here. People want to

\textsuperscript{22} ibid. Evidence before the court indicated the father did not know the smoothie he consumed contained a deadly substance.
\textsuperscript{23} ibid. The evidence was capable of swaying the decision either way, especially as the defendant had tried to conceal his involvement with the father’s death.
\textsuperscript{24} ibid [29]
\textsuperscript{25} \textit{Pretty v United Kingdom} (2002) 35 EHRR 1 [65]
take control of the manner and timing of their death, for their own sake, for the sake of their loved ones, and to some extent for the common good.

This last aspect is often presented with a negative connotation, to the point that law reform is feared, therefore active measures seek to block or impede such legislative change. Indeed, whereas human nature is set for survival, the sudden detachment from an inherent will to live by favouring quality over quantity of life, in exchange for the certainty of exercising control over their dying days, is a foreign concept. Yet, more and more jurisdictions around the world embark on this path, where the dying person becomes a focal and radiating point for self-determination based on compassion and love.

In the context of the current climate, additional pressure towards achieving law reform in England has been the experience of the pandemic, with its graphic stories of people dying alone, in care homes in lockdown, without their families and friends. Public attitudes and ongoing reactions to the pandemic will continue to unfold over the coming years; however, the struggles for a good death experienced during COVID-19 outbreak are set to influence a change in the law.

When the assisted dying debate is set to return before the Westminster Parliament, the findings in this study may assist to demonstrate the importance of adequate scrutiny of criteria to be adopted as part of a safe and transparent assisted dying framework. At that point, the triangulated analysis involving the judiciary, the legislative and the executive undertaken in this study – leading to the discovery and establishment of the notion of a good death as depicted within the assisted dying debate – may be of relevance.
For these reasons, the thesis exploration developed the argument that by navigating the assisted dying debate through the lens of the six elements and their influencing factors (see Good Death Diagram below), the journey to a compassionate good death by way of assisted dying law reform can lead to the achievement of a robust framework (see section 5.5. The Notion of a ‘Good Death’ in Chapter Five).
6.3. Future Research

This thesis has explored a range of issues that have led to other questions and themes that indicate a potential for future research on the issue of assisted dying law reform – whether prior to or after legislative change is adopted.

A. The Missing Link?

The first two cases which came before the English courts on the issue of assisted death – Pretty (2002) and Purdy (2009) – have both progressed the assisted dying debate in the early stages of the legal quest for change. This author considers the fact that some claimants are female is a characteristic that may add a different undertone to the general debate. One example that stands out in terms of court challenges is the case of Carter v Canada26 concerning a female claimant who went on to change the law and the subsequent introduction of the Medical Aid in Dying framework which runs parallel to an existing assisted suicide prohibition. While, unlike the Canadian court in that case, the UK courts do not have strike-down power, there is reason to believe the resistance to give a declaration demonstrated by the courts (Chapter Two) may diminish further in such a test-case. In England, since 2009, legal challenges have only been brought by male claimants. Thus, if the characteristics of the medical condition put forward by claimants in Nicklinson are advanced by a female claimant, in a future test-case, the courts may perceive this combination to justify the handing down of a declaration of incompatibility.

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26 Carter v Canada (Attorney General) [2015] 1 SCR 331
Indeed, the differential impact on men and women regarding the current prohibition is largely indicated by the higher numbers of female nurses, care workers, and family carers. Thus, a woman’s well-being seems to be far more intertwined with family responsibilities. As the Assisted Dying Bill 2021 is moved by former social worker Baroness Meacher – the second time such a Bill is being introduced by a female Member of Parliament – there is a sense the debate is shaping up to reflect the significance of a less represented link within the current debate. While women have yet to achieve a large presence, it has become increasingly apparent that in Parliament, in courts and legal representation, women continue to make a difference. This, in turn, points to an often-missed aspect of the assisted dying debate which in turn, if such a test case materialises, may come to be known as the missing link.

An exploration of this kind would be capable of indicating whether and to what extent future challenges, developed on this basis, may generate further progression in the long process of achieving assisted dying law reform.

**B. Well-being of Compassionate- Helpers**

As indicated by the sources and overall investigation in this thesis, much has been said about the impact of the current prohibition on death-seekers. In the interest of establishing the wider implications of the current system, there is a need to provide an account of such involvement from the perspective of compassionate-helpers. While involvement with assisted suicide abroad is largely proscribed (although known to law enforcement in England) the circumstances surrounding instances of assistance at home (on the territory of England and Wales) are less known. Thus, by carefully weighing the aspects and effects of assisting with

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suicide on individuals who are meant to grieve their loved one, Parliament would be better able
to estimate the potential harm inflicted on those who are willing to assist a loved one.

C. Getting Technical with Compassionate Assistance with Suicide

Currently, the law prohibiting assisted suicide enables compassionate-helpers, more often than
not, to escape prosecution. Given the technological advancements that led to the launch of Dr
Nitschke’s Sarco machine in 2019,28 the current prohibition may respond to such involvement
by providing or setting up a Sarco machine in the same way as it engages prosecutorial
discretion as regards compassionate-helpers. Investigating the law’s response in connection
with assistance with suicide by using a Sarco machine, would further highlight the weaknesses
of the current system in offering adequate safeguards pre-death.

D. The DPP Policy: Further Challenges?

As regards the wider scope of the DPP Policy, it is difficult to estimate its application in cases
that fall outside of the examples already addressed. Given that so far both legal actions leading
to the DPP publishing their Policy (Purdy case in 2009) and the subsequent update in 2014
(Nicklinson case in 2014) have challenged the prosecutorial decision-making process only in
connection with assisted suicide abroad, one question remains unanswered. Could an
individual challenge the justiciability of the public interest factors based on their apparent
discriminatory nature as regards the individual’s physical ability to undertake the final act
themselves? This investigation would expose the weaknesses of the DPP Policy as regards its
compatibility (through its application under Section 2(4)) with the Convention rights and
principles.

6.4. Reflections on ‘A Personal Lens’

The nuances of the debate on assisted dying law reform are seen through our very own generational lens, the survival tools that you and I (see ‘A Personal Lens’ in Thesis Introduction) were given to navigate life as human beings. However, our knowledge, experience, belief systems, and values, continue to be intertwined with those of the generation that raised us. Thus, the creative processes with which we are engaged are inevitably limited in certain aspects. By accepting the polarity of the current systems, we may be able to find a middle ground capable of balancing the scales for all. Indeed, society is inherently resistant to change. Yet, accepting the value of this resistance, difficult as it has been, is what guided the development of this study.

Then again, the experience of the pandemic has heightened the sense of abandonment that comes with the imposition of lockdown. To my mind, the images of older people in care homes and the knowledge that many have died without their loved ones, deprived of a good death, bring back memories of orphans in old Romania, an unfortunate and traumatic endemic.

6.5. Final Remarks

_We shall not cease from exploration_
_And the end of all our exploring_
_Will be to arrive where we started_
_And know the place for the first time._ – T S Eliot

While this thesis seeks to provide a well-rounded approach to investigating the question of assisted dying law reform, it also positions the subject matter as one encompassing valid, yet polarised, views. At the beginning of my journey, I was confident that judicial reasoning would bring the debate to the successful enactment of legislation in this area. However, the more I
submerged myself into this body of knowledge, the more I began to sense that something else is needed, a catalyst, a cause célèbre, a scandal, a vision, because the forces of inertia are too great. That said, my profound belief in being able to choose the manner and timing of our own death as part of a civilised society, persists. Therefore, the exploration of this thesis has given me the opportunity to enrich my own understanding of the world and the way I see it. Thus, I remain strongly of the belief this matter affects us all. If given the choice, everyone would elect to have a good, and as far as possible, painless, death.

I embarked on this journey of discovery because I fell in love with teaching. Yet, the experience of this chapter of my life researching such a sensitive issue, has turned out to be the most abundant of teachings, on so many levels. The chance to dive into this area of law will no doubt enable me to inspire future students to explore their inner creativity and investigate the depths of the law through their own lens. Furthermore, the COVID-19 outbreak helped me become more patient as the project took one year longer, meaning that the largest part of this thesis was written in lockdown. I now feel better equipped to continue my academic journey by teaching and researching the law. In terms of research, I have become interested in the prevalent changing attitudes regarding the reform of the assisted dying law.

The closest analogy to my journey in researching this thesis is the first time I geared myself up to snorkel in the Red Sea. I had no understanding of how life-changing this would be; what I would feel and how I would never be able to unknow it. A swimming enthusiast since childhood, any large body of water – be it a lake, a river, or the sea – would bring me joy. Yet, when for the first time, I placed the goggles over my face and trained my eyes to seek the depths that my vision could reach, the sight of that underwater world took my breath away.

I realise that only now can I see the depths of where this research exploration began and appreciate its value within the wider context of my life. In the same way, I accept my personal
lens – as my own built-in set of goggles – that allowed me to see the vibrant colours of the assisted dying law reform and appreciate the gradual move towards legal change.

In the initial stages of this research there was a sense that the painful process that leads to law reform could be overcome if either a judicial panel, Parliamentarians, or the DPP application of prosecutorial discretion persisted long enough. I now see that society was not prepared to make this momentous shift because too much was weighing in the balance against reform. Something more transformative was needed, not least it took more time. It took the stories of several other people to shape the understanding of pain and suffering. For their lessons to be absorbed, for their pain to alter the prevailing rhetoric creating a shift in perceptions and underlying values regarding suicide, dying, assisted suicide and assisted dying.

In terms of death, the new narrative portrayed by the media is more likely to describe one’s decision to commit suicide as one where ‘there were no suspicious circumstances’, or the person ‘died suddenly’, or they ‘took their own life’. Similarly, dying became ‘passing away’ and now increasingly simply ‘passing’. Although prohibited by law, successful assisted suicide (with involvement of compassionate-helpers) has become, most significantly in legislative debates, ‘assisted dying’. By contrast, in lockdown, a time when visitors were not allowed to see their loved ones in care homes, dying alone unaccompanied by family or friends has been seen as an indignity and a trauma for both the dying person and for those left behind to mourn them. Assisted dying is on its way to being seen as an alternative to unassisted (in the sense of unaccompanied) dying. This is what it means to say that the ‘narrative’ has changed.

Indeed, as this thesis is undergoing finishing touches (on 22 September 2021) before submission (on 30 September 2021) one notable piece by Daniel Finkelstein is featured in The
The title is aimed at MPs and declares ‘Assisted dying is a modest and popular step’. This approach is similar to that emphasised by Gilbert in connection with Conservative MPs who framed the same-sex marriage reform as a small evolutionary change. This guaranteed a softening of the narrative as one of radical and revolutionary nature within a conservative (small ‘c’) approach to law-making. Coincidentally, a similar tonality and approach was employed by Finkelstein in the lead to reform at the time in a piece for The Times entitled ‘Gay marriage – such a conservative idea’. Thus, in choosing to chronicle the assisted dying reform as ‘a modest and popular step’, Finkelstein’s words (highly-regarded by Conservative MPs) carry weight and seem to soften the path to reform.

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29 Daniel Finkelstein, ‘Assisted dying is a modest and popular step: Ministers should give parliamentary time to a bill which is not nearly as controversial as its opponents like to assert’ (The Times, 21 September 2021) <https://www.thetimes.co.uk/article/assisted-dying-is-a-modest-and-popular-step-708rkc5wz> accessed 22 Sep 2021

30 Andrew Gilbert, ‘From “Pretended Family Relationship” to “Ultimate Affirmation”: British Conservatism and the Legal Recognition of Same-Sex Relationships’ (2014) 26 Child & Fam LQ 463

31 Daniel Finkelstein, ‘Gay marriage – such a conservative idea: Party support for this proposal would not just amend past failings. It would chime with core Tory values’ (The Times, 16 February 2011) <https://www.thetimes.co.uk/article/gay-marriage-such-a-conservative-idea-kv6bm3jz8nt> accessed 22 Sep 2021
Appendix 1 – Section 2 of the Suicide Act 1961\textsuperscript{32}

Section 2 Criminal Liability for Complicity in Another’s Suicide.

(1) A person (“D”) commits an offence if—

(a) D does an act capable of encouraging or assisting the suicide or attempted suicide of another person, and

(b) D’s act was intended to encourage or assist suicide or an attempt at suicide.

(1A) The person referred to in subsection (1)(a) need not be a specific person (or class of persons) known to, or identified by, D.

(1B) D may commit an offence under this section whether or not a suicide, or an attempt at suicide, occurs.

(1C) An offence under this section is triable on indictment and a person convicted of such an offence is liable to imprisonment for a term not exceeding 14 years.

(2) If on the trial of an indictment for murder or manslaughter of a person it is proved that the deceased person committed suicide, and the accused committed an offence under subsection (1) in relation to that suicide, the jury may find the accused guilty of the offence under subsection (1).

(3) The enactments mentioned in the first column of the First Schedule to this Act shall have effect subject to the amendments provided for in the second column (which preserve in relation to offences under this section the previous operation of those enactments in relation to murder or manslaughter).

(4) No proceedings shall be instituted for an offence under this section except by or with the consent of the Director of Public Prosecutions.

\textsuperscript{32} As amended by Coroners and Justice Act 2009 Section 59
Section 2A Acts Capable of Encouraging or Assisting

(1) If D arranges for a person (“D2”) to do an act that is capable of encouraging or assisting the suicide or attempted suicide of another person and D2 does that act, D is also to be treated for the purposes of this Act as having done it.

(2) Where the facts are such that an act is not capable of encouraging or assisting suicide or attempted suicide, for the purposes of this Act it is to be treated as so capable if the act would have been so capable had the facts been as D believed them to be at the time of the act or had subsequent events happened in the manner D believed they would happen (or both).

(3) A reference in this Act to a person (“P”) doing an act that is capable of encouraging the suicide or attempted suicide of another person includes a reference to P doing so by threatening another person or otherwise putting pressure on another person to commit or attempt suicide.

Section 2B Course of Conduct

A reference in this Act to an act includes a reference to a course of conduct, and a reference to doing an act is to be read accordingly.
Appendix 2 – DPP Policy

Public Interest Factors Tending in Favour of Prosecution

[43] A prosecution is more likely to be required if:
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 him 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 who were not known to each other;
13. the suspect was paid by the victim or those close to the victim for his or her encouragement or assistance;

33 CPS, Policy for Prosecutors in Respect of Cases of Encouraging or Assisting Suicide (February 2010, updated October 2014) <https://www.cps.gov.uk/legal-guidance/suicide-policy-prosecutors-respect-cases-encouraging-or-assisting-suicide> accessed 10 Sep 2021
14. 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**; [1]

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.

[44] On the question of whether a person stood to gain, (paragraph 43(6) […]), the police and the reviewing prosecutor should adopt a common sense approach. It is possible that the suspect may gain some benefit - financial or otherwise - from the resultant suicide of the victim after his or her act of encouragement or assistance. The critical element is the motive behind the suspect's act. If it is shown that compassion was the only driving force behind his or her actions, the fact that the suspect may have gained some benefit will not usually be treated as a factor tending in favour of prosecution. However, each case must be considered on its own merits and on its own facts.

**Public Interest Factors Tending Against Prosecution**

[45] A prosecution is less likely to be required if:

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 offence, were of only minor encouragement or assistance;
4. the suspect had sought to dissuade the victim from taking the course of action which 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.
Footnote [1]: For the avoidance of doubt the words “and the victim was in his or her care” qualify all of the preceding parts of this paragraph [43.14]. 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.
Appendix 3 – European Convention on Human Rights

Article 2 – Right to Life

1. Everyone’s right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:

   (a) in defence of any person from unlawful violence;
   (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
   (c) in action lawfully taken for the purpose of quelling a riot or insurrection.

Article 3 – Prohibition of Torture

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

Article 8 – Right to Respect for Private and Family Life

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.
Article 9 – Freedom of Thought, Conscience and Religion

1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

2. Freedom to manifest one’s religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

Article 14 – Prohibition of Discrimination

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.
Appendix 4 – Human Rights Act 1998

Section 3 – Interpretation of Legislation

(1) So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.

(2) This section—

(a) applies to primary legislation and subordinate legislation whenever enacted;

(b) does not affect the validity, continuing operation or enforcement of any incompatible primary legislation; and

(c) does not affect the validity, continuing operation or enforcement of any incompatible subordinate legislation if (disregarding any possibility of revocation) primary legislation prevents removal of the incompatibility.

Section 4 – Declaration of Incompatibility

(1) Subsection (2) applies in any proceedings in which a court determines whether a provision of primary legislation is compatible with a Convention right.

(2) If the court is satisfied that the provision is incompatible with a Convention right, it may make a declaration of that incompatibility.

(3) Subsection (4) applies in any proceedings in which a court determines whether a provision of subordinate legislation, made in the exercise of a power conferred by primary legislation, is compatible with a Convention right.

(4) If the court is satisfied—
(a) that the provision is incompatible with a Convention right, and

(b) that (disregarding any possibility of revocation) the primary legislation concerned prevents removal of the incompatibility, it may make a declaration of that incompatibility.

(5) In this section “court” means—

(a) the Supreme Court;

(b) the Judicial Committee of the Privy Council;

(c) the Court Martial Appeal Court;

(d) in Scotland, the High Court of Justiciary sitting otherwise than as a trial court or the Court of Session;

(e) in England and Wales or Northern Ireland, the High Court or the Court of Appeal.

(f) the Court of Protection, in any matter being dealt with by the President of the Family Division, the [Chancellor of the High Court] or a puisne judge of the High Court.

(6) A declaration under this section (“a declaration of incompatibility”)—

(a) does not affect the validity, continuing operation or enforcement of the provision in respect of which it is given; and

(b) is not binding on the parties to the proceedings in which it is made.
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