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The DPP and Assisted Suicide: a Conspectus

Francis Bennion explains why the DPP's new Policy is unlawful

Introductory

The Suicide Act 1961 s. 2(1) said that a person who aids, abets, counsels or procures the suicide of another shall be liable on conviction on indictment to imprisonment for a term not exceeding fourteen years. In this article I disregard the amendments made by the Coroners and Justice Act 2009 because they do not affect the substance of the 1961 Act and are fully described in Part 2 of my article 'An Abortive Consultation on Assisted Suicide'.[1]

Under s. 2(4) of the 1961 Act, the consent of the Director of Public Prosecutions (the DPP) is required for a prosecution. In February 2010 the present DPP, Mr Keir Starmer QC, published a revised version of the Code for Crown Prosecutors issued under the Prosecution of Offences Act 1985 s. 10 (the Code) and a 'Policy for Prosecutors in respect of Cases of Encouraging or Assisting Suicide' (the Policy).

The Policy was issued as a result of *R (on the application of Purdy) v Director of Public Prosecutions* [2009] UKHL 45 (*Purdy*), which required the DPP to clarify what factors he regards as relevant for and against the institution of a prosecution when deciding whether to give his consent under s. 2(4). Both the Code and the Policy are intended to apply to suspected offences under s. 2(1).

The DPP's Policy

As foreshadowed in my recent article 'Assisted Suicide: Will Mr Starmer QC Obey the Law?'[2], in my view the Policy is unlawful. It names six factors which it says will make a prosecution less likely. These include three that are clearly unlawful: (1) the victim had already decided to commit suicide, (2) the suspect was motivated by compassion, and (5) the suspect helped only reluctantly. Does the DPP refrain from prosecuting a burglar because he was set on burgling, or pitied his victim, or acted reluctantly? Of course not.

The Court of Appeal said in the Purdy case, 'The DPP cannot dispense with or suspend the operation of s. 2(1) of the 1961 Act'. The statement by the DPP that the inclusion of these rogue factors 'does nothing to change the law' is incorrect. It seems likely that some interested party will apply to have the Policy quashed on judicial review.

A Complex Matter

The law surrounding the issuing of the Policy is complex. There are a number of points that need to be addressed. However they are neither addressed nor even mentioned in the Policy, where the DPP solely relies on the fact that the Appellate Committee ordered him to produce it. He seems oblivious of the fact that the right to issue such an order, and his power to obey it in the way he has, are both open to challenge.

The difficulties stem from the *sui generis* prosecutive power of the state, or power to put persons on trial. This is a separate and independent constitutional power vested at common law in the Attorney General. By virtue of legislation it now operates largely through the DPP.

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[1] 173 CL&J 773, www.francisbennion.com/2009/040.htm.
[2] 174 CL&J 90, www.francisbennion.com/2010/006.htm.

This statutory development began with the Prosecution of Offences Act 1879, which created the office of the DPP. It continued with the Prosecution of Offences Act 1908, which set up the department of the DPP as an entity. The current Act is the Prosecution of Offences Act 1985, which established the Crown Prosecution Service and made the DPP the head of it, subject to the superintendence of the Attorney General. This was in accordance with former practice. As an earlier holder of the office, Sir Norman Skelhorn, said of the DPP: 'He acts under what the relevant Act refers to as 'the superintendence of the Attorney General', and . . . is subject to the direction of the Attorney General in all matters'.[3] This is constitutionally correct because the Attorney General is normally an elected MP answerable to the House of Commons whereas the DPP is a mere civil servant.

The following points of doubt arise over assisted suicide.

1. The decision whether or not to prosecute must be taken in accordance with the requirements of the 1985 Act coupled with the Suicide Act 1961. The Policy is unlawful if there was not power to make it in the form in which it was drawn up. Arguably the 1985 Act provides only for a code on general principles and does not permit additional codes for specific offences.
2. In formulating the Policy the DPP failed to take account of existing law regarding the way s. 2(1) operates, particularly in relation to forfeiture: see *Dunbar v Plant* [1997] EWCA Civ 2167, [1998] Ch 412, [1997] 4 All ER 289 (*Dunbar*). This overlooked but highly relevant decision is discussed at length

below.

3. The Policy must respect the integrity of the Suicide Act 1961, especially its clear view that assisting suicide is a grave offence. Certain of the Policy provisions do not do this.
4. The DPP regards the question of whether or not a prosecution should be brought as one of discretion whereas it is actually a question of judgment. This misapprehension may affect the legality of the Policy because a statutory discretion confers more power than a mere requirement of judgment.
5. The doctrine laid down in *Purdy* that the factors to be used by the DPP in arriving at a judgment under the Suicide Act 1961 s. 2(4) must be stated by him in advance undermines his constitutional independence and improperly purports to restrict his powers, so that in this respect *Purdy* was wrongly decided and should have been resisted by the DPP. In 1973 Lord Dilhorne rebuked Lawton LJ for telling the DPP what to do, saying it was wrong for such instructions to come from any judicial authority. He said a court might condemn the DPP for what he has done, 'but he must not be told what he has got to do in the future'.[4]
6. Another reason for saying that *Purdy* was wrongly decided is that the Policy does not produce the certainty desired by Ms Purdy, which is in fact unobtainable.
7. The power to authorise a prosecution decision is a statutory power which is subject to the conditions attached to such powers. Under the doctrine of *ultra vires* its purported exercise may be unlawful if those conditions are contravened.

The *Dunbar* Case

The central point in the argument over the validity of the Policy is this. The fact that s 2(1) imposes the severe maximum penalty of fourteen years imprisonment for assisted suicide shows that Parliament wished sternly to deter persons from helping in the commission of

[3] *Public Prosecutor* (Harrap, 1981), p. 63.
[4] Skelhorn, *op. cit.*, p. 103.

what the common law has always regarded as the grave act of self-destruction or *felo de se*. The missed significance of *Dunbar* is that it shows that the law adds a further major element of discouragement. *Even though such assistance by him is not prosecuted* the law will in appropriate cases deprive the person assisting, and those claiming through him, of the whole or part of any benefit from the death. I will now describe what Mummery LJ described as 'the horrible events' in *Dunbar*.

In October 1987 Nanette Plant (Nanette) and Tony Dunbar (Tony) met and fell in love. Both were in their early twenties. They moved into a flat above the restaurant in Preston operated by Nanette's employer, First Leisure. She went to work at First Leisure's Savoy Hotel in Blackpool. Tony was a self employed technical illustrator. In October 1988 they bought a house in their joint names with the assistance of a mortgage. They got engaged at Christmas 1989 and planned to marry on 10 August 1991. In January 1991 Nanette fell under suspicion of false accounting and theft at First Leisure. The two discussed their fears about the future. They thought that Nanette might be prosecuted and sent to prison. Late on the afternoon of 24 February Tony talked to a representative of First Leisure, who said that Nanette would be arrested the next day. In the evening Nanette told Tony that she had decided to take her own life. His reaction was that he could not face life without her. If she was going to end her life, he would take his too. They agreed to commit suicide together.

In the evening of 24 February they made their first suicide attempt. They parked their car in a field. Tony attached a hose pipe to the car exhaust and brought it through the driver's window. They then both sat in the back of the car for three hours with the engine running. Although they suffered ill effects, they remained alive. They drove home. The next day they decided to try again. Nanette suggested hanging. This resulted in the death of Tony, but Nanette survived. She then made further attempts to finish her life by cutting her throat and wrists with a kitchen knife and jumping out of the back bedroom window. The Judge below described the injuries to Nanette's neck and wrists as horrific. She survived and made no further attempt on her life.

On 8 May 1992 Nanette received a suspended prison sentence of nine months for false accounting. She was not prosecuted under the Suicide Act 1961 s. 2(1) in respect of Tony. However the Judge below held it inescapable that on her own evidence Nanette had committed an offence under that enactment. He went on:

> 'It was a suicide pact, in my judgment, and whilst there was no counselling or procuring of the suicide of Tony Dunbar, to sit with him on the back seat of the car for three hours with carbon monoxide coming into the car, each of them holding each other's hands and hoping to die in each other's arms, there is an aiding and abetting there. To go up into the roof space of a house or to climb up a ladder with a noose around your neck, and to jointly count to '1, 2, 3' and then both jump, is giving a clearest, it seems to me, instance of aiding and abetting the suicide of another that it is possible to have. To do it a second time merely reinforces that.'

The Court of Appeal agreed. They also mentioned another point that shows how gravely the law regards the offence of assisted suicide. It was universally treated as murder until the Homicide Act 1957 s. 4 reduced it to manslaughter, still a serious offence, in respect of the survivor of a suicide pact. Then the Suicide Act 1961 further reduced it generally as stated above.

Forfeiture

Dunbar also illustrates a further aspect of the importance the law attaches to the offence of assisted suicide. In some cases persons held guilty of it, *even though not prosecuted*, are subject to forfeiture of property. I recounted above how Nanette and Tony bought a house in their joint names. On Tony's death Nanette claimed to succeed to his interest in it as a tenant in common. Tony's father claimed this interest as next of kin on the ground that because of her wrongdoing Nanette's interest was forfeited.

The Judge below found for the father. He said of Nanette:

> '. . . she was guilty of aiding and abetting [Tony's]

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> successful attempt to commit suicide - the commission of it itself. In that way each is aiding and abetting the other to commit deliberate and intentional and, so far as the aider and abetter is concerned, unlawful violence . . . no person can obtain or enforce any rights resulting to him (or her in this case) from her own crime'.

This was upheld by the Court of Appeal. However by two to one it further held that in the circumstances of a half-successful suicide pact the survivor should be relieved from forfeiture by applying the Forfeiture Act 1982 s. 2. In other cases of assisted suicide the forfeiture rule would apply. Mummery LJ said:

> '. . . the presence of acts or threats of violence is not necessary for the application of the forfeiture rule. It is sufficient that a serious crime has been committed deliberately and intentionally . . . The essence of the principle of public policy is that (a) no person shall take a benefit resulting from a crime committed by him or her resulting in the death of the victim and (b) the nature of the crime determines the application of the principle. On that view the important point is that the crime that had fatal consequences was committed with a guilty mind (deliberately and intentionally).'

In the case of the DPP's three impugned factors *against* prosecution, namely that the victim had already decided to commit suicide, or the suspect was motivated by compassion, or the suspect helped only reluctantly, 'the crime that had fatal consequences was committed with a guilty mind'. So to conform to the intentions of Parliament it is in the public interest that it should normally be prosecuted, provided the evidence is sufficient.

Consent of the DPP

The fact that under the Suicide Act 1961 s. 2(4) the consent of the DPP is required means that he is required to judge whether the evidence is sufficient and also whether it is in the public interest to prosecute. He has no discretion in the matter; it is a question of *judgment*.

In *Dunbar* the Court of Appeal held by two to one that special rules of leniency apply to the treatment of the survivor of a half-successful suicide pact. Phillips LJ said:

> 'In 1957 the Homicide Act recognised that aiding and abetting the suicide of another pursuant to a suicide pact called for a degree of leniency. Where two people are driven to attempt, together, to take their lives and one survives, the survivor will normally attract sympathy rather than prosecution . . . [It does not seem to me] that the public interest will normally call for either prosecution or forfeiture should one party to the pact survive.'

Phillips LJ was on less sure ground when he said in *Dunbar*:

> 'When the [Suicide Act 1961] is considered, however, it gives clear indication that the circumstances in which the offence is committed may be such that the public interest does not require the imposition of any penal sanction. This, in my judgment, is the logical conclusion to be drawn from the provision in s. 2(4) of the Act that no proceedings shall be instituted . . . except by or with the consent of the DPP'.

This is, with respect, mistaken. The principle that the public interest does not always require a prosecution even where the evidence is sufficient does not depend on provisions like s. 2(4) but applies to all offences. The former DPP Sir Norman Skelhorn indicated the true purpose of such provisions, of which there were 59 during his time as DPP (1964-1977). He said they were intended to produce uniformity in prosecution decisions, ensure responsible

prosecutions over serious matters such as terrorism, and prevent oppressive private prosecutions.[5]

Conclusions

The DPP should have realised that the decision in *Purdy* was improper in trespassing on his independence, and erroneous in that the Policy could not produce the certainty desired by Ms Purdy. He should therefore have declined to comply with the decision. He also acted erroneously in regarding the question of whether or not a prosecution should be brought as one of discretion whereas it is actually a question of judgment.

Even if *Purdy* was valid it cannot be supposed to have required the issuing of an *ultra vires* document. As explained above, the Policy is *ultra vires*, and therefore unlawful, in naming, as three out of six factors against prosecution, factors that contravene the anti-suicide intention of the Suicide Act 1961. If Parliament had wished to change that intention it would have done so in the Coroners and Justice Act 2009. The Policy is also unlawful because the 1985 Act provides only for a prosecution code on general principles and does not authorise individual codes for specific offences.

Accordingly the Policy is void as being beyond the DPP's powers.

The Attorney General should for the above reasons have directed the DPP not to issue the Policy in that form.

The DPP's decision to hold an elaborate public consultation was misconceived because the majority of those responding would have no knowledge of the legal constraints to which the DPP was subject in drawing up the Policy. One is tempted to add that the DPP displayed little knowledge of these either.

Postscript

On 19 March, after this article was completed, the DPP issued a statement saying that the public interest did not require the prosecution of Mr Caractacus Downes under s. 2(1) because 'the only driving force behind Mr Downes' actions was compassion'. I have not space to elaborate on this.

This article should be read in conjunction with my article 'Assisted Suicide: A Constitutional Change'.[6]

[5] Skelhorn, *op. cit.*, pp. 68, 84.
[6] 173 CL&J 519, www.francisbennion.com/2009/028.htm.