

2016

A Time to Fly and a Time to Die: Suicide Tourism and Assisted Dying in Australia Considered

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Hadeel Al-Alosi, *A Time to Fly and a Time to Die: Suicide Tourism and Assisted Dying in Australia Considered*, 17 Marq. Ben. & Soc. Welfare L. Rev. 2 (2016).

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A TIME TO FLY AND A TIME TO DIE: SUICIDE TOURISM AND ASSISTED DYING IN AUSTRALIA CONSIDERED

Hadeel Al-Alosi*

In the United Kingdom, a series of high-profile court cases have led the Director of Public Prosecutions to publish a policy clarifying the exercise of its discretion in assisted suicide. Importantly, the experience in the United Kingdom serves as a timely reminder that Australia too should formulate its own guidelines that detail how prosecutorial discretion will be exercised in cases of assisted suicide. This is especially significant given the fact that many Australian citizens are traveling to jurisdictions where assistance in dying is legal. However, any policy should not distract from addressing law reform on voluntary euthanasia. Australian legislators should consult with the public in order to represent the opinion of the majority. Nevertheless, any future policy and law reform implemented should provide adequate safeguards and be guided by the principle of individual autonomy.

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I. INTRODUCTION

Like many countries, Australia is suffering from a culture of silence with regard to discussions on suicide.¹ Unsurprisingly, this has resulted in a lack of attention given to the issue of assisted suicide, and to the growing phenomenon of “suicide tourism.”² Thus, many people who wish to die are flying to nations where assisted suicide is an option permitted by law. There have been continuous failed attempts by Australian parliaments to legislate on euthanasia in the past, and the year 2013 saw further failed attempts. Thus, Australia’s law on assisted suicide and suicide tourism remains in a state of confusion.³

The purpose of this Article is to shed light on this morally and ethically charged topic by analyzing the legal status of assisted suicide and suicide tourism in Australia. Part II of this Article explores the differences between euthanasia, suicide, and assisted suicide. It also briefly notes the status of assisted suicide in Switzerland, particularly because the country has become a popular location for many people who seek assistance in dying lawfully.⁴ Part III follows with a definition of “suicide tourism.” Part IV provides an analysis of the law on assisted suicide in Australia. The law in the United Kingdom is examined in Part V, due to the significance of the Director of Public Prosecutions’ (DPP) recent clarification on how discretion will be exercised in cases involving assisted suicide. Part VI discusses the arguments made in favor and against the prosecution of assisted suicide cases, in order to provide the reader insight into both sides of the debate. Finally, Part VII provides a number of recommendations concerning ways in which Australia should deal with assisted suicide and suicide tourism in the future.

1. Cristina Odone, *Assisted Suicide: How the Chattering Classes Have Got It Wrong*, CTR. FOR POLY STUD. 36 (Oct. 2010), [http://www.bioethicsperth.org.au/Upload%5C39694762-Assisted-Suicide-How-the-chattering-classes-have-got-it-wrong\[1\].pdf](http://www.bioethicsperth.org.au/Upload%5C39694762-Assisted-Suicide-How-the-chattering-classes-have-got-it-wrong[1].pdf).

2. Jacque Wilson, *‘Suicide Tourism’ to Switzerland Has Doubled Since 2009*, CNN (Oct. 7, 2014), <http://www.cnn.com/2014/08/20/health/suicide-tourism-switzerland/>.

3. Alex Mann, *Philip Nitschke’s Adelaide Euthanasia Clinic Comes Under Police Scrutiny*, ABC NEWS AUSTL. (Dec. 5, 2013), <http://www.abc.net.au/news/2013-12-05/Philip-nitschkes-new-euthanasia-clinic-in-adelaide/5138602>.

4. See Saskia Gauthier et al., *Suicide Tourism: A Pilot Study on the Swiss Phenomenon*, J. MED. ETHICS 1 (Aug. 20, 2014); Wilson, *supra* note 2.

II. EUTHANASIA, SUICIDE, AND ASSISTED SUICIDE

From the outset, it is essential to clarify the differences between euthanasia, suicide, and assisted suicide. This is especially important due to the fact that there is no “bright dividing line”⁵ between the three—the distinction is a matter of degree.⁶

Euthanasia involves the intentional killing of another person in order to end that person’s suffering.⁷ Voluntary euthanasia occurs when a person consents to a specific act or omission with the knowledge that this conduct will cause their death.⁸ Non-voluntary euthanasia occurs when a person takes active steps to end the life of another who cannot provide explicit consent.⁹ More ethically problematic is involuntary euthanasia, which involves a person taking active steps to end the life of another against their will.¹⁰ The focus of this Article is on the examination of voluntary euthanasia and the autonomy of those who actively seek assistance in dying.

Contrary to euthanasia, suicide is the act of self-termination. As stated by Justice Sellers, “[e]very act of self-destruction is, in common language, described by the word suicide, provided it be the intentional act of a party knowing the probable consequence of what he is about.”¹¹ Thus, the essential difference between euthanasia and suicide is the performance of the final act. If a third party performs the last act that causes a person’s death, euthanasia has occurred.

Finally, assisted suicide is the term that is used when a competent person has formed a desire to terminate his or her life, but requires assistance to perform the final act that will cause death. It is a special case of euthanasia, popularly termed “mercy killing” by the general public,¹² and often described by lawyers as

5. Lorana Bartels & Margaret Otlowski, *A Right to Die? Euthanasia and the Law in Australia*, 17 J. L. & MED. 532, 532-33 (2010).

6. *Id.* at 533.

7. PARL. OF TAS. CMTY. DEV. COMM., 6 REP. ON THE NEED FOR LEGISLATION VOLUNTARY EUTHANASIA 11 (1998), http://www.parliament.tas.gov.au/ctee/old_ctees/reports/Voluntary%20Euthanasia.pdf.

8. *Id.*

9. *Id.*

10. See *Voluntary and Involuntary Euthanasia*, BBC: ETHICS GUIDE (last visited Aug. 16, 2016), <http://www.bbc.co.uk/ethics/euthanasia/overview/volinvol.shtml>.

11. *Re Davis*, decd, [1968] 1 Q.B. 72, at 82.

12. RICHARD HUXTABLE, *EUTHANASIA, ETHICS AND THE LAW: FROM CONFLICT TO*

“complicity in suicide.”¹³ Assisted suicide involves the active participation in bringing about a person’s death, and also extends to a range of preparatory acts that form the heart of complicit and accessorial liability.¹⁴ Where the third person is a medical practitioner, it is commonly referred to as “physician-assisted suicide.”¹⁵

III. SUICIDE TOURISM

The term “suicide tourism”¹⁶ is now commonly used to refer to treatment that has been planned in advance to take place outside a person’s usual place of residency.¹⁷ Advances in modern technology and increased global travel have created opportunities for people seeking to end their lives by travelling to jurisdictions where assisted suicide is legal.¹⁸ Although suicide tourism has become an increasingly popular option for Australian citizens seeking to obtain assistance in dying, the issue of suicide tourism has received relatively low attention. Conversely, in the United Kingdom, suicide tourism has sparked a fierce debate. There are some who have urged their government to legalize assisted dying so that terminally ill patients do not have to travel abroad to die comfortably.¹⁹ On the other side of the debate, many have condemned the practice of suicide tourism and have pressed for laws criminalizing assisted suicide to extend to those who help a person die overseas.²⁰

COMPROMISE, at xiv-xv (Sheila Mclean ed., 2007)

13. *Id.*

14. Brendon Murphy, *Human Rights, Human Dignity and the Right to Die: Lessons from Europe on Assisted Suicide*, 33 CRIM. L. J. 341, 347 (2009).

15. Farooq Khan & George Tadros, *Physician-Assisted Suicide and Euthanasia in Indian Context: Sooner or Later the Need to Ponder!*, 35(1) INDIAN J. PSYCHOL. MED. 101-05.

16. Some have argued that “suicide tourism” is a rather unfortunate expression, as it implies that people are going on a happy holiday to die, which trivializes the experience that many terminally ill people are facing.

17. See Ali Venosa, *Suicide Tourism: Traveling For the Right to Die, And the Ethical and Legal Dilemmas that Come With It*, MED. DAILY: THE GRAPEVINE (May 25, 2016), <http://www.medicaldaily.com/assisted-suicide-tourism-right-die-387577>.

18. Murphy, *supra* note 14, at 348.

19. Rohith Srinivas, *Exploring the Potential for American Tourism*, 13 MICH. ST. U. J. MED. & L. 91, 92 (2009). See also *Suicide Guidelines a ‘Victory for Compassion’*, MANCHESTER EVENING NEWS (Sept. 23, 2009), <http://www.manchestereveningnews.co.uk/news/greater-manchester-news/suicide-guidelines-a-victory-for-compassion-930574>; *Swiss Group ‘Helped 22 Brits Die’*, BBC NEWS (Sept. 3, 2004), <http://news.bbc.co.uk/2/hi/health/3623874.stm>.

20. See Srinivas, *supra* note 19, at 92-93; *Swiss Group ‘Helped 22 Brits Die’*, *supra*

As will be discussed in Part IV, there is currently no law that explicitly prohibits suicide tourism in Australia. Suicide tourism does, however, raise the issue of the extra-territoriality of the law. As a general rule, the criminal law does not have extra-territorial application.²¹ Therefore, a person involved in an assisted suicide would not be liable for helping a person travel to another jurisdiction where assisted suicide is legal. However, this is unlikely to be an issue given the fact that, in many cases, the person who assisted the suicide would have engaged in a number of preparatory acts within the domestic state (e.g., making travel arrangements).²²

One of the most popular destinations for suicide tourism is Switzerland.²³ This is particularly true for Australian and British citizens who wish to end their lives.²⁴ Therefore, it is worth providing a brief overview of the Swiss law on euthanasia before specifically discussing the legal framework in Australia and the United Kingdom. The concept of euthanasia is not recognized under Swiss law. At present, euthanasia is punishable as murder under Article 111,²⁵ and as manslaughter under Article 113 of the Swiss Penal Code.²⁶ Although murder upon request by the victim is treated less severely than murder without the victim's request under Article 114, it remains illegal.²⁷

Nevertheless, assisted suicide has been legal in Switzerland

note 19; Mary Helen Spooner, *Swiss Irked by Arrival of "Death Tourists"*, 168(5) CAN. MED. ASS'N J. 600, 600 (Mar. 4, 2003), <http://www.cmaj.ca/content/168/5/600.1.full.pdf+html?sid=93694ac83c82-4707-865d-314e79cc84d8>; *Dignitas: Swiss Suicide Helpers*, BBC NEWS (Jan. 20, 2003), <http://news.bbc.co.uk/2/hi/europe/2676837.stm>.

21. See Murphy, *supra* note 14, at 349.

22. *Id.* at 350. See also Keir Starmer, *Decision on Prosecution – The Death by Suicide of Daniel James*, CROWN PROSECUTION SERV. (Sept. 12, 2008), http://www.cps.gov.uk/news/articles/death_by_suicide_of_daniel_james/.

23. See Wilson, *supra* note 2. See also Julia J.A. Shaw, *Recent Developments in the Reform of English Law on Assisted Suicide*, 16 EUR. J. HEALTH L. 333, 334 (2009); Dana M. Cohen, *Looking for a Way Out: How to Escape the Assisted Suicide Law in England*, 24 EMORY INT'L L. REV. 697, 697 (2010).

24. See generally Dan MacGuill, *Massive Rise in 'Suicide Tourism' to Switzerland*, THEJOURNAL.IE (Aug. 21, 2014), <http://www.thejournal.ie/how-many-people-travel-to-switzerland-for-assisted-suicide-1629579-Aug2014/>.

25. SCHWEIZERISCHES ZIVILGESETZBUCH [ZGB] [SWISS CRIMINAL CODE] Dec. 21, 1937, SR 311, art. 111 (Switz.) [hereinafter SWISS CRIMINAL CODE]. See also, Mustafa D. Sayid, *Euthanasia: A Comparison of the Criminal Laws of Germany, Switzerland and the United States*, 6(2) B.C. INT'L & COMP. L. REV. 533, 534 n.8-9 (1983).

26. SWISS CRIMINAL CODE, art. 113. See also Savid, *supra* note 25, at 534 n.8-9.

27. SWISS CRIMINAL CODE, art. 114. See also Samia A. Hurst & Alex Mauron, *Assisted Suicide and Euthanasia in Switzerland: Allowing a Role for Non-Physicians*, 326 BMJ 271, 272 (2003).

since 1937.²⁸ Under Article 115 of the Swiss Penal Code, it is not an offence to assist another person to commit suicide, provided that the assistor was not motivated by self-interest.²⁹ Hence, Swiss law requires an assessment of whether the suspect acted compassionately in providing assistance to the deceased.

Thus, Switzerland currently has the least restrictive laws on assisted suicide of any jurisdiction in the world. Additionally, there are no national residency requirements imposed on tourists seeking assistance with dying.³⁰ Dignitas, the Swiss organization that has assisted hundreds of foreigners in ending their lives since its establishment in 1998,³¹ has concluded that: “there could not be any discrimination just because of the place of residence of a person.”³² However, despite evidence that many Swiss citizens are in favor of continuing to legalize assisted suicide, they are discontent with the nation being described as a resort for suicide tourism.³³

Swiss law does not express any eligibility criteria that must be met before assisting in a person’s death, and provides only a few safeguards.³⁴ This is particularly concerning, not only for Swiss citizens, but for people around the world, including Australian citizens who travel to Switzerland to end their lives. Therefore, it is necessary that Australia seriously consider whether it should introduce legislation that would allow those seeking to die to do safely and comfortably within their own country.

28. SWISS CRIMINAL CODE, art. 115.

29. SWISS CRIMINAL CODE, art. 115. *See also* Nicolas P. Terry, *Under-Regulated Health Care Phenomena in a Flat World: Medical Tourism and Outsourcing*, 29 W. NEWENG. L. REV. 421, 432 (2007); *Dignitas: Swiss Suicide Helpers*, *supra* note 20.

30. *See* Terry, *supra* note 29, at 432-33; *Dignitas: Swiss Suicide Helpers*, *supra* note 20.

31. *Who is DIGNITAS*, DIGNITAS (last visited Aug. 16, 2016), http://www.dignitas.ch/index.php?option=com_content&view=article&id=4&Itemid=44&lang=en.

32. *See* Silvan Luley, Meeting and Third Annual SOARS Lecture: DIGNITAS and the Right to Live and Die in Dignity—Fourteen Years of Efforts in Suicide Attempt Prevention, Pro Life, Pro Choice, and Pro Assisted Dying (London, Oct. 26, 2012) (transcript available at <http://dignitas.ch/images/stories/pdf/diginpublic/referat-third-soars-lecture-london-26102012.pdf>).

33. Christian Nordqvist, *Assisted Suicide and Suicide Tourism to Continue, Swiss Referendum*, MED. NEWS TODAY (May 15, 2011), <http://www.medicalnewstoday.com/articles/225366.php>.

34. Ben White & Lindy Willmott, *How Should Australia Regulate Voluntary Euthanasia and Assisted Suicide?*, 20(2), J. L. & MED. 410, 417 (2012).

IV. THE LEGAL FRAMEWORK IN AUSTRALIA

In Australia, suicide and attempted suicide have been decriminalized.³⁵ However, each State and Territory makes it unlawful to assist another person with committing suicide.³⁶ The general position is that, even if a person is competent to make a decision and consents to ending his own life, any individual who helps to bring about that person's death is guilty of murder or of aiding and abetting suicide.

A. AUSTRALIAN ATTEMPTS AT LEGALIZING ASSISTED SUICIDE

In 1997, the Northern Territory became the first Australian jurisdiction to legalize euthanasia and assisted suicide.³⁷ Under the Rights of the Terminally Ill Act 1995 (NT) (the "NT Act"), persons aged eighteen years or older who suffered from a terminal illness could request that a physician assist them in dying.³⁸ The Supreme Court held the NT Act to be valid in *Wake v. Northern Territory*,³⁹ and, after the act had been in effect for nine months, four people were reported to have obtained assistance in dying.⁴⁰ However, the NT Act was later overturned by the Commonwealth Government, pursuant to its power under Section 122 of the Australian Constitution, which permits the Commonwealth to override legislation of Territories.⁴¹ At the time, the Government was of the view that the Northern Territory's legislation was sending a powerful message to the Australian community that

35. See, e.g., Crimes Act 1900 No. 40 (NSW) s 31A (Austl.).

36. Crimes Act 1900 No. 40 (NSW) s 18(1)(a) (Austl.); Crimes Act 1900 (ACT) s 12(1)(a)-(c) (Austl.); Criminal Law Consolidation Act 1935 (SA) s 12(a) (Austl.); Crimes Act 1958 (Vic) s 3A(1) (Austl.); Criminal Code Act 1899 (Qld) ss 291, 293, 300, 302(1)(a); Criminal Code Act 1983 (NT) s 162 (Austl.); Criminal Code Act 1924 (Tas) ss 156, 159 (Austl.); Criminal Code Compilation Act 1913 (WA) s 279 (Austl.); Crimes Act 1935 (SA) s 13A(5) (Austl.); Crimes Act 1958 (Vic) s 6B(2) (Austl.); Criminal Code Act 1899 (Qld) s 311 (Austl.); Criminal Code Act 1983 (NT) ss 161, 162 (Austl.); Criminal Code Act 1924 (Tas) s 163 (Austl.); Criminal Code Compilation Act 1913 (WA) s 288 (Austl.).

37. Crimes Act 1900 No 40 (NS) ss 18(1)(a), 31C (Austl.); Crimes Act 1900 (ACT) ss 12, 17 (Austl.); Criminal Law Consolidation Act 1935 (SA) ss 12(a), 13A(5) (Austl.); Crimes Act 1958 (Vic) ss 3A(1), 6B(2) (Austl.); Criminal Code Act 1899 (Qld) ss 291, 293, 300, 302, 311 (Austl.); Criminal Code Act 1983 (NT) ss 161, 162 (Austl.); Criminal Code Act 1924 (Tas) ss 156, 159, 163 (Austl.); Criminal Code Compilation Act 1913 (WA) ss 279, 288 (Austl.).

38. Bartels & Otlowski, *supra* note 5, at 540.

39. *Id.* (citing *Wake v. Northern Territory* (1996) 124 FLR 298, 299 (NT)).

40. *Id.* (citations omitted).

41. *Id.* *Euthanasia Laws Act 1997 No 17* (Cth) s 50A(1).

“vulnerable [people] are expendable and not valued,”⁴² and the Government did not want to appear to condone laws permitting euthanasia.

Unlike its power to override Territory legislation, the Commonwealth Government does not have that same power with respect to State legislation. Queensland is currently the only Australian parliament that has never considered enacting legislation to permit euthanasia.⁴³ And, while other State legislatures have initiated legalization legislation, such attempts have been unsuccessful. For example, in 2008, a bill allowing medically assisted suicide in the Victorian Parliament was rejected.⁴⁴ Similarly, attempts by members of the Western Australian Parliament to introduce voluntary euthanasia failed in 1997, 1998, 2000, and again in 2010.⁴⁵

To further illustrate, in South Australia, the two voluntary euthanasia bills introduced by Parliament were defeated in 2008.⁴⁶ However, there have since been attempts to legalize euthanasia. The latest is reported to be a significantly modified version of a bill introduced in February 2013.⁴⁷ Even with such recent attempts, there are doubts about the revised bill. Euthanasia supporter and Member of Parliament, Bob Such, openly expressed such doubts about the 2013 revised bill, stating that it “almost realistically won’t pass.”⁴⁸ Current South Australian legislation has also been described by pro-euthanasia advocate, Philip Nitschke, as a “grey area,” and has stated, “I can’t wait around for laws – I want to know what I can do with my own

42. DAVID BROWN ET AL., *CRIMINAL LAW: MATERIALS AND COMMENTARY ON CRIMINAL LAW AND PROCESS OF NEW SOUTH WALES* 529 (4th ed. 2006).

43. Bartels & Otlowski, *supra* note 5, at 543.

44. See Medical Treatment (Physician Assisted Dying) Bill 2008 (Vic) (Austl.), available at <http://www.austlii.edu.au/au/legis/vic/bill/mtadb2008415/> (defeated in the Legislative Council on Sept. 10, 2008).

45. See Voluntary Euthanasia Bill 1997 (WA) (Austl.); Voluntary Euthanasia Bill 1998 (WA) (Austl.); Voluntary Euthanasia Bill 2000 (WA) (Austl.); Voluntary Euthanasia Bill 2010 (WA) (Austl.). See also Angie Raphael, *WA Euthanasia Bill Rejected*, SYDNEY MORNING HERALD (Sept. 23, 2010), <http://news.smh.com.au/breaking-news-national/wa-euthanasia-bill-rejected-20100923-15npg.html>.

46. See Voluntary Euthanasia Bill 2008 (SA) (Austl.).

47. Ending Life with Dignity (No 2) Bill 2013 (SA) (Austl.). See also LawOne, *Ending Life with Dignity (No 2) Bill 2013 (SA)*, TIMEBASE (Nov. 8, 2013), <http://www.timebase.com.au/news/2013/AT779-article.html>.

48. Andrew Smith, *South Australian Euthanasia Bill ‘Almost Certainly Won’t Pass,’ MP Admits to LifeSiteNews*, LIFESITENEWS (Nov. 1, 2013), <http://www.lifesitenews.com/news/south-australian-euthanasia-bill-almost-certainly-wont-pass-mp-admits-to-lit> (quoting Member of Parliament, Bob Such).

personal strategy.”⁴⁹

In Tasmania, the Greens political party introduced the Dying with Dignity Bill⁵⁰ into Parliament in 2009. The bill, which was based on the Northern Territory’s controversial euthanasia legislation,⁵¹ sought to “confirm the right of a person enduring a terminal illness with profound suffering to request assistance from a medically qualified person to voluntarily end his or her life.”⁵² The Dying with Dignity Bill ultimately failed by fifteen to seven votes.⁵³ Despite this failure, the Greens have shown a commitment to working towards legalizing voluntary euthanasia.⁵⁴ In 2013, the Parliament of Tasmania again debated the Voluntary Assisted Dying Bill,⁵⁵ which would have effectively legalized the act by terminally ill persons to end their lives. Despite opinion polls indicating that the majority of the public supported the legislation,⁵⁶ the bill was defeated in Parliament by thirteen to eleven votes.⁵⁷ This led some commentators to question why “legislators [were] not representing public opinion.”⁵⁸ Notably, the Tasmanian bill provided several safeguards, which were described as “the strongest in the world,”⁵⁹ and included:

1. Requiring a competent patient to make three requests before any procedure was undertaken;
2. A cooling-off period;
3. Consent from two physicians;

49. See Mann, *supra* note 3 (quoting Philip Nitschke).

50. Dying with Dignity Bill 2009 (Tas) (Austl.), available at www.parliament.tas.gov.au/bills/Bills2009/pdf/37_of_2009.pdf.

51. See PARLIAMENT OF TAS., JOINT STANDING COMM. ON CMTY. DEV., REPORT ON THE DYING WITH DIGNITY BILL 2009 51 (Oct. 12, 2009), available at <http://www.parliament.tas.gov.au/ctee/REPORTS/Dying%20with%20Dignity%20Final%20Report.pdf>.

52. Dying with Dignity Bill, *supra* note 50.

53. See Bartels & Otlowski, *supra* note 5, at 533.

54. See Matthew Denholm, *State to Push for Mercy Killing*, THE AUSTRALIAN (Mar. 8, 2011) <http://www.theaustralian.com.au/news/nation/state-to-push-for-mercy-killing/story-e6frg6nf-1226017319925>.

55. Voluntary Assisted Dying Bill 2013 (Tas. Austl.).

56. See Margaret Otlowski, *Another Voluntary Euthanasia Bill Bites the Dust*, THE CONVERSATION (Nov. 18, 2013), <http://theconversation.com/another-voluntary-euthanasia-bill-bites-the-dust-19442>.

57. *Id.*

58. *Id.*

59. David Beniuk, *Tasmania’s Euthanasia Bill Fails Narrowly*, NEWS.COM.AU (Oct. 17, 2013), <http://www.news.com.au/national/breaking-news/tasmanias-euthanasia-bill-fails-narrowly/story-e6frku9-1226741999723> (quoting Labor Premier, Lara Giddings, and Greens leader, Nick McKim).

4. Requiring that the patient was either diagnosed with a terminal illness or experiencing considerable suffering;
5. Requiring that the treating physician first conclude that there were no other treatment options available that could adequately, and to the patient's satisfaction, improve his or her condition; and
6. A right for the patient to rescind his or her request at any time.⁶⁰

Likewise, in New South Wales (NSW), the three substantive attempts to legislate for voluntary euthanasia were rejected.⁶¹ Thus, in 2005, the Health Minister found it necessary to release its *Guidelines for End-of-Life Care and Decision-Making (Guidelines)*,⁶² which aimed to “end confusion between both public and health professionals about what is morally and legally permissible, and contrast that against the illegal practices of euthanasia or assisted suicide.”⁶³ The *Guidelines* are based on a number of principles, including the right of patients to receive or refuse life-prolonging treatment, providing patients with comfort and respecting their dignity, and the obligation of healthcare professionals and families to work together to make compassionate decisions for patients who lack decision-making capacity (taking account of a patient's previously expressed wishes when they are known).⁶⁴ The *Guidelines*, therefore, encourage planning in advance through the creation of care directives.⁶⁵ The recent case of *Hunter & New England Area*

60. Voluntary Assisted Dying Bill 2013 (Tas) pt 2 divs 1, 2 (Austl.).

61. Sarah Gerathy, *Upper House Votes Down Voluntary Euthanasia Bill*, ABC NEWS AUSTL. (May 23, 2013), <http://www.abc.net.au/news/2013-05-23/upper-house-votes-down-voluntary-euthanasia-bill/4709020>; see also Bartels & Otlowski, *supra* note 5, at 542 (published in 2010 and, consequently, without mention of the third Bill that was defeated in 2013).

62. NSW DEP'T OF HEALTH, GL2005_057, OFF. OF THE CHIEF HEALTH OFFICER, GUIDELINES FOR END-OF-LIFE CARE AND DECISION-MAKING (Mar. 22, 2005), http://www0.health.nsw.gov.au/policies/gl/2005/pdf/GL2005_057.pdf [hereinafter GUIDELINES].

63. Bartels & Otlowski, *supra* note 5, at 542 (internal quotation omitted) (quoting Morris Iemma at the New South Wales, Legislative Assembly, *Parliamentary Debates* on Mar. 3, 2005).

64. *Id.* at 2.

65. *Id.* at 3, 16. An advance care directive is a document that expresses a patient's wishes with regard to medical treatment in the event that he or she becomes unable to make treatment decisions. Advance care directives are sometimes referred to as a “living will.”

*Health Services v. A*⁶⁶ has clarified the legal recognition of such advance care directives in NSW. *Hunter* provides that respect and effect must be given to an advance care directive if it is made by a competent adult, is unambiguous, and extends to the situation at hand.⁶⁷

The *Guidelines* also make the specific distinction between assisted suicide and the withholding, or withdrawing of, life-sustaining treatment by medical physicians.⁶⁸ It states that, if the withdrawal or withholding of a patient's treatment causes the patient to subsequently die, the law deems the cause of death to be the patient's underlying condition, and not attributable to the actions of others.⁶⁹ This means that medical practitioners in NSW may lawfully administer treatment to patients to relieve pain, even if practitioners are aware that the administration of the treatment might also hasten death. However, the *Guidelines* stress that euthanasia and assisted suicide are crimes under the Crimes Act 1900 (NSW).⁷⁰ Further, the NSW courts have held that there is no obligation for medical physicians to continue life-supporting treatment if it can be shown that it is not "in the patient's best interest and welfare."⁷¹

In 2013, the NSW Parliament defeated the Rights of the Terminally Ill Bill, which would have effectively provided terminally ill people with the right to end their lives. The bill, which was defeated by twenty-three to thirteen votes,⁷² incited an emotional response from Members of Parliament: some welcomed the defeat while others viewed the defeat as a failure by Parliament to consider what the people of NSW want.⁷³ However, it appears that the debate is far from over, with one Member of Parliament stating, "[t]his is not the end. It is an inevitable reform."⁷⁴

66. *Hunter & New Eng. Area Health Servs. v. A* [2009] NSWSC 761 (Austl.).

67. *Id.*

68. *GUIDELINES*, *supra* note 62, at 12.

69. *Id.*

70. *Id.*

71. *Messiha v. South East Health* [2004] NSWSC 1061, ¶ 28 (Austl.).

72. Sarah Gerathy, *Upper House Votes Down Voluntary Euthanasia Bill*, ABC NEWS AUSTRALIA (May 23, 2013), <http://www.abc.net.au/news/2013-05-23/upper-house-votes-down-voluntary-euthanasia-bill/4709020>.

73. 'You're All Gutless': *Euthanasia Bill Defeated*, SYDNEY MORNING HERALD (May 23, 2013), <http://www.smh.com.au/nsw/youre-all-gutless-euthanasia-bill-defeated-20130523-2k3jv.html>.

74. *Id.*

B. AUSTRALIAN PROSECUTIONS OF ASSISTED SUICIDE

An analysis of Australian case law indicates that cases involving assisted suicide continue to pose a challenge for prosecutors and the courts alike. Australian prosecutors have shown reluctance in prosecuting these cases, and, when such cases have been prosecuted, they have generally been treated with leniency by the courts.⁷⁵ To illustrate, in 2005, the then Director of Public Prosecutions (DPP), Nicholas Cowdery QC, was confronted with a defendant who had killed his wife, who had multiple sclerosis, in order to end his wife's suffering.⁷⁶ By consent, the man's wife ingested sleeping aid medication and then allowed her husband to suffocate her with a pillow.⁷⁷ Under the Crimes Act 1900 (NSW),⁷⁸ the husband had committed murder. However, Cowdery exercised his discretion and agreed to the lesser charge of aiding suicide, stating: "I think those are the sorts of situations where good men and women – like that husband – should not be left at the mercy of the criminal law for acting humanely and compassionately, in a principled way and with the informed consent of the holder of the right to life."⁷⁹

There are a number of other Australian cases where suspects who were prosecuted for assisting suicide received relatively lenient penalties. In *R v. Marden*,⁸⁰ the offender pleaded guilty to the murder of his wife, who was suffering from chronic arthritic pain.⁸¹ The couple had made a suicide pact, but the husband-offender did not die.⁸² The husband was not required to serve any time in custody, having received a wholly suspended sentence.⁸³ Similarly, a wholly suspended sentence was imposed on the offender in *R v. Hood*,⁸⁴ where the offender aided his HIV-positive partner in committing suicide.⁸⁵ In *R v. Maxwell*,⁸⁶ a suspended

75. Bartels & Otlowski, *supra* note 5, at 544.

76. Quentin Dempster, *Do You Have the Right to Die?*, ABC NEWS AUSTRALIA (Nov. 28, 2011), <http://www.abc.net.au/news/2011-11-29/dempster-do-you-have-the-right-to-die/3702050>.

77. *Id.*

78. Crimes Act 1900 (NSW) (Austl.).

79. Dempster, *supra* note 78.

80. *R v. Marden* [2000] VSC 558 (Austl.).

81. *Id.* at ¶¶ 2, 6.

82. *Id.* at ¶ 16.

83. *Id.* at ¶ 25.

84. *R v. Hood* [2002] VSC 123 (Austl.).

85. *Id.* at ¶¶ 1, 7, 12, 23, 56.

86. *R v. Maxwell* [2003] VSC 278 (Austl.).

sentence was again imposed where the offender abetted the suicide of his wife, who was dying from breast cancer.⁸⁷ Finally, in *R v. Godfrey*,⁸⁸ a suspended sentence was imposed on an offender who had assisted his terminally-ill mother with committing suicide. In finding that a suspended sentence was appropriate, the *Godfrey* Court stated that it was not in the public's interest to impose a heavier sentence for a crime that was completely motivated by passion.⁸⁹

A more recent example of suspended sentencing is the case of *Director of Public Prosecutions v. Rolfe*.⁹⁰ In *Rolfe*, a husband and wife, who had formed a suicide pact, gassed themselves simultaneously.⁹¹ Paramedics were able to revive the husband, but the wife died.⁹² The Court imposed a wholly suspended sentence and told the husband: "Normal sentencing considerations do not apply to you. Your actions do not warrant denunciation; you should not be punished; there is no need to deter you from future offences; and you do not require reformation. Two sentencing elements require consideration: general deterrence . . . and mercy."⁹³

The above cases provide clear instances in which the individual who dies clearly consented to their own death. Of concern, then, are cases where the notion of consent by the person wishing to die is tenuous. For example, in *R v. Nicol*,⁹⁴ the offender, who agreed to follow his wife's request to help her commit suicide, admitted that his wife may have said "stop" at one point, but he felt that he "needed to finish the job."⁹⁵ The offender received a wholly suspended sentence of two years.⁹⁶

87. *Id.* at ¶¶ 1, 4, 42.

88. *R v. Godfrey* (Unreported, Supreme Court of Tasmania, Underwood, J.) (May 26, 2004) 1 (Austl.).

89. *Id.* See also *R v. Nicol* [2005] NSWSC 547, ¶ 23 (Austl.) ("There is no need for specific deterrence, no need to protect the community from him and no need for rehabilitation from any tendency towards criminal or other anti-social behavior."); *R v. Maxwell* [2003] VSC 278, ¶ 41 (Austl.) ("[I] do not believe that thoughtful members of the community, knowing all the facts relating to you personally and the unique circumstances of this tragic case, would regard your immediate imprisonment as necessary.").

90. *DPP (Vic) v. Rolfe* [2008] VSC 528 (Austl.).

91. *Id.* at ¶¶ 4, 8.

92. *Id.* at ¶¶ 4, 5, 8.

93. *Id.* at ¶ 25.

94. *R v. Nicol* [2005] NSWSC 547 (Austl.).

95. *Id.* at ¶¶ 11-12.

96. *Id.* at ¶ 34.

Similarly, in *Director of Public Prosecutions v. Nestorowycz*,⁹⁷ the offender attempted to kill her diabetic and dementia-suffering husband.⁹⁸ Although the husband often pleaded with his wife to be taken home from his care facility, there was no clear evidence that the husband had requested to die; therefore, the case did not fall within the parameters of voluntary euthanasia.⁹⁹ In the *Nestorowycz* Court's opinion, Judge Harper addressed the wife: "Judges do not have the right to decide whether someone else should live or die. Neither do you. Life – any life – is too important for that. So the Court cannot ignore the fact that you made a decision you had no right to make."¹⁰⁰

Consequently, in the absence of any legislation allowing euthanasia, a person in Australia seeking to undertake a medically supervised suicide would need to travel to an overseas jurisdiction where the practice is legal.¹⁰¹ *R v. Justins*¹⁰² illustrates the overlap amongst assisted suicide, murder, and suicide tourism.¹⁰³ In *Justins*, the deceased, who was seventy-two years old and suffering from Alzheimer's Disease, asked his de facto partner (the accused) and a friend to assist him in committing suicide.¹⁰⁴ The accused had been made aware that a certain drug—illegal in Australia—would help the deceased achieve his goal, and the friend travelled to Mexico to purchase and import the drug into Australia.¹⁰⁵ The deceased then ingested the drug and subsequently died.¹⁰⁶ Both the accused and the friend were charged with aiding and abetting suicide, but were ultimately convicted of manslaughter and accessory to manslaughter, respectively.¹⁰⁷

97. DPP (Vic) v. Nestorowycz [2008] VSC 385 (Austl.).

98. *Id.* at ¶¶ 1, 12, 18.

99. *See id.* at ¶¶ 3-4, 18.

100. *Id.* at ¶ 4.

101. Murphy, *supra* note 14, at 348.

102. *R v. Justins* [2008] NSWSC 1194 (Austl.) (Justins found guilty of manslaughter); *Justins v. The Queen* [2010] NSWCCA 242 (Austl.) (Court of Criminal Appeals quashed conviction and ordered new trial).

103. *R v. Justins* [2008] NSWSC 1194, ¶ 2, 14 (Austl.); *Justins v. The Queen* [2010] NSWCCA 242, 106 (Austl.).

104. *R v. Justins* [2008] NSWSC 1194, ¶¶ 2, 6, 7 (Austl.).

105. *Id.* at ¶ 2. The drug Nembutal was recently taken by a 100-year-old man who was not terminally ill but who wished to commit suicide. *See Police Tried to Halt Qld 100yo's Euthanasia: Doctor*, BRISBANETIMES.COM.AU (May 31, 2011), <http://www.brisbanetimes.com.au/queensland/police-tried-to-halt-qld-100yos-euthanasia-doctor-20110531-1fe8k.html>.

106. *R v. Justins* [2008] NSWSC 1194, ¶ 2 (Austl.).

107. *Id.* at ¶ 1 (Austl.) (Justins found guilty of manslaughter, and jury convicted

Unlike the United Kingdom, discussed *infra*, Australia does not have a statutory requirement or human rights convention that obligates the Director of Public Prosecutions to publish information concerning how he or she will exercise discretion in certain cases. Even so, Australians still deserve to be informed about the ways in which the DPP will exercise his or her discretion in cases involving assisted suicide and suicide tourism. Given the unique position that prosecutors hold in the criminal justice system, it is important that the DPP be transparent in how he or she determines where the public interest lies in each case considered for prosecution. As illustrated above, the current position in Australia on assisted suicide is unclear and inconsistent. And, as argued below, clarification of the law and policy in this area is required. First, however, the ways in which legislatures and courts in the United Kingdom are grappling with the complexities of assisted suicide.¹⁰⁸

V. UNITED KINGDOM

Just as in Australia, the United Kingdom has decriminalized suicide.¹⁰⁹ However, assisted suicide remains a criminal offence. Section 2(1) of the Suicide Act of 1961 (Suicide Act) provides that a person who “encourage[es] or assist[s] the suicide or attempted suicide of another person and . . . intended to encourage or assist suicide or an attempt at suicide. . . . is liable to imprisonment for a term not exceeding 14 years.”¹¹⁰

A. UK LEGISLATION

Similar to Australian legislation, discussed *supra*, the United Kingdom legislation recognizes that there are circumstances in which doctors may lawfully withdraw or withhold medical treatment from a patient.¹¹¹ Such circumstances exist when a

Jenning of being an accessory before the fact to that manslaughter); *Justins v. The Queen* [2010] NSWCCA 242 (Austl.) (Court of Criminal Appeals quashed conviction and ordered new trial). *See also* Rick Morton, *The Right to Life. . . and Death*, MAMAMIA (Apr. 29, 2011), <http://www.mamamia.com.au/health-wellbeing/the-right-to-die-with-dignity-say-euthanasia-campaigners/>.

108. It should be noted that the following jurisdictions have openly legalized assisted suicide: Belgium, the Netherlands, and the states of Oregon and Washington in the United States. However, this Article does not focus on these jurisdictions.

109. *See* Suicide Act 1961, 9 & 10 Eliz. 2 c. 60, § 1 (UK).

110. Suicide Act 1961, 9 & 10 Eliz. 2 c. 60, § 2(1) (UK).

111. *Pretty v. DPP* [2002] UKHL 61, 1 AC 800, [55].

doctor determines that it would not be in the “best interests” of the patient to commence or to continue medical treatment.¹¹²

The UK courts also recognize the “double effect” defense, described by Lord Goff in *Airedale NHS Trust v. Bland*¹¹³ as a situation where “[a] doctor may, when caring for a patient who is, for example, dying of cancer, lawfully administer painkilling drug despite the fact that he knows that an incidental effect of that application will be to abbreviate the patient’s life.”¹¹⁴

The issue of assisted suicide remains deeply contested in the UK.¹¹⁵ The three Assisted Dying for the Terminally Ill bills¹¹⁶ that were introduced during a three-year period all failed to pass through Parliament.¹¹⁷ More recently, the Assisted Dying (No. 2) Bill 2015-16¹¹⁸ was defeated in 2015;¹¹⁹ had it passed, it would have allowed terminally ill competent adults to legally obtain medically supervised assistance to end their own lives. However, the number of Members of Parliament who opposed the Bill was overwhelming, with 330 votes against and only 118 in favor.¹²⁰

Nevertheless, since 2010, the DPP has clarified how prosecutors will exercise their discretion in cases involving assisted suicide.¹²¹ After a period of public consultation, the DPP released its *Policy for Prosecutors in Respect of Cases of Encouraging or Assisting Suicide* (the *Policy*).¹²² As a result, the law on assisted suicide in the UK must now be read in conjunction with the prosecutorial guidelines, which set forth factors to consider when determining whether or not to prosecute in assisted suicide cases. Under the *Policy*, there are sixteen factors

112. *Airedale NHS Trust v. Bland* [1993] AC 789 (HL), 2 WLR 316, 15-16.

113. *Id.* at 13.

114. *Id.*

115. See Shaw, *supra* note 23, at 333.

116. Assisted Dying (No. 2) Bill 2015-16.

117. See Shaw, *supra* note 23, at 333; Patient (Assisted Dying) Bill 2002-03, HL Bill [37] (UK); Assisted Dying for the Terminally Ill Bill 2003-04, HL Bill [17] (UK); Assisted Dying for the Terminally Ill Bill 2005-06, HL Bill [36] (UK).

118. Assisted Dying (No. 2) Bill 2015-16, HC Bill [7] (UK).

119. John Bingham, *Right to Die: MPs Reject Assisted Dying Law*, TELEGRAPH (Sept. 11, 2015), <http://www.telegraph.co.uk/news/uknews/assisted-dying/11857940/Assisted-dying-vote-in-House-of-Commons.html>.

120. *Id.*

121. DPP, *Policy for Prosecutors in Respect of Cases of Encouraging or Assisting Suicide*, CPS (Feb. 2010) (last updated Oct. 2014), http://www.cps.gov.uk/publications/prosecution/assisted_suicide_policy.html [hereinafter *Policy*].

122. *Id.*

that favor prosecution and six factors that tend against it.¹²³ On the one hand, prosecution is more likely if, for example, the “victim”¹²⁴ was under eighteen years of age, if the victim did not have the capacity to reach an informed decision, and did not seek assistance or was pressured into committing suicide.¹²⁵ On the other hand, public interest factors tending against prosecution consider whether or not the victim unequivocally indicated his or her wish to commit suicide, whether the victim suffered from a terminal illness, and whether the assistor offered only minor assistance.¹²⁶

In particular, the *Policy* explicitly requires an assessment of whether “the suspect was wholly motivated by compassion” as a public interest factor tending against prosecution.¹²⁷ As such, the *Policy* places greater emphasis on the suspect’s motivation, rather than on the health of the person seeking assistance.¹²⁸ The practical implication of this is that a person who has acted compassionately in aiding another person who desired to die is unlikely to be prosecuted.¹²⁹ Such a motive-based approach is surprising, given the traditional treatment of motive in common law jurisdictions as legally unimportant (provided that there is sufficient proof of the *actus reus* together with the requisite *mens rea* for committing the offence).¹³⁰

B. UK CASES

The DPP was forced to consider its policy on assisted suicide after two important House of Lords decisions. First, in *R (Purdy) v. DPP*,¹³¹ the applicant, who was suffering from multiple sclerosis, sought information on whether her husband would be prosecuted in the event he assisted with her suicide.¹³² The

123. *Id.* at [43], [45].

124. In the *Policy*, the term “victim” is used to describe the person who commits or attempts to commit suicide. Although it was recognised that “[n]ot everyone may agree that this is an appropriate description,” it was considered to be the most suitable term to use in the context of the criminal law. *Id.* at [7].

125. *Id.* at [43].

126. *Id.* at [45].

127. *Id.*

128. *See id.* at [43], [45].

129. *See* Alexandra Mullock, *Overlooking the Criminally Compassionate: What are the Implications of Prosecutorial Policy on Encouraging Assisting Suicide?*, 18 *MED. REV.* 442, 453-54 (2010).

130. *Id.* at 455.

131. *R (Purdy) v. DPP* [2009] UKHL 45.

132. *Id.* at [17], [38].

applicant argued that the DPP should publish a policy relating to prosecution in cases where the suicide took place outside of the UK.¹³³ In its unanimous decision, the House of Lords were of the view that the applicant, and people in similar situations, are entitled to access sufficient information to guide their decision-making.¹³⁴ It was also held that assisted suicide was a specific kind of offence that merited clarity concerning the manner in which the DPP would exercise his or her discretion to prosecute.¹³⁵ Therefore, the DPP was ordered to “promulgate an offence-specific policy identifying the facts and circumstances which [the DPP] will take into account in deciding . . . whether or not to consent to a prosecution.”¹³⁶

Purdy can be contrasted with the earlier House of Lord’s decision in *Pretty v. DPP*.¹³⁷ In *Pretty*, the applicant, who was suffering from motor neurone disease, wanted assurance from the DPP that, if her husband assisted in ending her life, he would not be subject to prosecution.¹³⁸ The applicant argued that the threat of prosecution in compassionate cases was a breach of the rights guaranteed under the European Convention of Human Rights.¹³⁹ However, the House of Lords unanimously rejected the applicant’s rights-based arguments.¹⁴⁰ The subtle difference between the *Purdy* and *Pretty* decisions is that, unlike *Pretty*, the applicant in *Purdy* was not seeking a guarantee that her husband would not face legal consequences; she was seeking information detailing how the DPP would exercise its discretion to prosecute in cases involving assisted dying.¹⁴¹

Nevertheless, the *Policy* clarifies important issues concerning suicide tourism. The DPP has now explained that the

133. *See id.* at [30].

134. *Id.* at [104]-[06].

135. *See id.* at [1].

136. *Id.* at [56].

137. *Pretty v. DPP* [2002] UKHL 61, 1 AC 800.

138. *Id.* at [1].

139. *Id.* at [41]. In particular, Article 8(1) of the ECHR provides that “[e]veryone has the right to respect for his private and family life, his home and his correspondence.” Eur. Conv. On H.R. art. 8(1). Article 8(2) requires that any interference with the right bestowed in Article 8(1) be “in accordance with the law.” Eur. Conv. On H.R. art. 8(2).

140. *Pretty v. DPP* [2002] UKHL 61, 1 AC 800, [124].

141. Some have criticised the House of Lord’s decision in these two cases for being difficult to reconcile. *See, e.g.,* John Keown, *In Need of Assistance?*, NEW L. J. (Oct. 2, 2009), <http://www.newlawjournal.co.uk/nlj/content/need-assistance>; Stella Hambly, *The Choice to Give Up Living: Compassionate Assistance and the Suicide Act*, 3 UCLAN J. UNDERGRADUATE RES. 1, 12 (Dec. 2010).

location of death is irrelevant, and that its prosecutorial policy “[i]s going to cover all assisted suicides. The same broad principles will apply. They’ve got to apply to all acts, in the jurisdiction or out of it.”¹⁴² Thus, an assisted suicide in London is legally equivalent to an assisted suicide in, for example, Zurich.¹⁴³ It is worth mentioning the decision in *In Re Z*,¹⁴⁴ which stated in obiter that, although the contemplated suicide by a husband and wife was not a criminal act in Switzerland, it seems “inevitable that by making arrangements and escorting [the wife] on the flight, [the husband] will have contravened Section 2(1) [of the Suicide Act].”¹⁴⁵

Despite the prosecutorial policy, UK prosecutors have shown a reluctance to prosecute in cases involving assisted suicide.¹⁴⁶ It has been reported that, of the forty cases of suspected assisted suicide between 2009 and 2011, zero were prosecuted.¹⁴⁷ For example, the DPP refused to prosecute parents who assisted their twenty-three-year-old son to travel to Zurich to commit suicide, even though he was not terminally ill.¹⁴⁸ The DPP was of the opinion that it would not be in the public’s interest to prosecute because the son, as a “fiercely independent young man . . . was not in any way influenced by the conduct or wishes of his parents [to take his own life]—on the contrary he proceeded in the teeth of their imploring him not to do so.”¹⁴⁹

Some have criticized the United Kingdom’s prosecutorial policy as being limited in scope.¹⁵⁰ This Article does not intend to review the growing literature examining the *Policy*. However, it is notable that, as some critics have suggested, the *Policy* is limited in that it only applies to assisted suicide—it does not deal

142. Sarah Sharples, *Suicide Assistance Laws Need Clarification: Nitschke*, LAWS. WKLY (Aug. 5, 2009), <http://www.lawyersweekly.com.au/news/4808-suicide-assistance-laws-need-clarification-nitschk> (quoting Head of the UK Crown Prosecution Service, Keir Starmer).

143. Mullock, *supra* note 129, at 449.

144. *In Re Z* [2004] EWHC 2817, [2005] 1 WLR 959.

145. *Id.* at [14].

146. *See* Mullock, *supra* note 129, at 447.

147. David Holmes, *Legalise Assisted Suicide, UK Commission Urges*, 379 LANCET 15, 15 (Jan. 7, 2012).

148. Keir Starmer, *Decision on Prosecution—The Death by Suicide of Daniel James*, CPS (Sept. 12, 2008), http://www.cps.gov.uk/news/articles/death_by_suicide_of_daniel_james/.

149. *See id.* (for a detailed explanation for not prosecuting).

150. *See, e.g.*, Ben White & Jocelyn Downie, *Prosecutorial Guidelines for Voluntary Euthanasia and Assisted Suicide: Autonomy, Public Confidence and High Quality Decision-Making*, 36 MELB. U. L. REV. 656, 663-69 (2012).

with voluntary euthanasia.¹⁵¹ This has led some to criticize the *Policy* on the grounds that it does not respect the autonomy of those who seek to end their lives voluntarily.¹⁵² To overcome some of the limitation of the *Policy*, White and Downie recommend that three principles should be adopted when constructing Australia's own prosecutorial guidelines: (1) respecting autonomous choice; (2) promoting high quality decision-making by prosecutors; and (3) ensuring public confidence in the decisions of prosecutors.¹⁵³ These sound principles, together with the UK's experience, will greatly assist Australia in developing its own model prosecutorial guidelines.

VI. SHOULD ASSISTED SUICIDE BE PROSECUTED?

This Part addresses the arguments made both for an against the prosecution of assisted suicide. From the outset, it should be noted that this is a highly controversial topic, of which many people hold differing views. It is thereby unlikely that universal approval will ever be reached. However, an issue should not be ignored simply because it is complex, and, as stated by one Member of Parliament, "we are capable of actually drafting and enacting bills into laws that are complex."¹⁵⁴

Section A. of this Part first looks to arguments in favor of prosecution MORE. Section B. addresses the opposite side of the argument, and discusses MORE

A. ARGUMENTS IN FAVOR OF PROSECUTION

Historically, laws against assisted suicide were based on religious doctrines—only God had the right to determine when a person should die, and suicide was a rejection of God's gift of life.¹⁵⁵ Some have questioned, however, whether such arguments still have force in a secular society such as Australia.¹⁵⁶ It is suggested that many people in contemporary society would be more supportive of laws promoting an individual's right to autonomy, which includes the right to end one's life using the

151. *See id.* at 669.

152. *See id.* at 663.

153. *Id.* at 671-72.

154. 'You're All Gutless': Euthanasia Bill Defeated, *supra* note 73.

155. B. Steinbock, *The Case for Physician Assisted Suicide: Not (Yet) Proven*, 31 J. MED. ETHICS 235, 236 (2005).

156. *Id.*

assistance of family members and experts.¹⁵⁷

One strong factor tending towards prosecution is that the suicide may not have been voluntarily and expressly requested.¹⁵⁸ Indeed, in some instances, and as evidenced in the *Nicol* and *Nestorowycz* cases, whether the deceased requested assistance in dying may be tenuous and difficult to ascertain. This is further complicated by the fact that the person who sought assistance is no longer alive, and, therefore, is unable to provide evidence of a voluntary decision to die.¹⁵⁹

A second issue is whether a person had the mental capacity to make an informed decision to end his or her life. In *Justins*, evidence supported the argument that the deceased was not mentally competent.¹⁶⁰ Specifically, the deceased had previously applied to Dignitas¹⁶¹ for assistance, but his application was rejected because the organization had doubts as to his capacity to make an informed decision.¹⁶² In considering this evidence, the Court concluded that the jury must have been satisfied beyond a reasonable doubt that a reasonable person in the accused's position would have been aware of the deceased's lack of capacity.¹⁶³

Particularly problematic is determining whether assistance was motivated by self-interest or some ulterior motive. In many cases, the ulterior motive may not be detectable; it does not take a criminal mastermind to feign compassion or conceal self-interest.¹⁶⁴ In *R v. McShane*,¹⁶⁵ evidence of self-interest was captured in the form of secret video surveillance, which showed the defendant instructing her mother on how to overdose, and then informing her mother that her assistance must be kept secret (otherwise she would be denied inheritance).¹⁶⁶ The facts of *McShane* are exceptionally rare, however, and it would be unlikely for the prosecution in a majority of cases to have access to such compelling evidence.¹⁶⁷

157. *Id.* at 235-36.

158. Murphy, *supra* note 14, at 352-53.

159. Cohen, *supra* note 23, at 717.

160. *R v. Justins* [2008] NSWSC 1194, ¶¶ 5, 6-7, 15, 17, 20 (Austl.).

161. *See Who is DIGNITAS*, *supra* note 31.

162. *R v. Justins* [2008] NSWSC 1194, ¶¶ 14-15 (Austl.).

163. *Id.* at ¶ 5.

164. *See* Mullock, *supra* note 129, at 454.

165. *R v. McShane* (1977) CLR 737.

166. *Id.* at 737.

167. *See* Mullock, *supra* note 129, at 454.

Moreover, those against legalizing assisted suicide frequently argue that it would pressure the frail and vulnerable to end their lives.¹⁶⁸ It is believed that such pressure stems from the fact that many disabled patients may feel that their existence burdens their families.¹⁶⁹ Legalizing assisted suicide may also give rise to a range of conflicting interests, especially where a person has a financial interest. For example, legalizing assisted suicide may, in cases of inheritance, “empower heirs and others to pressure and abuse older people to cut short their lives.”¹⁷⁰ A conflict of interest might also arise where a person will receive some sort of remuneration for their assistance.¹⁷¹ Particularly concerning in such cases are organizations that facilitate suicide for a fee and, therefore, are motivated by profit.¹⁷²

The possibility also exists that medical physicians have misdiagnosed their patients. In London, for example, it was discovered that a number of patients were wrongly assessed as being in a persistent vegetative state, which had implications for their care, including the removal of life-support.¹⁷³ Conversely, even if a diagnosis is correct, the accuracy of a doctor’s prediction that a patient will die within a few months’ time remains questionable.¹⁷⁴ Accordingly, it has been suggested that, rather than alter the existing laws on assisted suicide, there should be a duty imposed on governments “to minimize the fear of dying badly.”¹⁷⁵

Those in favor of prosecution also argue that people who are not terminally ill may also obtain assistance in committing suicide if not deterred. This includes minors,¹⁷⁶ people suffering from treatable depression,¹⁷⁷ or those who choose to commit

168. James Kirkup, *Gordon Brown: Don't Legalise Assisted Suicide*, TELEGRAPH (Feb. 23, 2010), <http://www.telegraph.co.uk/news/uknews/law-and-order/7301399/Gordon-Brown-dont-legalise-assisted-suicide.html>.

169. *Id.*

170. Will Johnson et al., *Why We Should Be Afraid of Assisted Suicide*, LIFE NEWS.COM (Nov. 17, 2011), <http://www.lifenews.com/2011/11/17/why-we-should-be-afraid-of-assisted-suicide-in-canada/>.

171. White & Downie, *supra* note 150, at 689.

172. *Id.*

173. Odone, *supra* note 1, at 46.

174. *Id.*

175. Kirkup, *supra* note 168 (quoting Gordon Brown).

176. White & Willmott, *supra* note 34, at 421.

177. It has been found that many people suffering from a terminal illness who request assistance to commit suicide are often suffering from depression. A significant proportion of these people could be treated with anti-depressants and/or psychological therapy. Odone, *supra* note 1, at 45.

suicide simply due to the fear of dying from old age.¹⁷⁸ The solution to this problem, however, is not found simply in prosecution. Rather, the legislation should provide adequate safeguards to restrict assistance to adults who are both mentally competent and suffering from a terminal illness.¹⁷⁹

The slippery slope objection is also commonly raised against legalization of assisted suicide. Under this objection, if assistance were legalized, it would diminish the respect for human life and lead to the acceptance of lives being prematurely ended.¹⁸⁰ Conversely, it has been argued that legalizing suicide would not lead to such dire consequences; rather, “[f]ar from reducing respect for human life, respect is enhanced when the personal autonomy of the frail and vulnerable is recognized and protected.”¹⁸¹

Finally, it is feared that if Australia legalizes assisted suicide, it will attract suicide tourism.¹⁸² It is believed that legalizing assisted suicide would attract foreigners who wish to die, and would turn assisted suicide services into a profit-driven business.¹⁸³ However, as highlighted by Dr. Nitschke, suicide tourism can easily be avoided enforcing strict residential requirements, such that foreigners would not be able to access laws that decriminalize assisted suicide.¹⁸⁴

178. See Wesley J. Smith, *Fear of Dying of Old Age Assisted Suicide in Switzerland*, FIRST THINGS (Apr. 3, 2011), <http://www.firstthings.com/blogs/secondhandsmoke/2011/04/03/fear-of-dying-of-old-age-assisted-suicide-in-switzerland/>.

179. *Right-to-die Activist Nan Maitland ‘Died with Dignity’*, BBC (Apr. 4, 2011), <http://www.bbc.co.uk/news/uk-12959664>.

180. See, e.g., Marshall B. Kapp, *Old Folks on the Slippery Slope: Elderly Patients and Physician-Assisted Suicide*, 35 DUQUESNE L. REV. 443, 443-44 (1997); Margaret P. Battin et al., *Legal Physician-Assisted Dying in Oregon and The Netherlands: Evidence Concerning the Impact on Patients in “Vulnerable” Groups*, 33 J. MED. ETHICS 591, 591-92 (2007); J. Pereira, *Legalizing Euthanasia or Assisted Suicide: The Illusion of Safeguards and Controls*, 18(2) *Current Oncology* e38, e38-40 (2011).

181. *The Slippery Slope Objection*, WORLD FED’N OF RT. TO DIE SOC’YS, <http://www.worldrtd.net/slippery-slope-objection> (last visited Sept. 10, 2016).

182. Peter James Saunders, *12 Reasons Why Euthanasia Should Not be Legalised*, NAT’L ALLIANCE OF CHRISTIAN LEADERS (2010), http://nacl.com.au/nacl/index.php?option=com_content&view=article&id=41:euthanasia&catid=24:articles&Itemid=30.

183. Helen Pidd, *‘Death Tourism’ Leads Swiss to Consider Ban on Assisted Suicide*, GUARDIAN (Oct. 28, 2009), <http://www.guardian.co.uk/society/2009/oct/28/swiss-consider-ban-assisted-suicide>.

184. Punch Team, *Q&A: Plans for Australia’s First Euthanasia Clinic*, PUNCH (Mar. 29, 2011), <http://web.archive.org/web/20120408115622/http://www.thepunch.com.au/articles/wil-1-australia-soon-have-its-first-euthanasia-clinic>.

B. ARGUMENTS AGAINST PROSECUTION

The law recognizes the freedom for individuals to self-terminate their lives.¹⁸⁵ Accordingly, it should follow that individuals are free to seek the assistance of others in bringing about that result.¹⁸⁶ People who reside in jurisdiction that criminalize assisted suicide may feel that they have no other option but to engage in suicide tourism, and, as a result, would need to be physically fit to travel.¹⁸⁷

It can also be argued that it is not in the public interest to prosecute in cases of assisted suicide. Prosecuting a merciful assistant has been previously deemed a waste of prosecutorial resources and against the public interest to pursue a case that is anticipated to only result in a light sentence.¹⁸⁸ And, as Australian case law provides, suspects of assisted suicide are generally afforded leniency. As Sir Shawcross pointed out, “[i]t is not always in the public interest to go through the whole process of the criminal law if, at the end of the day, perhaps because of mitigating circumstances, [or] what the defendant has already suffered, only a nominal penalty is likely to be imposed.”¹⁸⁹

Moreover, it has not been substantiated that failing to prosecute assisted suicide would result in abuses or pose a threat to vulnerable people.¹⁹⁰ Critics have drawn on evidence from jurisdictions that permit assisted dying in order to demonstrate the feasibility of implementing “significant safeguards, which are working well.”¹⁹¹ In fact, annual formal review of jurisdictions that have openly legalized euthanasia shows that there has been no significant increase in assisted dying, and that many patients have reported a great sense of relief now that they know they have a choice to die in a dignified manner and with medical assistance.¹⁹² Notably, the safeguards that have been

185. Bartels & Otlowski, *supra* note 5, at 550.

186. *Id.*

187. Murphy, *supra* note 14, at 348.

188. HUXTABLE, *supra* note 12, at 79.

189. Murphy, *supra* note 14, at 351 (quoting Sir Hartley Shawcross QC before the House of Commons in 1951).

190. Ian Austen, *Canada: Top Scientists Urge Allowing Assisted Suicide*, N.Y. Times (Nov. 15, 2011), http://www.nytimes.com/2011/11/16/world/americas/canada-top-scientists-urge-allowing-assisted-suicide.html?_r=1&ref=assisted-suicide.

191. Canadian Press, *Lawyer: Time to Look Again at Assisted Suicide*, SPEC (Dec. 1, 2011), <http://www.thespec.com/news/canada/article/633339—lawyer-time-to-look-again-at-assisted-suicide> (internal quotations omitted).

192. In particular, annual reviews of Oregon’s (USA) euthanasia laws show that

implemented in these jurisdictions include the following:

1. Ensuring that the person is well-informed about his or her options, including the palliative and supportive care available;
2. Ensuring that the person made the decision voluntarily;
3. Restricting assistance to only those suffering from terminal illness, requiring at least two doctors to confirm that the patient's condition is in fact terminal; and
4. Requiring a cooling-off period before any procedure is carried out.¹⁹³

Furthermore, continuing to criminalize assisted suicide is anomalous from the present law that permits doctors to withdraw medical treatment in certain circumstances.¹⁹⁴ As highlighted previously, there is no obligation at common law for medical professionals to treat an adult where no benefit would be conferred.¹⁹⁵ This is further complicated by the recognition of advance care directives, which make it mandatory for doctors to respect the wishes of terminally ill patients who have expressed their refusal of life-sustaining measures prior to becoming incompetent.¹⁹⁶

The reality is that global travel has made suicide tourism an option for many people who wish to end their lives. Thus, continuing to criminalize assisted suicide tourism is less than satisfactory—it comes at the great cost of exporting suicidal citizens to an overseas jurisdiction where assistance is too readily available.

its laws are working well and that there has not been a significant increase in physician-assisted suicide since it was legalized. *See, e.g.,* Ezekiel J. Emanuel et al., *Attitudes and Practices of Euthanasia and Physician-Assisted Suicide in the United States, Canada, and Europe*, 316(1) *JAMA* 79-90 (July 5, 2016), <http://jama.jamanetwork.com/article.aspx?articleid=2532018>.

193. The Voluntary Assisted Dying Bill implemented many of these safeguards. *See* Voluntary Assisted Dying Bill 2013 (Tas) ss 9-10, 12, 14, 19 (Austl.). *See also* Medical Treatment (Physician Assisted Dying) Bill 2008 (Vic) (Austl.).

194. STANDING COMM. ON SOC. ISSUES, NSW PARLIAMENT, LEGIS. COUNCIL, SUBSTITUTE DECISION-MAKING FOR PEOPLE LACKING CAPACITY, REP. NO. 43, 195-96 (2010).

195. *See, e.g.,* *Messiha v. South East Health* [2004] NSWSC 1061 (Austl.).

196. Odone, *supra* note 1, at 50-51.

VII. RECOMMENDATIONS FOR AUSTRALIA

As this Article makes clear, the legal status of assisted suicide in Australia is ambiguous and inadequate. Thus, it is time that Australian governments devise a legal framework that clearly sets out the circumstances in which terminally ill people may seek assistance in dying. This Article does not argue that euthanasia and assisted suicide should be legalized—it argues that these issues be seriously considered by parliaments after wide public consultation, and be guided by the underlying principle of individual autonomy.

At the very least, and especially while euthanasia and assisted suicide remain illegal, prosecuting and sentencing guidelines should be formulated and made publicly available. This would ensure that decisions to prosecute are rendered predictably and consistently, which would benefit a range of people, including the family members of terminally ill patients, medical practitioners, and prosecutors. Such a policy should make clear that it does not in any way decriminalize the offence of assisting suicide, and should not be taken as an assurance that a person will be immune from prosecution if he or she offers assistance. Accordingly, the criminal law will continue to act as a sufficient deterrent from committing murder disguised as suicide, but will at the same time recognize that compassionate assistance is a different form of killing, and one that deserves to be more mercifully dealt with.

It is also recommended that Australia's prosecutorial policy explicitly state the circumstances where helping someone travel to another jurisdiction to commit suicide would be grounds for prosecution. On the other hand, Australia can follow the approach taken in the UK, so that the jurisdiction where the suicide takes place is irrelevant to the lawfulness of assisting suicide. This argument is strengthened due to the fact that many acts of preparatory assistance occur in the home jurisdiction.¹⁹⁷

On the other hand, it is debatable as to whether it is in the public interest to prosecute in cases involving suicide tourism. Some have persuasively argued that it would be against the public interest to prosecute sympathetic family members and friends accompanying a loved one abroad.¹⁹⁸

197. Murphy, *supra* note 14, at 350.

198. HUXTABLE, *supra* note 12, at 64-66.

VIII. CONCLUSION

As the population is aging and people are living longer with severe illnesses, it is pertinent that Australia considers its current stance on assisted suicide and suicide tourism. When someone suffering from a severe illness contemplates death, the law in Australia permits that person to end his or her life. However, the reality is that death often involves family and friends.¹⁹⁹ The Australian experience highlights the fact that parliaments persistently oppose public opinion.²⁰⁰ The issue of Australia legalizing voluntary euthanasia should be decided after consultation with the public, and any legislative reforms that follow should represent the public's opinion. However, regardless of whether or not such laws are passed, it is inevitable that instances of assisted suicide and suicide tourism are occurring and will continue to occur.²⁰¹

At the very least, there should be recognition of circumstances where assisted suicide falls within the parameters of the law. Requiring the DPP to publish an offence-specific policy on assisted suicide would help achieve greater certainty in the criminal law, and would enable individuals to regulate their lives in a way that minimizes the prospect of being prosecuted.²⁰² The final guidelines published by the DPP in the UK, formulated after consultation with academics, health providers, politicians and religious groups,²⁰³ provide direction on how Australia should formulate its own prosecutorial policy. On a final note, the reality of modern medicine has transformed our experience of life and death so that, in the words of Jean Martin, “‘Il n’y a pas de mort naturelle’ (There is no natural death).”²⁰⁴

199. See Philip Luker & T. Parramore, *Submission by the New South Wales Branch of the Australian Voluntary Euthanasia Society on the Need for Changes in the Laws Relating to Suicide*, 9 AUSTL. J. FORENSIC SCI. 3, 5 (1976).

200. See Lyn Carson & Brette Blakely, *What Can Oregon Teach Australia About Dying?*, 6 J. POL. & L. 30, 38-39 (2013).

201. Bartels & Otlowski, *supra* note 5, at 551.

202. Jeremy W. Rapke, *R (Purdy) v DPP – Its Implications for Prosecuting Authorities*, CONF. AUSTL. & PACIFIC PROSECUTORS 17 (Brisbane, Oct. 2009), http://web.archive.org/web/20120321183453/http://www.opp.vic.gov.au/resources/1/a/1a61df80404a17d6b4b5fff5f2791d4a/purdy_implications_speech+_revised_oct09.pdf.

203. Thomas Faunce, *Justins v The Queen: Assisted Suicide, Juries and the Discretion to Prosecute*, 18 JLM 706, 715 (2011).

204. Ariane Gigon, *Case Puts Assisted Suicide at a Crossroads*, SWISSINFO.CH (Jan. 4, 2011), http://www.swissinfo.ch/eng/politics/Case_puts_assisted_suicide_at_a_crossroads.html?cid=29157532 (quoting Jean Martin).