



NORTHERN  
IRELAND  
HUMAN  
RIGHTS  
COMMISSION

## **Response to the Public Prosecution Service consultation on Guidance on the Offence of Assisted Suicide**

### **Summary**

The Public Prosecution Service (PPS) consultation on the interim Guidance on prosecuting cases of assisted suicide was, issued on, and effective from, 23 September 2009.

The Commission's response focuses on the interpretation and application in Northern Ireland of Article 2 of the European Convention on Human Rights (the right to life), including the positive obligation on the state to take appropriate steps to safeguard the lives of those within its jurisdiction, and the procedural aspect of Article 2 which requires that the state effectively investigate unnatural deaths in a manner capable of leading to a prosecution.

1. The Northern Ireland Human Rights Commission (the Commission) is a statutory body created by the Northern Ireland Act 1998. It has a range of functions including reviewing the adequacy and effectiveness of Northern Ireland law and practice relating to the protection of human rights,<sup>1</sup> advising on legislative and other measures which ought to be taken to protect human rights,<sup>2</sup> advising on whether a Bill is compatible with human rights<sup>3</sup> and promoting understanding and awareness of the importance of human rights in Northern Ireland.<sup>4</sup> In all of that work the Commission bases its positions on the full range of internationally accepted human rights standards, including the European Convention on Human Rights (ECHR), other treaty obligations in the Council of Europe and United Nations systems, and the non-binding 'soft law' standards developed by the human rights bodies.
2. The Commission welcomes the opportunity to contribute its views to the Public Prosecution Service (PPS) consultation on the interim Guidance, issued on and effective from 23 September 2009, on prosecuting cases of assisted suicide.
3. Since its creation, the Commission has taken a particularly close interest in the interpretation and application in Northern Ireland of Article 2 of the ECHR (the right to life), including the positive obligation on the state to take appropriate steps to safeguard the lives of those within its jurisdiction, and the procedural aspect of Article 2 which requires that the state effectively investigate unnatural deaths in a manner capable of leading to a prosecution. Both of these aspects of Article 2 are clearly engaged in relation to assisted suicide – the first before the event and the second after it.
4. In relation to the first aspect, the state's positive obligations from Article 2 in relation to suicide include, in the public health arena, the resourcing and implementation of suicide prevention strategies, counselling services, hospice and end-of-life palliative care, and other services and facilities designed to reduce the incidence of suicide, particularly among sections of the population at particular risk. Additionally, when an individual is identified as being at particular risk of suicide, the state is obliged to ensure the provision of appropriate psychiatric, medical and social care and support to try to reduce the risk.

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<sup>1</sup> Northern Ireland Act 1998, s.69(1).

<sup>2</sup> *Ibid*, s.69(3).

<sup>3</sup> *Ibid*, s.69(4).

<sup>4</sup> *Ibid*, s.69(6).

5. In relation to legislative provision, the European Court of Human Rights (ECtHR) in its judgment in the leading assisted suicide case, *Pretty v the UK* (application 2346/02), said that the state's positive obligation includes

... a primary duty to secure the right to life by putting in place effective criminal-law provisions to deter the commission of offences against the person backed up by law-enforcement machinery for the prevention, suppression and sanctioning of breaches of such provisions...
6. The Court went on to note, and this is of particular relevance to assisted suicide, that the state's obligation to safeguard life

...may also imply in certain well-defined circumstances a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual...
7. The state is obviously not in violation of Article 2 in every case where it fails to prevent a suicide. Suicide is by definition an act of individual will; it is not a crime, and it is an unfortunately common occurrence (in the region of 200 cases per year in Northern Ireland). The state cannot hope to prevent every individual at risk from dying by suicide, and even when a particularly high risk is identified in an individual, suicides can still happen. This remains the case when the individual is in the direct care of the state, as where that risk is related to a mental illness and the person has been taken into hospital for their own protection, or when the person is in prison. The degree of surveillance and care needed to provide absolute protection from self-harm can be so intrusive as to engage other human rights and, given the difficulty of identifying the precise degree of risk in a particular case, deaths by suicide may still occur even in closely controlled conditions.
8. The present consultation, however, is not concerned with suicide *per se* but with the involvement of a person or persons in facilitating (aiding, abetting, counselling or procuring) the suicide of another. The state has made such acts criminally liable: s.13 of the Criminal Justice Act (Northern Ireland) 1966 established "criminal liability for complicity in another's suicide", and on commencement of s.60 of the Coroners and Justice Act 2009 (the 2009 Act), the offence is more extensively defined, extending for example to the provision of information on 'suicide clinics' to enable a third party to assist

a person unknown to the information provider, but the maximum penalty remains unchanged at 14 years imprisonment (notwithstanding a recommendation from the Criminal Law Revision Committee in 1980<sup>5</sup> that it be reduced to seven years).

9. The Commission is not in this consultation asked to comment on the law on assisting suicide. Neither is it addressing the moral, ethical or religious concepts engaged by the right to life and a putative 'right to die' which no human rights instrument asserts. The absence of any such right in Articles 2 and 8 (among others) of the ECHR was extensively addressed by the ECtHR in the *Pretty* judgment, which also references the domestic jurisprudence and the moral, religious and ethical concerns around suicide and its assistance:

...Article 2 cannot, without a distortion of language, be interpreted as conferring the diametrically opposite right, namely a right to die; nor can it create a right to self-determination in the sense of conferring on an individual the entitlement to choose death rather than life.

10. The Commission therefore makes this submission in the context of the law as it stands: there is no human right to commit or attempt suicide, and no human right to assist in either. Assisting suicide or attempted suicide is a criminal offence and the question for the Commission is whether the policy approach to prosecution set out in the interim Guidance is human rights-compliant.
11. The procedural obligation on the state from Article 2 ECHR is not that a criminal prosecution be brought in every instance of death by homicide or assisted suicide, but that the state ensure an investigation that is sufficiently rigorous, independent, effective and transparent. In cases of assisted suicide that would be likely to involve an investigation by the Police Service under the supervision of the PPS, and an inquest. Where the assistance, or even an attempt to assist, does not result in a suicide or attempted suicide, an offence is still committed and Article 2 is still engaged, and there remains a duty on the state to investigate to a standard that is capable of founding a prosecution.
12. The interim Guidance sets out a number of factors to be weighed by prosecutors in determining whether to proceed

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<sup>5</sup> Fourteenth Report (1980, Cmnd 7844).

with a prosecution. The police investigation is required in all cases and no decision is to be made until all relevant material has been secured by full and thorough enquiry by the police. The evidential test must then be satisfied; this test, set out on p2 of the Guidance, must establish that there was a suicide or attempted suicide, and that the suspect intentionally assisted (or attempted to assist) by acts that the suspect knew were capable of constituting assistance. The Guidance notes that where the act causing, or attempting to cause, death is not the act of the victim, the offence will be actual or attempted murder or manslaughter.

13. The evidential test having been set out, the Guidance turns to the public interest test, setting out a range of factors that are to be taken into account in favour of prosecution, and a range of factors that weigh against prosecution. These public interest factors, which do not represent a comprehensive list (allowing for consideration of special factors in each case), are categorised: eight factors will weigh heavily in favour of prosecution, eight others favour prosecution, seven factors weigh heavily against a prosecution and six others can also indicate that the public interest would not be served by prosecuting. (The lists of factors are appended for ease of reference.) The prosecutor must then refer the assessment to the Director of the PPS who will determine whether to prosecute.
14. While it has some comments to offer on the detail, the Commission broadly agrees with the approach taken. In offences related to assisted suicide, as in every area of the criminal law, there are degrees of culpability and degrees of extenuation. Prosecutors are under a duty to assess not only the evidential base but whether the public interest lies in a decision to prosecute. The factors set out in the Guidance as weighing for or against prosecution appear to the Commission to be reasonable and proportionate, with in both cases the first grouping constituting the most important considerations. The Commission further notes that the Northern Ireland interim Guidance is the same as that applied in England and Wales, and it does not see any need to vary the approach taken to prosecuting in this jurisdiction.
15. In terms of the detail, the Commission notes that the first factor cited in favour of prosecution is that "The victim was under 18 years of age". The Commission favours public authorities, and the law, recognising as children all persons under the age of 18, as provided for in the international

standards, which also establish a particular obligation (for example, in Article 6 of the Convention on the Rights of the Child) to protect the child's right to life. The Commission agrees that assisting the suicide of a child must always be a matter weighing very heavily, perhaps compellingly, in favour of prosecution. However, when the prosecutor, or as may be preferable the court, comes to assess whether a person under 18 years of age had capacity to reach an informed decision to commit suicide, it may be that account should be taken of the Gillick principle. The House of Lords in *Gillick*<sup>6</sup> held that when children have the intelligence and understanding to be competent to give or withhold consent to a particular treatment, the parental right to consent terminates. If very many of the extenuating factors are evident and it is shown that the child, being Gillick-competent, reached a clear, settled and informed decision, the question arises if that should be treated differently for prosecutorial or sentencing purposes from a case where the child whose death was "assisted" had no proven competence to reach informed decisions. Where no informed consent can be given, the issue is not suicide but homicide.

16. Likewise, where at point 7 a factor in favour of prosecution can be that the suspect "stood to gain in some way from the death", account should be taken of the likelihood that a suspect who had a close family or personal relationship with the deceased would in many instances be expected to inherit from the deceased had they died other than in an assisted suicide. Outside the context of material gain, it may be that an assisting person could "gain" from some change in circumstances following from the death, for example by being relieved of caring responsibilities, and again this might have ensued from the death even had they not assisted. Great weight should attach to actions that are clearly shown to have been motivated in whole or partly by prospective gain, but this factor should be substantially discounted where the gain could have been expected to occur had the deceased died without any assistance from the suspect. A distinction should also be drawn between cases where the anticipated gain was very substantial, and those where the suspect either expected only a small legacy or had no reason to anticipate any benefit. A person contemplating suicide may not be deterred from seeking assistance by the knowledge that, should he or she provide (or fail to revoke provision) for a legacy for the assisting person or anyone connected to them, that person

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<sup>6</sup> *Gillick v West Norfolk and Wisbech Area Health Authority and another* [1986] 1 AC 112 (HL).

might become more likely to be prosecuted; however it could be that such knowledge would cause great pain to an already distressed and despairing individual, and inhibit their ability to dispose of their property as they would have wished and as Article 1 of the First Protocol to the ECHR entitles them to do. The focus, in short, should be on evidence of motivation by material or other gain, not on the mere fact of a gain, through inheritance or otherwise, that ensued from or was accelerated by the suicide.

17. The eleventh factor relates to provision of information to a person unknown to the suspect via, for example, a website or publication. The Commission is mindful of the protection afforded to freedom of expression by Article 10 ECHR, including freedom “to receive and impart information and ideas without interference by public authority and regardless of frontiers”. It would expect that this factor should apply only to the extent provided for in the limiting clause of Article 10, and in particular, that no-one should be prosecuted for such information offences as publishing a link to a website in another jurisdiction to information that is lawfully published in that jurisdiction, or for website hosting or other “innocent carrier” or “mere conduit” actions where the person concerned was unaware of and/or had no practical ability to monitor the content of the information conveyed. This protection from prosecution appears to be secured by Schedule 12 to the 2009 Act but is not made clear in the Guidance.
18. Factor 13 in favour of prosecution, relating to payment to the suspect for their assistance, should stress actual gain rather than the reimbursement of, for example, travel expenses.
19. Factor 16 in favour of prosecution is membership of an organisation or group that aims to provide a physical environment in which to allow another to commit suicide. The Commission notes that there are many differences in law among states party to the ECHR, and a margin of appreciation that allows such differences. In principle the PPS should not, other factors being equally balanced, arrive at a decision to prosecute a person on the basis that they are a member of an organisation that is lawful in the jurisdiction in which it operates; however the wording of Schedule 12 to the 2009 Act leaves open the possibility of such a prosecution where “the pursuit of public policy” requires.

20. The factors listed against prosecution are clearly aligned with what a court would be obliged to consider as mitigating factors in the event of a prosecution. The Commission does not propose any additional public interest factors.
21. The Commission commends the additional clarity afforded by publication of the interim Guidance, and the public consultation exercise.

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## Appendix

### Extract from the interim Guidance

#### Public interest factors in favour of prosecution

The public interest factors in favour of prosecution are set out below.

- 1) The victim was under 18 years of age.
- 2) The victim's capacity to reach an informed decision was adversely affected by a recognised mental illness or learning difficulty.
- 3) The victim did not have a clear, settled and informed wish to commit suicide; for example, the victim's history suggests that his or her wish to commit suicide was temporary or subject to change.
- 4) The victim did not indicate unequivocally to the suspect that he or she wished to commit suicide.
- 5) The victim did not ask personally on his or her own initiative for the assistance of the suspect.
- 6) The victim did not have:
  - a terminal illness; or
  - a severe and incurable physical disability; or
  - a severe degenerative physical condition;from which there was no possibility of recovery.
- 7) The suspect was not wholly motivated by compassion; for example, the suspect was motivated by the prospect that they or a person closely connected to them stood to gain in some way from the death of the victim.
- 8) The suspect persuaded, pressured or maliciously encouraged the victim to commit or attempt to commit suicide, or exercised improper influence in the victim's decision to do so; and did not take reasonable steps to ensure that any other person did not do so.
- 9) The victim was physically able to undertake the act that constituted the assistance him or herself.
- 10) The suspect was not the spouse, partner or a close relative or a close personal friend of the victim.
- 11) The suspect was unknown to the victim and assisted by providing specific information via, for example, a website or publication, to the victim to assist him or her in committing suicide.
- 12) The suspect gave 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 their assistance.
- 14) The suspect was paid to care for the victim in a care/nursing home environment.
- 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 a member of an organisation or group, the principal purpose of which is to provide a physical environment

(whether for payment or not) in which to allow another to commit suicide.

In most cases, factors (1) to (8) above will carry more weight than the other factors in deciding that a prosecution is required in the public interest.

### **Public interest factors against prosecution**

The public interest factors against prosecution are set out below.

- 1) The victim had a clear, settled and informed wish to commit suicide.
- 2) The victim indicated unequivocally to the suspect that he or she wished to commit suicide.
- 3) The victim asked personally on his or her own initiative for the assistance of the suspect.
- 4) The victim had:
  - a. a terminal illness; or
  - b. a severe and incurable physical disability; or
  - c. a severe degenerative physical condition; from which there was no possibility of recovery.
- 5) The suspect was wholly motivated by compassion.
- 6) The suspect was the spouse, partner or a close relative or a close personal friend of the victim, within the context of a long-term and supportive relationship.
- 7) The actions of the suspect, although sufficient to come within the definition of the offence, were of only minor assistance or influence, or the assistance which the suspect provided was as a consequence of their usual lawful employment.
- 8) The victim was physically unable to undertake the act that constituted the assistance him or herself.
- 9) The suspect had sought to dissuade the victim from taking the course of action which resulted in their suicide.
- 10) The victim has considered and pursued to a reasonable extent recognised treatment and care options.
- 11) The victim had previously attempted to commit suicide and was likely to try to do so again.
- 12) The actions of the suspect may be characterised as reluctant assistance in the face of a determined wish on the part of the victim to commit or attempt to commit suicide.
- 13) The suspect fully assisted the police in their enquiries into the circumstances of the suicide or the attempt and his or her part in providing assistance.

In most cases, factors 1) to 7) above will carry more weight than the other factors in deciding that a prosecution is not required in the public interest.