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

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Abstract:

Recently, a series of high-profile court cases have led the Director of Public Prosecution in the United Kingdom 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 guideline that detail how prosecutorial discretion will be exercised in cases of assisted suicide. This is especially given the fact that many Australian citizens are travelling to jurisdictions where assistance in dying is legal. Any policy should not, however, distract from addressing law reform on voluntary euthanasia. Australian legislators should be consulting 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.

I. Introduction

Like many countries, Australia is suffering from a culture of silence in regards to discussion on suicide.¹ Unsurprisingly, this has resulted in a lack of attention being given to the issue of assisted suicide and the growing phenomenon of ‘suicide tourism’. Thus, many people who are wishing to die are deciding to fly to nations where assisted suicide is an option permitted by law. There have been continued 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.² The purpose of this article is to shed light on this morally and ethically charged topic by analysing the legal status of assisted suicide and suicide tourism in Australia. It is divided into several sections; firstly, the definitional differences between euthanasia, suicide and assisted suicide will be explored. This will be followed by a definition of ‘suicide tourism’ and then an analysis of the law on assisted suicide in Australia. The law in United Kingdom and Switzerland have also been analysed; the former because of the significance in the Director of Public Prosecution’s (DPP) recent clarification of how it will exercise its discretion in cases involving assisted suicide. Swiss law is analysed given the fact that it has become a popular jurisdiction to travel for many people who seek assistance in dying lawfully. Arguments both in favour and against prosecuting cases of assisted suicide will also be discussed in order to give the reader insight into the views of both sides of the debate. Lastly, this article makes a number of recommendations on how Australia should deal with assisted suicide and suicide tourism in the future.

¹C Odone, “Assisted Suicide: How the chattering classes have got it wrong”, *Centre for Policy Studies*, (2010) 36, <[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)>.

²A Mann, “Philip Nitschke’s Adelaide Euthanasia Clinic Comes Under Police Scrutiny”, *ABC News* (online), 5 December 2013, <<http://www.abc.net.au/news/2013-12-05/philip-nitschkes-new-euthanasia-clinic-in-adelaide/5138602>>.

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 due to the fact that there is no “bright dividing line”³ between euthanasia, assisted suicide and physician-assisted suicide; the distinction is a matter of degree.⁴

Euthanasia involves the intentional killing of another person in order to end that person’s suffering.⁵ Voluntary euthanasia occurs when a person consents to a specific act or omission with the knowledge that this conduct will cause death. Non-voluntary euthanasia involves a person taking active steps to end the life of another where the person cannot give explicit consent. More ethically problematic is involuntary euthanasia, which involves a person taking active steps to end the life of another against his or her will. The focus of this article is on voluntary euthanasia and the autonomy of those who actively seek assistance in dying.

On the other hand, suicide is the act of self-termination. As stated by Sellers LJ: “every 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”.⁶ 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 the person’s death, euthanasia has occurred.

Conversely, assisted suicide is the term 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 as ‘mercy killing’ by the general public, and by lawyers often described as ‘complicity in suicide’.⁷ 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.⁸ Where the third person is a medical practitioner this is commonly referred to as physician-assisted suicide.

III. Suicide Tourism

The term ‘suicide tourism’⁹ 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.¹⁰ 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.¹¹ Although suicide tourism has become an increasingly popular option for Australian citizens who want to obtain

³V Hiley (2008) quoted in L Bartels and M Otlowski, “A right to die? Euthanasia and the law in Australia”, (2010) 17(4), *Journal of Law and Medicine*, 532.

⁴L Bartels and M Otlowski, “A right to die? Euthanasia and the law in Australia”, (2010) 17(4), *Journal of Law and Medicine*, 532.

⁵J Healey, *Voluntary Euthanasia*, (Spinney Press, 2008) 4.

⁶*In Re Davis* [1968] 1 QB 72 at 82.

⁷R Huxtable, *Euthanasia, Ethics and the Law: From Conflict to Compromise*, (Routledge-Cavendish, 2007), xv.

⁸B Murphy, “Human rights, human dignity and the right to die: Lessons from Europe on assisted suicide”, (2009) 33, *Criminal Law Journal*, 327.

⁹Some have argued that ‘suicide tourism’ is a rather unfortunate expression as it implies that people are going on a happy holiday to die, which trivialises the experience many terminally ill people are facing. See Healey, above n 5, 17.

¹⁰*Ibid*, 22.

¹¹Murphy, above n 8, 348.

assistance in dying, the issue of suicide tourism has received little attention. Conversely, in the United Kingdom, suicide tourism has sparked a fierce debate; there are some who have urged their government to legalise assisted dying so that terminally ill patients do not have to travel abroad to die comfortably.¹² On the other side of the debate, many British citizens have condemned the practice of suicide tourism and urged for the laws criminalising assisted suicide to extend to those who help a person die overseas.¹³

As will be discussed in the following section, 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.¹⁴ Therefore, a person involved in assisting suicide would not be liable by helping a person to 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 (such as making travel arrangements).¹⁵ The need for Australia to clarify its legal stance on suicide tourism will be further examined in section VII.

IV. The Legal Framework in Australia

In Australia, suicide and attempted suicide have been decriminalised.¹⁶ However, each State and Territory makes it unlawful to assist another person to commit suicide. The general position is that, even if a person is competent to make a decision and consents to ending their life, those who help to bring about their death are guilty of murder¹⁷ or aiding and abetting suicide.¹⁸

In 1997, the Northern Territory became the first Australian jurisdiction to legalise euthanasia and assisted suicide. Under the *Rights of the Terminally Ill Act 1995* (NT) (the Act), persons aged 18 years or over suffering from a terminal illness could request a physician to assist them in dying. The Supreme Court held the Act to be valid in *Wake v Northern Territory*,¹⁹ and, during the 8 months of the Act's effect, four people were reported have obtained assistance in dying.²⁰ However, the Act was subsequently overturned by the Commonwealth Government pursuant to its power under section 122 of the Australian Constitution, which allows the Federal Parliament to override legislation of Territories.²¹ The Government at the time was of the view that the Northern Territory's legislation was sending a powerful

¹²R.V Srinivas, "Exploring the Potential for American Death Tourism", (2009) 13(1), *Michigan State University College of Law Journal of Medicine and Law*, 92.

¹³*Ibid.*

¹⁴Murphy, above n 8, 349.

¹⁵*Ibid.*, 350.

¹⁶See, for example, *Crimes Act 1900* (NSW), s 31A.

¹⁷See *Crimes Act 1900* (NSW), s18(1)(a); *Crimes Act 1900* (ACT), s12(1)(a), (b); *Criminal Law Consolidation Act 1935* (SA), s12A; *Crimes Act 1958* (Vic), s3A; *Criminal Code* (Qld), ss291, 293, 300, 302(1)(a); *Criminal Code* (NT), ss161-162; *Criminal Code* (Tas), ss156, 159; *Criminal Code* (WA), s 279(1).

¹⁸See *Crimes Act 1900* (NSW), s31(c); *Crimes Act 1900* (ACT), s17; *Criminal Law Consolidation Act 1935* (SA), S13A(5); *Crimes Act 1958* (Vic), s 6B(2); *Criminal Code* (Qld), S311; *Criminal Code* (NT), ss161-162; *Criminal Code Act 1925* (Tas), s163; *Criminal Code* (WA), s288.

¹⁹*Wake v Northern Territory* (1996) 109 NTR 1.

²⁰Healey, above n 5, 32.

²¹*Euthanasia Laws Act 1997* (Cth).

message to the Australian community that “vulnerable people are expendable and not valued”²² and did not want to appear to condone laws permitting euthanasia.

Conversely, the Commonwealth Government does not have the same constitutional power to overrule State legislation. Queensland is currently the only Australian parliament never to have considered legislation permitting euthanasia.²³ However, initiatives by other State legislatures to legalise euthanasia have continuously been unsuccessful. For example, in 2008, a Bill allowing medically assisted suicide in the Victorian Parliament was rejected.²⁴ Similarly, attempts by members of the Western Australian Parliament to introduce voluntary euthanasia have failed in 1997, 1998, 2000, and again in 2010.²⁵

In South Australia, the two voluntary euthanasia Bills introduced by Parliament were defeated in 2008,²⁶ but there has been more recent attempts to legalise euthanasia. The latest *Ending Life with Dignity (No.2) Bill 2013* is said to be a modified version of a bill introduced in February 2013, but even euthanasia supporter MP Bob Such has openly expressed doubts about the revised Bill, stating that it “almost realistically won’t pass”.²⁷ The current South Australian legislation has been described by pro-euthanasia advocate, Philip Nitschke, as a “grey area” and has stated that he “can’t wait around for laws – I want to know what I can do with my own personal strategy”.²⁸

In Tasmania, the Greens introduced the *Dying with Dignity Bill* into Parliament in 2009. The Bill 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...”.²⁹ The Bill, which was based on the Northern Territory’s controversial euthanasia legislation, ultimately failed by 15 votes to 7. Despite this failure, the Greens have shown a commitment to working towards legalising voluntary euthanasia.³⁰ In 2013, the Tasmania Parliament had yet again debated the *Voluntary Assisted Dying Bill* that would have effectively made it legal for terminally persons to end their lives. Despite opinion polls indicating that the majority of the public support the legislation, the Bill was defeated in Parliament by 13 to 11 votes, leading some commentators to question “why are our legislators not representing public opinion?”.³¹ Notably, the Tasmanian Bill provided several safeguards described as “the strongest of the world”.³² This included:

²²D Brown, D Farrier, S Egger, L McNamara, and A Steel, *Criminal Law: Materials and Commentary on Criminal Law and Process of New South Wales*, (The Federation Press, 4th ed, 2006), 529.

²³Bartels and Otlowski, above n 4, 543.

²⁴See the *Medical Treatment (Physician Assisted Dying) Bill 2008* (Vic).

²⁵See the *Voluntary Euthanasia Bill 1997* (WA); the *Voluntary Euthanasia Bill 1998* (WA); and the *Voluntary Euthanasia Bill 2000* (WA); A Raphael, “WA Euthanasia Bill Rejected”, *Sydney Morning Herald*, 23 September 2010, accessed 27 January 2012, <<http://news.smh.com.au/breaking-news-national/wa-euthanasia-bill-rejected-20100923-15npk.html>>.

²⁶See the *Voluntary Euthanasia Bill 2008* (SA) and the *Consent to Medical Treatment and Palliative Care (Voluntary Euthanasia) Amendment Bill 2008* (SA).

²⁷MP Bob Such quoted in Andrew Smith, “South Australian Euthanasia Bill ‘almost certainly won’t pass’”, *LifeSite News* (online), 1 November 2013, <<http://www.lifesitenews.com/news/south-australian-euthanasia-bill-almost-certainly-wont-pass-mp-admits-to-li>>.

²⁸Philip Nitschke quoted in Mann, above n 2.

²⁹*Dying with Dignity Bill 2009* (Tas). Long Title.

³⁰M Steadman, “Death Bill Voted Out”, *The Mercury* (online), 5 November 2009, <http://www.themercury.com.au/article/2009/11/05/107795_tasmania-news.html>; M Denholm, “State to push for mercy killing”, *The Australian* (online), 8 March 2011, <<http://www.theaustralian.com.au/news/nation/state-to-push-for-mercy-killing/story-e6frg6nf-1226017319925>>.

³¹M Otlowski, “Another Voluntary Euthanasia Bill Bites the Dust”, *The Conversation* (online), 19 November

- Requiring a competent patient to make three requests before any procedure being undertaken;
- A cooling-off period;
- Consent from two physicians;
- A requirement that the patient be diagnosed with a terminal illness or experiencing considerable suffering;
- Prior to providing any assistance, the treating physician must have reached a conclusion that there were no other treatment options available that may adequately, and to the patient's satisfaction, improve his or her condition;
- A right for the patient to rescind their request at any time.³³

Likewise, in New South Wales the three substantive attempts to legislate for voluntary euthanasia were rejected. Thus, in 2005 the Health Minister felt the need to release its *Guidelines for End-of-Life Care and Decision-Making*,³⁴ which aimed to “end the confusion between both the public and health professionals about what is morally and legally permissible, and contrast that against illegal practices of euthanasia or assisted suicide”.³⁵ The *Guidelines* are based on a number of principles, including the right of patients to receive or refuse life-prolonging treatment; to provide patients comfort and dignity to the dying person; 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 previously expressed wishes of the patients where these are known.³⁶ The *Guidelines*, therefore, encourage planning in advance through making care directives.³⁷ The recent case of *Hunter and New England Area Health Services v A*³⁸ has clarified the legal recognition of advance care directives in NSW, providing that if it was made by a competent adult, and is clear and unambiguous, and extends to the situation at hand, it must be respected and given effect to.³⁹

The *Guidelines* specifically make the distinction between assisted suicide and withholding or withdrawing life-sustaining treatment by medical physicians. 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 as the patient's underlying condition and not the actions of others.⁴⁰ This means that medical practitioners in NSW can lawfully administer treatment to patients to relieve pain, even if the practitioner is aware that the administration of the treatment might

2013, <<http://theconversation.com/another-voluntary-euthanasia-bill-bites-the-dust-19442>>.

³²Labor Premier Lara Giddings and Greens leader Nick McKim quoted in “Tasmania's Euthanasia Bill Fails Narrowly”, *News* (online), 17 October 2013, <<http://www.news.com.au/national/breaking-news/tasmanias-euthanasia-bill-fails-narrowly/story-e6frfku9-1226741999723>>.

³³R Lehman, “Tasmania Parliament set to debate ‘improved’ voluntary euthanasia bill”, *ABC News* (online), 16 October 2013, <<http://www.abc.net.au/news/2013-10-16/tasmania-to-debate-euthanasia/5024348>>.

³⁴A copy of the *Guidelines for End-of-Life Care and Decision-Making* can be accessed online <http://www0.health.nsw.gov.au/policies/gl/2005/pdf/GL2005_057.pdf>.

³⁵Morris Iemma quoted in Bartels and Otlowski, above n 4, 542.

³⁶New South Wales Department of Health (2005), *Guidelines for End-of-Life Care and Decision-Making*, Part 2.

³⁷An advance care directive is a document that expresses a patient's wishes in regards to their medical treatment in the event that the patient becomes unable to make treatment decisions. They are sometimes referred to as a ‘living will’.

³⁸*Hunter and New England Area Health Services v A* [2009] NSWSC 761.

³⁹*Ibid*, at 40.

⁴⁰New South Wales Department of Health (2005), *Guidelines for End-of-Life Care and Decision-Making*, at [7.3].

also hasten death. However, the *Guidelines* stress that euthanasia and assisted suicide are crimes under the *Crimes Act 1900* (NSW).⁴¹ It should also be noted that 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”.⁴²

In 2013, the NSW Parliament defeated *The Rights of the Terminally Ill Bill* that would have effectively given people with terminal illness the right to end their life. The Bill, which was defeated 23 to 13 votes, incited an emotional response from Members of Parliament, with some welcoming the defeat; while others seeing the defeat as failing to consider what the people of NSW want.⁴³ However, it appears that the debate is far from over, with one MP stating: “This is not the end. It is an inevitable reform”.⁴⁴

Nevertheless, analysis of the Australian case law indicates that cases involving assisted suicide continue to pose a challenge for prosecutors and the courts. Australian prosecutors have shown reluctance to prosecute in these cases and, when they are prosecuted, are generally dealt with leniently by the courts.⁴⁵ For example, in 2005, the then DPP, Nicholas Cowdery QC, was confronted with a defendant who had killed his wife to put an end to her suffering, which was brought on by multiple sclerosis. By consent, she had taken sleeping aid medication and then allowed her husband to suffocate her with a pillow. Under the *Crimes Act 1900* (NSW), the defendant had committed murder. However, Cowdery exercised his discretion and agreed to accept 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”.⁴⁶

There are a number of other Australian cases where suspects that have been prosecuted for assisting suicide and received relatively lenient penalties. In *R v Marden*,⁴⁷ the offender pleaded guilty to the murder of his wife, who was suffering from chronic arthritic pain. The couple had made a suicide pact, but the offender did not die. He was not required to serve any time in custody, having received a wholly suspended sentence. Similarly, a wholly suspended sentence was imposed on the offender in *R v Hood*,⁴⁸ where the offender had aided his HIV-positive partner to commit suicide. A suspended sentence was also imposed on the offender in *R v Maxwell*,⁴⁹ who had abetted the suicide of his wife who was dying from breast cancer; and the offender in *R v Godfrey*,⁵⁰ who had assisted his terminally ill mother commit suicide, on the grounds that it was not in the public interest to impose a heavier sentence on a crime that was completely motivated by compassion.⁵¹

⁴¹Ibid, at [7.1].

⁴²*Messiha v South East Health* [2004] NSWSC 106 at [28].

⁴³“‘You’re all gutless’: euthanasia bill defeated”, *Sydney Morning Herald* (online), 23 May 2013, <<http://www.smh.com.au/nsw/youre-all-gutless-euthanasia-bill-defeated-20130523-2k3jv.html>>.

⁴⁴<http://www.smh.com.au/nsw/youre-all-gutless-euthanasia-bill-defeated-20130523-2k3jv.html>

⁴⁵Bartels and Otowski, above n 4, 544.

⁴⁶Nicholas Cowdery quoted in Q Dempster, “Do you have the right to die?”, *ABC News* (online), 29 November 2011, <<http://www.abc.net.au/news/2011-11-29/dempster-do-you-have-the-right-to-die/3702050>>.

⁴⁷*R v Marden* [2000] VSC 558.

⁴⁸*R v Hood* (2002) 130 A Crim R 473.

⁴⁹*R v Maxwell* [2003] VSC 278.

⁵⁰*R v Godfrey* (unrep, Sup Ct, Tas, 26 May 2004, Underwood J).

⁵¹See also, *R v Maxwell* [2003] VSC 278; *R v Nicol* [2005] NSWSC 547.

More recent is case is that of *DPP v Rolfe* where a husband and wife gassed themselves simultaneously.⁵² Paramedics were able to revive the husband but not the wife. Cummins J imposed a wholly suspended sentence on the offender, observing that: “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”.⁵³

Of concern are cases where the notion of consent by the person wishing to die is tenuous. For example, in *R v Nicol*,⁵⁴ the offender, who had agreed to follow his wife’s request to help her commit suicide, admitted that she may have said “stop” at one stage but felt he “needed to finish the job”.⁵⁵ He received a wholly suspended sentence for 2 years. Similarly, in *R v Nestorowycz*,⁵⁶ the offender attempted to kill her husband who was suffering from dementia and diabetes. Although the husband often pleaded with his wife to be taken home from his care facility, there was no clear evidence that the husband requested to die and, therefore, the case did not fall within the parameters of voluntary euthanasia. As stated by Harper J: “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”.⁵⁷

Consequently, in 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.⁵⁸ The case of *R v Justins* illustrates the overlap between assisted suicide, murder, and suicide tourism.⁵⁹ In that case, the deceased, who was suffering from Alzheimer, asked his de facto partner (the accused) and a friend to assist him commit suicide. The accused had become aware that a drug called Nembutal would help achieve this and the friend travelled to Mexico to purchase and import the drug into Australia.⁶⁰ The deceased was then given the drug and subsequently died. Both the partner and the friend were charged with aiding and abetting suicide, but were ultimately convicted of manslaughter and accessory to manslaughter.⁶¹

Unlike the United Kingdom, there is no statutory requirement or human rights convention obligating the DPP in Australian jurisdictions to publish information about it will exercise its discretion in certain cases. However, Australians deserve to be informed about how the DPP will exercise its discretion in cases involving assisted suicide and suicide tourism. Given the unique position prosecutors hold in the criminal justice system, it is important that there is transparency in how they determine where the public interest lies in every case considered for

⁵²*Director of Public Prosecutions v Rolfe* [2008] VSC 528.

⁵³*Ibid*, at 25.

⁵⁴*R v Nicol* [2005] NSWSC 547.

⁵⁵*Ibid*, at 12.

⁵⁶*Director of Public Prosecutions v Nestorowycz* [2008] VSC 385.

⁵⁷*Ibid*, at 4.

⁵⁸Murphy, above n 8, 348.

⁵⁹*R v Justins* [2008] NSWCCA 242. Also see, *Justins v R* [2010] NSWCCA 242.

⁶⁰The drug Nembutal was recently taken by a 100 year old man who was not terminally ill but wished to commit suicide. See “Police tried to halt Qld 100yo’s euthanasia: doctor”, *The Brisbane Times* (online), 31 May 2011, <<http://www.brisbanetimes.com.au/queensland/police-tried-to-halt-qld-100yos-euthanasia-doctor-20110531-1fe8k.html>>.

⁶¹R Morton, “The right to life...and death”, *Mamamia* (online), 29 April 2011, <<http://www.mamamia.com.au/health-wellbeing/the-right-to-die-with-dignity-say-euthanasia-campaigners/>>.

prosecution. The current position in Australia on assisted suicide is unclear and inconsistent and, as it will be argued below, clarification of the law and policy in this area is required. First, however, the way in which legislatures and courts overseas are grappling with the complexities of assisted suicide is examined.⁶²

V. The Legal Framework in the United Kingdom and Switzerland

A *United Kingdom*

Like Australia, the United Kingdom (UK) has decriminalised suicide, but assisted suicide remains a criminal offence. Section 2(1) of the *Suicide Act 1961* states that: “A person who aids, abets, counsels or procures the suicide of another, or an attempt of another to commit suicide, shall be liable on conviction to imprisonment for a term of imprisonment not exceeding fourteen years”.

Similar to the Australian legislation, the UK legislation recognises there are circumstances where it may be lawful for doctors to withdraw or withhold medical treatment.⁶³ This is where the doctor considers it not to be in “the best interests”⁶⁴ of the patient to commence or continue medical treatment. The UK courts also recognise the “double effect” defence, which was explained by Lord Goff in *Airedale NHS Trust v Bland* as the situation where: “A doctor may, when caring for a patient who is, for example, dying of cancer, lawfully administer pain-killing drugs despite the fact he knows that an incidental effect of that application will be to abbreviate the patient's life”.⁶⁵

Nevertheless, the issue of assisted suicide remains a deeply contested issue in the UK.⁶⁶ The three *Assisted Dying for the Terminally Ill* Bills that were introduced during a three-year period have all failed to pass through Parliament. In 2010, after a period of public consultation, the DPP in the UK released its *Policy for Prosecutors in respect of Cases of Encouraging or Assisting Suicide* (the Policy), clarifying how the DPP will exercise its discretion in cases involving assisted suicide. Thus, the law in the UK on assisted suicide must now be read in conjunction with the prosecutorial guidelines, which sets out the factors that will be taken into consideration in determining whether or not to prosecute in cases involving assisted suicide. Under the Policy, there are 16 factors that favour prosecution and six factors that tend against it. Prosecution is more likely if, for example, the “victim”⁶⁷ was under 18 years of age; the victim did not have the capacity to reach an informed decision; and the victim did not seek assistance or was pressured to commit suicide. On the other hand, the public interest factors tending against prosecution include: whether or not the victim unequivocally indicated his or her wish to commit suicide; whether the victim suffered from a terminal illness; and if the assistor offered only minor assistance.

⁶²It should be noted that the following jurisdictions have openly legalised 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.

⁶³*Pretty v DPP* [2002] 1 AC 800 at 55.

⁶⁴*Airedale NHS Trust v Bland* [1993] 2 WLR 316.

⁶⁵*Ibid*, at 370.

⁶⁶J.A Shaw, “Recent Developments in the Reform of English Law on Assisted Suicide”, (2009) 16, *European Journal of Health Law*, 333.

⁶⁷The term “victim” in the policy is used to describe the person who commits or attempts to commit suicide. Although it was recognised that it not 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.

In particular, the Policy explicitly requires an assessment of whether “the suspect was wholly motivated by compassion”⁶⁸ as a public interest factor tending against prosecution. Hence, the Policy places greater emphasis on the suspect’s motivation, rather than the health of the person seeking assistance.⁶⁹ 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.⁷⁰ Such a motive-based approach is surprising given the traditional treatment of motive in common law jurisdictions as legally unimportant providing that there is sufficient proof of the *actus reus* together with the requisite *mens rea* for committing the offence.⁷¹

The DPP was forced to consider its policy on assisted suicide after two important House of Lords decisions. In *R (on the application of Purdy) v DPP*,⁷² the applicant, who was suffering from multiple sclerosis, sought information on whether her husband would be prosecuted in the event he assisted in her suicide. She urged that the DPP publish a policy relating to prosecution in cases where the suicide took place outside the UK. In its unanimous decision, the House of Lords were of the view that Mrs Purdy, and people in similar situations, are entitled to access sufficient information to guide their decision-making. They held that assisted suicide was a specific form of offence that merited clarity in the manner in which the DPP would exercise its discretion to prosecute and, therefore, ordered the DPP to: “promulgate an offence-specific policy identifying the facts and circumstances which he will take into account in deciding...whether or not to consent to a prosecution”.⁷³

This case can be contrasted with the earlier House of Lord’s decision in *Pretty v DPP*.⁷⁴ Mrs Pretty, who was suffering from motor neurone disease, wanted assurance from the DPP that if her husband assisted her in ending her life he would not be subject to prosecution. Her argument was that the threat of prosecution in compassionate cases was in breach of the rights guaranteed under the *European Convention of Human Rights*.⁷⁵ However, the House of Lords unanimously rejected her right-based arguments. The subtle difference between the decisions in *Purdy* and *Pretty* has been said to be that, unlike Mrs Pretty, Mrs Purdy was not seeking a guarantee that her husband would not face legal consequences should he assist her to die, but rather was seeking information detailing how the DPP would exercise its discretion to prosecute in cases involving assisted dying.⁷⁶

⁶⁸Crown Prosecution Service (2010), *Policy for Prosecutors in Respect of Cases of Encouraging or Assisting Suicide*, at [43(1)].

⁶⁹The Independent, “Assisted suicide policy ‘focused on suspect motivation’”, *The Independent* (online), 25 February 2010, <<http://www.independent.co.uk/news/uk/crime/assisted-suicide-policy-focused-on-suspect-motivation-1910294.html>>.

⁷⁰A Mullock, “Overlooking the criminally compassionate: What are the implications of prosecutorial policy on encouraging or assisting suicide?”, (2010) 18 *Medical Law Review*, 454.

⁷¹*Ibid*, 455.

⁷²*R (on the application of Purdy) v DPP* [2009] UKHL 45.

⁷³*Ibid*, at 56.

⁷⁴*Pretty v DPP* [2002] 1 AC 800.

⁷⁵In particular, Art 8(1) of the ECHR, which provides that: “Everyone has the right to respect for his private and family life, his home and his correspondence”. Art 8(2) requires that any interference of the right to live free from interference is private life be “in accordance with the law”.

⁷⁶Some have criticised the House of Lord’s decision in these two cases for being difficult to reconcile. See J Keown, J, “In Need of Assistance?”, *New Law Journal* (online), 2 October 2009, <<http://www.newlawjournal.co.uk/nlj/content/need-assistance>>; S Hambly, “The choice to give up living: compassionate assistance and the Suicide Act”, *UCLAN Community* (online), 17 December 2010, <<http://atp.uclan.ac.uk/buddypress/diffusion/volume-3-issue-2/the-choice-to-give-up-living-compassionate-assistance-and-the-suicide-act>>.

Importantly, the Policy clarifies important issues concerning suicide tourism. The DPP has now explained that the location of death is irrelevant and that its prosecutorial policy “is going to cover all assisted suicide. The same broad principles will apply. They’ve got to apply to all acts, in the jurisdiction or out of it”.⁷⁷ Thus, an assisted suicide in London is legally equivalent to an assisted suicide in, for example, Zurich.⁷⁸ It is worth noting that in the decision of *Re Z* it was stated in obiter that, although the contemplated suicide by Mr and Mrs Z was not a criminal act in Switzerland, “it seems to me inevitable that by making arrangements and escorting Mrs Z on the flight, Mr Z will have contravened s 2(1) of the *Suicide Act*”.⁷⁹

Nevertheless, prosecutors in the UK have shown a reluctance to prosecute in cases involving assisted suicide.⁸⁰ It has been reported that of 40 cases of suspected assisted suicide between 2009-2011, none were prosecuted.⁸¹ For example, the DPP refused to prosecute the parents of 23 year-old, Daniel James, whom they assisted to travel to Zurich to commit suicide despite the fact he was not terminally ill.⁸² The DPP was of the opinion that it was not in the public interest to prosecute because: “Daniel, as a fiercely independent young man, was not influenced by his parents to take his own life and the evidence indicates he did so despite their imploring him not to.”⁸³

Some have criticised the United Kingdom’s prosecutorial policy as being limited in its scope.⁸⁴ This article does not intend to review the growing literature examining the Policy, but it is notable, as some critics have pointed out, the Policy is limited in that it only applies to assisted suicide and does not deal with voluntary euthanasia. This has led some to criticise the Policy on the grounds that it does not respect the autonomy of those who seek to end their life voluntarily.⁸⁵ To overcome some of the limitations with the Policy, White and Downie recommend 3 principles that should be adopted when constructing Australia’s own prosecutorial guidelines, which are: respecting autonomous choice; promoting high quality decision-making by prosecutors; and ensuring public confidence in the decisions of prosecutors.⁸⁶ These are sound principles that, together with United Kingdom’s experience, will greatly assist Australia in developing its own model prosecutorial guidelines.

B Switzerland

⁷⁷Head of the UK Crown Prosecution, Service Keir Starmer, quoted in S Sharples, “Suicide assistance laws need clarification: Nitschke”, *Lawyers Weekly* (online), 5 August 2009, <http://www.lawyersweekly.com.au/blogs/top_stories/archive/2009/08/05/suicide-assistance-laws-need-clarification-nitschke.aspx>.

⁷⁸Mullock, above n 70, 449.

⁷⁹*In Re Z* [2005] 1 WLR 959 at 14 (Hedley J).

⁸⁰Mullock, above n 70, 447.

⁸¹D Holmes, “Legalise assisted suicide, UK Commission urges”, (2012) 39 (9810), *The Lancet*, 15.

⁸²K Starmer, “Decision on prosecution: The death by suicide of Daniel James”, (2008), <http://www.cps.gov.uk/news/articles/death_by_suicide_of_daniel_james/>.

⁸³For a detailed explanation for not prosecuting see Crown Prosecution Service, “Decision On Prosecution – The Death By Suicide of Daniel James”, (2008), <http://www.cps.gov.uk/news/articles/death_by_suicide_of_daniel_james/>.

⁸⁴See B White and J Downie, “Prosecutorial Guidelines for Voluntary Euthanasia and Assisted Suicide: Autonomy, Public Confidence and High Quality Decision-Making”, (2012) 36, *Melbourne University Law Review*.

⁸⁵*Ibid.*

⁸⁶*Ibid.*, 671.

Given the popularity of Switzerland as a resort for suicide tourism for both British and Australian citizens,⁸⁷ Swiss law on euthanasia and assisted suicide is briefly discussed. The concept of euthanasia is not recognised under Swiss law. At present, euthanasia is punishable as murder under article 111 and manslaughter under article 113 of its Penal Code.⁸⁸ However, under article 114, murder upon request by the victim, is treated less severely than murder without the victim's request, but remains illegal.⁸⁹

Nevertheless, assisted suicide has been legal in Switzerland since 1937. Under article 115 of the Swiss Penal Code, it is not an offence to assist another person to commit suicide providing that the assistor was not motivated by self-interest.⁹⁰ 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 than any other jurisdiction in the world. This is also given the fact that there are no national residency requirements imposed on tourists seeking to obtain assistance in dying.⁹¹ *Dignitas*, the Swiss organisation that has assisted hundreds of foreigners in ending their lives since its establishment in 1998, has concluded that: "there could not be any discrimination just because of the residence of the person".⁹² However, despite evidence that many Swiss citizens are in favour of continuing to legalise assisted suicide, they are discontent with the nation being described as a resort for suicide tourism.⁹³

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

VI. Should Assisted Suicide Be Prosecuted?

The following section discusses the arguments for and against prosecuting assisted suicide. From the outset, it should be noted that this is a highly controversial topic on which many people hold differing views. It is thereby unlikely that universal approval will ever be reached. However, an issue should not be ignored because it complex and, as stated by one

⁸⁷Healey, above n 5, 17; Shaw, above n 66, 337; D.M Cohen, "Looking for a Way Out: How to Escape the Assisted Suicide Law in England", (2010) 24(2), *Emory International Law Review*, 697.

⁸⁸*Swiss Penal Code*, 21 December 1937, in force since 1 January 1942.

⁸⁹S.A Hurst and A Mauron, "Assisted Suicide and Euthanasia in Switzerland: Allowing a roll for non-physicians", (2003) 26 (7383), *British Medical Journal*, 271.

⁹⁰N.P Terry, "Under-Regulated Health Care Phenomena in a Flat World: Medical Tourism and Outsourcing", (2007) 29(6), *Western New England Law Review*, 432.

⁹¹*Ibid.*

⁹²Ludwig Mineilli (founder of Dignitas) quoted in J Coggon, R Huxtable and C Stewart, "Recent Developments", (2009) 6 (4), *Journal of Bioethical Inquiry*, 408.

⁹³C Nordqvist, "Assisted Suicide and Suicide Tourism to Continue, Swiss Referendum", *Medical News Today* (online), 15 May 2011, <<http://www.medicalnewstoday.com/articles/225366.php>>.

Member of Parliament, “we are capable of drafting and enacting bills into laws that are complex”.⁹⁴

a) Arguments in favour of prosecution

Historically, laws against assisted suicide were based on religious doctrines. This included the argument that only God has the right to determine when a person will die and that suicide is a rejection of God’s gift of life.⁹⁵ However, some have questioned whether these arguments still have force in a secular society such as Australia.⁹⁶ They suggest that many people in contemporary society would be more supportive of laws that promote an individual’s right to autonomy, which includes the right to end one’s life with the assistance of family members and experts.⁹⁷

Another strong factor tending towards prosecution is that the suicide may not have been voluntarily and expressly requested.⁹⁸ Indeed, in some cases, whether the deceased requested assistance in dying may be tenuous and difficult to ascertain, as seen in the *Nicol’s case*⁹⁹ and *Nestorowycz’s case*.¹⁰⁰ This is further complicated by the fact that the person who sought assistance is no longer alive and, therefore, is unable to provide evidence that they actually made a voluntary decision to die.¹⁰¹

There is also an issue of whether the person had the mental capacity to make an informed decision to end their life. In *Justins*,¹⁰² there was evidence to support the argument that the 72-year-old deceased was not mentally competent. The deceased had applied to *Dignitas* for assistance previously, but his application was rejected because the organisation had doubts as to the deceased’s capacity to make an informed decision. The Court concluded that the jury must have been satisfied beyond reasonable doubt that a reasonable person in the defendant’s position would have been aware of the deceased’s lack of capacity.

Particularly problematic is determining whether assistance was motivated by self-interest or some ulterior motive. In many cases this motive may not be detectable given the fact it does not take a criminal mastermind to feign compassion or conceal self-interest.¹⁰³ In *R v McShane*,¹⁰⁴ evidence of this self-interest was captured by secret video surveillance that showed the defendant advising her mother how to consume an overdose and instructing her mother that her assistance must be kept secret or else she would be denied inheritance. However, the facts of *McShane* are exceptionally rare in that the prosecution in most cases are unlikely to have access to such compelling evidence.¹⁰⁵

⁹⁴ “‘You’re all gutless’: euthanasia bill defeated”, *Sydney Morning Herald* (online), 23 May 2013, <<http://www.smh.com.au/nsw/youre-all-gutless-euthanasia-bill-defeated-20130523-2k3jv.html>>.

⁹⁵ B Steinbock, “The case for physician assisted suicide: not (yet) proven”, (2005) 31, *Journal of Medical Ethics*, 236.

⁹⁶ *Ibid.*

⁹⁷ *Ibid.*

⁹⁸ Murphy, above n 8, 352.

⁹⁹ *R v Nicol* [2005] NSWSC 547.

¹⁰⁰ *Director of Public Prosecutions v Nestorowycz* [2008] VSC 385.

¹⁰¹ D.M Cohen, “Looking for a Way Out: How to Escape the Assisted Suicide Law in England”, (2010) 24(2), *Emory International Law Review*, 717.

¹⁰² *R v Justins* [2008] NSWSC 1194.

¹⁰³ Mullock, above n 70, 454.

¹⁰⁴ *R v McShane* [1977] Crim LR 737.

¹⁰⁵ Mullock, above n 70, 454.

Moreover, those against legalising assisted suicide frequently argue that it will pressure the frail and vulnerable to end their lives.¹⁰⁶ It is believed that such pressure stems from the fact that many disabled patients may feel their existence is burdensome on their family.¹⁰⁷ Legalising assisted suicide may also give rise to a range of conflicting interests, especially where a person has a financial interest. For example, it has been argued that legalising assisted suicide would, in the case of inheritance, “empower heirs and others to pressure and abuse older people to cut short their lives”.¹⁰⁸ A conflict of interest may also arise if the person will receive some sort of remuneration for their assistance.¹⁰⁹ Also concerning is where the assisting organisation facilitating suicide for a fee is dependent on customers for the viability of the business and is therefore motivated by profit.¹¹⁰

There is also the possibility that medical physicians have misdiagnosed patients. In London, for example, it was found 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.¹¹¹ Conversely, even if the diagnosis is correct, it is questionable how accurate a doctor can predict that a patient will die within a few months.¹¹² Accordingly, it has been suggested that rather than alter the existing laws on assisted suicide, there should be a duty on governments “to minimise the fear of dying badly”.¹¹³

It is also possible that people who are not terminally ill may obtain assistance in committing suicide. This includes minors,¹¹⁴ people suffering from treatable depression,¹¹⁵ or those who choose to commit suicide simply because of the fear of dying of old age.¹¹⁶ However, the solution to this problem would be to ensure that the legislation provides adequate safeguards that restrict assistance only to adults who are mentally competent and who are suffering from a terminal illness.¹¹⁷

Furthermore, the slippery slope objection is often raised against legalising assisted suicide. Based on this objection, if assistance was legalised, it would diminish respect for human life and lead to the acceptance of lives being prematurely ended. Conversely, it has been argued that legalising assisted suicide would not lead to such dire consequences. Rather, “far from

¹⁰⁶J Kirkup, “Gordon Brown: don’t legalise assisted suicide”, *The Telegraph* (online), 23 February 2010, <<http://www.telegraph.co.uk/news/uknews/law-and-order/7301399/Gordon-Brown-dont-legalise-assisted-suicide.html>>.

¹⁰⁷Ibid.

¹⁰⁸Nancy Elliot quoted in W Johnston and A Schadenberg, “Why we should be afraid of assisted suicide”, *Calgary Herald* (online), 13 November 2011, <<http://www.calgaryherald.com/news/should+afraid+assisted+suicide/5703321/story.html>>.

¹⁰⁹White and Downie, above n 84, 689.

¹¹⁰Ibid.

¹¹¹Odone, above n 1, 46.

¹¹²Ibid.

¹¹³Gordon Brown quoted in Kirkup, above n 106.

¹¹⁴B White and L Willmott, “How should Australia Regulate Voluntary Euthanasia and Assisted Suicide”, (2012) 20(2), *Journal of Law and Medicine*, 421.

¹¹⁵It 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. See Odone, above n 1, 44.

¹¹⁶W.J Smith, “Fear of Dying of Old Age Assisted Suicide in Switzerland”, *First Things* (online), 3 April 2011, <<http://www.firstthings.com/blogs/secondhandsmoke/2011/04/03/fear-of-dying-of-old-age-assisted-suicide-in-switzerland/>>.

¹¹⁷“Right-to-die activist Nan Maitland ‘died with dignity’”, *BBC News* (online), 4 April 2011, <<http://www.bbc.co.uk/news/uk-12959664>>.

reducing respect for human life, respect would be enhanced when the personal autonomy of the frail and vulnerable is recognised and protected”¹¹⁸.

Lastly, it is feared that if Australia legalises assisted suicide, it will attract suicide tourism.¹¹⁹ It is believed that legalising assisted suicide would attract foreigners wishing to die and make assisted suicide services a profit-driven business.¹²⁰ However, as highlighted by Dr Nitschke, suicide tourism can easily be avoided by enforcing strict residential requirements so that foreigners would not be able to access laws that decriminalise assisted suicide.¹²¹

b) Arguments against prosecution

The law recognises the freedom for individuals to self-terminate their lives. Accordingly, it should follow that individuals should also be free to seek the assistance of others in bringing this about.¹²² People residing in jurisdictions that criminalise assisted suicide may feel they have no option but to engage in suicide tourism. As a result, many patients may end their lives sooner than desired due to needing to be physically fit to travel.¹²³

It has also been argued that it is not in the public interest to prosecute in cases of assisted suicide. Prosecuting a merciful assistant has been said to be a waste of prosecutorial resources and against the public interest in pursuing a case that is anticipated to only result in a light sentence¹²⁴ and, as the Australian case law discussed previously demonstrates, suspects of assisted suicide are generally afforded leniency. According to Sir Shawcross: “It 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”¹²⁵.

Moreover, some argue that the fear that failing to prosecute assisted suicide would result in abuses and pose a threat to vulnerable people has not been substantiated.¹²⁶ These critics have drawn on evidence from jurisdictions that permit assisted dying to demonstrate that they have implemented “significant safeguards, which are working well”.¹²⁷ In fact, annual formal review of jurisdictions that have openly legalised euthanasia show that there has been no significant increase in assisted dying and that many patients have reported that a great weight has been lifted off them now that they know they have a choice to die in a dignified manner

¹¹⁸Dr Chaney, quoted in Healy, above n 5,19.

¹¹⁹P Saunders, “12 Reasons Why Euthanasia Should Not be Legalised”, *National Alliance of Christian Leaders* (online), 22 March 2010, <http://nacl.com.au/nacl/index.php?option=com_content&view=article&id=41:euthanasia&catid=24:articles&Itemid=30>.

¹²⁰H Pidd, “Death Tourism leads Swiss to consider ban on assisted suicide”, *The Guardian* (online), 28 October 2009, <<http://www.guardian.co.uk/society/2009/oct/28/swiss-consider-ban-assisted-suicide>>.

¹²¹The Punch Team, “Q&A: Plans for Australia’s first euthanasia clinic”, *The Punch* (online), 29 March 2011, <<http://www.thepunch.com.au/articles/will-australia-soon-have-its-first-euthanasia-clinic/>>.

¹²²Bartels and Otlowski, above n 4, 550.

¹²³Murphy, above n 8, 450.

¹²⁴Huxtable, above n 7, 79.

¹²⁵Sir Hartley Shawcross QC (1951), quoted in Murphy, above n 8, 351.

¹²⁶I Austen, “Canada: Top Scientists Urge Allowing Assisted Suicide”, *The New York Times* (online), 15 November 2011, <http://www.nytimes.com/2011/11/16/world/americas/canada-top-scientists-urge-allowing-assisted-suicide.html?_r=1&ref=assisted-suicide>.

¹²⁷The Canadian Press, “Lawyer: Time to look assisted suicide”, *The Spec* (online), 1 December 2011, <<http://www.thespec.com/news/canada/article/633339--lawyer-time-to-look-again-at-assisted-suicide>>.

with medical assistance.¹²⁸ Notably, the safeguards that have been implemented include the following:

- Testing whether the person requesting assistance is mentally competent and providing him or her or her with counselling prior to undertaking any procedure;
- Ensuring that the person made the decision voluntarily and informed;
- Restricting assistance to only to those suffering from terminal illness and requiring at least two doctors to confirm that the patient's condition is in fact terminal; and
- Requiring a cooling-off period before any procedure is carried out.¹²⁹

Furthermore, continuing to criminalise assisted suicide is anomalous with the present law that makes it lawful for doctors to withdraw medical treatment in certain circumstances.¹³⁰ As highlighted previously, at common law there is no obligation for medical professionals to treat an adult where “no benefit at all would be conferred”.¹³¹ This is further complicated by recognition of advance care directives, which make it mandatory for doctors to respect the wishes of terminally ill patients who have expressed the refusal of life-sustaining measures prior to becoming incompetent.¹³²

Lastly, the reality is that global travel has made suicide tourism an option for many people wishing to end their lives. Thus, continuing to criminalise assisted suicide tourism is less than satisfactory in that it comes at the great cost of exporting suicidal citizens to an overseas jurisdiction where assistance is too easily available.

VII. Recommendations for Australia

As this article has made abundantly clear, the legal status of assisted suicide in Australia is ambiguous and inadequate. Thus, it is timely that Australian governments devise a legal framework that clearly sets out the circumstances in which terminally ill people can seek assistance in dying. It is not being recommended that euthanasia and assisted suicide be legalised, but 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, especially while euthanasia and assisted suicide remains illegal, prosecuting and sentencing guidelines should be formulated and made publicly available. This would ensure that decisions to prosecute are made predictably and consistently, which would be beneficial for a range of people, including family members of terminally ill patients, medical practitioners and prosecutors. Such a policy should make clear that it does not in any way decriminalise 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 at the same time recognise that compassionate assistance is a different form of killing that deserves to be more mercifully dealt with.

¹²⁸In particular, annual reviews of Oregon's (USA) euthanasia laws show that its laws are working well and that there has not been a significant increase in physician assisted suicide since it was legalised. See Healey, above n 4, 15.

¹²⁹The Tasmanian *Voluntary Assisted Dying Bill 2013* implemented many of these safeguards.

¹³⁰New South Wales Parliament, Legislative Council, Standing Committee on Social Issues, *Substitute Decision-making for People Lacking Capacity*, (2010), 195.

¹³¹*Messiha v South East Health* [2004] NSWSC 1061.

¹³²Odone, above n 1, 51.

It is also recommended that Australia's prosecutorial policy explicitly state in what circumstances helping someone travel to another jurisdiction to commit suicide would face prosecution. On the one hand, Australia can follow the approach taken in the United Kingdom so that the jurisdiction in which the suicide takes place is irrelevant to the lawfulness of assisting suicide. This argument becomes stronger when considering the fact that many acts of preparatory assistance occur in the home jurisdiction.¹³³

On the other hand, it is arguable 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 who accompany a loved one abroad.¹³⁴

In summary, it is strongly recommended that:

- Australia seriously considers whether it is now time to legalise voluntary euthanasia. A boarder societal debate is required in the near future before any attempt to change the law on assisted dying. Ultimately, whether voluntary euthanasia is legalised should reflect the opinion of the majority;
- Regardless whether voluntary euthanasia laws are passed, it is inevitable that instances of assisted suicide and suicide tourism occur and will continue to occur.¹³⁵ Therefore, Australian prosecutors should develop a policy that clearly states how it will exercise its discretion in cases of assisted suicide and suicide tourism;
- Initially, Australia should use the United Kingdom's prosecutorial policy as guidance while it develops its own policy; and
- Any legislative reforms and policy should be guided by the principle of individual autonomy.

VIII. Conclusion

As the population ages 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 severely suffering contemplates death, the law in Australia permits that person to end his or her life. Though, the reality is death often involves family and friends.¹³⁶ Whether Australia legalises 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, at the very least, there should be recognition of circumstances where assisted suicide will be 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 enable individuals to regulate their lives in a way that minimises the prospect of them being prosecuted.¹³⁷ The final guidelines published by the

¹³³Murphy, above n 8, 350.

¹³⁴Huxtable, above n 7, 66.

¹³⁵Otlowski, above n 31.

¹³⁶P Luker and T Parramore, "Submission by the New South Wales Branch of the Australian Voluntary Euthanasia Society on the Need for Changed in the Laws Relating to Suicide", (1976) 9 (1), *Australian Journal of Forensic Sciences*, 5.

¹³⁷J.W Rapke (2009), "R (Prudy) v DPP – Its Implications for Prosecuting Authorities", *Conference of Australian and Pacific Prosecutors Brisbane*,

DPP in the United Kingdom, which was formulated after consultation with academics, health providers, politicians and religious groups,¹³⁸ provide guidance on how Australia should formulate its own prosecutorial policy. A range of people, including family members, medical practitioners and prosecutors, would welcome such a 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”).¹³⁹

<http://www.opp.vic.gov.au/resources/1/a/1a61df80404a17d6b4b5fff5f2791d4a/purdy_implications_speech+_revised_oct09.pdf>.

¹³⁸T Faunce, “Justins v The Queen: assisted suicide, juries and the discretion to prosecute”, (2011) 18(4) *Journal of Law and Medicine*, 715.

¹³⁹Jean Martin quoted in A Gigon, “Case puts assisted suicide at a crossroads”, *Swissinfo* (online), 4 January 2011, <http://www.swissinfo.ch/eng/politics/Case_puts_assisted_suicide_at_a_crossroads.html?cid=29157532>.