



# CATHOLIC BISHOPS' CONFERENCE OF ENGLAND AND WALES

## **Interim Policy for prosecutors in respect of cases of assisted suicide issued by the Director of Public Prosecutions (DPP)**

### **Response from the Catholic Bishops' Conference of England and Wales**

**November 2009**

1. The following response has been agreed unanimously by the Catholic Bishops of England and Wales. This response is concerned not only with how the Policy could help or harm members of the Catholic community but with how the Policy could help or harm all citizens in England and Wales. It is concerned not only with the morality of prosecuting, or refraining from prosecuting, in cases of assisted suicide but also with the implications of such decisions for public safety. It draws upon common principles of morality and public policy for the sake of the common good.

#### **Summary**

2. The Policy's list of factors does set out some which are properly relevant public interest factors for prosecution and against prosecution. However, in order to avoid the risk of misinterpretation, the guidelines need to be re-structured. **The list of factors should begin with a clear statement about the Code for Crown Prosecutor's presumption of prosecution unless public interest factors against prosecution clearly outweigh those in favour.**
3. The list of factors in the interim Policy is currently flawed in that it identifies factors which are not relevant to non-prosecution and the inclusion of which could have serious harmful effects on society:
  - i) **The disability or state of health of the victim:** A sick or disabled person's life should merit the same degree of protection by law. The inclusion of terminal illness as a factor against prosecution also contradicts the declared will of Parliament, which has recently rejected the legalisation of assisted suicide in such a case.
  - ii) **The victim's determination to commit suicide** as demonstrated by previous suicide attempts: A history of suicide is more likely to be a sign of depression or some other underlying mental disorder, and hence a factor in favour of prosecution, than it is to be a factor against prosecution.

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- iii) **Being a spouse, partner and close family member:** The law should not presume that these relationships will always be supportive. Indeed, crimes of violence are very commonly carried out by someone known to the victim and not infrequently within the same family.

## Terminology and clarity

4. The Policy is entitled *Interim Policy for prosecutors in respect of cases of assisted suicide*. **The use of the language of “assisting” should be reconsidered here.** The statement from the Director of Public Prosecutions in relation to the Daniel James case referred to “aiding and abetting suicide” and this is a better term both in that it reflects the law and in that it does not carry the connotation of helpfulness or benevolence. Aiding and abetting someone who has the intention to harm himself or herself is not helping them.
5. The use of the term “victim” is helpful in that it reminds the public that assisted suicide is not a “victimless crime” but leads to loss of life and is a serious offence. While other people will also be adversely affected by the death, it is the person whose suicide is facilitated who is the primary victim of harm. This is also how we understand the situation where someone with a duty of care fails to prevent a suicide.
6. While the Policy is in layman’s language, further steps still need to be taken to make it understandable to the lay reader. For example, because of some misleading press coverage, many people are under the false impression that this Policy changes the law on aiding and abetting suicide. Thus, **the second paragraph of the Policy should state very clearly in layman’s language that nothing in the Policy in any way or in any kind of case decriminalizes assisting suicide, or makes any kind of exception to the law.**
7. Again, the public, unfamiliar with the Code for Crown Prosecutors, may easily take the references to “whether a prosecution is needed in the public interest” as implying a presumption against prosecution unless a case can be made that it is needed in the public interest. The Policy could avoid this danger if it included a statement such as that given in relation to the Daniel James case that “paragraph 5.7 of the Code for Crown Prosecutors (the Code) states that, ‘A prosecution will usually take place unless there are public interest factors tending against prosecution which clearly outweigh those tending in favour’ ”.

## Undesirable side-effects of the Policy

8. This response is based on the view that the Policy should not assume that the cases that will arise for consideration in future will be of the same kind as have arisen over the past decade or so. Media attention has naturally focused on a very small number of cases in which compassionate

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considerations seem almost overwhelming and which exemplify none of the factors listed below "favouring prosecution". Yet these are even now a small percentage of the actual cases of suicide, and it would be a mistake to shape the law around them.

9. Furthermore, in the future there could be a culture shift, in part influenced by the media claiming that "assisted suicide" has been partly "decriminalised" or that the DPP has authorised "exceptions to the law", and this could in turn lead to a much wider range of cases of assisted suicide, even including the facilitation of suicide within the United Kingdom by medical professionals.
10. There is also the related danger that, if aiding and abetting suicide is perceived to be tolerated, then abuse by carers (paid or unpaid) that currently expresses itself as neglect, violence and coercion, will take other forms. While the Policy states explicitly that it does not guarantee immunity from prosecution, the list of factors against prosecution could create the opposite impression. Those who stand to gain advantage from the death of someone in their care might then be tempted to counsel or procure suicide.
11. As the Policy is a public document it will itself have an influence and must be framed also with the public perception in mind. For example, the naming of categories of suspect (spouse, close relative) among the factors that in themselves weigh against prosecution too easily gives encouragement to people in these categories to believe that they will escape prosecution if they aid or abet suicide, so long as their motivation remains hidden. This is a reason for great caution in the way that factors for and against are expressed.

## **Framing of the factors for and against prosecution**

12. The general tone of the Policy gives the impression of balance. This is generally a positive attribute in a document. However, in this case it could give members of the public – and perhaps even prosecutors tasked with implementing the Policy - the false impression that there is no presumption in favour of prosecuting these offences, or that public interest factors favouring prosecution and public interest factors against prosecution are weighed in the same way. **It needs to be reiterated that, if there is sufficient evidence to provide a realistic prospect of conviction, then the presumption is that a prosecution will go ahead unless public interest factors against prosecution "clearly outweigh" those in favour.**
13. At present the Policy includes as public interest factors in favour of prosecution statements of the absence of factors against prosecution, for example, that "the suspect was *not* wholly motivated by compassion" or that "the suspect was *not* the spouse". If there is a clear statement of the presumption in favour of prosecution, then it will not be necessary to include as factors in favour of prosecution the converse of the factors against.

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14. Similarly the factors against prosecution currently include some factors that are not factors against prosecution at all but simply examples of the absence of aggravating factors. For example, it would be expected in a case of aiding and abetting suicide that “the victim indicated unequivocally to the suspect that he or she wished to commit suicide”. The presence of such a suicidal expression is not a reason against prosecution, though the absence of such an expression would be a factor in favour of prosecuting.
15. Against this background and in order to avoid the risk of misinterpretation, the guidelines need to be re-structured. The list of factors should begin with a clear statement about the Code’s presumption of prosecution unless public interest factors against prosecution clearly outweigh those in favour.
16. The factors in favour could then more clearly identify particular circumstances which *aggravate* the offence, **in the presence of any one of which a prosecution would normally be brought**, for example, if the victim is under 18 years of age or not mentally competent. There would then be no need to identify some of these factors as “weighty”: all would be weighty; each, even standing alone, would normally suffice to warrant prosecution.
17. The factors against would then identify circumstances that *clearly weigh against* prosecution, the presence of one or more of which may lead to non-prosecution - for example, that the actions of the suspect were of only minor assistance or influence, or that 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 suicide.
18. Such rebalancing of the guidelines is essential in order to ensure that it is made clear to potential aiders or abettors of suicide that the act remains a criminal offence which will be prosecuted unless there are clear factors to the contrary. It is also necessary in order to remove the risk, which is significant under the guidelines as they are currently, that they will be seen as conferring, for practical purposes, immunity from prosecution in specific circumstances. It would lead to shortening and simplification of both lists, though both lists may be added to by other factors identified during the consultation process.

### **Irrelevant factors**

19. While the Policy correctly and helpfully identifies a number of factors that aggravate the offence and a number that clearly weigh against prosecuting, it currently also identifies factors which are not relevant to prosecution and the inclusion of which could have serious harmful effects on society.
20. **First and foremost of these irrelevant factors is the physical state of health of the victim and whether the victim has a physical disability.** This is presented as a factor that constitutes a reason for non-prosecution of aiding and abetting suicide but, unlike other listed factors that weigh against prosecution, this factor does not relate to the motivation and reluctance of the

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suspect or to the nature of actions taken. Rather it seems to imply that, if the victim is disabled or terminally ill, then his or her life does not merit the same degree of protection by law. Such an underlying assumption is unacceptable in a civilised and caring society.

21. Parliament has several times debated whether there should be a change in the law to permit assisted suicide for people who are terminally ill. The result of this has been a clear rejection by Parliament of a change in the law in this direction. Prominent in this debate have been both physicians and people with disabilities. Legalising assisted suicide for the terminally ill was rejected both because of the prospect that it would have a harmful effect on vulnerable people and on society as a whole, and also because in itself it is discriminatory.
22. It should also be noted that the change in the law in Holland to allow euthanasia began as a decision not to prosecute certain classes of action. The Director of Public Prosecutions has stated that it is not the role of this Policy to change the law and that it is the role of Parliament to determine the law. Given the clear view that Parliament has expressed on the issue, the inclusion in the guidance of the categories of terminal and degenerative illness and incurable disability as conditions that weigh against prosecution oversteps the role of the Director of Public Prosecutions.
23. It is noteworthy that in the Daniel James case the young man's disability was not cited in the official statement of the reasons for non-prosecution. These focused instead on the fact that the suspects had not influenced Daniel James to commit suicide, rather they had strenuously sought to dissuade him, and that they did not stand to gain from his death. That statement was commendable for avoiding reference to disability in stating the factors against prosecution. For no other crime would it be said to be less appropriate to prosecute simply because the victim was disabled or otherwise not in full health. The difficulty of coping with illness or disability may explain someone's motivation in wishing to commit suicide, but the law must not treat victims unequally on that account.
24. **Secondly, closely related to the mistaken inclusion of disability and terminal illness as relevant factors is the inclusion of a history of suicide attempts as a reason against prosecution.** The Policy currently refers to "recognised mental illness" as a reason in favour of prosecution, but does not explicitly mention depression. Nevertheless, depression is a common mental illness and a history of suicide attempts is symptomatic of depression. If someone is detained in prison or in a mental hospital, then a history of suicide attempts is seen as a reason for vigilance. The presence of a history of suicide attempts may form the background to demonstrating reluctance on the part of the suspect, but in itself it is more likely to be a sign of depression or some other underlying mental disorder, and hence a factor in favour of prosecution, than it is to be a factor against.

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25. **The third irrelevant factor is the inclusion of spouse, partner and close family member relationships as factors against prosecution.** The reasoning seems to be that such relationships are generally supportive and give evidence that the aiding and abetting was purely motivated by compassion. However, these relationships are not always supportive, and indeed crimes of violence are very commonly carried out by someone known to the victim and not infrequently (for example, in instances of elder abuse) within the same family. Furthermore, as is evident in the Domestic Violence, Crime and Victims Act 2004, family members may become liable for failing to prevent the death of a vulnerable adult. It is not only paid carers who have a duty of care.
26. In 2005 the Law Commission produced a consultation document on the reform of the Homicide Act in England and Wales. Among other areas they considered were mercy killing and suicide pacts. Their consultation report gave striking evidence of gender inequalities in homicide-suicides and in suicide pacts (see 8.68 and following) and questioned how common or realistic was the stereotype of “compassionate assistance to someone already determined to commit suicide”. They argued that “in many cases men remain ‘in control’ of decision-making within the relationship, which explains the suspicion that, in many suicide pacts cases, men are taking the lead or even using coercion”. (8.78) This again raises the question of whether a close relationship in itself should be a factor weighing against prosecution. If the assistance of the spouse or unpaid carer is indeed reluctant and motivated by compassion, then it is these factors that are relevant, not the category of spouse or carer. In short, spouses, partners and close family members and personal friends should not be given special category status as compassionate assistance with suicides.
27. The inclusion of certain categories of victim (e.g. persons with disability) and certain categories of relationship (spouse, unpaid carer) as weighing against prosecution is highly misleading and could also encourage criminal behaviour. They are categories irrelevant to weighing up public interest in prosecution and they give the impression of a change in the law outside of and in contradiction to the recent explicit expression of the will of Parliament.

## **Other relevant factors**

28. The Policy's list of factors does set out some which are properly relevant public interest factors for prosecution and against prosecution. However there are other relevant factors for and against.
29. While the Policy's list of factors favouring prosecution explicitly mentions paid care-home staff, who do indeed have a duty of care, there should also be mention of medical or nursing professionals, and of situations where the victim is detained and those detaining him or her have a special duty of care, for example staff in prison or mental hospital.

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30. As the relationship of spouse or carer does not in itself imply innocent motivation, so a prior history of domestic violence or abuse between suspect and victim should be clear factor in favour of prosecution. This too should be included.
31. The statement in the Daniel James case gave as a reason against prosecution that the suspects did not *stand* to gain any advantage, financial or otherwise, by his death. As this has been cited as a reason in an actual non-prosecution, it should be incorporated into the Policy. Furthermore, it has the advantage, unlike many of the other factors, of being independently verifiable. In the Purdy judgement one of the Lords commented that this was problematical, as it would seem automatically to favour prosecution of a spouse. Nevertheless, the rationale for non-prosecution in the Daniel James is compatible with this obiter dictum in the Purdy case, for 'not standing to gain' is precisely a factor against prosecution while 'motivation by prospect of gain' is a factor in favour of prosecution. This reflects the broader point that the absence of a factor against is not itself a factor in favour (and vice versa).
32. In the Daniel James case the Director of Public Prosecutions stated that "a decision not to prosecute should not be taken merely because there are powerful mitigating circumstances but a factor that is otherwise relevant does not cease to be relevant merely because it overlaps with, or might be relevant to, mitigation". One factor that the Law Commission raised in relation to carers who kill was the presence of depression and desperation in the suspect which could lead to diminished responsibility. While the presence of depression in the suspect is not a strong reason against prosecution, in combination with other reasons it may weigh against prosecution.
33. Some of the factors for and against prosecution that are clearly relevant are phrased in a way that is unduly narrow. For example, factor 16 for prosecution "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" should also include organisations that promote, aid or abet suicide in other ways. This particular factor should also be placed higher in the list.
34. The appendix to this document offers a Suggested Revised Policy taking into account all the points made above.

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**Appendix:**  
**Suggested Revised Policy for  
prosecutors in respect of cases of aiding,  
abetting, counseling or procuring  
suicide**

**Introduction**

1. A person commits an offence if he or she aids, abets, counsels or procures (referred to in this policy as "aiding and abetting") the suicide of another, or the attempt by another to commit suicide. The consent of the Director of Public Prosecutions (DPP) is required before an individual may be prosecuted.
2. While the DPP can issue a policy which sets out the factors he will take into account in deciding whether to prosecute in individual cases, only Parliament can change the law on aiding and abetting suicide. The DPP cannot assure a person in advance of committing a crime that a prosecution will not be brought, and nothing in this policy can be taken to amount to such an assurance.
3. It has never been the rule that a prosecution will automatically follow whenever an offence is believed to have been committed. The way in which prosecutors make their decisions in all cases whether or not to prosecute is set out in the Code for Crown Prosecutors. However, the courts have decided that prosecutors should have further guidance setting out additional factors that may be relevant when deciding whether a prosecution for aiding and abetting suicide is in the public interest in a particular case.
4. For the purposes of this policy, the term "victim" is used to describe the person who may have committed or attempted to commit suicide.
5. This policy applies when the acts that allegedly constitute the aiding and abetting are committed in England and Wales; the suicide or attempted suicide may occur anywhere in the world, including in England and Wales.

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## **The investigation**

6. The police are responsible for investigating all cases of aiding and abetting suicide and they are encouraged to ask for the advice of prosecutors at an early stage and throughout their enquiries to ensure that all appropriate lines of investigation have been undertaken. Prosecutors should only make a decision when they have all the relevant material that is reasonably capable of being obtained after a full and thorough investigation.

## **The decision-making process**

7. Prosecutors will apply the Code for Crown Prosecutors in making their decisions: there must be sufficient evidence to provide a realistic prospect of conviction in respect of an offence of aiding and abetting suicide. If there is sufficient evidence, prosecutors should consider whether a prosecution is needed in the public interest.

8. The factors taken into account in deciding whether a prosecution is needed in the public interest also determine whether or not the DPP will consent to a prosecution.

## **The evidential stage**

9. A person commits the offence of aiding and abetting suicide if he or she aids, abets, counsels or procures the suicide of another, or an attempt by another to commit suicide.

10. For the evidential stage to be satisfied, the prosecution must prove that:

- the victim committed or attempted to commit suicide; and
- the suspect aided or abetted them in doing so.

11. The prosecution also has to prove that the suspect intended to aid or abet the victim to commit or attempt to commit suicide and that the suspect knew that those acts were capable of aiding and abetting the victim to commit suicide.

12. The act of suicide requires the victim to take his or her own life. It remains murder or manslaughter for another person to cause the death. Even clear expressions of desire from someone that his or her life be ended do not entitle another person to carry out those wishes if, for example, the person who wishes to commit suicide is asleep or is not conscious. Murder and manslaughter are generally more serious crimes than aiding and abetting suicide.

13. It is possible in law to attempt to aid or abet a suicide. This means that there may be an offence committed even where a suicide does not occur or where there is not an attempt to commit suicide. Whether there is sufficient evidence of an attempt to aid or abet suicide will depend on the factual circumstances of the case.

## **The public interest stage**

14. Prosecutors must consider the public interest factors set out in the Code for Crown Prosecutors and the factors set out in this policy.

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15. Deciding on the public interest is not simply a matter of adding up the number of factors on each side and seeing which side has the greater number. As stated in the Code for Crown Prosecutors, “A prosecution will usually take place unless there are public interest factors tending against prosecution which clearly outweigh those tending in favour”.

16. The satisfaction of the evidential stage creates a presumption in favour of prosecution in the public interest, unless factors against prosecution clearly outweigh those in favour. Thus the presence of one or more of the listed factors against prosecution may lead to non-prosecution. A decision not to prosecute should not be taken merely because there are powerful mitigating circumstances. Nevertheless, a factor that is otherwise relevant does not cease to be relevant merely because it overlaps with, or might be relevant to, mitigation.

17. In the light of the presumption in favour of prosecution, especially where there has been loss of life, the listed public interest factors in favour of prosecution should be understood as identifying particular circumstances which aggravate the offence, in the presence of any one of which a prosecution would normally be brought.

18. The absence of a factor does not necessarily mean that it should be taken as a factor tending in the opposite direction. For example, just because the victim did “indicate unequivocally to the suspect that he or she wished to commit suicide” does not transform the “factor in favour of a prosecution” into a “factor against prosecution”.

19. It may sometimes be the case that the only source of information about the circumstances of the suicide and the state of mind of the victim is the suspect. Prosecutors and investigators should make sure that they pursue all reasonable lines of further enquiry in order to obtain, wherever possible, independent verification of the suspect's account.

20. Once all reasonable enquiries are completed, if prosecutors are doubtful about the suspect's account of the circumstances of the suicide and the state of mind of the victim which are relevant to any factor set out below, they should conclude that they do not have sufficient information in support of that factor.

## **Public interest factors in favour of prosecution**

21. 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 mental disorder or learning difficulty such as those recognized as mental or behavioural disorders by the World Health Organisation's International Classification of diseases.
3. The victim did not indicate unequivocally to the suspect that he or she wished to commit suicide.

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4. The victim did not ask personally on his or her own initiative for the assistance of the suspect.
  5. 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.
  6. The suspect persuaded, pressured or encouraged the victim 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.
  7. 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.
  8. The suspect was a member of an organisation or group, a principal purpose of which is to aid, abet, counsel or procure suicide (whether for payment or not).
  9. The suspect gave assistance to more than one victim who were not known to each other.
  10. The suspect was paid to care for the victim in a care/nursing home environment
  11. The victim was detained in a secure environment such as a prison or mental hospital and was in the care of the suspect.
  12. The suspect was a nurse, doctor or other healthcare professional and the victim was in their care.
  13. The suspect was paid by the victim or those close to the victim for their assistance.
  14. 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.
22. In most cases, any one factor will be enough on its own to merit a prosecution in the public interest, notwithstanding the presence of one or more factors against prosecution.
23. The evidence to support these factors must be sufficiently close in time to the act of aiding or abetting to allow the prosecutor reasonably to infer that the factors remained operative at that time. This is particularly important at the start of the specific chain of events that immediately lead to the suicide or the attempt.

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24. These lists of public interest factors are not exhaustive and each case must be considered on its own facts and on its own merits.

## **Public interest factors that may weigh against prosecution**

25. Public interest factors against prosecution are set out below.

1. 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 suicide.
2. The suspect was wholly motivated by compassion.
3. The actions of the suspect, although sufficient to come within the definition of the offence, were of only minor assistance or influence.
4. The suspect had sought to dissuade the victim from taking the course of action which resulted in his or her suicide.
5. The assistance which the suspect provided was as a consequence of his or her usual lawful employment and did not directly or immediately contribute to the death
6. The suspect did not stand to gain any advantage, financial or otherwise, by the death of the victim.
7. The suspect's capacity to reach an informed decision to aid and abet the victim was adversely affected by a mental disorder or learning difficulty such as those recognized as mental or behavioural disorders by the World Health Organisation's International Classification of diseases.

26. In most cases, factors (1) to (4) above will carry more weight than the other factors in deciding that a prosecution is not in the public interest.

27. The evidence to support these factors must be sufficiently close in time to the act of aiding or abetting to allow the prosecutor reasonably to infer that the factors remained operative at that time. This is particularly important at the start of the specific chain of events that immediately lead to the suicide or the attempt.

28. These lists of public interest factors are not exhaustive and each case must be considered on its own facts and on its own merits.

## **Handling arrangements**

29. Cases of aiding and abetting suicide are dealt with in Special Crime Division in CPS Headquarters. The Head of that Division reports directly to the DPP.

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30. Any prosecutor outside Special Crime Division of Headquarters therefore who receives any enquiry or case involving an allegation of aiding and abetting suicide should ensure that the Head of Special Crime Division is notified.

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