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RAISING OUR HEADS ABOVE THE PARAPET? SOCIETAL ATTITUDES TO ASSISTED SUICIDE AND CONSIDERATION OF THE NEED FOR LAW REFORM IN ENGLAND AND WALES

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AN INTRODUCTION TO DEATH

Death has been described as the last taboo.[1] It is unsurprising therefore that those individuals who openly proclaim to desire death find themselves headline news. In October 2008, Debbie Purdy, who suffers with multiple sclerosis, challenged the legality of the failure of the Director of Public Prosecutions to issue guidance as to the circumstances in which individuals will or will not be prosecuted for assisting another person to commit suicide.[2] The judgment was pronounced barely two weeks after injured rugby player Dan James travelled with his parents to Switzerland, to secure his death with the help of the local group, Diginitas.[3] James was reportedly the youngest of the 100 Britons who have travelled to Dignitas to find the 'sanctuary of death.' However, Sky TV's screening of the assisted death of Craig Ewert in December was no doubt the most controversial event of the year in this respect.

By comparison to ancient civilizations who prepared for death in the most ostentatious of fashions,[4] modern Britain appears ill-equipped to deal with death and unprepared to talk about it. This situation has been exacerbated by

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[1] The CIS Funeral Plan - Tackling Death as the Last Taboo.htm published 4th October 2006. This encourages people to plan ahead for their funeral, with pre-pay instalments.

[2] *R (On application of Debbie Purdy) v DPP* [2008] EWHC 2565. This ruling has now been overturned by the House of Lords. R (on the application of Purdy) (Appellant) *v* Director of Public Prosecutions (Respondent) [2009] UKHL 45.

[3] See Nick Britton "Police Quiz Parents on Assisted Suicide of Rugby Son" *The Daily Telegraph*, Saturday October 18th 2008. No charges have been made.

[4] The Pyramids at Giza being are outstanding example.

the lack of a universal definition of death.[5] This is somewhat ironic as statistics indicated that over nine thousand deaths *each week* in England and Wales.[6] It is well known for young children to deny that they will ever die,[7] but adults also seem reluctant to face the obvious truth, with *two-thirds* of us dying intestate.[8] Indeed followers of various faiths herald the 'life everlasting.' The original Christian belief being, for example, that death is "only as a preparation for the hereafter.'[9]

Within this current climate of death denial, medicine has weaved a further layer of complication. Medical developments during the last century render it possible to prolong life in all sorts of ways unbelievable to our ancestors. Yet no matter how successful medicine can be, it cannot prolong life indefinitely, nor can it deny the ageing process. Current society faces an ever-ageing population, increasingly reliant upon a minority of young and physically superior beings, for support. Jonathan Swift in 'Gulliver's Travels' described this very society nearly three hundred years ago.[10] This satirical masterpiece, describes in agonising detail the quality of life and autonomy held by the immortal race known as the *Struldbruggs*.

> "As soon as they have completed the term of eighty years, they are looked on as dead in law; their heirs immediately succeed to their

[5] Although there is now a new code of practise in the "Diagnostic Confirmation of Death" produced by the Academy of Medical Royal Colleges October 2008 (available online at www.aomrc.org.uk) there is no legal definition of death.

[6] www.statistics.gov.uk Weekly deaths registered in England and Wales for the week ending 17th October 2008 was 9,501 for the week ending 7th November 2008 there was an estimated 9,900. In January 2009 the weekly deaths were in the region of 13,000 per week.

[7] "Talking To Children About Death" p 6 produced by the Hospice Organisation. Accessed through www.hospicenet.org/html/talking/html

[8] National Association of Head Teachers, Issue 22 April 2004 gives a figure of 72% of the population in the UK as not having a will. allmediaScotland.com (26/04/2006) reports that 67% of people in Scotland do not have a will. If two-thirds of the nation are reluctant to draw up a traditional will, it is to be questioned as to how many will prepare an advanced directive, should they be enforceable in the UK. A similar pattern can be seen in other jurisdictions. Marsha Goetting in "Dying Without a Written Will in Montana: Who Receives Your Property?" indicates that 60% of the population of Montana die intestate.
http://www.montana.edu/wwwpb/pubs/mt8908.html

[9] Glanville Williams *The Sanctity of Life and the Criminal Law* (Faber & Faber, 1958) p 229: "The Christian belief was that life on earth was important only as a preparation for the hereafter."

[10] Swift J *Gulliver's Travels* (1726). Far from being a children's book, this was one of the most satiric and controversial works of its time, and the author's views still resonate three centuries later.

> estates…they are held incapable of any employment of trust or profit, they cannot purchase land or take leases, neither are they allowed to be witnesses in any cause, either civil or criminal…At ninety they lose their teeth and hair…[But] the diseases they were subject to, still continue without increasing or diminishing."[11]

Is this a fate to which society would subscribe?

It appears that many are crying out for a change in English Law to allow assisted suicide to take place, yet Parliament constantly refuses to pass such legislation. According to Lord Joffe[12] "opinion polls, over 25 years, consistently show between 71 per cent and 87 per cent in favour of assisted dying."[13] Yet despite this, in May 2006, Lord Joffe's '*Assisted Dying for the Terminally Ill Bill*' was postponed for six months. It was obvious to all concerned that the postponement was an attempt to defeat the Bill, which has joined the ever-growing list of failed attempts to pass such legislation.[14] As the current Prime Minister Gordon Brown has openly declared his hostility to such legislation, and the British Medical Association is against a change in the law, despite the fact that 40 per cent of GPs support a change in the law,[15] it is unlikely that such a bill will be successful in the near future. If society truly supports assisted dying, then it needs to adopt a more pro-active approach should it wish to see legislation passed. This paper aims to explore current attitudes to assisted dying, and death generally, discuss current legal provisions in force worldwide, and to evaluate whether any law reforms are a) desirable and b) achievable in the United Kingdom today.

LEGAL AND PHILOSOPHICAL ATTITUDES TO ASSISTED SUICIDE

1. Legal Issues

The taboo around death intensifies, with the mention of the 's' word. The idea that one may be free to take one's own life often shocks the conscience of the populace. This is somewhat ironic, as suicide is no recent phenomena. In Roman society, suicide was an accepted means by which honor could be

[11] In Book III Journey to Laputa, Chapter 10.
[12] Hansard 12th May 2006, Column 1185.
[13] This includes "80 per cent of Christians, of all denominations", ibid at 1186.
[14] Eg 1936 Euthanasia Bill and the Voluntary Euthanasia Bill 1969. Conversely, the Medical Treatment (Prevention of Euthanasia) Bill 1999 aimed to make it unlawful to withdraw or withhold futile treatment.
[15] Kate Devlin "40pc of GPS Support Calls to Legalise Euthanasia" *The Daily Telegraph* Thursday February 5th 2009.

preserved. Those charged with capital crimes, for example, could prevent confiscation of their family's estate by taking their own lives before being convicted in court. Indeed far from being thought of performing a dreadful sin, early Christians took their own lives, primarily in the guise of martyrdom, "for fear of falling before temptation."[16]

In England and Wales suicide was a capital offence until the passing of the Suicide Act 1961,[17] and historically, those who successfully committed suicide were not permitted the usual burial rites.[18] Until the early nineteenth century, any person who recovered from an unsuccessful suicide attempt would be tried and hanged. The Crown then confiscated the deceased's property.[19] The 1961 Act decriminalised suicide itself, but nonetheless it remains illegal to assist suicide, by virtue of section 2(1) Suicide Act 1960. [20]

In Sweden and Finland, where suicide is legal, the countries' legal systems support the logical argument that as suicide is not a crime, to *assist* in a suicide cannot be a criminal offence. In other European countries, where assisted suicide remains a crime, rarely does prosecution occur. Should a conviction be obtained, sentences given are considerably lower than here. This, according to the Death with Dignity (formally Voluntary Euthanasia Society), makes the legal position in England and Wales regarding assisted suicides "the most restrictive and inflexible in Europe. Only Ireland compares." [21]

It is important to establish the difference between euthanasia and assisted suicide, as often the terms are used interchangeably. Assisted suicide and euthanasia are not strictly synonymous. Euthanasia comes from a Greek derivative meaning 'gentle and easy death,'[22] but in the modern context, it is the act of one person that brings death to another. In Britain, active voluntary

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[16] Glanville Williams, above n 9, p 229.

[17] The rules regarding suicide pacts had previously been addressed in the Homicide Act 1957. Under section 4(1) (as amended by the Suicide Act 1961 s 3 (2) Schedule 2) a survivor of a suicide pact would be charged with manslaughter rather than murder.

[18] They would be swung from a gibbet then buried in the highway with a stake through the body.

[19] The Forfeiture Act 1870, abolished forfeiture for suicide. (This endorsed common practice seen in England at this stage.)

[20] S 2 (1) A person who aids, abets, counsels or procures the suicide of another, or an attempt by another to commit suicide, shall be liable on conviction on indictment to imprisonment for a term not exceeding fourteen years.

[21] In the *European Court of Human Rights Diane Pretty* v *UK* Application 2346/02. Intervention by the Voluntary Euthanasia Society of England and Wales. Diane Pretty suffered from Motor Neurone Disease, and did not wish to go through the end stage of her illness.

[22] *The Concise Oxford Dictionary* (Oxford, 7th edn, 1981).

euthanasia constitutes murder and carries a mandatory life sentence regardless of the wishes of the deceased.

Assisted suicide covers various shades of activity, thus for example, although death might occur by injecting poison into another, equally a person is assisting a suicide merely by supplying the poison itself. The difference of involvement or *mens rea*, would be reflected purely by the sentence meted out.[23] Where doctors assist, known as physician assisted suicide (PAS), they may find themselves liable for murder. How many doctors refuse on ethical rather than legal grounds is unknown, but under current legislation a doctor can put himself at very great risk if he takes positive action. If an attending physician's *primary intention* was his patient's death,[24] the doctor could face murder charges.[25] Such was the situation that concerned Dr David Moor who faced murder charges after injecting a patient with diamorphine.[26] His defence was that as diamorphine relieves pain, his actions came under the legally and ethically acceptable principle of 'double effect.' The principle being first formulated in law by Devlin J during *R* v *Adams.*[27] In summing up Devlin J stated:

> "If the first purpose of medicine, the restoration of health, can no longer be achieved there is still much for a doctor to do, and he is entitled to do all that is proper and necessary to relieve pain and suffering, even if the measures he takes may incidentally shorten human life."

This legal principle will only protect a doctor from criminal liability where the patient has a terminal illness and "has reached the stage where there is no hope of recovery."[28] The case of Dr Nigel Cox highlights the vulnerability of the medical profession.[29] Dr Cox injected his dying patient, at her repeated request, with a solution of potassium chloride, resulting in death shortly afterwards. As potassium chloride has no pain relieving

[23] The circumstances in which distributors of a booklet published by the (then) Voluntary Euthanasia Society advising on methods of suicide were considered in *Attorney-General v Able* [1984] QB 795, no causal link was found between the booklet and those who had committed suicide.
[24] *R v Cox* (1992) 12 BMLR 38.
[25] For a very rare exception *Re: A (Conjoined twins: Surgical Separation)* (2000) 4 All ER 961.
[26] *R v Moor* [1999] Crim LR 31.
[27] *R v (Bodkin) Adams* (1957) Crim LR 354 per Devlin J.
[28] M. Otlowski, C Steven and R Hassan "Management of Death, Dying and Euthanasia" (1994) 20 J Med Ethics 41.
[29] *R v Cox* (1992) 12 BMLR 38.

qualities, 'double effect' could not be a defence. Dr Cox was convicted of attempted murder and given a twelve month suspended sentence.[30]

Yet, despite the possibility of a criminal record, it was reported in 2004, that doctors helped some 18,000 patients die each year in the United Kingdom.[31] The protection of medical professionals remains one of the strongest arguments in favour of legalising assisted suicide.

2. Patient Autonomy

Although English law recognises the right to autonomy with regard to the act of suicide itself,[32] in terms of assisted suicide, patients have no legal right to ask for medical intervention to end life, nor can they give valid consent to their death.[33] A competent patient's right to physical self-determination only extends as far as passive euthanasia- the removal or refusal of medical treatment leading to death. Many have argued that there is a philosophical inconsistency in British law regarding personal autonomy and self-determination, with regards to suicide and assisted suicide.

The word 'autonomy' derives from the Greek meaning 'self-rule.' However what amounts to 'autonomy' in a medical setting leads to discussion in itself. Patient autonomy "is practiced at different locations,"[34] and is not just under attack in the consulting room. It has been said "the principle of autonomy is the principle of liberty."[35] This is to be questioned as a definition for medical ethics. To equate being a patient, with being at *liberty*, (if patients were asked if they felt at liberty in a hospital environment) would prove a challenge. It is likely that a number would intimate that their position was more akin to that of a prisoner.[36] It has been pointed out that there is a

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[30] As the body had been cremated before enquiries took place it was impossible clarify causation of death and the murder charge was dropped.

[31] As calculated by Dr Hazel Biggs, and reported by Jamie Doward in "Revealed: Full Scale of Euthanasia in Britain" *The Observer* 19th September 2004. Although as noted in Hansard 12th May 2006 column 1185, recent research suggests a more realistic figure of 900 deaths each year.

[32] Autonomy means literally 'self-rule': see Margaret Brazier *Medicine Patients and the Law* (London: Penguin, 3rd edn, 2003) p 38.

[33] *R v Brown* [1994] 1AC 212 This case is an authority for stating that consent cannot be a valid defence for injuries of actual bodily harm or greater, except in defined circumstances (suicide is not such a circumstance).

[34] Rita M Struhkamp "Patient Autonomy: A View from the Kitchen" (2005) 8 *Medicine, Health Care and Philosophy* 105.

[35] T Takal "Concepts of 'Person' and 'Liberty', and their Implications to our Fading Notions of Autonomy" (2007) 33 J Med Ethics 225.

[36] A number of people the author has met during her time both as student and patient, would express their discontent as being 'locked-up' or 'kept-in.'

danger of regarding 'autonomy' as having a universally understood single meaning.[37] An attempt to define autonomy with one all-embracing description is likely to be "made in vain."[38] In reality, a spectrum of definitions can be viewed.

The label of 'self-determination' has perhaps been given the most credence as the essential aspect of autonomy by ethicists,[39] and occurs when a person "does what she chooses to do (because she chooses to do so) and she chooses to do what she does because she wants to do so."[40] Those who ardently support implementing legislation on assisted dying, imply that 'autonomy' is the only worthwhile argument. Yet these protagonists disregard the fact that there are a number of people who, for reasons of birth and education, can never be truly autonomous in their decision-making. There is always the potential of the unscrupulous relative taking advantage of a vulnerable person.[41] This is perhaps the most compelling argument *against* the legalisation of euthanasia in the UK, and an argument often cited by various religious organisations who strongly condemn such legislation.

3. Doctor Autonomy

The Hippocratic Oath decrees a doctor "shall do no harm." This places doctors in a dilemma if a patient requests 'an end'. In 2003 a survey for the Independent Newspaper revealed that 50 per cent of British doctors had experienced patients requesting the right to die, with a "surprisingly large number" of doctors admitting that they have been involved with active voluntary euthanasia.[42] Although appearing at odds with the Hippocratic Oath it might be argued that it causes more harm to prolong endless agony rather than engineer a swift end. Unfortunately the Harold Shipman enquiry has helped label all those who genuinely wish to ease pain, with the tag of murderer.[43] Public hysteria over the episode has had a backlash on the medical profession to the point where in some health authorities district

[37] Kay Wheat "The Law's Treatment of the Suicidal" (2000) 8 Med L Rev 182.
[38] Lars Sandman "On the Autonomy Turf; Assessing the Value of Autonomy to Patients" (2004) 7 *Medicine, Health Care and Philosophy* 261.
[39] Ibid at 262.
[40] Ibid.
[41] *R v McShane* (1977) 66 Cr App R 97. Here a daughter encouraged her elderly mother to commit suicide as she wanted her inheritance. There is (understandable) fear that permitting assisted suicide would encourage this type of behaviour.
[42] Margaret Brazier *Medicine Patients and the Law* (London: Penguin, 3rd edn, 2003) p 439.
[43] The infamous doctor may well have killed over 300 patients.

nurses are no longer allowed to carry morphine in their bags without rigid inspection.[44]

Ironically, the 'ancient' oath is far from fixed in stone; it has been radically transformed to reflect the modern age, with some of its original pledges removed.[45] Furthermore, there is concern as to *when* a medical student should swear the oath, one author preferring the oath to be taken when a student is proficient in the craft of a doctor and not 'blindly sign' as a novice.[46] Certain training institutions encourage their students to devise their own declaration,[47] and it is interesting to note that the model promoted by Professor Gillon[48] does not preclude assisted dying, but rather stipulates that trainees will do nothing to the *'overall harm'* of the patient. If a doctor believed that '*overall harm'* was the prolonging of life for a specific patient, the reluctance to administer a lethal injection might be overcome. It appears hypocritical to *only* select aspects of the oath that appeal. The test will be subjective, as one doctor's support of 'euthanasia' is another man's poison. It is submitted that the modernisation of the current law for assisted suicide should not be impeded because of an ancient, but variable tradition. With patient autonomy on the increase, perhaps now is the time for *society* to specify how doctors conduct their profession, rather than doctors themselves stipulating how patients should be treated. If society wants a doctor to act 'unethically,' the burden should be lifted from the doctor's shoulders and passed to the patient. However, there would still remain the problem of who is to *administer* the lethal medication. It has been noted that general support from nursing staff falls when faced with the reality that it would be them, not the doctors, who may be called upon to complete the procedure.[49]

[44] A personal friend reported a 'two hour search,...sheer pandemonium' when one vial of diamorphine was unaccounted for. It was eventually located in a corner of a car that was used during a night visit. (There was concern that it has been taken by a dying patient, or even worse, that the nurse had given him an extra dose!)

[45] For example, not carrying out either surgery or abortions.

[46] R M Veatch "White Coat Ceremonies: a Second Opinion." J Med Ethics (2002) 28 5-6.

[47] Eg Imperial College, London, see R Gillon "In Defence of Medical Commitment Ceremonies" (2002) 28 J Med Ethics 7.

[48] Ibid.

[49] M Berghs et al "The Complexity of Nurses Attitudes Toward Euthanasia: a Review of the Literature" (2005) 31 J Med Ethics 441. A recent survey carried out on Nurses.co.uk showed that only 20.9% of UK nurses think that assisted suicide should be legalised here.

ENDING LIFE: ACTS v OMISSIONS

Campaigners against PAS are particularly adamant that it is the patients who are unable to speak for themselves that are in most danger of being 'euthanased' without consent. This includes those suffering from 'Permanent Vegetative State' (PVS). A PVS patient may well appear to be awake and have their eyes open, they may breather without support, but will need a mechanised system of feeding to keep them alive.

The case of Tony Bland[50] stirred the emotions of the nation when his case came to court in 1993. Bland was a victim of the infamous Hillsborough disaster, in which 96 people died and another 400 where injured.[51] He suffered massive and irreversible brain damage, and was in a PVS state for more than three years before doctors, with the parents' permission, applied for a declaration to withdraw artificial feeding and therefore bring about his death.[52]

There is inconsistency bordering on hypocrisy when comparing positive acts to the currently legal route of omissions. It does not seem at all logical that a doctor who orders a life-support machine to be switched off (an omission) should be any less culpable that a doctor who administers a lethal cocktail (an act) therefore hastening death. Lord Goff discussed this very dichotomy during the *Bland* case. His Lordship stated:

> "I agree that the doctor's conduct in discontinuing life support can properly be categorised as an omission. …and as a matter of general principle an omission such as this will not be unlawful unless it constitutes a breach of duty to the patient…It is true that the drawing of this distinction may lead to a charge of hypocrisy."[53]

The Bland ruling was unsatisfactory to a number of people. It only applied to patients in PVS. Competent patients, who voluntarily requested death by the withdrawal of treatment, still had to obtain a court order. In such cases as these, capacity needs to be shown. In *Re AK*,[54] a sufferer from motor

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[50] *Airedale NHS Trust v Anthony Bland* [1993] AC 789.

[51] Due to inadequate policing, a surge of fans rushed forward crushing others after six minutes of semi-final between Liverpool and Nottingham Forest at Hillsborough Stadium in Sheffield 15th April 1989.

[52] The House of Lords permitted the withdrawal of artificial feeding.

[53] Above n 50 at 865. It was unsurprising that this ruling brought forth a whirlwind of academic debate, as there is much academic discussion regarding the futility of medical treatment, and the Bland case especially. See John M Finnis "Bland: Crossing the Rubicon" (1993) 109 LQR 329.

[54] *RE: AK (Medical Treatment: Consent)* (2001) 1 FLR 129.

neurone disease had written an advanced directive, requesting the withdrawal of treatment, when he could no longer blink. The High Court granted a declaration, stating that withdrawing life support was an omission, adding that it would in fact be unlawful not to respect the wishes of the patient, who wanted the machine switched off.

However, doctors remained reluctant, to withdraw or withhold medication even though, as stated by the General Medical Council, "it is for the patient, not the doctor to determine what is in the patient's own interests."[55] Evidence of this can be seen in *Ms B v An NHS Trust.*[56] Ms B was a paralysed patient, who relied on a ventilator to breathe. She requested that the machine be turned off, but doctors initially refused to do so, judging her incompetent. Ms B sought a court order and this was granted.[57] The ventilator was switched off resulting in her death shortly afterwards. Lady Justice Butler-Sloss reiterated a competent patient's complete right to refuse treatment, in such a situation specified guidelines.[58] In future, a wise doctor will no doubt follow the guidelines and obtain 'unequivocal assurances' that this is the patient's wishes.

Many in the UK wish to see a change in the law on grounds of compassion. The House of Lords decision of *R (on the Application of Mrs Diane Pretty)* v *Director of Public Prosecutions (Respondent) and Secretary of State for the Home Department (Interested Party)*[59] followed by that of *Pretty* v *United Kingdom,*[60] raised public awareness to assisted suicide, producing newspaper opinion polls of over 80 per cent in favour of its legalisation.

Diane Pretty suffered motor neurone disease (MND). This disease causes the motor neurons in the brain and spinal cord to shrink and disappear, so that the muscles can no longer receive signals to move. As a result, the muscles become smaller and weaker. Gradually the body becomes paralyzed. The cause of motor neurone disease is unknown, although in a small number of cases there appears to be a hereditary element. As yet no cure has been found. The disease occurs worldwide with one to two people per 100,000 of the population, suffering from the disease. In the UK it is more prevalent in those aged between 50 to 70 years. It is more common in men than women There are different types of MND and each will effect its victim in different ways,

[55] "Seeking Patients' Consent: the Ethical Considerations" GMC UK Nov 1998 p 5.
[56] *RE: Ms B v a NHS Trust* (2002) EWHC 429 (Fam).
[57] Due to her condition, the court in the person of Elizabeth Butler-Sloss, then President of the Family Division, attended her in hospital.
[58] The guidelines, established after *St George's Healthcare NHS Trust v S (Guidelines), R v Collins, ex ps (No 2)* [1999] Fam 26 (1998) 44 BMLR 194.
[59] [2001] UKHL 61.
[60] *European Court of Human Rights Diane Pretty* v *UK* Application No 2346/02.

and over different periods of time. Some notice that they are gradually becoming weaker, tripping over steps and dropping various items. For some, slurring of the speech and difficulty with swallowing will occur. However, all of the different variations the disease takes have a common thread in being a progressive degenerative illness that results in death. Those suffering from the most common forms of the disease will experience the most rapid degeneration with approximately three years between diagnoses and death.

Mrs Pretty had reached the stage in her illness where it was no longer possible to take her own life unaided, nor did she want to die straightaway, however, she did not want the disease to reach its final conclusion. The end stage of MND sees the degeneration of rib muscles resulting in suffocation. It was this manner of death that Mrs Pretty wanted to avoid. Her husband was prepared to help but, as has already been stated above, to assist in another's suicide is a criminal offence contrary to section 2(1) Suicide Act 1960. Therefore Mrs Pretty sought an undertaking from the Director of Public Prosecutions that her husband would not be prosecuted should he assist in her death. She argued that the European Convention of Human Rights (ECHR), she had a right to die under Article 2. As the ECHR was then in force in domestic law by virtue of The Human Rights Act 1998, she argued that the legal provision in the UK were such as to allow here to die with dignity at a time of her bidding, with assistance. The House of Lords, though sympathetic to Mrs Pretty's plight were not prepared to rule in her favour.

Having lost her appeal at the House of Lords, Diane Pretty then took her appeal to the European Court of Human Rights. The Court refused to acknowledge that Art.2 ECHR provided the right to die, and consequently her appeal was again unsuccessful. She died in May 2002, less then two weeks after the ruling at Strasburg was pronounced.

After Diane Pretty's death, her husband helped to establish UKActNow. One of its members wrote in 2004:

> "The dilemma with my illness is possibly facing suicide whilst I still have some physical strength of my own. Ending life sooner than I may want, because the law will not recognise the right to choose, seems cruel and inhumane to my family and myself."[61]

The demand to be allowed to live as long as possible, rather than dying at a time they are able to perform the necessary actions, is a *leitmotif*, in many sufferers' stories, and remains perhaps the most compelling reason why PAS *should* be legalised.

[61] www.ukActNow.

INTERNATIONAL APPROACHES

1. North America

In Canada, a similar dilemma to that faced by Mrs Pretty was shown in the *Rodriguez* case.[62] Sue Rodriguez suffered from the most common type of MND known as amyotrophic lateral sclerosis (ALS) which is commonly referred to in North America as Lou Gehrig's disease.[63] This type of MND is seen in 65 per cent of cases. Of those diagnosed with AML, 50 per cent of people die within three years of onset. Occasionally a person can survive considerably longer than this, but a sufferer will experience a steady degeneration.[64]

Ms Rodriguez wished to gain the right to an assisted suicide in the future, should her illness became unbearable and she had lost the capacity to act for herself. She sought an order that would allow a qualified medical practitioner to set up equipment by which she could, herself, end her life when she believed the time was right to do so. Therefore she applied to the Supreme Court of British Columbia for an order that s 241 (b) of the Criminal Code, RSC, 1985, c C-46,[65] should be declared invalid under the *Canadian Charter of Rights and Freedoms* (the "Charter").

Section 241(b) is similar to section 2 of the Suicide Act 1961. It provides:

> Everyone who ...(b) aids or abets a person to commit suicide, whether suicide ensues or not, is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years.

Ms Rodriguez argued that the criminal offence created by s 241(b) prohibits a person from aiding her to terminate her life when she cannot do so without assistance, thus depriving her of liberty and security of the person under s 7 of the Charter.[66]

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[62] *Rodriguez v British Columbia (Attorney General)* (1993) 107 DLR (4th) 342.

[63] Lou Gehrig was a famous baseball player. He was diagnosed with the disease in 1939, dying two years later.

[64] The most famous long-term survivor of this disease is Stephen Hawking who has been living with the disease for 40 years — ever since his diagnosis at age 21.

[65] S 241: Everyone who…(a) counsels a person to commit suicide or (b) aids or abets a person to commit suicide, whether suicide ensues or not, is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years.

[66] S 7 of the Charter provides: Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

The British Columbia Court dismissed her application and a majority of the British Columbia Court of Appeal affirmed the trial judge's decision. Ms. Rodriguez then appealed to the Supreme Court of Canada, where she argued that s 241(b) violates sections 7, 12, and 15 of the Charter, as it prohibited a terminally ill person from committing physician assisted suicide.[67] In the Supreme Court she lost he appeal by a 5:4 decision, the Court finding s 241(b) to be constitutional. The Court pronounced that state has an interest in protecting human life, and s 241(b), reflects this interest by protecting the vulnerable who, in a moment of weakness, might be persuaded to commit suicide. It was also noted, however, that 'sanctity of life' is not absolute and has changed over time, for example, as in Britain, attempted suicide is no longer a criminal offence. Canadian courts also recognize that patients have the right to refuse or withdraw treatment even if death results. Rodriguez ended her life in 1994.

Since the Rodriguez case, Canadian Courts have continued to enforce euthanasia laws, and have, on occasions, meted out stern punishments to those who assist in another's death. In 1993, Robert Latimer used carbon monoxide to kill his 12-year-old disabled daughter, who had cerebral palsy.[68] Latimer's argument that he had done so to relieve the pain and anguish she was suffering, was given short shrift, and he was convicted of second degree murder. The Supreme Court upheld the mandatory minimum sentence for second-degree murder, 10 years, as stipulated in s 235 of the Criminal *Code*. However, there remain inconsistencies. In one such situation Nancy Morrisson, a doctor from Nova Scotia, was charged with first-degree murder after giving a patient a deadly cocktail of non-painkilling drugs shortly after he was taken off life support. A judge dismissed the charges, saying that no reasonable jury would convict Dr Morrisson.[69]

The law in Canada, then, is similar to that of the United Kingdom. Assisted suicide remains a crime, but there appears to be no consistency in prosecutions. However, over the border in the U.S. there are now two states which allow PAS to take place.

The state of Oregon, on the West Coast of the U.S. has had legal framework for PAS since 1994, when the controversial Oregon Death with

[67] S 12: Everyone has the right not to be subjected to any cruel and unusual treatment or punishment. S 15 (1): Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

[68] *R* v *Latimer* [2001] 1 SCR. 3.

[69] Professor Barney Sneiderman "Dr Nancy Morrison and Her Dying Patient: A Case of Medical Necessity" Ethics Centre (2002);
www.umanitoba.ca/centres/ethics/articles/Barticle1.htm.

Dignity Act 1994 was passed, although it took until 1997 to be operational. The Act only applies to those who have reached the age of majority (which in Oregon is 18 years of age) and have been diagnosed as being terminally ill. The Act allows for a doctor to prescribe a fatal dose of barbiturates that the patients self-administer. Unsurprisingly, the Act has met with fierce opposition, its enactment was initially delayed as a court injunction prevented the measure from taking effect challenge to repeal the law was finally defeated in 1997. In 2006, the Act was again challenged, this time by the former Bush administration. In the Supreme Court, justices ruled in a 6-3 vote, that a federal drug law could not be used to prosecute Oregon doctors who prescribed a lethal dose.

Since the ruling in 2006, it has been noticeable that other states are preparing to instigate similar legislation. Between 1994 and 2006, there were 75 legislative bills to legalise PAS in 21 states, of which failed, but in November 2008, Washington State passed *Initiative 1000*, which allows for PAS.

In December 2008, Montana became the third state to allow for PAS, as a result of a court ruling by Judge Dorothy Mc Carter, who wrote that "the Montana constitutional rights of individual privacy and human dignity" gives a competent person, suffering from a terminal illness, the right to die with dignity. However, it is likely that this decision will be appealed by the state legislature, who believes that it should decide whether PAS should be legalised.

2. Belgium & Netherlands

The law in Belgium and the Netherlands goes yet further, with both countries allowing euthanasia to take place. (Doctors actually administer a lethal injection, albeit in a controlled manner.) The Belgium Act on Euthanasia 2002 defines euthanasia, as "intentionally terminating life by someone other than the person concerned at the latter's request." In Belgium the patient must have reached the age of majority, or be an emancipated minor,[70] and the request must be "voluntary, well-considered and repeated." Each act of Euthanasia has to be reported to the police. It was recorded that in 2005, 360 deaths had occurred in this manner.[71] This may seem a significant number, but it should be remembered that figure equates to the number of deaths that take place in the UK every six *hours*.

By contrast in the Netherlands, the law is not limited to adults, (the government is currently reviewing a protocol to allow euthanasia, with

[70] Belgium Act on Euthanasia 2002 Chap II S 3 ss1.

[71] Gundrun Schultz "Euthanasia Rates Double in Belgium" LifeSiteNews.com Tuesday February 7, 2006.

parental consent, for babies born with terminal illnesses) nor does a patient have to be terminally ill to request death, if a patent can show hopeless and unbearable suffering. The Dutch legislation, "termination of Life on Request and Assisted Suicide (Review Procedures) Act, was passed in 2001, after consultation with the country. However, it appears that this Act merely legalised a practice that was already taking place. [72] It is to be questioned whether laws should be passed to endorse current practice; however, the very fact it occurs implies that it is what society wants. If there is no legal framework in place then it is not uncommon for society to obtain what it desires, albeit in a less salubrious fashion.[73] What the law appears to have done is to give doctors "peace of mind" that they are operating within the law.[74]

3. Active Campaigns Worldwide

The number of campaigns that occur worldwide every year indicates the support for PAS. In Northern Australia, there have been attempts to bring back legislation that was briefly in place thirteen years ago. Northern Australia was the first place where assisted suicide and euthanasia was actively legalised in 1995 when the "Rights of the Terminally Ill (ROTI) Act" was passed. It was in force for eight months before the Act was repealed. The state of Victoria is now also considering a similar Act. The newly found energy in re-launching such legislation has occurred since the defeat of John Howard's liberal party in 2007, who held, what was seen as very strong conservative views in a variety of medico-legal areas, such as abortion and assisted reproduction for single-sex couples. These areas are now under consideration in Parliament.

In 2008, Lothian MSP Margo MacDonald launched a campaign to legalise assisted suicide in Scotland. There has been similar action in the Czech Republic, where it has been reported that two-thirds of Czech's believe that euthanasia should be incorporated into national law.[75] Further a field, Kerala in Southern India, has recently angered Church leaders by considering laws that would legalise euthanasia. All of the above indicate the progression of liberal laws in favour of PAS. The most startling developments of late

[72] There had been several decisions in court, from 1973 onwards, which showed a lenient view to those who had helped bring about another's death.

[73] Statistics on 'back-street abortions' indicate how prevalent it was for a woman to take her life in her hands, until the Abortion Act 1967 was passed.

[74] See Marjike Van den berg "Euthanasia law five years old" www.radionetherlands.nl/currentaffairs/eut070330mc.

[75] CTK "Czech Minister Views Proposal to Legalise Euthanasia Unfortunate" 21.07.2008. www.ceskenoviny.cz/news/index_view.php?id=324110

though, have occurred in Luxembourg. In February 2008 the Luxembourg parliament, adopted a law that would allow assisted suicide in the Duchy. It was anticipated that this would come into force last summer, but there have been the inevitable problems, which has shaken the constitution. No doubt haunted by the Pope declaring the Act to be "evil,"[76] Duke Henri indicated his refusal to sign the law, in December, for "reasons of conscience."[77] Members of the Luxembourg parliament then threatened to amend the national constitution, to remove his power of veto. The Duke agreed to sign such an amendment, stating that he would not them have to sign the Act against his conscience. This singular surrender of power indicates the depths of emotions that are stirred up by any enactment of assisted suicide. Ironically it seems that although politicians are allowed to vote in accordance with their beliefs, Heads of State are not allowed to express their views at all.

4. Switzerland

In Switzerland, although euthanasia is illegal, assisted suicide is not an offence in its own right and there are several groups who assist suicide. [78] The most publicised of these is *Dignitas,* whose motto is "to live with dignity, to die with dignity." It was to this organisation that both Dan James and Craig Ewert went for help. Swiss members of *Dignitas* are able to die in their own homes, but obviously this is not possible for 'suicide tourists.'[79] For non-nationals, *Dignitas* once rented a flat in an apartment block in the residential suburb of Wiedikon in Zurich. Unsurprisingly there were complaints and they were evicted from the flat. At one point, whilst looking for new accommodation, they assisted the death of a German 'suicide tourist' in a car park. The organisation currently operates in a business park in the village of Schwerzenbach.

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[76] "Pope Decries Euthanasia as 'Evil' as Luxembourg Advances Assisted Suicide" Christian Telegraph 22/12/08 www.christiantelegraph.com/issue4325.html

[77] "ADF-allied Attorneys Prepared to Challenge Luxembourg Assisted Suicide Law if Passed" 10th December 2008 wwwtelladf.org

[78] Swiss law does not state that assisted suicide is legal. Article 115 of the Swiss Penal Code states that "Whoever lures someone into suicide or provides assistance to commit suicide out of a self-interested motivation will, on completion of the suicide, be punished with up to five years' imprisonment". It only considers assisted suicide a crime, if the motive is selfish. There have been calls to look at Dignitas regarding the financial 'benefits' that Mr Minnelli receives for a death.

[79] There have been calls to tighten up the law in Switzerland to stop 'death tourism' occurring. However, Swiss Ministers do not believe a change is necessary at the moment, as reported 2 June 2006 LifeSiteNews.com.

At first glance, the organisation may appear a somewhat cavalier, as it seems that a deadly cocktail can be bought, with no real consideration of the needs of the individual. However, a person is not granted his or her wish to die as of right. There is often involvement by two physicians, a psychologist and a lawyer, before the fatal prescription is handed over. It is reported that of the 150 people turning to *Dignitas* for help during the period 1998 to 2004, only two changed their minds at the last minute.[80] The rest took the lethal cocktail prepared for them. Perhaps what is more startling is the need for such an organisation. It is submitted that if a similar, but arguably more controlled facility were allowed in Britain, it would be a more holistic solution for all concerned.

EVALUATION OF PALLIATIVE CARE

Many would argue that the current law protects the vulnerable from being forced to submit to euthanasia. It is feared that these vulnerable people will opt for assisted suicide rather than be a burden to their families. There is also concern that pain effects mental capacity, and the patient is unable to consent to death. Opponents to physician-assisted suicide very often state that there should be less emphasis on assisted suicides and more on palliative care. This area is not in contention from those who support assisted suicide in relation to terminally ill patients.[81] It is generally agreed that good palliative care should always be the first aim, and assisted suicide the last. To emphasis this further, studies have shown that those receiving good palliative care are less likely to ask for PAS.[82] However, various studies on the subject of terminal illness show that not all pain is effectively controlled. It has been reported in one study, that approximately 50 per cent of conscious patients who were dying in hospital suffered a degree of pain ranging from moderate to severe during the last three days of their lives.[83] The problem of inadequate pain relief appears to be worse for women than men. [84] A further survey indicates that some

[80] www.aucklandves.orcon.net.nz/intnews.htm 14/01/04.

[81] Although there are some who wish for assisted suicide who do not suffer from 'pain' as such. Those who suffer from mental anguish cannot be treated, except to given made permanently unconscious. This surely is a 'lack of dignity.'

[82] In 2007 the Ottawa Health Research Institute conducted a study of 379 Canadians receiving palliative care. It revealed that 10% of the patients would have asked for PAS initially, had it been available, but changed their minds once pain was under control.

[83] B Steinbock "The Case for Physician Assisted Suicide: Not (yet) Proven" (2005) 31 J Med Ethics 235.

[84] Ibid.

patients feel considerable pain even while under general anaesthetic. [85] As Kuhse points out,[86] even if a dying patient is given terminal sedation, they may still have to live with "considerable pain and suffering" during their last days. Therefore despite all the arguments in support of palliative care, it is clear that such pain-relief is not always the answer to everyone.

A similar situation also arises with patients with advanced dementia. Their inability to eat has been considered to be part of the dying process, and it has been debated whether to "postpone impending death with technology," (a gastronomy tube which in itself can be painful) should be allowed in such circumstances.[87] It has been argued that withdrawing nutrition from these patients does not contradict the principle of sanctity of life.[88]

The present Archbishop of Canterbury stated that "there is no stage of human life and no level of human experience, that is intrinsically incapable of being lived through in some kind of trust and hope,"[89] and though many would agree with His Reverence, a major point has been overlooked. It is when *hope* is lost that patients can no longer tolerate pain and request to die. For those patients in the last weeks of their lives their "key concern is their quality of life."[90] Although the Courts have ruled to the contrary, it is suggested that a breach of Article 3 ECHR might occur at times. [91]

ATTITUDES TO LEGISLATION AND BEYOND

Opponents claim that legalising assisted suicide would open the floodgates to involuntary euthanasia. However, according to World Heath Organisation statistics (2001) there is no correlation between the numbers of suicides in countries and the flexibility of laws on assisted suicides. This has been backed up by research in Oregon, where law allowing PAS has been recorded as being used "rarely."[92] In addition, the Remmelink Commission set up in the Netherlands 1990 to investigate the area, found that

[85] H Kuhse "Response to Ronald M Perkin and David B Resnik: 'The agony of trying to match sanctity of life and patient-centred medical care'" (2002) 28 J Med Ethics 270.
[86] Ibid.
[87] Above n 83.
[88] Ibid. This would only apply to those patients in the final stages of dementia, who no longer want or request nutrition or water, and for whom the process is unbearably painful.
[89] Hansard 12th May 2006 Column 1196.
[90] Muriel R Gillick "Artificial Nutrition and Hydration in the Patient with Advanced Dementia: is Withholding Treatment Compatible with Traditional Judaism?" (2001) 27 J Med Ethics 12-15.
[91] The Courts did not agree with Diana Pretty's argument that it was: above n 59.
[92] M Brazier *Medicine Patients and the Law* (London: Penguin, 3rd edn, 2003) p 460.

approximately nine thousand requests for physician-assisted suicide were received each year, but only a third of these were agreed to. Fierce opposition stops at nothing to ensure that so-called 'sanctity of life' is revered, even when it is in the patients 'best interests' to reach the 'sanctuary of death.' To the patient "life appears less sacred when it has exceeded its natural span and its quality has been degraded."[93]

Although it is no longer 'illegal' to commit suicide, its social stigma remains. Families often blame themselves for allowing such a death to occur, even if the suicide victim was beyond their help. How then are families supposed to cope with both moral and legal issues arising when a loved one who asks them to assist in their death? No matter how merciful it would be to assist in another's death, section 2 of the Suicide Act 1961, stipulates that it is a crime to aid, abet, counsel or procure a suicide. Therefore under current provisions in England and Wales, anyone who helps another to commit suicide, even for the best of reasons, is liable to face prosecution, either by the instigation or consent of the Director of Public Prosecution, with a potential penalty of 14 years imprisonment. This would be the case whether the death took place in the United Kingdom or abroad. To date, over 90 families have journeyed from the UK to countries which allow assisted suicide, each family member unsure as to whether they would be prosecuted on their return or not. So far, although there have been investigations, there have yet to be any prosecutions, but there is no guarantee that a prosecution will *not* take place.

This situation was unsatisfactory to Debbie Purdy, and the current lack of legal clarity was the motivation behind her recent Court action.[94] She wants her husband to travel with her to Switzerland, and help her to die at a stage when she believed her life had become too unbearable for her to continue. However, frustrated by the lack of clear legal advice as to whether her husband would face prosecution on his return, Mrs Purdy was tried to ascertain such guidelines from the Director of Public Prosecutions. Her action was initially unsuccessful. The Court of Appeal, whilst sympathising strongly with Mrs Purdy and others in her position, made it perfectly clear in that any change in the law in regards to assisted suicide was a task for Parliament not the Courts. However, in their final judgment, the House of Lords has now overturned earlier decisions. Consequently, the Director of Public Prosecutions has announced that he will produce interim guidance by the end of September. This will be followed by a full consultation before final guidance is issued in Spring 2010.

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[93] Hazel Biggs "A Feminist Reflects on Women's Experiences of Death and Dying." in Sally Sheldon & Michael Thomson (eds) *Feminist Perspectives on Health Care Law* (London: Cavendish Publishing Ltd, 1998).

[94] R (on the application of Purdy) (Appellant) *v* Director of Public Prosecutions (Respondent) [2009] UKHL 45.

Mrs Purdy's dilemma is whether she should end her life before she wants to, by travelling on her own to Switzerland to die alone, while she is still able to do so unaided, so that she will not need physical support from her husband, lest he be prosecuted on his arrival home. She will be waiting the DPP's guidance anxiously.

Where PAS had taken place, according to the physician, life had been shortened by "a few hours or days only." [95] In contrast to the number of hours 'lost' with the aid of a physician, the stark reality is that a number of Britons (including Reginald Crew and Anne Turner) have been forced to take positive life-ending action, considerably earlier than 'a few days' and more poignantly, at a time well in advance of when they themselves really want to, just to ensure it can be achieved. How can it be that in our so-called liberated and morally aware society people are forced to either end their life before they wish to, or suffer to the very end of their journey?

The current law on assisted suicide gives rise to much debate in terms of its inconsistencies regarding self-autonomy, medical ethics and compassion, with many wishing to see it changed. Lord Joffe's Patient (Assisted Dying) Bill, aimed to:

> "Enable a competent adult who is suffering unbearably as a result of a terminal or a serious and progressive physical illness to receive medical help to die at his own considered and persistent request; and to make provision for a person suffering from such a condition to receive pain relief medication."[96]

There were mixed emotions when the Bill was delayed in the House of Lords. Campaigners against the Bill claimed victory with their scoop of 100,000 signatures against it. However, if one compares the number of signatories with the number of people who will die in the UK in any one year, it is a paltry number.[97]

Despite a high percentage of the UK population apparently wishing for PAS to be legalised, it is clear that it will prove extremely difficult to pass any such Act without motivating the support of the country at large. However, "everyone seems to want to keep their head below the parapet."[98] This is

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[95] P Van der Maas, J Van Delden, L Pijnenborg and C Looman "Euthanasia and Other Medical Decisions Concerning the End of Life" (1991) 338 *Lancet* 669 at 671.

[96] HL Bill 37.

[97] In the region of 475,000, based on an average 9,500 per week www.statistics.gov.uk.

[98] Debbie Purdy as reported by Afua Hirsch and Audrey Gillan "Ask Parliament, not Courts, Whether your Husband Can Help You End Your Life" *The Guardian* Thursday 30th October 2008.

partly due to actions of the minority with a say, putting self-interest before social conscience. It has been noted that it is an unsound move for politicians to promote legislation in this area. This was highlighted in Scotland in 2005, when Jeremy Purvis's final proposal for a Scottish bill "to allow for a mentally capable, terminally ill adult the right to receive medical assistance to die" received only five supporters. It is thought that one reason for the lack of support was the impeding elections; MP's are reluctant to support controversial bills when their parliamentary seat is at stake.[99] This is a pandemic problem. Whilst canvassing in 2008, it was noticeable how careful (the then) Senator Obama and Senator Clinton were in their comments when asked for their opinions on the Oregon law allowing PAS. Whilst both applauded the innovative laws on Oregon, as responding to the demands of the people, both were also careful not to say they supported the views!

The subject of assisted suicide is a very emotive one and gives rise to impassioned debate for and against its legalisation. That the law should be changed to allow euthanasia in its widest terms is highly questionable. Yet the Patient (Assisted Dying) Bill in principle would have benefited many people. It would have confirmed patient autonomy by ensuring that, *providing full consent were given*, the *right* to assisted death was safeguarded. It would have extended quality of life, by removing a need to commit suicide for fear of a lingering death. It would have relieved doctors of the medical dilemma as to what to do for the patients' best interests, whilst conferring protection on them. Finally, it would have ended the torment of families who currently are paralysed by the legal constraints in the UK today.

As Lord Goff said:

> "It is of course well known that there are many responsible members of our society who believe that euthanasia should be made lawful; but that result could, I believe, only be achieved by legislation which expresses the democratic will that so fundamental a change should be made in our law, and can, if enacted, ensure that such legalised killing can only be carried out subject to appropriate supervision and control."[100]

It is suggested that this subject is so sensitive that it should be removed from the control of a select few. Taking all relevant factors into account, public debate is an essential prerequisite to any attempt at law reform on assisted dying. In this respect the most logical approach to this issue would be to hold a nationwide consultation on the issue leading to a referendum.

[99] www.Care "Not Killing: "Scottish Euthanasia Bill Fails" 12th December 2005 'Scotland has a parliamentary election in 2007 and nobody wants to rock the boat…'
[100] Hansard 12th May 2006, Column 1185.

This could question the Nation on (i) the acceptability of assisted suicide in any form and (ii) the level/degree to which suicide should be assisted.

Society can, and does, change its opinions and values on a regular basis.[101] Thus even if a referendum were held and legislation enacted permitting assisted suicide, it would be advisable to hold regular reviews of any such active legislation, and perhaps build in an expiry date for re-consultation. A rolling referendum every five to ten years would appease the majority who apparently support the legislation on assisted dying. The legislation could be tightly monitored and, if rejected, which might well prove to be the case, then those in favour would know that further fresh efforts to establish a change in the law could be brought to bear, in the not–too-distant future.

Whatever the outcome is, it is clear that this area needs much more open debate from all levels of society, not just those groups who hold steadfast but extremist views on either side of the argument. This is essential to help and support the needs of those who are seeking relief today. In the words of Debbie Purdy, "everyone seems to want to keep their head below the parapet but this needs to be discussed."[102] Perhaps now is the time to raise our heads and be counted- after all, at some stage in life, death comes to each and every one.

[101] Legalising abortions (Abortion Act 1967), and making marital rape a criminal offence (Criminal Justice Act 1994) are two legislative measures demonstrating societal changes in attitudes.
[102] Above n 98.