

# PROSECUTORIAL GUIDELINES FOR VOLUNTARY EUTHANASIA AND ASSISTED SUICIDE: AUTONOMY, PUBLIC CONFIDENCE AND HIGH QUALITY DECISION-MAKING

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*[This article proposes offence-specific guidelines for how prosecutorial discretion should be exercised in cases of voluntary euthanasia and assisted suicide. A similar policy has been produced in England and Wales but we consider it to be deficient in a number of respects, including that it lacks a set of coherent guiding principles. In light of these concerns, we outline an approach to constructing alternative guidelines that begins with identifying three guiding principles that we argue are appropriate for this purpose: respect for autonomy; the need for high quality prosecutorial decision-making; and the importance of public confidence in that decision-making.]*

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## I INTRODUCTION

Euthanasia and assisted suicide remain the subject of ongoing debate in Australia. Public interest has been sparked by a series of recent prosecutions, most notably those of Shirley Justins and Caren Jenning in connection with the death of Graeme Wylie.<sup>1</sup> Other recent prosecutions that have attracted attention include those of Ann Leith<sup>2</sup> and Victor Rijn<sup>3</sup> in Victoria, Merin Nielsen in Queensland,<sup>4</sup> and David Mathers in New South Wales.<sup>5</sup> A promi-

<sup>1</sup> The cases associated with Graeme Wylie's death are discussed further below at Part VIIIA.

<sup>2</sup> See Adrian Lowe and Steve Butcher, 'No Conviction for Euthanasia Drug', *The Age* (Melbourne), 16 April 2010, 3.

<sup>3</sup> See Adrian Lowe, 'Husband's Suicide Push Driven "by Love"', *The Age* (online), 23 May 2011 <<http://www.theage.com.au/victoria/husbands-suicide-push-driven-by-love-20110523-1f00m.html>>.

<sup>4</sup> See *R v Nielsen* [2012] QSC 29 (16 February 2012). See also Rosanne Barrett, 'Queensland Teacher Merin Nielsen Jailed for Aiding Suicide of Man, 76', *The Australian* (online), 16 February 2012 <<http://www.theaustralian.com.au/news/nation/queensland-teacher-jailed-for-helping-suicide-of-man-76/story-e6frg6nf-1226272723498>>; Brooke Baskin, 'Family in Despair at Jailing of Merin Nielsen for Assisting in Suicide', *The Courier-Mail* (online), 17

ment part of the debate in this area has been directed to the need for reform and those efforts to date have focused on legislative change. For example, there have been a number of Bills recently introduced or considered in South Australia,<sup>6</sup> Western Australia<sup>7</sup> and New South Wales<sup>8</sup> seeking to liberalise the law.<sup>9</sup> There have also been reports of a forthcoming Bill being prepared in Tasmania, which has the support of the Premier of that state,<sup>10</sup> and there have been attempts at the Commonwealth level to repeal the laws that preclude territory governments from legislating in relation to euthanasia.<sup>11</sup>

One issue that has not yet received sufficient attention in the Australian context, however, is the use of discretion as to when cases of euthanasia and assisted suicide should be prosecuted.<sup>12</sup> Examination of the role that prosecutorial discretion might play in such cases is timely given recent developments in England and Wales and Canada. In 2010, after a period of public consulta-

February 2012 <<http://www.couriermail.com.au/news/queensland/familys-despair-at-suicide-jailing/story-e6freoof-1226273271906>>.

<sup>5</sup> 'Mercy Killer Escapes Jail over "Agonising Conflict"', *The Sydney Morning Herald* (online), 28 April 2011 <<http://www.smh.com.au/nsw/mercy-killer-escapes-jail-over-agonising-conflict-20110428-1dxst.html>>.

<sup>6</sup> Criminal Law Consolidation (Medical Defences — End of Life Arrangements) Amendment Bill 2011 (SA); Voluntary Euthanasia Bill 2010 (SA).

<sup>7</sup> Voluntary Euthanasia Bill 2010 (WA).

<sup>8</sup> Rights of the Terminally Ill Bill 2011 (NSW).

<sup>9</sup> For a recent discussion of earlier attempts to legalise voluntary euthanasia and assisted suicide in Australia, see Lorana Bartels and Margaret Otlowski, 'A Right to Die? Euthanasia and the Law in Australia' (2010) 17 *Journal of Law and Medicine* 532.

<sup>10</sup> See, eg, Matthew 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>>; Dinah Arndt, 'Assisted Death Debate Reignited', *The Examiner* (online), 24 June 2012 <<http://www.examiner.com.au/story/157059/assisted-death-debate-reignited/>>.

<sup>11</sup> See Restoring Territory Rights (Voluntary Euthanasia Legislation) Bill 2010 (Cth).

<sup>12</sup> A notable exception to this is Otlowski's study, published in 1993, which looked at how 19 cases of 'mercy killings' were treated by the criminal justice system (including the exercise of prosecutorial discretion) over a period of almost 30 years: Margaret Otlowski, 'Mercy Killing Cases in the Australian Criminal Justice System' (1993) 17 *Criminal Law Journal* 10. There have also been some more recent discussions of this issue that are relevant but do not cover the same terrain as our article: see, eg, Thomas Faunce and Ruth Townsend, 'Justins v The Queen: Assisted Suicide, Juries and the Discretion to Prosecute' (2011) 18 *Journal of Law and Medicine* 706; Margaret Otlowski, 'House of Lords Directs DPP to Clarify Assisted Suicide Law' (2010) 18(1) *Australian Health Law Bulletin* 6; Brendon Murphy, 'Human Rights, Human Dignity and the Right to Die: Lessons from Europe on Assisted Suicide' (2009) 33 *Criminal Law Journal* 341; Jeremy W Rapke, 'R (Purdy) v DPP — Its Implications for Prosecuting Authorities' (Paper presented at the Conference of Australian and Pacific Prosecutors, Brisbane, October 2009).

tion, the Director of Public Prosecutions ('DPP') in England and Wales released its *Policy for Prosecutors in respect of Cases of Encouraging or Assisting Suicide*, which provides offence-specific guidance for how prosecutors will approach their decision of whether or not to prosecute.<sup>13</sup> In Canada, both the reports of the Royal Society of Canada Expert Panel on End-of-Life Decision-Making and the all-party Select Committee of the Quebec National Assembly included the adoption of prosecutorial guidelines as part of their recommendations for reform in this area.<sup>14</sup>

The purpose of this article is to develop offence-specific guidelines for how prosecutorial discretion should be exercised in cases of voluntary euthanasia and assisted suicide. We acknowledge the threshold issue of whether such guidelines are an appropriate vehicle for reform, but there is not scope in this article to make the case for this. It is sufficient for our purposes to point to developments in England and Wales and Canada, which make it timely for Australian jurisdictions to consider this issue, and to offer our guidelines as a principled approach for those contemplating this model.

We propose that our guidelines would supplement the existing general prosecution guidelines and we begin by outlining the way in which these guidelines in the various Australian states and territories operate in relation to the prosecution of offences generally. We then turn to consider the position in the England and Wales and how the offence-specific policy there came to be produced. Although a useful starting point, we conclude that this policy is deficient in a number of respects, including that it lacks a set of coherent guiding principles. In light of these concerns, we outline an approach to constructing alternative guidelines that begins with identifying three guiding principles that we argue are appropriate for this purpose: respect for autonomy; the need for high quality prosecutorial decision-making; and the importance of public confidence in that decision-making. Using those principles, we then construct our own guidelines for how prosecutorial discretion should

<sup>13</sup> Crown Prosecution Service (England and Wales), *Policy for Prosecutors in respect of Cases of Encouraging or Assisting Suicide: Issued by the Director of Public Prosecutions* (February 2010) <[http://www.cps.gov.uk/publications/prosecution/assisted\\_suicide\\_policy.pdf](http://www.cps.gov.uk/publications/prosecution/assisted_suicide_policy.pdf)>. This policy is discussed in more detail below. These guidelines do not apply in Scotland: see James Chalmers, 'Assisted Suicide: Jurisdiction and Discretion' (2010) 14 *Edinburgh Law Review* 295; Sheila A M McLean, Clare Connelly and J Kenyon Mason, 'Purdy in Scotland: We Hear, but Should We Listen?' [2009] *Juridical Review* 265.

<sup>14</sup> See Udo Schüklenk et al, 'End-of-Life Decision-Making in Canada: The Report by the Royal Society of Canada Expert Panel on End-of-Life Decision-Making' (2011) 25 *Bioethics* 1, 69–70; Select Committee on Dying with Dignity, *Assemblée Nationale du Québec, Dying with Dignity Report* (2012) 90 recommendation 20.

be exercised in cases of voluntary euthanasia and assisted suicide. For ease of reference, our proposed guidelines are set out in full in the Appendix.

## II PROSECUTORIAL GUIDELINES IN AUSTRALIA

The criminal offences that principally arise in the context of euthanasia and assisted suicide are murder, manslaughter, and aiding, abetting or counselling suicide.<sup>15</sup> It is no defence that the accused's conduct was motivated by compassion,<sup>16</sup> nor is a person excused from criminal responsibility because a victim consented to his or her own death.<sup>17</sup> However, the commission of one of the above offences is not of itself sufficient to lead to prosecution. All of the

<sup>15</sup> See Cameron Stewart, 'Euthanasia and Assisted Suicide' in Ben White, Fiona McDonald and Lindy Willmott (eds), *Health Law in Australia* (Lawbook, 2010) 415, 416-33 [12.10]-[12.160]. See also Bartels and Otlowski, above n 9, 534-5. For a wider discussion of the relevant criminal law position in Australia, see Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law* (Lawbook, 3<sup>rd</sup> ed, 2010) 503-42 [9.05]-[9.175] (unlawful killing); see especially 512-22 [9.40]-[9.95] (euthanasia and unlawful killing), 546-9 [9.190]-[9.205] (offences related to suicide). There may also be other relevant offences, including: the misuse of drugs under various state health regulations contrary to, eg, the *Poisons and Therapeutic Goods Act 1966* (NSW); using a carriage service for suicide-related material contrary to ss 474.29A-474.29B of the *Criminal Code Act 1995* (Cth) sch ('*Criminal Code*'); or importing 'border controlled drugs' contrary to *Criminal Code* s 314.4.

<sup>16</sup> Motive is immaterial to the determination of criminal responsibility in these cases. In relation to three Australian states with criminal codes, see *Criminal Code Act 1899* (Qld) sch 1 s 23(3); *Criminal Code Act 1924* (Tas) sch 1 s 13(4); *Criminal Code Act Compilation Act 1913* (WA) sch s 23(2). In relation to the common law, see, eg, *Airedale NHS Trust v Bland* [1993] AC 789, 892 (Lord Mustill). For a discussion of the irrelevance of motive in this context, see Margaret Otlowski, *Voluntary Euthanasia and the Common Law* (Oxford University Press, first published 1997, 2000 ed) 21-2.

<sup>17</sup> In relation to the common law, see *R v Cato* [1976] 1 WLR 110, 117 (Lord Widgery CJ); Otlowski, *Voluntary Euthanasia and the Common Law*, above n 16, 20-1. In relation to the Code states, see *Criminal Code Act 1983* (NT) s 26(3); *Criminal Code Act 1899* (Qld) sch 1 s 284; *Criminal Code Act 1924* (Tas) sch 1 s 53(a); *Criminal Code Act Compilation Act 1913* (WA) sch s 261. On this point, we anticipate a possible argument that our proposed guidelines could be subject to an administrative law challenge on the basis that they are based on an autonomous choice by the deceased for his or her life to end and this is inconsistent with the prohibition on consenting to one's own death. However, we consider that our proposed guidelines would withstand such a challenge because the guidelines do not infringe on the criteria for when criminal responsibility as a matter of law is established. Instead, the proposed voluntary euthanasia and assisted suicide guidelines are relevant only to assessments as to whether it is in the public interest for that conduct to be prosecuted and a discretion to be exercised accordingly. We also note that the public interest factor of autonomous choice in the proposed guidelines would not be the sole criterion for the exercise of prosecutorial discretion as DPPs would also have to apply the other public interest considerations as set out in the general prosecution guidelines.

state and territory DPPs have issued guidelines that govern the exercise of prosecutorial discretion generally and made them publicly available.<sup>18</sup> In all but one jurisdiction (Tasmania), the production of these guidelines is expressly authorised by the statute that creates the office of the DPP.<sup>19</sup> These guidelines set out the test that the DPP will apply in considering whether to prosecute an accused. Although the approach is formulated in different ways in the various jurisdictions,<sup>20</sup> there are broadly two considerations:

<sup>18</sup> See Office of the Director of Public Prosecutions (ACT), *Prosecution Policy* (27 September 2011) <[http://www.dpp.act.gov.au/publications/prosecutions\\_policy](http://www.dpp.act.gov.au/publications/prosecutions_policy)> (There is also a document called *Guidelines for Prosecutors* which provides further guidance on specific issues. Both the *Prosecution Policy* and the *Guidelines for Prosecutors* are reproduced in Office of the Director of Public Prosecutions (ACT), *Annual Report 2010–11* (2011) app); Office of the Director of Public Prosecutions (NSW), *Prosecution Guidelines* (1 June 2007) <[http://www.odpp.nsw.gov.au/guidelines/DPP%20Guidelines\\_whole\\_document\\_current%20to%2031\\_dec\\_2010.pdf](http://www.odpp.nsw.gov.au/guidelines/DPP%20Guidelines_whole_document_current%20to%2031_dec_2010.pdf)>; Office of the Director of Public Prosecutions (NT), *Guidelines* (13 January 2005) <<http://www.nt.gov.au/justice/dpp/docs/DPPguidelines.pdf>>; Office of the Director of Public Prosecutions (Qld), *Director's Guidelines* (15 June 2011) <[http://www.justice.qld.gov.au/\\_data/assets/pdf\\_file/0015/16701/Directors-guidelines.pdf](http://www.justice.qld.gov.au/_data/assets/pdf_file/0015/16701/Directors-guidelines.pdf)>; South Australian Office of the Director of Public Prosecutions, *Prosecution Policy* (14 December 2006) <[http://www.dpp.sa.gov.au/03/prosecution\\_policy\\_guidelines.pdf](http://www.dpp.sa.gov.au/03/prosecution_policy_guidelines.pdf)>; Office of the Director of Public Prosecutions (Tas), *The Role of an Independent Prosecutor and Guidelines for the Exercise of the Discretion to Prosecute* (4 September 2009) <[http://www.crownlaw.tas.gov.au/dpp/prosecution\\_guidelines](http://www.crownlaw.tas.gov.au/dpp/prosecution_guidelines)>; Director of Public Prosecutions Victoria, *Director's Policy: The Prosecutorial Discretion* (30 July 2012) <<http://www.opp.vic.gov.au/getattachment/c19fca74-1629-41df-a13c-9e017aab79d/2-The-Prosecutorial-Discretion.aspx>>; Director of Public Prosecutions for Western Australia, *Statement of Prosecution Policy and Guidelines* (2005) <[http://www.dpp.wa.gov.au/content/statement\\_prosecution\\_policy2005.pdf](http://www.dpp.wa.gov.au/content/statement_prosecution_policy2005.pdf)>. See also Commonwealth Director of Public Prosecutions, *Prosecution Policy of the Commonwealth: Guidelines for the Making of Decisions in the Prosecution Process* (November 2008) <<http://www.cdpp.gov.au/Publications/ProsecutionPolicy/ProsecutionPolicy.pdf>>. The position at the federal level will not be considered further in this article given the Commonwealth's limited role in regulating these issues.

<sup>19</sup> *Director of Public Prosecutions Act 1990* (ACT) s 12; *Director of Public Prosecutions Act 1986* (NSW) ss 13–15 (the present guidelines are issued pursuant to s 13); *Director of Public Prosecutions Act 1990* (NT) s 25; *Director of Public Prosecutions Act 1984* (Qld) s 11; *Director of Public Prosecutions Act 1991* (SA) s 11; *Public Prosecutions Act 1994* (Vic) s 26 (note also that issuing guidelines is a 'special decision' as defined in s 3(1) and so must occur on the advice of a 'Director's Committee': s 22(2)); *Director of Public Prosecutions Act 1991* (WA) s 24. There is no equivalent provision in *Director of Public Prosecutions Act 1973* (Tas). Although not considered in this article, note also that in some jurisdictions, the Attorney-General is able to give directions or provide guidelines to the Director of Public Prosecution as to how his or her functions are to be carried out: see, eg, *Director of Public Prosecutions Act 1990* (ACT) s 20; *Director of Public Prosecutions Act 1986* (NSW) s 26; *Director of Public Prosecutions Act 1990* (NT) s 28.

<sup>20</sup> For example, some jurisdictions expressly include the reasonable prospect of securing a conviction as part of the wider public interest test (see, eg Director of Public Prosecutions for Western Australia, *Statement of Prosecution Policy and Guidelines*, above n 18, 7 [24]) while other jurisdictions frame these two considerations in different ways (see, eg, Office of the

- 1 Is there sufficient evidence such that there is a reasonable prospect of securing a conviction?
- 2 If so, is it in the public interest that a prosecution occur?

The second consideration is the significant one for this article. The various Australian prosecution guidelines identify a range of factors that may be relevant to determining whether a prosecution is in the public interest. These factors include: the seriousness of the alleged offence;<sup>21</sup> any mitigating or aggravating circumstances;<sup>22</sup> the characteristics of the accused, the victim and any witnesses (such as age, physical or mental health, or disability);<sup>23</sup> the degree of the accused's culpability in relation to the offence;<sup>24</sup> antecedents and background of the accused;<sup>25</sup> the prevalence of this type of offence and the need for deterrence;<sup>26</sup> the level of public concern about the offence;<sup>27</sup> the attitude of the victim to prosecution;<sup>28</sup> the level of cooperation from the accused;<sup>29</sup> the need to maintain confidence in Parliament, the courts and the law;<sup>30</sup> the likely sentence if the accused is convicted;<sup>31</sup> and the likely length and cost of trial.<sup>32</sup> Although some of these factors may have particular applicability to cases involving voluntary euthanasia and assisted suicide, none of the prosecution guidelines in Australia include specific criteria to consider when determining whether a prosecution should occur in such cases.<sup>33</sup>

Director of Public Prosecutions (NSW), *Prosecution Guidelines*, above n 18, 8, which outlines a three-stage approach).

<sup>21</sup> See, eg, Director of Public Prosecutions Victoria, *Director's Policy: The Prosecutorial Discretion*, above n 18, 4 [2.1.10(a)].

<sup>22</sup> See, eg, *ibid* 4 [2.1.10(b)].

<sup>23</sup> See, eg, *ibid* 4 [2.1.10(c)].

<sup>24</sup> See, eg, *ibid* 4 [2.1.10(f)].

<sup>25</sup> See, eg, *ibid* 4 [2.1.10(d)].

<sup>26</sup> See, eg, *ibid* 4 [2.1.10(j)].

<sup>27</sup> See, eg, *ibid* 4 [2.1.10(l)].

<sup>28</sup> See, eg, *ibid* 5 [2.1.10(n)].

<sup>29</sup> See, eg, *ibid* 5 [2.1.10(p)].

<sup>30</sup> See, eg, *ibid* 5 [2.1.10(t)].

<sup>31</sup> See, eg, *ibid* 5 [2.1.10(q)].

<sup>32</sup> See, eg, *ibid* 5 [2.1.10(o)].

<sup>33</sup> Note, however, that the Attorney-General of the ACT has issued a direction entitled *Director of Public Prosecutions Direction 2006 (No 2)* (ACT), which clarifies that health professionals will not be prosecuted for withholding or withdrawing life-sustaining treatment that has been

## III THE ASSISTED SUICIDE POLICY IN ENGLAND AND WALES

The position is different in England and Wales, as they have recently produced a prosecutorial policy dealing with assisted suicide (the policy does not cover voluntary euthanasia).<sup>34</sup> This occurred after the final judicial decision of the House of Lords in July 2009: *R (Purdy) v Director of Public Prosecutions* ('*Purdy*').<sup>35</sup> Ms Purdy suffered from primary progressive multiple sclerosis and wished to obtain assistance from her husband to travel to a jurisdiction where assisted suicide was lawful so that she might die. She was, however, concerned that her husband might be prosecuted and so requested information from the DPP as to the factors he would consider when deciding whether to consent to the initiation of a prosecution for assisted suicide. This consent is specifically required by s 2(4) of the *Suicide Act 1961*.<sup>36</sup> The DPP declined to provide that information and Ms Purdy challenged that decision. The House of Lords concluded that Ms Purdy was entitled to know what factors the DPP would consider when deciding whether to prosecute and directed him to promulgate an offence-specific policy to this effect.<sup>37</sup>

In reaching this conclusion, the House of Lords considered that Ms Purdy's right to respect for her private life under art 8(1) of the *European Convention for the Protection of Human Rights and Fundamental Freedoms* ('*Convention*')<sup>38</sup> was engaged.<sup>39</sup> A failure to provide an offence-specific policy setting out the factors that will be used to determine whether a prosecution is in the public interest interfered with that right in a manner that was not 'in accordance with law' as required by art 8(2) of the *Convention*.<sup>40</sup> Matters of

lawfully refused or where death may have been incidentally hastened by the provision of pain relief: at para 4.

<sup>34</sup> See Crown Prosecution Service (England and Wales), *Policy for Prosecutors in respect of Cases of Encouraging or Assisting Suicide*, above n 13.

<sup>35</sup> [2010] 1 AC 345.

<sup>36</sup> 9 & 10 Eliz 2, c 60.

<sup>37</sup> *Purdy* [2010] 1 AC 345, 378 [1] (Lord Phillips), 396 [56] (Lord Hope), 400 [69] (Baroness Hale), 405 [86]–[87] (Lord Brown), 409 [106] (Lord Neuberger).

<sup>38</sup> Opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953), as amended by *Protocol No 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Amending the Control System of the Convention*, opened for signature 13 May 2004, CETS No 194 (entered into force 1 June 2010).

<sup>39</sup> *Purdy* [2010] 1 AC 345, 386–90 [29]–[39] (Lord Hope), 399 [67] (Baroness Hale), 401 [75] (Lord Brown), 406 [95] (Lord Neuberger).

<sup>40</sup> *Ibid* 395–6 [54]–[55] (Lord Hope), 398 [64] (Baroness Hale), 405 [85] (Lord Brown), 407–8 [100]–[101] (Lord Neuberger); see also at 390–91 [40]–[43] (Lord Hope) (discussing art 8(2)), 391 [44]–[53] (Lord Hope) (discussing the Director's discretion).

significance in reaching this conclusion included the recognised inadequacy of the general *Code for Crown Prosecutors*<sup>41</sup> in providing guidance for prosecution decisions in cases of this type<sup>42</sup> and the disparity between the prohibition on assisted suicide and the general practice in terms of prosecutions actually brought.<sup>43</sup> Greater clarity was needed as to how this discretion was to be exercised for Ms Purdy to be able to make decisions about how she lived her life.<sup>44</sup>

In September 2009, the DPP produced an interim policy setting out proposed factors for and against prosecution of cases of assisted suicide.<sup>45</sup> That policy was then the subject of a wide public consultation process that included the participation of over 4800 individuals and organisations.<sup>46</sup> In February 2010, after considering the results of that consultation exercise, the DPP published its final *Policy for Prosecutors in respect of Cases of Encouraging or Assisting Suicide*.<sup>47</sup> In determining whether a prosecution is in the public interest, the policy sets out 16 factors that favour prosecution and six factors that tend against it (see tables below).

<sup>41</sup> Crown Prosecution Service (England and Wales), *The Code for Crown Prosecutors* (February 2010) <<http://www.cps.gov.uk/publications/docs/code2010english.pdf>> ('Code for Crown Prosecutors').

<sup>42</sup> See, eg, *Purdy* [2010] 1 AC 345, 398 [64] (Baroness Hale).

<sup>43</sup> See, eg, *ibid* 395 [54] (Lord Hope).

<sup>44</sup> See, eg, *ibid* 386 [27], 391 [43], 395 [55] (Lord Hope).

<sup>45</sup> Crown Prosecution Service (England and Wales), *Interim Policy for Prosecutors in respect of Cases of Assisted Suicide* (September 2009) <[http://www.cps.gov.uk/consultations/as\\_policy.pdf](http://www.cps.gov.uk/consultations/as_policy.pdf)> ('Interim Policy on Assisted Suicide').

<sup>46</sup> See Crown Prosecution Service (England and Wales), *Public Consultation Exercise on the Interim Policy for Prosecutors in respect of Cases of Assisted Suicide: Summary of Responses* (February 2010) 6 [1.11] <[http://www.cps.gov.uk/consultations/as\\_responses.pdf](http://www.cps.gov.uk/consultations/as_responses.pdf)> ('Interim Policy on Assisted Suicide: Summary of Responses'). See also Crown Prosecution Service (England and Wales), *Interim Policy for Prosecutors in respect of Cases of Assisted Suicide: Consultation Document* (September 2009) <[http://www.cps.gov.uk/consultations/as\\_consultation.pdf](http://www.cps.gov.uk/consultations/as_consultation.pdf)>.

<sup>47</sup> Crown Prosecution Service (England and Wales), *Policy for Prosecutors in respect of Cases of Encouraging or Assisting Suicide*, above n 13. Note also that the Isle of Man has recently followed suit and issued guidelines in similar terms: see 'Suicide Policy Same as UK', *Isle of Man News: Isle of Man Examiner* (online), 28 September 2011 <[http://www.iomtoday.co.im/news/isle-of-man-news/suicide\\_policy\\_same\\_as\\_uk\\_1\\_3814031](http://www.iomtoday.co.im/news/isle-of-man-news/suicide_policy_same_as_uk_1_3814031)>.

**Public Interest Factors Tending in Favour of Prosecution under the  
England and Wales Assisted Suicide Policy<sup>48</sup>**

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- 1 The victim was under 18 years of age.
- 2 The victim did not have the capacity (as defined by the *Mental Capacity Act 2005*) to reach an informed decision to commit suicide.
- 3 The victim had not reached a voluntary, clear, settled and informed decision to commit suicide.
- 4 The victim had not clearly and unequivocally communicated his or her decision to commit suicide to the suspect.
- 5 The victim did not seek the encouragement or assistance of the suspect personally or on his or her own initiative.
- 6 The suspect was not wholly motivated by compassion; for example, the suspect was motivated by the prospect that he or she or a person closely connected to him or her stood to gain in some way from the death of the victim.<sup>49</sup>
- 7 The suspect pressured the victim to commit suicide.
- 8 The suspect did not take reasonable steps to ensure that any other person had not pressured the victim to commit suicide.
- 9 The suspect had a history of violence or abuse against the victim.
- 10 The victim was physically able to undertake the act that constituted the assistance him or herself.
- 11 The suspect was unknown to the victim and encouraged or assisted the victim to commit or attempt to commit suicide by providing specific information via, for example, a website or publication.
- 12 The suspect gave encouragement or assistance to more than one victim who were not known to each other.
- 13 The suspect was paid by the victim or those close to the victim for his or her encouragement or assistance.

<sup>48</sup> Crown Prosecution Service (England and Wales), *Policy for Prosecutors in respect of Cases of Encouraging or Assisting Suicide*, above n 13, 5–6 [43].

<sup>49</sup> The policy later clarifies that a 'common sense approach' should be taken in relation to this factor. Some benefit may accrue to the suspect from the victim's death but the critical element is the suspect's motive: *ibid* 6 [44].

- 14 The suspect was acting in his or her capacity as a medical doctor, nurse, other healthcare professional, a professional carer (whether for payment or not), or as a person in authority, such as a prison officer, and the victim was in his or her care.
- 15 The suspect was aware that the victim intended to commit suicide in a public place where it was reasonable to think that members of the public may be present.
- 16 The suspect was acting in his or her capacity as a person involved in the management or as an employee (whether for payment or not) of an organisation or group, a purpose of which is to provide a physical environment (whether for payment or not) in which to allow another to commit suicide.

**Public Interest Factors Tending against Prosecution under the  
England and Wales Assisted Suicide Policy<sup>50</sup>**

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- 1 The victim had reached a voluntary, clear, settled and informed decision 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 encouragement or assistance.
- 4 The suspect had sought to dissuade the victim from taking the course of action which resulted in his or her suicide.
- 5 The actions of the suspect may be characterised as reluctant encouragement or assistance in the face of a determined wish on the part of the victim to commit suicide.
- 6 The suspect reported the victim's suicide to the police and fully assisted them in their enquiries into the circumstances of the suicide or the attempt and his or her part in providing encouragement or assistance.

<sup>50</sup> *Ibid* 7 [45].

There is a growing body of academic work that examines the England and Wales policy.<sup>51</sup> There is not scope in this paper to rehearse that literature, nor is it our goal to undertake a detailed critique of the policy. However, to contextualise our own attempt at drafting guidelines, we feel compelled to make four brief observations about them. These observations inform our alternative approach and lead to points of disagreement and thereafter divergence of our guidelines from the England and Wales policy.

The first observation is that the policy does not appear to be founded on a set of coherent guiding principles. This seemed to be confirmed by evidence given by the DPP responsible for developing the policy, Keir Starmer QC, to the privately established Commission on Assisted Dying.<sup>52</sup> In response to a question about what the ‘underlying principle’ was for the policy, he noted that a ‘schematic approach’ had been avoided on the basis that such an approach would risk, ‘unless it’s very carefully constructed, undermining

<sup>51</sup> See, eg, Penney Lewis, ‘Informal Legal Change on Assisted Suicide: The Policy for Prosecutors’ (2011) 31 *Legal Studies* 119; Julia J A Shaw, ‘Fifty Years On: Against Stigmatising Myths, Taboos and Traditions Embedded within the *Suicide Act 1961* (UK)’ (2011) 18 *Journal of Law and Medicine* 798; Glenys Williams, ‘Assisting Suicide, the Code for Crown Prosecutors and the DPP’s Discretion’ (2010) 39 *Common Law World Review* 181; John Finnis, ‘Invoking the Principle of Legality against the Rule of Law’ [2010] *New Zealand Law Review* 601; Carol C Cleary, ‘From “Personal Autonomy” to “Death-on-Demand”: Will *Purdy v DPP* Legalize Assisted Suicide in the United Kingdom?’ (2010) 33 *Boston College International & Comparative Law Review* 289; Rob Heywood, ‘The DPP’s Prosecutorial Policy on Assisted Suicide’ (2010) 21 *King’s Law Journal* 425; John Coggon, ‘Prosecutorial Policy on Encouraging and Assisting Suicide — How Much Clearer Could It Be?’ (2010) 36 *Journal of Medical Ethics* 381; Jonathan Rogers, ‘Prosecutorial Policies, Prosecutorial Systems, and the *Purdy* Litigation’ (2010) 7 *Criminal Law Review* 543; Roger Daw and Alex Solomon, ‘Assisted Suicide and Identifying the Public Interest in the Decision to Prosecute’ (2010) 10 *Criminal Law Review* 737; Alexandra Mullock, ‘Overlooking the Criminally Compassionate: What Are the Implications of Prosecutorial Policy on Encouraging or Assisting Suicide?’ (2010) 18 *Medical Law Review* 442; Suzanne Ost, ‘The De-Medicalisation of Assisted Dying: Is a Less Medicalised Model the Way Forward?’ (2010) 18 *Medical Law Review* 497; Clive Seale, ‘Doctors and Assisted Suicide: Do It Properly or Not at All’ (2010) 340 *British Medical Journal* 775; John Coggon, ‘Doctors and Assisted Suicide: New Policy Fulfils a Legal Requirement, but the Implications Are Unclear’ (2010) 340 *British Medical Journal* 547. Although not in the academic context, see also the detailed examination of the England and Wales policy in Commission on Assisted Dying, *The Current Legal Status of Assisted Dying is Inadequate and Incoherent...* (Demos, 2012) 89–105 <<http://www.demos.co.uk/publications/thecommissiononassisteddying>>.

<sup>52</sup> More information is available at: Commission on Assisted Dying, *About the Commission on Assisted Dying* (17 August 2010) <<http://www.commissiononassisteddying.co.uk/about-the-commission-for-assisted-dying>>.

Parliament's intention that this should be an offence.<sup>53</sup> The role of the DPP was instead, he explained, to exercise discretion on a case-by-case basis.<sup>54</sup> The risk of that approach, however, is that the policy may not be conceptually sound and may lead to undesirable outcomes in practice. Consider, for example, the factor in favour of prosecution that the suspect was aware that the deceased intended to commit suicide in a public place where people may be present. It is clear that this factor is different in character to the others in the policy and seems to be aimed at different considerations. We ultimately omitted this factor from our guidelines because it did not flow from the guiding principles we established as relevant to our approach. We were also concerned that it may inadvertently capture places where we would argue it could be appropriate for voluntary euthanasia or assisted suicide to occur, such as a hospital room which, at least sometimes, is a 'public place'. Nevertheless, depending on one's starting point, such a factor could be regarded as appropriate. However, without a clear articulation of relevant guiding principles, it is unclear whether this is so and what purpose this factor is serving.<sup>55</sup>

The second observation is linked to the first and concerns how the authors of the policy failed to articulate the significance of, and the relationships between, the various factors in the policy.<sup>56</sup> For example, as we outline below when constructing our approach, some factors are considerations in their own right. An illustration from the policy is that 'the victim had not reached a

<sup>53</sup> Commission on Assisted Dying, *Transcript of Evidence from Keir Starmer QC, Director of Public Prosecutions* (14 December 2010) 18 <<http://commissiononassisteddying.co.uk/wp-content/uploads/2010/12/Keir-Starmer-Transcript-Final1.pdf>>.

<sup>54</sup> *Ibid.*

<sup>55</sup> It could reflect an attempt to prevent harm to third parties who witness the assisted suicide or voluntary euthanasia. However, for such an objective, the language would be both under- and over-inclusive. That is, it could capture individuals in a public place, such as a hospital room, where no innocent third parties will be harmed, and it could also fail to capture individuals in a private place, where third parties will be harmed by discovering the body. Location seems to be a poor proxy for some consequences one might legitimately seek to prevent.

<sup>56</sup> A similar critique is made in relation to the various elements of the 'public interest' test contained in the general *Code for Crown Prosecutors*: see John Rogers, 'Restructuring the Exercise of Prosecutorial Discretion in England' (2006) 26 *Oxford Journal of Legal Studies* 775, 793–4. The latest incarnation of this test is contained in Crown Prosecution Service (England and Wales), *Code for Crown Prosecutors*, above n 41, 10–15 [4.10]–[4.20]. The interim policy did suggest some factors be given greater weighting than others: Crown Prosecution Service (England and Wales), *Interim Policy on Assisted Suicide*, above n 45, 4 [20], 5 [22]. This was ultimately removed to make the policy 'clearer and more accessible': Crown Prosecution Service (England and Wales), *Interim Policy on Assisted Suicide: Summary of Responses*, above n 46, 18 [4.7], 21 [5.6], 32 [8.5], 34 [9.5].

voluntary, clear, settled and informed decision to commit suicide'.<sup>57</sup> By contrast, other factors might best be described as 'evidential', that is, they are evidence as to when other factors in the policy will be substantiated or not. A relevant example is that 'the suspect pressured the victim to commit suicide'<sup>58</sup> as this is evidence that goes to the factor mentioned earlier, namely the voluntary nature of the decision. This distinction matters as consistent and considered decision-making requires an understanding of the role and significance of the relevant factors in a process of deliberation. We acknowledge that the policy does note that assessing the public interest is not a numerical exercise and that prosecutors 'must decide the importance of each public interest factor in the circumstances of each case and go on to make an overall assessment.'<sup>59</sup> However, we consider this sort of guidance to still fall short of articulating in a meaningful way how the factors are to be used in the decision-making process.

The third observation is that the policy applies only to assisted suicide and does not deal with voluntary euthanasia.<sup>60</sup> Although this arose because of the way in which the policy was produced in response to the *Purdy* decision, we consider that differentiating between voluntary euthanasia and assisted suicide is not justifiable for four reasons. First, to differentiate discriminates on the basis of disability. If the policy does not include voluntary euthanasia, a person whose disability or illness means that he or she is not capable of ending life on his or her own (and so requires another to do the final act that ends life) may be deprived of that assistance because of concerns about prosecution.<sup>61</sup> Second, given that we argue for guidelines grounded in respect for autonomy, both assisted suicide and voluntary euthanasia are justified (even though the final agent of death is different as between assisted suicide and voluntary euthanasia). Third, an assumption that sometimes underpins treating assisted suicide differently from voluntary euthanasia is that the

<sup>57</sup> Crown Prosecution Service (England and Wales), *Policy for Prosecutors in respect of Cases of Encouraging or Assisting Suicide*, above n 13, 5 [43(3)].

<sup>58</sup> *Ibid* 6 [43(7)].

<sup>59</sup> *Ibid* 5 [39].

<sup>60</sup> Voluntary euthanasia is where a person performs an act that intentionally ends the life of another person. This is done in response to a competent request by that second person who considers his or her life is no longer worth living. Assisted suicide is where a competent person dies after being provided by another with the means or knowledge to kill him or herself. For a discussion of various terminology in this area, see Ben White and Lindy Willmott, *Background Paper: How Should Australia Regulate Voluntary Euthanasia and Assisted Suicide?* (Australia 21, 2012) 7–8.

<sup>61</sup> Otowski, *Voluntary Euthanasia and the Common Law*, above n 16, 194–5.

former is *always* less serious than the latter.<sup>62</sup> But this is not always the case,<sup>63</sup> and including both in the guidelines allows prosecutors to assess whether a prosecution is appropriate in the circumstances of each case. And, as noted below, this assessment would occur not only having regard to the offence-specific guidelines but also the general prosecutorial guidelines which take into account factors such as the level of culpability of the accused. Finally, we accept that some people may say that they would experience an emotional difference between assisting another person to commit suicide and participating in voluntary euthanasia.<sup>64</sup> However, different emotional reactions do not provide a foundation for a claim of there being a morally significant distinction — particularly a distinction to be used as the basis for public policy. Otherwise, of course, the fact that some people experience *withholding* treatment differently from *withdrawing* treatment could justify permitting one and not the other. In the context of public policy grounded in respect for autonomy, in most circumstances, the emotional difference *could* justify a person, such as a medical or other health professional, not being forced to provide both assisted suicide and voluntary euthanasia (autonomy is often constrained where its exercise would result in harm to others)<sup>65</sup> but it *could not* justify a difference in public policy with respect to the permissibility of one and not the other.<sup>66</sup>

The final observation is concerned with the emphasis the England and Wales policy places on the conduct of the suspect being characterised as non-professional, ‘compassionately-motivated, one-off assistance’.<sup>67</sup> Related to this, the policy specifically discourages the involvement of medical and other health professionals as well as individuals belonging to organisations that facilitate assisted suicide. Such an approach gives rise to concerns that

<sup>62</sup> See, eg, Sidney H Wanzer et al, ‘The Physician’s Responsibility toward Hopelessly Ill Patients’ (1989) 320 *New England Journal of Medicine* 844.

<sup>63</sup> For example, we would argue that a case of coerced assisted suicide where the will of a person was overborn should be treated more seriously than a case involving a competent request for voluntary euthanasia.

<sup>64</sup> See, eg, Illinka Haverkate et al, ‘The Emotional Impact on Physicians of Hastening the Death of a Patient’ (2001) 175 *Medical Journal of Australia* 519.

<sup>65</sup> See Otłowski, *Voluntary Euthanasia and the Common Law*, above n 16, 195 (‘doctors should not be required to abdicate their autonomy in favour of that of the patient’).

<sup>66</sup> See, eg, Dan W Brock, ‘Voluntary Active Euthanasia’ (1992) 22(2) *Hastings Center Report* 10, 10.

<sup>67</sup> Crown Prosecution Service (England and Wales), *Interim Policy on Assisted Suicide: Summary of Responses*, above n 46, 10 [2.7]. See also Commission on Assisted Dying, *Transcript of Evidence from Keir Starmer QC*, above n 53, 8–9, 11; Williams, above n 51, 192–3; Mullock, above n 51, 453–60, who note the significant weight given to this consideration.

assessments of the deceased's competence, without the relevant expertise and experience, may be incorrect.<sup>68</sup> Also of concern is the fact that amateur attempts to assist the deceased to die may lead to him or her dying in pain or discomfort, or experiencing the indignity in death that the deceased was seeking to avoid.<sup>69</sup> Further, precluding the involvement of medical and other health professionals may also reduce opportunities for the deceased to make a decision about whether to die in light of complete and accurate information about his or her prognosis and treatment options.<sup>70</sup> For these reasons, our proposed guidelines do not treat acting in a professional capacity in and of itself as a factor in favour of prosecution. We note finally that this aspect of the England and Wales policy is currently the subject of a legal challenge by a man who wishes to end his life but whose family will not assist him. 'Martin' is challenging the policy seeking that it be amended to permit professionals to assist him to die.<sup>71</sup>

#### IV PROPOSED VOLUNTARY EUTHANASIA AND ASSISTED SUICIDE GUIDELINES: INTRODUCTION

Turning from the experience in England and Wales, and informed by our above critique of its policy, we now set out our proposed guidelines for when prosecutions should or should not occur in relation to voluntary euthanasia and assisted suicide. Although we are not able to undertake a detailed review of the England and Wales policy in this paper, we consider there are sufficient concerns about that model to warrant starting anew and designing a set of guidelines for the Australian context, albeit informed by the experience in England and Wales. As part of that process, we start from first principles and

<sup>68</sup> Lewis, above n 51, 129. Although there are aspects of assessing whether decision-making is competent and voluntary that do not require medical expertise (for example, the impact of family dynamics), medical involvement in capacity assessments is likely to reduce error: Ost, above n 51, 534–7.

<sup>69</sup> Lewis, above n 51, 129–30; Seale, above n 51; Ost, above n 51, 533–4; Mullock, above n 51, 452–3; Commission on Assisted Dying, *The Current Legal Status of Assisted Dying is Inadequate and Incoherent...*, above n 51, 98–9.

<sup>70</sup> Ost, above n 51, 537.

<sup>71</sup> Clare Dyer, 'Nicklinson's Widow Is Refused Right to Appeal to Higher Court' (2012) 345 *British Medical Journal* e6690. 'Martin' received leave to appeal against the English High Court's conclusion in *R (on the application of Nicklinson) v Ministry of Justice* [2012] EWHC 2381 (16 August 2012) that the DPP was not required to clarify his policy as requested. 'Martin's' case was heard along with the related case of Tony Nicklinson (who challenged the law rather than the DPP policy). Nicklinson was unsuccessful before the High Court and his widow (Nicklinson had subsequently died) was denied leave to appeal.

identify three guiding principles for constructing these guidelines: respecting autonomous choice; promoting high quality decision-making by prosecutors; and ensuring public confidence in the decisions of prosecutors. Each of these principles is discussed in more detail below.

Having identified those principles, we are then in a position to determine the content of the guidelines, which we have organised into six components. The first component states that a public interest factor that tends in favour of, or against, prosecution is whether the deceased's death occurred as a result of an autonomous choice made by the deceased for his or her life to end. The second and third components of the guidelines deal with how the nature of the deceased's choice (if any) is to be established: what are the *elements* of an autonomous choice in the context of voluntary euthanasia and assisted suicide; and what is the *evidence that is directly relevant* to determining whether those elements are present or not. For example, one element of an autonomous choice is that it was made voluntarily, and direct evidence of whether that is the case or not might include whether the suggestion to consider voluntary euthanasia or assisted suicide came from the deceased or from the suspect.

The fourth component is comprised of factors that do not constitute direct evidence of whether the elements of an autonomous choice are present or not, but that nevertheless give confidence or raise doubts as to the nature of the choice. An example of this is where the suspect has a financial interest in the death of the deceased. While in such cases, as a matter of fact, it is still possible to show that an autonomous choice has been made, the presence of this factor creates a real risk that this may not be the case. Recognition of such 'confidence factors' in the guidelines is important in individual cases but also in the longer term for ensuring the public has confidence in these decisions and that these guidelines do not foster situations where non-autonomous choices are acted upon.

These four components comprise the decision-making content of the offence-specific guidelines, and explain how a DPP should use each component in his or her decision-making. Although this is explained further below when each component is considered in more detail, we have briefly indicated here the role played by each of the components and how they relate to each other. This is important in light of the objection expressed earlier in relation to the England and Wales policy that it fails to articulate the significance of, and the relationships between, the various factors in that policy. We anticipate the suggestion that in practice, such decision-making may not be as nuanced and orderly as the approach we have proposed here. Nevertheless, deficits in practice do not detract from the importance of conceptual clarity in decision-

making and there is merit in attempting to articulate how decisions should be made in a principled way.

The final two components relate more to process issues of decision-making than the content of those decisions. The fifth component requires that decisions whether or not to prosecute under the guidelines must be made by the DPP himself or herself. The sixth component establishes a reporting structure for decisions whether or not to prosecute. Reporting should occur in relation to individual decisions but systematic data should also be kept and published to ensure the system is working.

Turning finally to the scope and operation of the proposed guidelines, they are intended to supplement, and not to exclude, the operation of the general prosecutorial guidelines. Directors of public prosecutions would be required to apply the broader public interest considerations in the general guidelines as well as the additional public interest factor identified as significant for these specific offences set out below.<sup>72</sup> Our guidelines also apply only where the deceased was capable of making an autonomous choice for his or her life to end. This includes competent adults and competent minors as discussed below.<sup>73</sup> Given the centrality of autonomy in these guidelines, it is not appropriate that they govern those who are incompetent. Finally, for the reasons outlined above,<sup>74</sup> the guidelines apply to both voluntary euthanasia and assisted suicide. We note though that the operation of the general prosecutorial guidelines may be significant in terms of how these two situations are treated. As noted above,<sup>75</sup> some of the factors in the general guidelines to be considered in assessing whether prosecution is in the public interest include the seriousness of the alleged offence and the degree of culpability of the accused. It may be that in particular cases of voluntary euthanasia the greater level of participation by the accused in the deceased's death points more towards prosecution than if he or she had only assisted the deceased's suicide, but that will not always be the case and allowing the guidelines to deal with both situations allows this discretion to be exercised in light of the facts of each case.

<sup>72</sup> This is also the approach taken in England and Wales: Crown Prosecution Service (England and Wales), *Policy for Prosecutors in respect of Cases of Encouraging or Assisting Suicide*, above n 13, 4–5 [38].

<sup>73</sup> See below Part VIIA.

<sup>74</sup> See above Part III.

<sup>75</sup> See above Part II.

## V THREE GUIDING PRINCIPLES

In drafting the proposed prosecutorial guidelines, we were guided by three principles:

- 1 the critical factor that tends against prosecution is if the deceased's death occurred as a result of an autonomous choice made by the deceased for his or her life to end;
- 2 the decision-making pursuant to the prosecutorial discretion in this area needs to be of high quality; and
- 3 the decision-making pursuant to that discretion needs to attract public confidence.

### A *An Autonomous Choice*

Support for autonomy as an appropriate value underpinning these guidelines can be found in law and public opinion.<sup>76</sup> First, the principle of respect for autonomy is a fundamental tenet of Australian law. The High Court has consistently recognised the significance of autonomy in the common law and this is most notably seen in the recent case of *Stuart v Kirkland-Veenstra*.<sup>77</sup> In that case, where the High Court declined to recognise a duty of care owed by police officers to prevent a person from committing suicide, Gummow, Hayne

<sup>76</sup> Support can, of course, also be found in ethics. We do not, however, rely upon an ethical argument for respect for autonomy here. This is in part because we believe that the argument grounded in law and public opinion is sufficient and it can be made without introducing the complexity and controversy associated with competing ethical theories about autonomy. Contrast, for example, Immanuel Kant, *Fundamental Principles of the Metaphysic of Morals* (T K Abbott trans, Prometheus Books, 1987) [trans of: *Grundlegung zur Metaphysik der Sitten* (first published 1785)]; John Stuart Mill, *On Liberty* (David Bromwich and George Kateb eds, Yale University Press, first published 1859, 2003 ed); Susan Sherwin, 'Relational Autonomy and Global Threats' in Jocelyn Downie and Jennifer L Llewellyn (eds), *Being Relational: Reflections on Relational Theory and Health Law* (UBC Press, 2012) 13. While we believe that the case can be made for autonomy as a core value and respect for autonomy as a core principle within an ethical foundation for the law, we leave that discussion for other venues. We believe that it is necessary and sufficient to ground the guidelines proposed in this article in the conventional understanding of autonomy that underpins the law more generally. The guidelines can and should evolve inasmuch as the law evolves in relation to changing conceptions of autonomy within moral philosophy. But we do not see the project in this article as contributing to or driving such change.

<sup>77</sup> (2009) 237 CLR 215. See also *Cole v South Tweed Heads Rugby League Football Club Ltd* (2004) 217 CLR 469, 477 [14] (Gleeson CJ); *Perre v Apand Pty Ltd* (1999) 198 CLR 180, 215 [88], 223–5 [114]–[117], 235 [146]–[148] (McHugh J).

and Heydon JJ concluded that such a duty would ‘mark a significant departure from an underlying value of the common law which gives primacy to personal autonomy.’<sup>78</sup> These judges considered that personal autonomy is ‘a value that informs much of the common law’<sup>79</sup> and permits the individual to decide whether to engage in conduct that may cause harm to himself or herself.<sup>80</sup> Other support in law for the principle of respect for autonomy comes from the cases that deal with a closely related field: refusals of medical treatment. For example, in *Brightwater Care Group (Inc) v Rossiter*, Martin CJ referred to the ‘common law principle of autonomy and self-determination’<sup>81</sup> and also noted that the principle is ‘well established at common law’.<sup>82</sup>

Public opinion provides another basis for adopting respect for autonomy as a guiding principle for the prosecution guidelines. While there have been a number of surveys that found that public opinion favours legalising voluntary euthanasia and assisted suicide (at least in certain circumstances),<sup>83</sup> these surveys have not explored *why* those views are held. There is some evidence, however, that much of the high level of public support for reform in this area is motivated by the commitment to the value of autonomy. Sikora and Lewins examined 12 large representative surveys conducted between 1993 and 2002 on the issue of assisted suicide and analysed views on its acceptability in four different factual situations.<sup>84</sup> By examining the responses of participants in these different situations, the authors were able to discern the weight given by participants to the various dominant ethical perspectives as identified in the euthanasia literature.<sup>85</sup> They concluded that ‘a large proportion of the population accepts all forms of voluntary euthanasia, which points to the strong

<sup>78</sup> *Stuart v Kirkland-Veenstra* (2009) 237 CLR 215, 248 [87].

<sup>79</sup> *Ibid* 248 [88].

<sup>80</sup> *Ibid* 248 [89], citing *Agar v Hyde* (2000) 201 CLR 552, 583–4 [88]–[90] (Gaudron, McHugh, Gummow and Hayne JJ). The judges also endorsed the view of Lord Hope in *Reeves v Commissioner of Police of the Metropolis* [2000] 1 AC 360, 379–80: ‘[o]n the whole people are entitled to act as they please, even if this will inevitably lead to their own death or injury’.

<sup>81</sup> (2009) 40 WAR 84, 95 [48].

<sup>82</sup> *Ibid* 91 [24]. See also *H Ltd v J* (2010) 107 SASR 352, 364–9 [33]–[46] (Kourakis J); *Hunter and New England Area Health Service v A* (2009) 74 NSWLR 88, 93 [5] (McDougall J).

<sup>83</sup> See, eg, Roy Morgan Research, *Survey into Voluntary Euthanasia* (2002) <<http://www.dwdv.org.au/Docs/VE Poll Results 2002.pdf>>; Newspoll, *Dying with Dignity — Summary Report* (February 2007) <<http://www.dwdv.org.au/Docs/DWD Summary Newspoll Report 2007.pdf>>.

<sup>84</sup> Joanna Sikora and Frank Lewins, ‘Attitudes concerning Euthanasia: Australia at the Turn of the 21<sup>st</sup> Century’ (2007) 16 *Health Sociology Review* 68.

<sup>85</sup> The three dominant themes considered were utilitarianism, individualism/commitment to autonomy and a commitment to Christian doctrine: *ibid* 69–71.

commitment to individual autonomy as the underpinning motivation<sup>86</sup> and that the ‘pattern of responses indicates that the commitment to individual autonomy may lead many Australians, close to 50% in these surveys, to approve of active voluntary euthanasia in any circumstance.’<sup>87</sup>

In light of its recognition by Australian law and its role in public opinion, we consider that respect for autonomy is an appropriate guiding principle to inform our approach to drafting guidelines that outline when prosecution may or may not be in the public interest. Therefore, as argued below, we consider that the critical factor that tends against prosecution in such cases is if the deceased’s death occurred as a result of an autonomous choice made by the deceased for his or her life to end.

### B High Quality Decision-Making

A decision whether or not to prosecute cases potentially involving voluntary euthanasia and assisted suicide is significant. Most obviously, whether a prosecution occurs in relation to a death is significant for the deceased. For example, a choice not to prosecute on public interest grounds means the taking of the deceased’s life does not, in all of the circumstances, warrant criminal sanctions. While in some instances such an outcome would be as the deceased had hoped, in other circumstances such a decision could be regarded as a failure to acknowledge the wrongful nature of the death. A decision whether to prosecute is also significant for the deceased’s family and friends who, for example, may be seeking public acknowledgement of the loss and harm they have suffered.<sup>88</sup> The decision is also significant for the suspect (who may also be a member of the deceased’s family or a friend). A decision to prosecute imposes the ‘harms of prosecution’<sup>89</sup> on the suspect and he or she also faces the prospect of conviction for a serious criminal offence, potentially murder, which in some Australian states carries a mandatory life sentence.<sup>90</sup> Finally, it is significant for society as a whole: the ending of another person’s

<sup>86</sup> Ibid 77.

<sup>87</sup> Ibid.

<sup>88</sup> For a discussion of some of the harm caused by the unlawful killing of a family member, see Tracey Booth, ‘Voices after the Killing: Hearing the Stories of Family Victims in New South Wales’ (2001) 10 *Griffith Law Review* 25.

<sup>89</sup> Rogers, ‘Restructuring the Exercise of Prosecutorial Discretion in England’, above n 56, 787–91.

<sup>90</sup> See, eg, *Criminal Law Consolidation Act 1935* (SA) s 11; *Criminal Code Act 1899* (Qld) sch 1 s 305.

life matters for the community<sup>91</sup> and so determining the appropriate criminal law response is important. It is therefore critical that decisions whether or not to prosecute in such cases be of high quality. For the purposes of this article, we consider that high quality decision-making requires a process that is rigorous, transparent and accountable, and which results in outcomes that accurately reflect conceptually sound criteria (which we put forward in our proposed guidelines). The importance of high quality decision-making is particularly significant given that such decisions are not susceptible to judicial review in Australia.<sup>92</sup>

The production of clear guidelines dealing with the exercise of prosecutorial discretion in relation to cases of voluntary euthanasia and assisted suicide is one way to promote high quality decision-making. As was discussed in *Purdy*, clear guidelines provide a basis for ensuring decisions whether to prosecute are made predictably and consistently.<sup>93</sup> This is a function of prosecution guidelines generally<sup>94</sup> and this claim can also be made in relation to those designed for specific offences. Making the guidelines publicly available also helps promote high quality decision-making as prosecutorial decisions (even in the absence of reasons for those decisions as discussed below)<sup>95</sup> can then attract some level of scrutiny that can be referenced against those criteria.<sup>96</sup>

The terms of the guidelines themselves can also establish ways in which high quality decision-making in this area can be promoted. One is by ensuring there is rigour in the decision-making process, and the requirement to

<sup>91</sup> Tracey Booth, 'Penalty, Harm and the Community: What Role Now for Victim Impact Statements in Sentencing Homicide Offenders in NSW?' (2007) 30 *University of New South Wales Law Journal* 664, 672.

<sup>92</sup> *Maxwell v The Queen* (1996) 184 CLR 501, 512–14 (Dawson and McHugh JJ), 534–5 (Gaudron and Gummow JJ). Note, however, that the courts do retain power to intervene to prevent an abuse of process or ensure a fair trial: at 512–14 (Dawson and McHugh JJ), 535 (Gaudron and Gummow JJ). See also *Barton v The Queen* (1980) 147 CLR 75, 90–1, 96 (Gibbs ACJ and Mason J); *Likiardopoulos v The Queen* [2012] HCA 37 (14 September 2012) [1]–[5] (French CJ), [37] (Gummow, Hayne, Crennan, Kiefel and Bell JJ).

<sup>93</sup> *Purdy* [2010] 1 AC 345, 395 [54] (Lord Hope).

<sup>94</sup> See, eg, Office of the Director of Public Prosecutions (NT), *Guidelines*, above n 18, iii; Office of the Director of Public Prosecutions (Qld), *Director's Guidelines*, above n 18, 1.

<sup>95</sup> See below Part XA.

<sup>96</sup> Andrew Ashworth, 'The "Public Interest" Element in Prosecutions' [1987] *Criminal Law Review* 595, 605–6; Commission on Assisted Dying, *Transcript of Evidence from Keir Starmer QC*, above n 53, 5.

produce reasons for decisions can help to achieve that.<sup>97</sup> Another is by advocating an open approach to the exercise of the prosecutorial discretion and making those reasons for decisions publicly available so that decision-making is transparent and accountable to the community.<sup>98</sup> Developing monitoring systems of longer-term trends to ensure the efficacy of the guidelines and decision-making pursuant to them can also ensure that the discretion is being exercised to a high standard.<sup>99</sup> The terms of the guidelines can also support high quality decision-making by requiring that the DPP himself or herself decide whether a prosecution should occur or not.

### C Public Confidence in the Exercise of Prosecutorial Discretion

The third guiding principle that informs our proposed guidelines is that they, and the decisions made pursuant to them by DPPs, need to retain public confidence. As noted above, these are significant decisions in a difficult area and so it is important that the public has confidence in how they are made.<sup>100</sup> Although this guiding principle is related to the previous one, for example in that high quality decision-making can attract public confidence, these principles are distinct and so warrant separate consideration. Public confidence could be had in decision-making that is not of a high standard, and high quality decision-making will not always attract public confidence.

One way in which public confidence in prosecutorial decision-making can be earned is through openness. As noted above, the public availability of the

<sup>97</sup> Geoffrey A Flick, *Natural Justice: Principles and Practical Application* (Butterworths, 2<sup>nd</sup> ed, 1984) 118–19.

<sup>98</sup> Ashworth, above n 96, 605–6. This is why the current DPP in England and Wales, Keir Starmer QC, states that he makes publicly available reasons for decisions not to prosecute in cases that are already in the public domain: Commission on Assisted Dying, *Transcript of Evidence from Keir Starmer QC*, above n 53, 5. See also *ibid*.

<sup>99</sup> While not gathered in relation to prosecutorial guidelines of the sort advocated for in this article, the systemic data collected in the Netherlands have, for example, highlighted issues of concern that have then been able to be addressed through changes to law and practice. See, eg, the discussion of changing reporting requirements and rates in Judith A C Rietjens et al, ‘Two Decades of Research on Euthanasia from the Netherlands: What Have We Learnt and What Questions Remain?’ (2009) 6 *Bioethical Inquiry* 271, 279.

<sup>100</sup> Daw and Solomon, above n 51, 742, 750–1; Some of the Australian state and territory prosecutorial guidelines explicitly recognise that wrongly exercising prosecutorial discretion undermines public confidence in the criminal justice system: South Australian Office of the Director of Public Prosecutions, *Prosecution Policy*, above n 18, 3; Office of the Director of Public Prosecutions (Tas), *The Role of an Independent Prosecutor and Guidelines for the Exercise of the Discretion to Prosecute*, above n 18, 2; Director of Public Prosecutions Victoria, *Director’s Policy: The Prosecutorial Discretion*, above n 18, 1 [2.1.1].

guidelines can make decision-making more transparent which can engender public confidence in the exercise of prosecutorial discretion.<sup>101</sup> There is also scope for the guidelines to impose requirements designed to promote public confidence. Openness in decision-making by making the reasons for decisions publicly available enables the public to scrutinise the exercise of the discretion which, if being exercised appropriately, will attract public confidence.<sup>102</sup> A similar argument applies to making systemic data about how the guidelines are being used publicly available.<sup>103</sup> Requiring the DPP to be the ultimate decision-maker in these cases can also promote public confidence in the guidelines.

Of course, one could argue that all decisions should be made well and should attract public confidence and that the guiding principles of high quality decision-making and public confidence in the exercise of this discretion should apply not only in relation to the offences being discussed in this article, but to *all offences*. Indeed, many of the factors identified above could be applied or adapted to other offences, particularly those of a serious nature. However, because of the nature of the conduct at issue and the novelty of the approach (effectively allowing that some instances of assisted suicide and voluntary euthanasia do not warrant prosecution), decisions as to whether or not prosecuting a case involving voluntary euthanasia or assisted suicide is in the public interest can give rise to a particularly high level of community

<sup>101</sup> Ashworth, above n 96, 605–6; Commission on Assisted Dying, *Transcript of Evidence from Keir Starmer QC*, above n 53, 5.

<sup>102</sup> Louis Blom-Cooper, 'Reasons for Not Prosecuting' [2000] *Public Law* 560; Ashworth, above n 96, 605–6; Commission on Assisted Dying, *Transcript of Evidence from Keir Starmer QC*, above n 53, 5. See also Flick, above n 97, 118–19.

<sup>103</sup> For example, the public availability of data about the Netherlands, Belgium, Oregon and Washington State as to the practice of voluntary euthanasia and assisted suicide has made it possible for the public to see that claims about slippery slopes and risks to vulnerable groups (such as the poor, the elderly, people from ethnic backgrounds and people with disabilities) are demonstrably false. See, eg, Rietjens et al, above n 99; Kenneth Chambaere et al, 'Trends in Medical End-of-Life Decision Making in Flanders, Belgium 1998–2001–2007' (2011) 31 *Medical Decision Making* 500. See also Oregon Health Authority, *Death with Dignity Act*, Oregon.gov <<http://public.health.oregon.gov/ProviderPartnerResources/EvaluationResearch/DeathwithDignityAct/Pages/index.aspx>>; Washington State Department of Health, *Death with Dignity Act* <<http://www.doh.wa.gov/dwda/>>. Of course there are authors who argue that there is empirical evidence of slippery slopes and risks to vulnerable groups. See, eg, John Keown, *Euthanasia, Ethics and Public Policy: An Argument against Legalization* (Cambridge University Press, 2002) pt 3; Emily Jackson and John Keown, *Debating Euthanasia* (Hart Publishing, 2011) 118–36.

interest and sometimes concern.<sup>104</sup> We therefore believe it to be especially important to explicitly articulate these guiding principles here.

## VI AUTONOMOUS CHOICE

As outlined above, respect for autonomy is one of the guiding principles we used when constructing the proposed prosecutorial guidelines. And whereas high quality decision-making and public confidence are directed at least in part to procedural matters, respect for autonomy makes a greater contribution to determining the content of the guidelines. Accordingly, we place autonomy at the centre of our approach and include whether the deceased's death occurred as a result of an autonomous choice by him or her as the first component of our guidelines and the sole additional public interest factor they contribute. As noted above, this does not preclude consideration of the broader public interest factors contained in the general prosecutorial guidelines. Rather, these proposed guidelines add a further factor for DPPs to consider that is specifically tailored for this context.

### 1 Autonomous Choice: An Additional Public Interest Factor Specific to these Offences

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- 1.1 An additional public interest factor that tends in favour of prosecution is that the deceased's death did not occur as a result of an autonomous choice made by the deceased for his or her life to end.
- 1.2 An additional public interest factor that tends against prosecution is that the deceased's death occurred as a result of an autonomous choice made by the deceased for his or her life to end.

## VII ELEMENTS AND DIRECT EVIDENCE OF AN AUTONOMOUS CHOICE

This section considers the second and third components of the proposed guidelines. The second component identifies the elements of an autonomous choice while the third component sets out an inclusive list of the direct evidence that may be relevant to assessing whether those elements have been satisfied or not.

<sup>104</sup> For evidence of this high level of community interest and concern in England and Wales, see Crown Prosecution Service (England and Wales), *Interim Policy on Assisted Suicide: Summary of Responses*, above n 46, 6 [1.14].

The three elements that need to be satisfied for the deceased's death to have occurred as a result of his or her autonomous choice are:

- 1 the deceased was competent to make the decision to end his or her life;
- 2 the decision was made voluntarily by the deceased; and
- 3 the deceased had received, or was offered, sufficient information in relation to the decision to end his or her life.

These elements are derived from the law that applies to when medical treatment is refused. Although not entirely apposite to cases of voluntary euthanasia and assisted suicide, this is a useful departure point and this was the approach taken by the England and Wales policy.<sup>105</sup>

#### *A Competence*

Applying the law that governs refusal of treatment, a person will be judged competent if he or she has the necessary *capacity* to make a decision and is then able to *communicate* that decision.<sup>106</sup> McDougall J in *Hunter and New England Area Health Service v A* (*'Hunter'*) described the test at common law for when an adult will be found to lack capacity as where he or she:

- 1 is unable to comprehend and retain the information which is material to the decision, in particular as to the consequences of the decision; or
- 2 is unable to use and weigh the information as part of the process of making the decision.<sup>107</sup>

Adults are presumed to be capable of making their own decisions.<sup>108</sup> The competence required to make a decision is said to be commensurate with its significance so that a decision with grave consequences, such as one which

<sup>105</sup> Crown Prosecution Service (England and Wales), *Policy for Prosecutors in respect of Cases of Encouraging or Assisting Suicide*, above n 13, 5 [43(2)–(3)], 7 [45(1)]. See also the discussion of the relevant Australian (and some foreign) cases in this area in *Justins v The Queen* (2010) 79 NSWLR 544, 601–4 [350]–[362] (Johnson J).

<sup>106</sup> *R (Burke) v General Medical Council* [2005] QB 424, 440 [41] (Munby J); this aspect of the judgment was confirmed on appeal: *R (Burke) v General Medical Council* [2006] QB 273, 290 [10] (Lord Phillips MR, Waller and Wall LJ).

<sup>107</sup> (2009) 74 NSWLR 88, 93 [25]. McDougall J was paraphrasing the Court of Appeal of England and Wales in *Re MB (Medical Treatment)* [1997] 2 FLR 426, 436–7 (Dame Butler Sloss LJ).

<sup>108</sup> *HE v A Hospital NHS Trust* [2003] 2 FLR 408, 414–15 (Munby J); *Re C (Adult: Refusal of Treatment)* [1994] 1 WLR 290, 294 (Thorpe J); *Re T (Adult: Refusal of Treatment)* [1993] Fam 95, 115 (Lord Donaldson MR); *Hunter* (2009) 74 NSWLR 88, 93 [23] (McDougall J).

results in death, requires a higher level of capacity than other decisions.<sup>109</sup> Children are not presumed to have capacity but are capable of making decisions if they possess ‘a sufficient understanding and intelligence to enable him or her to understand fully what is proposed’ (*Gillick* competence).<sup>110</sup>

Evidence that is relevant to determining whether a deceased was competent or not includes whether he or she had a recent capacity assessment undertaken by an appropriately qualified medical or other health professional. Also relevant is whether the deceased was in need of assistance to make decisions about other aspects of his or her life. Although capacity is specific to the particular decision to be made, findings of incompetence in other realms can sometimes shed light on whether the deceased had capacity to choose for his or her life to end.

Before leaving this issue, we note the attempt by the trial judge in *R v Justins* (considered on appeal in *Justins v The Queen*)<sup>111</sup> to set out a test for capacity to commit suicide. In this case, the accused, Justins, placed a bottle of Nembutal and a glass on a table in front of her de facto partner, Wylie, because she believed he wanted to die. She gave evidence that she said: ‘This will relieve your pain, Graeme. If you drink this you will die.’<sup>112</sup> He poured himself a glass from the bottle and drank it knowing he would die. Wylie had previously attempted suicide and had expressed interest in ending his own life and sought assistance to do so. There were doubts, however, as to whether Wylie had capacity to make this decision. He had been diagnosed with Alzheimer’s disease three years earlier and there was a range of evidence that his mental capacity had diminished. A critical issue for the jury was whether Wylie had capacity at the time of his death. A lack of capacity would suggest that Justins caused the death whereas the presence of capacity would suggest that drinking the Nembutal was instead truly Wylie’s act. The trial judge

<sup>109</sup> *Re B (Adult: Refusal of Medical Treatment)* [2002] 2 All ER 449, 458 [31] (Dame Butler-Sloss P), quoting *Re T (Adult: Refusal of Treatment)* [1993] Fam 95, 113 (Lord Donaldson MR).

<sup>110</sup> *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] 1 AC 112, 188–9 (Lord Scarman), adopted in Australia in *Secretary, Department of Health and Community Services (NT) v JWB* (1992) 175 CLR 218, 238–9 (Mason CJ, Dawson, Toohey and Gaudron JJ), 311 (McHugh J) (*Marion’s Case*). Note, however, that the courts retain the power to override a decision of a *Gillick*-competent child to refuse medical treatment: see Ben Mathews, ‘Children and Consent to Medical Treatment’ in Ben White, Fiona McDonald and Lindy Willmott (eds), *Health Law in Australia* (Lawbook, 2010) 114, 133–5 [5.160], 139–40 [5.210].

<sup>111</sup> *R v Justins* [2008] NSWSC 1194 (12 November 2008), revd *Justins v The Queen* (2010) 79 NSWLR 544. For further discussion of this case, see Faunce and Townsend, above n 12.

<sup>112</sup> *Justins v The Queen* (2010) 79 NSWLR 544, 546 [7] (Spigelman CJ), 571 [172] (Simpson J).

directed the jury that to have ‘capacity to commit suicide,’ a person must be able to do all of the following:

- 1 know the extent of his illness and its prognosis;
- 2 understand the nature of the act of suicide and its consequences;
- 3 comprehend the benefits and disadvantages of the alternatives (life and death);
- 4 be able to weigh the benefits and advantages and decide between them; and
- 5 be able to communicate that decision.<sup>113</sup>

The jury acquitted Justins of murder but found her guilty of manslaughter by gross criminal negligence. The New South Wales Court of Criminal Appeal quashed the conviction and ordered a new trial.<sup>114</sup> One ground of appeal on which Justins was successful was that the trial judge misdirected himself in relation to the issue of capacity and erred by stating these five elements as requirements of law.<sup>115</sup> Instead, these elements (which emerged from the expert evidence) were only factual matters for the jury to consider when determining whether Wylie had capacity. As a result, this case does not establish or endorse a legal test for when an adult has capacity to commit suicide.<sup>116</sup> We do note, however, that the approach suggested by the trial judge is broadly consistent with the law that governs when a person may refuse treatment as set out above.

### B *Voluntariness*

Again building on the law that governs refusal of medical treatment, a decision to commit suicide must also be free of undue influence.<sup>117</sup> It is worth

<sup>113</sup> Ibid 549–50 [25] (Spigelman CJ). Note also that the direction stated: ‘It must be his independent decision, even though taken with the advice of others’: at 549 [25], which reflects the voluntariness element discussed below.

<sup>114</sup> That second trial did not go ahead as the Crown instead accepted a guilty plea to aiding and abetting suicide (which it had refused to accept at Justins’ trial). Justins received no further punishment having already served her sentence for the more serious charge of manslaughter: *R v Justins* [2011] NSWSC 568 (26 May 2011).

<sup>115</sup> *Justins v The Queen* (2010) 79 NSWLR 544, 557–60 [74]–[101] (Spigelman CJ), 585 [268] (Simpson J), 600–1 [345]–[349] (Johnson J).

<sup>116</sup> Indeed Simpson J specifically stated that it would be inappropriate in the context of this appeal to define what constitutes capacity to commit suicide: *ibid* 585 [269] (Simpson J).

<sup>117</sup> *Re T (Adult: Refusal of Treatment)* [1993] Fam 95, 121 (Staughton LJ); *Hunter* (2009) 74 NSWLR 88, 94 [26] (McDougall J).

noting though that not all influence will be undue. So, provided that the decision remains that of the person in question, it is legitimate for others, such as family, friends and doctors, to provide advice and even seek to persuade the person to change her or his mind.<sup>118</sup> Evidence relevant to the voluntary nature of the decision includes whether there was any pressure placed on the deceased in his or her decision-making, whether the suggestion for taking such steps originally came from the deceased, and whether there was a clear and unequivocal request from the deceased for assisted suicide or voluntary euthanasia.

### C Received or Offered Sufficient Information

Our proposed guidelines require that the deceased had received or was offered sufficient information about the decision to end his or her life including, where appropriate, information from qualified medical or other health professionals. This would include information about the diagnosis, prognosis and treatment options for a person's illness or disability (if any); other care options including palliative care; the nature of possible methods of voluntary euthanasia or assisted suicide and associated risks; and the consequences of alternative courses of action. Since *Rogers v Whitaker*,<sup>119</sup> Australian law has recognised that medical and other health professionals have a duty to offer all information that would be considered significant in the circumstances by either a reasonable person or the particular individual concerned. The High Court's reasoning was based on autonomy: a person can only make a meaningful choice to undertake treatment or not with relevant information about what that treatment involves and its potential risks.<sup>120</sup> So recognition of the need for an autonomous decision requires that either the deceased has received such information or been offered it.

While it is clear how a decision by a person who has received the relevant information supports respect for autonomy, further explanation is needed in

<sup>118</sup> See *Re T (Adult: Refusal of Treatment)* [1993] Fam 95, 121, in which the English Court of Appeal found that a woman's refusal of treatment was not binding on the treating team, Staughton LJ considered that influence will be undue only if there is 'such a degree of external influence as to persuade the patient to depart from her own wishes, to an extent that the law regards it as undue.'

<sup>119</sup> (1992) 175 CLR 479.

<sup>120</sup> *Ibid* 487, 489 (Mason CJ, Brennan, Dawson, Toohey and McHugh JJ). The civil liability legislation in Queensland, Tasmania and Victoria includes provisions dealing with this duty to warn in terms that reflect the common law position: *Civil Liability Act 2003* (Qld) s 21; *Civil Liability Act 2002* (Tas) s 21; *Wrongs Act 1958* (Vic) s 50.

relation to why the guidelines also recognise as sufficient the *offering* of relevant information. This issue has received some attention in Australia in a series of cases dealing with refusals of life-sustaining treatment. McDougall J in *Hunter* considered that a refusal of treatment did not need to be informed to be effective,<sup>121</sup> whereas Martin CJ in *Brightwater Care Group (Inc) v Rossiter* disagreed.<sup>122</sup> Kourakis J in *H Ltd v J* preferred the approach taken in *Hunter* but qualified this by saying that another specific legal duty could require that a refusal of treatment be informed.<sup>123</sup> There is not scope in this paper to engage properly in this debate or to resolve these conflicting judicial authorities. For our purposes, it is sufficient to note our preference for the *Hunter* position and to adopt the view that a person is able to refuse life-sustaining treatment without having *received* information about that decision.<sup>124</sup> To require that a person must have received information to be able to refuse treatment is inconsistent with the widely endorsed position that treatment may be refused for irrational reasons or no reason at all.<sup>125</sup> We consider a similar approach should be taken here and note this is supported by comments in *Justins v The Queen* to the effect that a person may be regarded as having capacity to commit suicide even if doing so on a basis that is ill-informed or not supported by a reason.<sup>126</sup> So while it is desirable that a decision by a deceased to end his or her life is an informed one from a policy perspective, compelling receipt of (as opposed to offering) information is inconsistent both with that broad legal framework and with permitting a person to make autonomous decisions to refuse information.

Evidence as to whether the deceased had received or been offered sufficient information will include the steps taken to ensure this occurred including, where appropriate, whether qualified medical or other health professionals were involved. Also relevant would be the nature of the information received by, or offered to, the deceased such as whether it included relevant information about the diagnosis, prognosis and treatment options for a person's illness or disability (if any), other care options including palliative

<sup>121</sup> (2009) 74 NSWLR 88, 98 [40].

<sup>122</sup> (2009) 40 WAR 84, 92 [30].

<sup>123</sup> (2010) 107 SASR 352, 367–8 [41]–[43].

<sup>124</sup> This point is discussed further in Lindy Willmott, Ben White and Shih-Ning Then, 'Withholding and Withdrawing Life-Sustaining Medical Treatment' in Ben White, Fiona McDonald and Lindy Willmott (eds), *Health Law in Australia* (Lawbook, 2010) 449, 455–7 [13.40].

<sup>125</sup> See, eg, *Re T (Adult: Refusal of Treatment)* [1993] Fam 95, 102, 113 (Lord Donaldson MR).

<sup>126</sup> *Justins v The Queen* (2010) 79 NSWLR 544, 604 [363]–[365] (Johnson J); see also at 585 [269] (Simpson J).

care, the nature of possible methods of voluntary euthanasia or assisted suicide and associated risks, and the consequences of alternative courses of action. Further evidence that is relevant to the sufficiency of information offered to the deceased or received by him or her is whether any of that information was misleading or inaccurate, and whether it was in a form that the deceased could understand.

#### *D Guidelines*

Accordingly, the prosecutorial guidelines should outline the elements of an autonomous choice and an inclusive discussion of the direct evidence that may be relevant to determining whether those elements are satisfied.

### **2 Elements of an Autonomous Choice**

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The elements of an autonomous choice by the deceased for his or her life to end are:

- 2.1 the deceased was competent to make the decision to end his or her life;
- 2.2 the decision was made voluntarily by the deceased; and
- 2.3 the deceased had received, or was offered, sufficient information in relation to the decision to end his or her life.

### **3 Direct Evidence in relation to the Elements of an Autonomous Choice**

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Factors that may be relevant to determining whether the deceased's death occurred as a result of an autonomous choice by him or her include whether:

- 3.1 the deceased had been assessed recently as having capacity to make the decision to end his or her life by an appropriately qualified medical or other health professional (competence);
- 3.2 the deceased needed assistance to make decisions about other aspects of his or her life (competence);
- 3.3 there was a clear and unequivocal request from the deceased for voluntary euthanasia or assisted suicide (voluntariness);
- 3.4 the suggestion to consider voluntary euthanasia or assisted suicide came from the deceased or from the suspect or others (voluntariness);
- 3.5 the suspect or others took steps to ensure that the deceased's decision was not brought about by pressure or coercion (voluntariness);

- 3.6 the suspect or others took steps to ensure that the deceased had received, or was offered, sufficient and accurate information about the decision including, where appropriate, information from qualified medical or other health professionals (sufficient information).

#### VIII CONFIDENCE REGARDING WHETHER DEATH OCCURRED AS A RESULT OF AUTONOMOUS CHOICE

The proposed guidelines also include factors that are relevant to a prosecutor's *confidence* about whether the death that occurred was as a result of an autonomous choice by the deceased (confidence factors). The role of these factors is different from those mentioned in the previous section where the goal was to identify matters that could be used as *direct evidence* in relation to whether the three elements of an autonomous choice discussed above were satisfied. The factors in this section do not have that same direct probative value and so cannot be used in that way.

Two examples of confidence factors are where the suspect has an interest of his or her own that conflicts with the interest of the deceased in making an autonomous choice about death (conflict of interest), and where there is a history of violence or abuse towards the deceased by the suspect. These factors are not direct evidence of an absence of autonomy and it is *possible* that decisions that occur in the presence of such factors could still be autonomous and therefore not appropriate for prosecution. To illustrate, a DPP who was firmly satisfied that a deceased had made an autonomous choice to die, in spite of the existence of potentially negative confidence factors, would be justified under our guidelines in not prosecuting. Nevertheless, the presence of these circumstances can give rise to real doubts that such a choice has been made. This risk is sufficient to justify addressing them in the guidelines. One of the guiding principles for constructing these guidelines is the importance of public confidence in prosecutorial decision-making. If circumstances that cause us to doubt there was an autonomous choice are specifically addressed, confidence can be had by the public that prosecutorial discretion is only being exercised to decline to prosecute in clear cases of autonomous decision-making.

Also included in this section are confidence factors that are *indirectly* about autonomy. An example is whether a suspect reported the deceased's death to the police and cooperated with its investigation. Such action is not directly about whether the death occurred as a result of an autonomous choice. However, reporting and cooperation by a suspect can suggest that his or her behaviour is more likely to be consistent with the non-prosecution

factors in the guidelines than if the suspect concealed his or her involvement. Given that those non-prosecution factors are based on the deceased making an autonomous choice, these factors can still, albeit indirectly, give rise to confidence or doubts as to the nature of any choice made by the deceased.

These confidence factors have two functions in the guidelines. The first is that factors which give rise to doubts about whether the deceased made an autonomous choice for his or her life to end act as *triggers* for further investigation or scrutiny of the circumstances in which the death occurred. The presence of these confidence factors is a warning that should prompt a DPP to review even more closely the direct evidence in relation to the elements of an autonomous choice in the case at hand. We note that confidence factors can also provide reassurance that the deceased chose to die but we are not proposing that this should lead to a reduced level of scrutiny. The second function for confidence factors is that they must be used by DPPs in their deliberations when weighing the direct evidence of the elements of an autonomous choice set out above. To illustrate, the existence of a troubling conflict of interest is an important part of the context in which DPPs would assess the available direct evidence about whether the deceased was making a competent and voluntary decision. We now consider the four confidence factors we include in our proposed guidelines.

#### A *History of Violence or Abuse*

A history of violence or abuse by the suspect towards the deceased gives rise to real concerns about whether the deceased made an autonomous choice for his or her life to end. Such abuse need not be physical in nature and can include emotional or psychological abuse. While it is possible for a decision to end one's life to be made autonomously despite that history, the existence of this type of relationship between the suspect and deceased casts doubt over this and poses a risk that the decision was not autonomous.<sup>127</sup> Accordingly, the guidelines identify this factor as one that should trigger very close scrutiny of the circumstances in which the death occurred. A DPP should weigh any available evidence as to whether the deceased made an autonomous choice in

<sup>127</sup> For a discussion of some of the evidence as to the impact that a history of violence and/or coercion can have on decision-making autonomy, albeit in the context of domestic violence, see Tamara L Kuennen, 'Analyzing the Impact of Coercion on Domestic Violence Victims: How Much Is Too Much?' (2007) 22 *Berkeley Journal of Gender, Law & Justice* 2. See also Cheryl Hanna, 'The Paradox of Progress: Translating Evan Stark's Coercive Control into Legal Doctrine for Abused Women' (2009) 15 *Violence against Women* 1458.

light of this history. Part of this may include accessing information or advice about the dynamics of such relationships and the impact that any violence or abuse may have had on the deceased's ability to make his or her own choices.

### B *Settled Decision*

A confidence factor that may point the other way is that the deceased's decision appeared to be a settled one. One way this could be demonstrated is through repeated requests by the deceased for his or her life to end. We note that the settled nature of a decision is not an element of an autonomous choice: it is not part of the law that governs the refusal of medical treatment discussed above. Nevertheless, if a decision appears to be a settled one, then a prosecutor, and indeed the public, could have greater confidence that the choice was autonomous. However, as noted above, we are not suggesting this should lead to a lower level of scrutiny than that which generally occurs in these cases.

### C *Conflict of Interest*

One factor that tends to undermine confidence that the deceased's death occurred as a result of an autonomous choice by him or her is that there is an interest on the part of the suspect that *conflicts* with the interest of the deceased in making that autonomous choice. Sometimes the nature of the conflict is such that it creates a challenge to the deceased making an autonomous choice in that the suspect is tempted to coerce the deceased or otherwise undermine his or her free choice. Other times the conflict might not be in direct opposition to a deceased's autonomy, but rather lead to or encourage the suspect to be careless or disinterested in ensuring that death was genuinely the deceased's choice. In both instances, however, the existence of a conflict creates the risk that the deceased is not making an autonomous choice and this is what warrants inclusion of conflict of interest as a confidence factor in the guidelines.

There are a range of interests that can give rise to conflict. One is where a suspect has a financial interest in the deceased's death. The obvious example is where the suspect or a person close to him or her will benefit financially through an inheritance. A financial conflict of interest can also arise not because of the deceased's death but because a suspect is financially remunerated for providing assistance of some kind. This could arise in relation to an organisation that facilitates voluntary euthanasia or assisted suicide for a fee. Another example is where a medical or other health professional participates

in the deceased's death and is remunerated for that. Other conflicts of interest may be non-financial. A suspect may have reputational interests he or she is interested in advancing that may be in conflict with the deceased making an autonomous choice. A suspect may also wish to be relieved of the burden of caring for the deceased.

The presence of a conflict of interest will trigger a DPP to scrutinise closely the circumstances of the deceased's death and to weigh the evidence in relation to the nature of any choice made by the deceased in light of that conflict. The level of this additional scrutiny and deliberation will depend, however, on the nature of the conflict and the extent to which the suspect's own interests were significant in the decision to end the deceased's life or provide assistance to do so.<sup>128</sup> This approach is consistent with how the law in relation to fiduciary relationships, from which the conflict rule comes, has developed in Australia. Not all conflicts of interest by fiduciaries will be regarded as breaching the conflict rule:

if the doctrine be inexorably applied and without regard to the particular circumstances of the situation, every transaction will be condemned once it be shown that the fiduciary had such a hope or expectation, however unlikely to be realized it may be, and however trifling an inducement it will be if it is realized ... We have found no decisions that have applied this rule inflexibly to every occasion in which the fiduciary has been shown to have had a personal interest that might in fact have conflicted with his loyalty. On the contrary in a number of situations courts have held that the rule does not apply, not only when the putative interest, though in itself strong enough to be an inducement, was too remote, but also when, though not too remote, it was too feeble an inducement to be a determining motive.<sup>129</sup>

Applying this approach, while a possible conflict of interest will be a trigger for DPPs to take care, the nature of that conflict will determine the extent of that additional scrutiny and deliberation. The issue is whether the potential for the suspect to benefit is either, first, so remote so that it is of no consequence, or secondly, if it is not too remote, it is insufficient to be a relevant

<sup>128</sup> This approach has similarities to the 'common sense' one outlined in the England and Wales policy, where a suspect may obtain a benefit from the deceased's death but that this need not be a factor in favour of prosecution if 'compassion was the only driving force' for his or her actions: Crown Prosecution Service (England and Wales), *Policy for Prosecutors in respect of Cases of Encouraging or Assisting Suicide*, above n 13, [44].

<sup>129</sup> *Pilmer v Duke Group Ltd (in liq)* (2007) 207 CLR 165, 199 (McHugh, Gummow, Hayne and Callinan JJ), quoting *Phelan v Middle States Oil Corporation*, 220 F 2d 593, 602–3 (Learned Hand J for Learned Hand and Swan JJ) (2<sup>nd</sup> Cir, 1955).

factor in the decision to end the deceased's life or to assist with that decision. It is this second issue that will be most significant in this context and will ultimately be a matter for the DPP to determine, on the facts of the case, how troubled he or she is by the conflict of interest. To illustrate, an inheritance for a suspect will automatically trigger additional scrutiny and deliberation but a DPP will need to determine the extent to which it could be regarded as a relevant factor in the suspect's decision-making process. We consider that very close scrutiny would be called for where the suspect's financial circumstances had recently changed for the worse and this seemed to prompt a renewed interest in assisting the deceased. By contrast, a medical or other health professional who received payment for providing a medical or other health service as part of their usual care for a patient is unlikely to consider that remuneration a relevant factor in their decision to be involved in the death. But more scrutiny will be required, however, if that professional had established a practice devoted exclusively or primarily to assisting people to die and so depended for his or her livelihood on voluntary euthanasia or assisted suicide.<sup>130</sup> Finally, people volunteering in a not-for-profit organisation might obtain some reputational or other benefit from being involved in a death. Although perhaps less likely than where financial incentives are involved, such interests are capable of giving rise to a conflict of interest and additional scrutiny and deliberation is needed commensurate with the nature and extent of the conflict.

#### D *Reporting the Death*

The guidelines include as a confidence factor that either the suspect reported the death to the police and cooperated fully with its investigation, or did not take such action. How a suspect behaves in this regard can inform a prosecutor's confidence as to whether a deceased's death occurred in conformity with the non-prosecution factors in the guidelines which, as noted above, goes indirectly to the confidence a DPP can have in relation to whether there was

<sup>130</sup> We note that earlier in this paper we have argued against treating 'acting in a professional capacity in and of itself' as a factor tending in favour of prosecution: see Crown Prosecution Service (England and Wales), *Policy for Prosecutors in respect of Cases of Encouraging or Assisting Suicide*, above n 13, 6 [43(14)], which states that acting in a professional capacity is a public interest factor tending in favour of prosecution. Therefore the fact that a medical or other health professional is involved in voluntary euthanasia or assisted suicide in a professional capacity does not *of itself* point towards prosecution. However, if that involvement gives rise to a conflict of interest then that must be considered by a DPP as a confidence factor.

an autonomous choice by the deceased. While there can be other motivations, one reason why a suspect may feel able to report the death to police is that they will not be prosecuted based on the criteria in the guidelines. By contrast, it could be argued that a suspect whose involvement in a death points towards the factors in favour of prosecution would be more likely to conceal the death or his or her involvement in it, or refuse to participate in a police investigation, for fear of the adverse consequences.<sup>131</sup>

If these arguments are correct, then reporting and cooperation is an appropriate confidence factor for the guidelines. As with other confidence factors, a troubling response warrants additional scrutiny and deliberation, whereas a comforting response would not reduce the rigour of a prosecutor's approach but is relevant to deliberations as to how any evidence in relation to an autonomous choice is weighed.

We also note that including this particular factor has additional systemic benefits for how the guidelines operate above and beyond deliberations in particular cases. Incentivising disclosure of cases involving voluntary euthanasia and assisted suicide so they may be investigated adds to the public confidence that potential suspects are acting, and will in future act, in accordance with the guidelines. It also bolsters the public reporting of cases involving the guidelines (proposed below) which again promotes public confidence that the guidelines are functioning appropriately.

### E *Guidelines*

The guidelines should include the following confidence factors, namely those factors which either give confidence or raise doubts as to whether a deceased's death occurred as a result of an autonomous choice.

<sup>131</sup> Of course, there could also be other motivations for not reporting the death to police and cooperating with its investigation. For example, a person whose conduct is otherwise unlikely to attract prosecution may not be aware of the guidelines and so conceal his or her involvement in the death for fear of prosecution.

#### 4 Confidence whether Death Occurred as the Result of Autonomous Choice

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The presence of factors that give confidence that the deceased's death occurred as a result of an autonomous choice by him or her does not reduce the scrutiny that the circumstances of the death receive. Such factors can, however, be used in weighing any direct evidence available in relation to whether the elements of an autonomous choice are satisfied. These factors include:

- 4.1 the deceased's decision for his or her life to end appeared to be a settled one;
- 4.2 the suspect reported the death to the police within a reasonable time and cooperated fully with the investigation.

The presence of factors that raise doubts that the deceased's death occurred as a result of an autonomous choice by him or her triggers additional scrutiny of the circumstances of the death. Such factors can also be used in weighing any direct evidence available in relation to whether the elements of an autonomous choice are satisfied. These factors include:

- 4.3 a history of violence or abuse by the suspect towards the deceased;
- 4.4 an interest on the part of the suspect that conflicts with the interest of the deceased in making an autonomous choice about death. In determining the level of additional scrutiny and deliberation that is required, regard must be had to the likelihood of the conflict arising and whether the interest is such as to be a relevant factor in the suspect's decision-making;
- 4.5 the suspect did not report the death to the police within a reasonable time or did not cooperate fully with the investigation.

### IX DECISION TO BE MADE BY THE DIRECTOR OF PUBLIC PROSECUTIONS

It was noted above that two of the principles that inform how the guidelines are constructed are:

- 1 the decision-making pursuant to the prosecutorial discretion in this area needs to be of high quality; and
- 2 the decision-making pursuant to that discretion needs to attract public confidence.

One way in which these goals can be promoted is by requiring that decisions whether or not to prosecute under the guidelines be made by the DPP himself or herself. We note that this is consistent with some Australian jurisdictions

that already have provisions in their general prosecutorial guidelines dealing with when the DPP's consent is specifically required either to bring or discontinue a prosecution for certain types of offences.<sup>132</sup> Such an approach is also consistent with the position in England and Wales although the DPP's role in that jurisdiction is given legislative force. Section 2(4) of the *Suicide Act 1961*<sup>133</sup> provides that proceedings under that Act may be instituted only with the consent of the DPP. There are also other key differences between the position in England and Wales and what is being proposed in these guidelines. One is that our proposed guidelines are broader than the position in England and Wales in that the DPP's consent in that jurisdiction is only required if a prosecution is instituted. The DPP is not required by the Act to make decisions where it is proposed that a person not be prosecuted; his or her role is only mandated where there is a decision to prosecute. We understand, however, that the practice to date is for the DPP to be involved in all decisions (including those not to prosecute),<sup>134</sup> which is consistent with our proposed approach.

Another key difference relates to the wider function of the consent provision in England and Wales. The House of Lords in *Purdy* identified the 'basic reason' for the relevant sub-section as being to prevent the risk of prosecutions in 'inappropriate circumstances'.<sup>135</sup> A significant motivation for imposing a legislative requirement for DPP consent to prosecutions is to avoid vexatious or inappropriate private prosecutions.<sup>136</sup> Our proposed guidelines do not directly address this concern as they only purport to guide the exercise of prosecutorial discretion by the state and cannot of themselves (unlike a legislative requirement for consent) prevent inappropriate private prosecutions.

Nevertheless, despite these differences, some of the rationales for s 2(4) of the *Suicide Act 1961*<sup>137</sup> are relevant to the proposed fifth component of our

<sup>132</sup> See, eg. Office of the Director of Public Prosecutions (Qld), *Director's Guidelines*, above n 18, 21; Office of the Director of Public Prosecutions (NT), *Guidelines*, above n 18, 9–10, 12.

<sup>133</sup> 9 & 10 Eliz 2, c 60.

<sup>134</sup> Commission on Assisted Dying, *Transcript of Evidence from Keir Starmer QC*, above n 53, 6.

<sup>135</sup> [2010] 1 AC 345, 392 [45].

<sup>136</sup> For a wider discussion of the importance of the right to bring a private prosecution, and the corresponding justifications advanced for requiring DPP or other consents to prosecution, see Law Commission, England and Wales, *Consents to Prosecution* (Report No 255, 1998) 12–14 [2.12]–[2.21] (private prosecutions), 22–6 [3.27]–[3.35] (justifications for a requirement of consent). See also *ibid.*

<sup>137</sup> 9 & 10 Eliz 2, c 60.

guidelines. In particular, we note that Lord Hope in *Purdy* pointed to reasons underpinning the consent requirement as including

to secure consistency of practice ... [and] to enable account to be taken of mitigating factors and to provide some central control of the use of the criminal law where it has to intrude into areas which are particularly sensitive or controversial.<sup>138</sup>

We agree and consider that requiring the DPP to make all decisions whether to prosecute or not under these guidelines will lead to greater consistency and predictability in decision-making. This is partly because all such decisions will be made by a single person in each jurisdiction (at least for the duration that they hold office).<sup>139</sup> We also point to the likely calibre of the individual in the role of the DPP as the person making this decision; as the highest-ranked prosecutor in the jurisdiction, they would possess a high level of competence and a breadth of experience to ensure high quality decision-making. These factors would also promote public confidence in decisions made pursuant to the guidelines.

## 5 Decision to Be Made by the Director of Public Prosecutions

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All decisions whether or not to prosecute cases involving voluntary euthanasia and assisted suicide pursuant to these guidelines must be made by the Director of Public Prosecutions.

### X PUBLIC REPORTING OF DECISION-MAKING

Another way in which high quality decision-making that attracts public confidence can be promoted is through giving reasons for decisions and making them publicly available. We propose this be done where possible in relation to individual decisions not to prosecute but also that information about how the guidelines are operating at a systemic level be collected and published.

<sup>138</sup> [2010] 1 AC 345, 392 [46] (Lord Hope). See also Williams, above n 51, 184–5.

<sup>139</sup> We note that the relevant legislation establishing the DPPs generally permits for the delegation of his or her functions but we consider that it should not occur for these decisions. In relation to specific delegation powers in these Acts, see *Director of Public Prosecutions Act 1990* (ACT) s 17; *Director of Public Prosecutions Act 1986* (NSW) s 33; *Director of Public Prosecutions Act 1990* (NT) s 32; *Director of Public Prosecutions Act 1991* (SA) s 6A; *Public Prosecutions Act 1994* (Vic) s 30 (although note the limitations in this provision as to when delegation may occur); *Director of Public Prosecutions Act 1991* (WA) s 31.

### A Reasons for Decisions

Subject to any contrary legal obligations prohibiting such a course, DPPs are able to give reasons for their prosecutorial decisions<sup>140</sup> and make them publicly available. Five of the Australian state and territory prosecution guidelines contain discrete policies specifically addressing the giving of reasons.<sup>141</sup> Six of them also contain specific policies dealing with media interaction, generally in the context of using the media as a vehicle to engage with the public, and sometimes with reference to publishing reasons for decisions.<sup>142</sup> To advance the guiding principles of high quality decision-making and public confidence, we consider that the guidelines should require that, where possible, reasons for decisions be given in these cases and made publicly available. We do note, however, that this aspect of the guidelines applies only to decisions *not* to prosecute and not to decisions for a prosecution to go ahead. Aside from concerns about prejudicing either the Crown's ability to prosecute or the accused's right to a fair trial, a decision to prosecute means the Crown's case is subjected to the public rigour of the criminal justice system, and this is sufficient to address the guiding principles of high quality decision-making and public confidence identified above.

There are a number of benefits of publishing reasons for decisions. One is that the discipline of producing written reasons assists a decision-maker in his

<sup>140</sup> Although note that administrative decision-makers are under no general duty at common law to provide reasons for their decisions: *Public Service Board of New South Wales v Osmond* (1986) 159 CLR 656.

<sup>141</sup> Office of the Director of Public Prosecutions (ACT), *Prosecution Policy*, above n 18, [6]; Office of the Director of Public Prosecutions (NSW), *Prosecution Guidelines*, above n 18, 19 [12]; Office of the Director of Public Prosecutions (Qld), *Director's Guidelines*, above n 18, 28 [22]; Director of Public Prosecutions Victoria, *Director's Policy: The Giving of Reasons for Discretionary Decisions* (3 March 2010) <<http://www.opp.vic.gov.au/getattachment/25f36122-017f-4896-8dac-85fee996eb65/24-The-Giving-of-Reasons-for-Discretionary-Decisio.aspx>>; Director of Public Prosecutions for Western Australia, *Statement of Prosecution Policy and Guidelines*, above n 18, 16 [72]; see also specific consideration of the issue as part of the media policy: at 28 [164], app 6. There is no separate policy in the Northern Territory but the guidelines do mention this issue in various places: see, eg, Office of the Director of Public Prosecutions (NT), *Guidelines*, above n 18, 9 [7.2], 11 [7.11], 12 [7.18].

<sup>142</sup> Office of the Director of Public Prosecutions (NSW), *Prosecution Guidelines*, above n 18, 57–61 [32]; Office of the Director of Public Prosecutions (NT), *Guidelines*, above n 18, 49–50 [26]; Office of the Director of Public Prosecutions (Qld), *Director's Guidelines*, above n 18, 65–6 [56]; South Australian Office of the Director of Public Prosecutions, *Prosecution Policy*, above n 18, 15; Director of Public Prosecutions Victoria, *Director's Policy: Media*, 3–4 [3]–[9] <<http://www.opp.vic.gov.au/getattachment/494ff51f-18f3-48ef-a0aa-d13e9c90c05c/12-Media-Policy.aspx>>; Director of Public Prosecutions for Western Australia, *Statement of Prosecution Policy and Guidelines*, above n 18, app 6.

or her deliberations and ensures the reasoning is subjected to the rigour of justification, thereby promoting high quality decision-making.<sup>143</sup> Another benefit is that it ensures accountability and transparency in decision-making by requiring justification of a conclusion to the public, and this also supports public confidence.<sup>144</sup> A third benefit is that awareness of the basis of how these decisions are made promotes predictability and consistency in decision-making.<sup>145</sup> This is of advantage for successive DPPs seeking to exercise their discretion consistently and there would also be scope to consider and benefit from decisions made in other Australian jurisdictions. It also assists members of the public who will know not only the general criteria for prosecution decisions, but also how those criteria are being applied in practice. This means they will be in a position to regulate their own conduct so as to ensure, if possible, that it is not in the public interest for them to be prosecuted.

While these benefits are applicable generally to the exercise of prosecutorial discretion, we consider the case for published reasons for decisions is particularly compelling in relation to voluntary euthanasia and assisted suicide. As the experience in England and Wales has demonstrated, prosecutorial discretion in this area can give rise to a high level of public interest and concern about how it may be exercised.<sup>146</sup> It is therefore appropriate that the public can scrutinise these decisions, and be reassured if they are being made in accordance with the guidelines. These concerns have prompted the DPP in England and Wales to make publicly available reasons for his decisions in relation to the assisted suicide policy where the information about the case is already in the public domain.<sup>147</sup> Accordingly, although the majority of guidelines already address in a generic way the issue of reasons for decisions,

<sup>143</sup> *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Palme* (2003) 216 CLR 212, 242 [105] (Kirby J), citing S A de Smith, Harry Woolf and Jeffrey Jowell, *Judicial Review of Administrative Action* (Sweet & Maxwell, 5<sup>th</sup> ed, 1995) 459; Flick, above n 97, 118–19; Marilyn Pittard, 'Reasons for Administrative Decisions: Legal Framework and Reform' in Matthew Groves and H P Lee (eds), *Australian Administrative Law: Fundamentals, Principles and Doctrines* (Cambridge University Press, 2007) 174.

<sup>144</sup> Pittard, above n 143, 174; Flick, above n 97, 118–19. See also above n 102 as to these arguments specifically applied in the context of prosecutorial decision-making.

<sup>145</sup> *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Palme* (2003) 216 CLR 212, 242 [105] (Kirby J); Pittard, above n 143, 174.

<sup>146</sup> See, eg, Crown Prosecution Service (England and Wales), *Interim Policy on Assisted Suicide: Summary of Responses*, above n 46, 6 [1.14].

<sup>147</sup> Commission on Assisted Dying, *Transcript of Evidence from Keir Starmer QC*, above n 53, 5. See also, eg, Crown Prosecution Service (England and Wales), *The Suicide of Mr Raymond Cutkelvin — Decision on Prosecution* (25 June 2010) <[http://www.cps.gov.uk/news/articles/the\\_suicide\\_of\\_mr\\_raymond\\_cutkelvin\\_decision\\_on\\_prosecution/](http://www.cps.gov.uk/news/articles/the_suicide_of_mr_raymond_cutkelvin_decision_on_prosecution/)>.

we consider it should be specifically dealt with in these guidelines and that reasons for decisions should be provided and made public wherever possible.

We do recognise, however, that the context of prosecutorial decision-making means there are constraints that may limit or preclude the giving of full reasons or making them publicly available. For example, DPPs are subject to various legislative privacy obligations which, absent a relevant exception, prohibit publication of certain information.<sup>148</sup> Some or all of these obligations may not apply, however, in relation to information that is already in the public domain, for example, if it is discussed in open court at a committal hearing and the prosecution is later discontinued. Another relevant consideration is whether the production and publication of reasons would prejudice the prosecution of a co-offender, or an ongoing investigation.<sup>149</sup> Other public interest considerations which may weigh against giving reasons are if doing so would significantly prejudice the administration of justice or cause serious harm to witnesses or the suspect.<sup>150</sup> Accordingly, while it is desirable as outlined above, it will not always be possible to produce and publish reasons for decisions. Nevertheless, we consider the publication of reasons should be the presumption, and where that is not possible, consideration should also be given to whether it is possible to publish reasons of some kind that do not prejudice meeting those other obligations. For example, it might be possible to make reasons for a decision available in a de-identified form or for the reasons not to refer to particular information that should not be disclosed.

<sup>148</sup> See, eg, Office of the Director of Public Prosecutions (NSW), *Prosecution Guidelines*, above n 18, 18 [11], 19 [12], 57–8 [32]; Office of the Director of Public Prosecutions (NT), *Guidelines*, above n 18, 48–9 [25]; Office of the Director of Public Prosecutions (Qld), *Director's Guidelines*, above n 18, 65–8 [56]–[59]; Director of Public Prosecutions Victoria, *Director's Policy: Victims and Witnesses* (29 January 2007) 3 [7.2.3] <<http://www.opp.vic.gov.au/getattachment/5f8ac14d-574a-400b-a176-7fbad02358a5/7-Victims-and-Witnesses.aspx>>; Director of Public Prosecutions Victoria, *Director's Policy: The Release of Documents and Information from Prosecution Files to Private Solicitors, Government and Quasi Government Agencies, Researchers and the General Public ('File Requests')* (10 August 2010) 5–6 [20.5.7], 6 [20.5.9] <<http://www.opp.vic.gov.au/getattachment/b532bc56-e3fe-46d397194c264310715c/20-Release-of-Documents-and-Information-from-Prose.aspx>>.

<sup>149</sup> Director of Public Prosecutions Victoria, *Director's Policy: The Giving of Reasons for Discretionary Decisions*, above n 141, 3 [24.3(e)].

<sup>150</sup> Office of the Director of Public Prosecutions (ACT), *Prosecution Policy*, above n 18, [6]; Office of the Director of Public Prosecutions (NSW), *Prosecution Guidelines*, above n 18, 19 [12]; Office of the Director of Public Prosecutions (Qld), *Director's Guidelines*, above n 18, 28 [22(v)]; Director of Public Prosecutions for Western Australia, *Statement of Prosecution Policy and Guidelines*, above n 18, 16 [72].

### B Systemic Data Reporting in Annual Report

Another way in which high quality decision-making that attracts public confidence can be promoted is to monitor how the guidelines are working at a systemic level. This permits a level of scrutiny of global trends to ensure that the guidelines are leading to appropriate outcomes. Such an approach is generally a feature of voluntary euthanasia and assisted suicide legislation that establishes or empowers a commission or other body to oversee the administration of the legislation.<sup>151</sup> Again, this information should be made available for public scrutiny.

The reporting of systemic data (which can be done in a de-identified form) will be valuable for determining whether the terms of the guidelines themselves are appropriate or not. It will also permit scrutiny of how the guidelines are being applied in practice over a period of time. This sort of scrutiny ensures that decision-making is of a high quality and enables problems to be identified and addressed.<sup>152</sup> It can also provide a measure of public confidence in that the community knows how the guidelines are being used and what the outcomes are. These data can include decisions to prosecute as concerns about prejudicing the prosecution identified in relation to reasons for decisions need not arise at this systemic de-identified level of reporting, or if they do, the data can be included at a later stage once all proceedings have concluded.

The nature of the systemic data we consider should be captured includes:

- demographic data for the deceased such as gender, age, ethnic background, health status, disabilities (if any), income level and educational level;
- the deceased's underlying illness (if any);
- whether the deceased had access to palliative care;
- whether the deceased had private health insurance;
- the relationship between the suspect and the deceased;
- whether the case involved voluntary euthanasia or assisted suicide;

<sup>151</sup> See, eg, the summary description of the various oversight mechanisms in the Netherlands, Belgium, Luxembourg, Oregon and Washington State in Schüklenk et al, above n 14, 55–9. The collection and publication of data to improve the administration of criminal law processes has also been suggested in relation to death penalty cases in the United States: James S Liebman, 'The Overproduction of Death' (2000) 100 *Columbia Law Review* 2030, 2150 n 288.

<sup>152</sup> See, eg, experiences with respect to 'life ending acts without explicit request of the patient' and reporting rates in the Netherlands as discussed in Rietjens et al, above n 99. See also Chamberaere et al, above n 103, for a discussion of trends in end-of-life decision-making in Belgium.

- the number of decisions reached to prosecute or not prosecute; and
- the number of convictions that occurred in those cases where the decision was to prosecute.

To achieve an understanding of the trends that might be emerging from the use of the guidelines, the data collected in the first six bullet points needs to be correlated with those collected in the last two bullet points.

## 6 Public Reporting of Decision-Making

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- 6.1 Subject to any contrary legal obligation, the Director of Public Prosecutions will produce and publish reasons for a decision not to prosecute a case involving voluntary euthanasia and assisted suicide. Before concluding that the production and publication of reasons for a decision is not possible, consideration will be given to whether the reasons could be published in a more limited form.
- 6.2 The Director of Public Prosecutions will publish in his or her Annual Report systemic data about what decisions are being made and how they are being made in accordance with these guidelines.

## XI CONCLUSION

The purpose of this article was to construct offence-specific guidelines for how prosecutorial discretion should be exercised in cases of voluntary euthanasia and assisted suicide. In undertaking this task, we were guided by the principles of respect for autonomy, the need for high quality prosecutorial decision-making and the importance of public confidence in that decision-making. We also drew on the existing England and Wales policy.

We propose that in light of the *Purdy* decision, and given the recent Canadian developments noted above,<sup>153</sup> it is timely for the various state and territory DPPs around Australia to consider guidelines of this type. As Murphy notes:

The *Purdy* case should send a signal to the various prosecution authorities that the need to incorporate offence-specific policy is on the horizon, especially where the jurisdiction contains or anticipates the introduction of express

<sup>153</sup> See above n 14.

human rights enactments. The *Purdy* case is highly significant for any jurisdiction that has, or is planning to introduce, human rights Acts or Charters.<sup>154</sup>

Others have reached a similar view.<sup>155</sup> Australia presently does not have a human rights statute at federal level. There is, however, human rights legislation in Victoria and the Australian Capital Territory, and both jurisdictions have provisions dealing with privacy in broadly similar terms to art 8 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*, which was considered in *Purdy*.<sup>156</sup> One commentator has noted the view that if the *Purdy* decision is applied in Victoria, aspects of current criminal law may be inconsistent with its *Charter of Human Rights and Responsibilities Act 2006* (Vic).<sup>157</sup>

We do observe, however, that the case for such guidelines may be less urgent in Australia as the situation here is different from that in England and Wales. One difference which may be of significance is the lack of history in Australia of a publicly compassionate approach to non-prosecution of these offences. This can be contrasted with the DPP in England and Wales, who had declined to prosecute in a number of cases of assisted suicide involving travel to permissive jurisdictions, including the very public Daniel James case in which reasons for the decision were published.<sup>158</sup> The DPP's approach to these cases was considered significant by the House of Lords in *Purdy* in concluding that greater clarity and certainty was needed as to when a prosecution will occur and when it will not. Other points of possible contrast that were relevant to the House of Lords' deliberations were the obligation on the DPP to produce prosecution guidelines (whereas in Australia, DPPs are empowered but not *required* to do so) and that in England and Wales assisted suicide can only be prosecuted with consent of the DPP.<sup>159</sup>

<sup>154</sup> Murphy, above n 12, 356.

<sup>155</sup> See, eg, Rapke, above n 12, 11–17; Faunce and Townsend, above n 12, 714–15.

<sup>156</sup> *Human Rights Act 2004* (ACT) s 12; *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 13. The High Court recently considered and affirmed the validity of the Victorian legislation in *Momcilovic v The Queen* (2011) 245 CLR 1. Human rights legislation is also being considered in Tasmania: see Department of Justice (Tasmania), *A Charter of Human Rights and Responsibilities for Tasmania* <[http://www.justice.tas.gov.au/corporateinfo/projects/human\\_rights\\_charter](http://www.justice.tas.gov.au/corporateinfo/projects/human_rights_charter)>.

<sup>157</sup> Rapke, above n 12, 11.

<sup>158</sup> See Crown Prosecution Service (England and Wales), *Decision on Prosecution — The Death by Suicide of Daniel James* (9 December 2008) <[http://www.cps.gov.uk/news/articles/death\\_by\\_suicide\\_of\\_daniel\\_james/index.html](http://www.cps.gov.uk/news/articles/death_by_suicide_of_daniel_james/index.html)>.

<sup>159</sup> See *Suicide Act 1961*, 9 & 10 Eliz 2, c 60, s 2(4).

Nevertheless, despite these differences, we consider that the *Purdy* decision squarely raises questions about the need for specific prosecutorial guidelines dealing with voluntary euthanasia and assisted suicide. This is particularly so in jurisdictions with a human rights statute but we also consider there is merit in considering this approach in the absence of such legislation. For those jurisdictions contemplating such a step, we offer these guidelines as a principled approach to decisions whether or not to prosecute cases of voluntary euthanasia and assisted suicide.

XII APPENDIX: PROPOSED PROSECUTORIAL GUIDELINES FOR  
VOLUNTARY EUTHANASIA AND ASSISTED SUICIDE

**1 Autonomous Choice: An Additional Public Interest Factor  
Specific to these Offences**

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- 1.1 An additional public interest factor that tends in favour of prosecution is that the deceased's death did not occur as a result of an autonomous choice made by the deceased for his or her life to end.
- 1.2 An additional public interest factor that tends against prosecution is that the deceased's death occurred as a result of an autonomous choice made by the deceased for his or her life to end.

**2 Elements of an Autonomous Choice**

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The elements of an autonomous choice by the deceased for his or her life to end are:

- 2.1 the deceased was competent to make the decision to end his or her life;
- 2.2 the decision was made voluntarily by the deceased; and
- 2.3 the deceased had received, or was offered, sufficient information in relation to the decision to end his or her life.

**3 Direct Evidence in relation to the Elements of an Autonomous Choice**

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Factors that may be relevant to determining whether the deceased's death occurred as a result of an autonomous choice by him or her include whether:

- 3.1 the deceased had been assessed recently as having capacity to make the decision to end his or her life by an appropriately qualified medical or other health professional (competence);
- 3.2 the deceased needed assistance to make decisions about other aspects of his or her life (competence);
- 3.3 there was a clear and unequivocal request from the deceased for voluntary euthanasia or assisted suicide (voluntariness);
- 3.4 the suggestion to consider voluntary euthanasia or assisted suicide came from the deceased or from the suspect or others (voluntariness);

- 3.5 the suspect or others took steps to ensure that the deceased's decision was not brought about by pressure or coercion (voluntariness);
- 3.6 the suspect or others took steps to ensure that the deceased had received, or was offered, sufficient and accurate information about the decision including, where appropriate, information from qualified medical or other health professionals (sufficient information).

#### **4 Confidence whether Death Occurred as the Result of Autonomous Choice**

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The presence of factors that give confidence that the deceased's death occurred as a result of an autonomous choice by him or her does not reduce the scrutiny that the circumstances of the death receive. Such factors can, however, be used in weighing any direct evidence available in relation to whether the elements of an autonomous choice are satisfied. These factors include:

- 4.1 the deceased's decision for his or her life to end appeared to be a settled one;
- 4.2 the suspect reported the death to the police within a reasonable time and cooperated fully with the investigation.

The presence of factors that raise doubts that the deceased's death occurred as a result of an autonomous choice by him or her triggers additional scrutiny of the circumstances of the death. Such factors can also be used in weighing any direct evidence available in relation to whether the elements of an autonomous choice are satisfied. These factors include:

- 4.3 a history of violence or abuse by the suspect towards the deceased;
- 4.4 an interest on the part of the suspect that conflicts with the interest of the deceased in making an autonomous choice about death. In determining the level of additional scrutiny and deliberation that is required, regard must be had to the likelihood of the conflict arising and whether the interest is such as to be a relevant factor in the suspect's decision-making;
- 4.5 the suspect did not report the death to the police within a reasonable time or did not cooperate fully with the investigation.

#### **5 Decision to Be Made by the Director of Public Prosecutions**

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All decisions whether or not to prosecute cases involving voluntary euthanasia and assisted suicide pursuant to these guidelines must be made by the Director of Public Prosecutions.

## **6 Public Reporting of Decision-Making**

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- 6.1 Subject to any contrary legal obligation, the Director of Public Prosecutions will produce and publish reasons for a decision not to prosecute a case involving voluntary euthanasia and assisted suicide. Before concluding that the production and publication of reasons for a decision is not possible, consideration will be given to whether the reasons could be published in a more limited form.
- 6.2 The Director of Public Prosecutions will publish in his or her Annual Report systemic data about what decisions are being made and how they are being made in accordance with these guidelines.