

**Can I help you with that?**  
**Assisted Suicide in New Zealand**

Sean McIntyre

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## Introduction

In late 2011<sup>1</sup>, Rosie was suffering from late stage primary progressive multiple sclerosis – an aggressive form of multiple sclerosis, causing her chronic pain and to slowly lose the ability to walk and take care of herself. She made the decision to end her life. She did her own research and discussed this with her husband of 24 years, Evans. She acquired a gas cylinder filled with nitrogen, however she needed help to attach a flow meter to the cylinder. She asked her husband to help her attach the flow meter and to put the cylinder in the wardrobe where she could get to it. On the 28<sup>th</sup> of December she asked him to leave the house and when he returned she was dead.

Unfortunately for Evans, while Rosie's decision to commit suicide is not an offence, he had assisted her suicide and therefore was liable under s 179 of the Crimes Act 1961, a crime with a maximum sentence of 14 years' imprisonment. This does not paint a pretty picture for Evans, who has already suffered a tremendous loss, while he did a very minor act, he found himself nonetheless squarely within s 179 and therefore pleaded guilty to assisting his wife commit suicide.

However, Evans did not receive a sentence anywhere close to 14 years' imprisonment, in fact he did not receive a custodial sentence at all. He was discharged without conviction because his assistance was minor, he had acted out of love and compassion, and his employment prospects would be destroyed by a conviction.

While it may seem surprising that a 14-year maximum sentence was reduced to a discharge without conviction, even in the circumstances where he fell squarely within the section, the reality is that this is common when these exceptional cases arise, the defendants tend to receive non-custodial sentences such as supervision or community service, in stark contrast to the heavy maximum penalty.

The central thesis advanced in this dissertation is that the law of assisted suicide is uncertain and difficult to apply, which is an unacceptable state for the criminal law. While the uncertainty in *Seales v Attorney-General*<sup>2</sup> related to what actually constituted aid in dying, the focus of this dissertation is to emphasise how problematic the legal regime is when practically applied, as the

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<sup>1</sup> *R v Mott* [2012] NZCH 2366.

<sup>2</sup> *Seales v Attorney General* [2015] NZHC 1239.

law itself provides for an enormous range of circumstances without further guidance. The statutory regime outlines a very clear statement of the law, while the reality of cases and sentencing practice is far removed, consequently the law is unclear. Judges are forced to speak highly about the sanctity of life, emphasising how it is a fundamental concern of the criminal law<sup>3</sup>, whilst also accepting that the facts of the case are “exceptional” and therefore deserving of significantly reduced or effectively nominal sentences. This balancing act becomes strained when the primary tool available to address these cases exists within the Crimes Act, and the courts do not easily find the defendants in these cases to exhibit the type of criminality that would be expected of someone charged with such a significant offence, resulting in sentences that have become progressively more lenient as the interests in humanity appear to override the sanctity of life. The inconsistency between the statute and its application provides a bad framework for the criminal law when dealing with the sanctity of life and effectively devalues the principle.

While I do not disagree with the sentences that have been passed down, and certainly in many of the cases the defendant does seem to lack a sense of “criminality” that might be expected of a person charged with an offence carrying a sentence of up to 14 years’ imprisonment, it is a difficult position for both the law and the judges to be in, where the sanctity of life must be upheld and the law expressly forbids any complicity in the victim taking their own life, but the defendant is also deserving, for one reason or another, of a much lower sentence.

The criminal law, specifically when dealing with such serious matters, needs to be realistic and certain, affording citizens the ability to plan their lives in accordance with the law. This view is consistent with Baroness Hale of Richmond<sup>4</sup>, stating that a major objective of the criminal law is to be sufficiently clear that law-abiding citizens can behave and plan their lives accordingly. Further, as stated by Simester and Brookbanks<sup>5</sup> ‘The criminal law is not there solely to tell police and judges what to do after someone offends, but also to tell citizens what not to do in advance. ... Only then can the law act as the deterrent it is intended to be. And only then do citizens have a fair opportunity to steer themselves clear of criminal liability.’

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<sup>3</sup> *R v Ruscoe* (1992) 8 CRNZ 68 (CA).

<sup>4</sup> *R v Purdy* [2009] UKHL 45 at [59].

<sup>5</sup> Simester & Brookbanks, *Principles of Criminal Law*, pp.28-29.

The Crimes Act is simultaneously providing a clear (albeit broad) statement of the law, while the courts are provided with no guidance to address the wide range of cases and defendants that may be liable under it and therefore elements of morality and judicial discretion will creep in, especially as it is such a sensitive topic. On the one hand the statute makes it very clear that any act under s 179 is liable to a sentence not exceeding 14 years, while the cases themselves show that the courts are unprepared to sentence anywhere near that mark.

This creates a problem where ordinarily law-abiding citizens may seek help in ending their lives. The Crimes Act explicitly states that they should not, at the risk of their loved ones' liberty, but the cases suggest that in the right circumstances that risk may be acceptably low.

A common theme in the New Zealand cases is that the assistance provided tends to be limited to only what the victim has asked of the defendant. There is no evidence to suggest that they have instigated or encouraged the victim's suicide. In my view this is a critical aspect of s 179 that has largely gone unnoticed or perhaps taken for granted; by aiding the victim there is a clear breach of s 179, but also recognition and respect for the victim's autonomy. This is not likely to be the case where the defendant has incited, procured, counselled or abetted the victim's suicide. I will address this argument more thoroughly in chapter II.

For the following reasons I believe that this is an important area that needs to be addressed sooner than later, particularly following the public attention received by *Seales v AG*<sup>6</sup> and in light of proposed aid in dying legislation<sup>7</sup>.

First, it is undeniable that the population is living longer, with increased age comes a host of diseases such as Alzheimer's, dementia, strokes and other diseases that significantly reduce quality of life. It is not an uncommon sentiment to hear that people would rather be put out of their misery than to live like relatives in rest-homes who suffer from dementia. Further, the rate of suicide amongst the eldest<sup>8</sup> (85+) in our society is greater than any other age group when measured per 100,000 by almost double the next group which may mean that as people live longer, more people ultimately choose to end their lives rather than waiting for the end.

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<sup>6</sup> Above n 2.

<sup>7</sup> The Green Party "Medically-Assisted Dying Policy" (22 September 2009) The Green Party of Aotearoa New Zealand <[www.greens.org.nz](http://www.greens.org.nz)>.

<sup>8</sup> Statistics New Zealand "Suicide" (January 2016) <[www.statsnz.govt.nz](http://www.statsnz.govt.nz)>.

Secondly, medical science is improving at a rapid pace, there are now more diseases and conditions that can be survived through for a very long time, while also significantly reducing quality of life. For example: tetraplegics can be kept alive with treatment for a very long time, patients with kidney failure can be kept alive on dialysis even if their prospects of a donor kidney are very low or non-existent, or patients who suffer strokes and lose all but their mental function can be sustained for a long time. These patients may have very little function; they are unable to end their own lives except through painfully starving themselves to death or ceasing medical treatment which may be equally painful. Friends and family members may well become complicit in their death simply because they do not want to watch them suffer any more than they have to.

Consistent with the views of Professor Henaghan<sup>9</sup> this is a conversation that needs to be had eventually, even in the absence of fully fledged euthanasia legislation, as the problems may simply begin to compound and the cases occur more frequently.

### **Is further guidance necessary?**

As stated by Lord Hope in *Purdy*<sup>10</sup>, on the one hand the law could not be any clearer, but the consequences of an overt breach in a compassionate case are not particularly clear. While he suggested that it was the judges' role to clarify this uncertainty, their position, under different constitutional arrangements, entitled them to direct the Director of Public Prosecutions (DPP) to clarify the guidelines in place. While the courts in New Zealand are not empowered to act as the House of Lords did, the same issues and solutions exist here. The courts themselves could simply wait for more cases come before them and eventually the case law would develop more principles and patterns to follow, providing more guidance for example, on when a discharge without conviction is likely; or alternatively a set of guidelines could be produced that could circumvent these issues and perhaps even allow for public participation. The latter seems like a better solution than waiting for the right cases to come before the court and a sufficiently bold court to lay out clear principles to follow, tending either towards actual custodial sentences on one end or discharges without conviction on the other<sup>11</sup>.

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<sup>9</sup> John Lewis "Issues should be discussed" Otago Daily Times (Online Ed, Dunedin, 25 November 2011).

<sup>10</sup> Above n 4 at [27].

<sup>11</sup> Above n 1.

In Lord Hope's view<sup>12</sup>, the law is required, to "be formulated with sufficient precision to enable the individual, if need be with appropriate advice, to regulate his conduct...". While he was referring to obligations owing to the European Convention on Human Rights, it is nonetheless an important principle, particularly of the criminal law. The discretion granted to prosecutors in the Solicitor-General's Prosecution Guidelines<sup>13</sup> provides them with wide discretion, while it cannot cater to every eventuality, it could certainly provide more guidance in this particular area, where the courts are indicating that there are difficulties in using such a broad provision.

Chapter I will examine the law as it currently stands, addressing the relevant sections of the Crimes Act and the Sentencing Act. The cases that have come before the courts will then be examined, to highlight the trend that has been established – a significant disparity between the law on the books and the reality of sentencing in these difficult cases.

Chapter II will discuss the problems that the cases and the law examined in chapter I raise. These include the general sentencing practices so far; the mischief of the section; what actually constitutes "assisting"; the Seales dilemma; the poorly drafted nature of the provision; and the fact that these issues tend to become a political football.

Chapter III discusses potential solutions to the problem. The primary solution is to follow the position in England and Wales, placing more emphasis on the discretion of the prosecutor by formulating a set of guidelines to assist in the public interest analysis of whether these cases ought to be brought before the court. Secondly I argue that the Crimes Act requires an amendment to provide the courts with a better tool to use in these cases.

Chapter IV will address the potential difficulties posed by the solutions in chapter III. These include determining whether this would amount to de facto decriminalisation; whether prosecutors have or ought to have the power to make these decisions; whether the decisions not to prosecute would be amenable to judicial review; and how well would a new provision fit in the Crimes Act.

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<sup>12</sup> Above n 4 at [43].

<sup>13</sup> Crown Law *Solicitor-General's Prosecution Guidelines* (1 July 2013).

## Chapter I

### What is the Current Regime?

#### *A. Overview of the Law of Suicide and the Crimes Act 1961*

To understand the difficulty posed by section 179 Crimes Act 1961 and the related sections, a brief overview of the history of suicide and related areas of law may be helpful<sup>14</sup>.

Historically, suicide was considered a crime due to being a form of self-murder, however this offence was omitted in the Crimes Act 1908, while it remained an offence to attempt to commit suicide, an offence punishable by up to two years' imprisonment<sup>15</sup>. Attempting to commit suicide was then omitted from the most recent iteration of the Crimes Act 1961, due to the fact that help was often more important than a criminal charge for people surviving a suicide attempt.

Suicide and attempted suicide are therefore no longer criminal offences. However as stated by Lord Bingham<sup>16</sup> this does not create a "right" to suicide. This is supported in New Zealand by section 41<sup>17</sup> of the Crimes Act, which allows the use of such force as may be reasonably necessary in order to prevent the commission of suicide, among other things. This indicates that while it has been decriminalised, Parliament has ensured that they are by no means encouraging it; there remain grounds to prevent suicide without exposing yourself to criminal liability, such as pulling a person away from a cliff edge or shoving them out of harm's way. This is also supported by s 63<sup>18</sup> which prevents a person from consenting to their own death, which would otherwise prevent criminal liability from attaching to the perpetrator. For completeness, s 164<sup>19</sup> prevents the acceleration of death by an act or omission that causes the death of a person who was otherwise labouring under some other injury or disease, it is therefore not sufficient to simply claim that a terminal illness would have otherwise killed the victim in the next week for example.

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<sup>14</sup> For further discussion on suicide see Colin Gavaghan "Stopping Suicide After Seales" [2016] NZCLR 4 at

<sup>15</sup> Crimes Act 1908, s 193

<sup>16</sup> *Pretty v Director of Public Prosecutions* [2001] UKHL 61 at [35].

<sup>17</sup> Crimes Act 1961, s 41.

<sup>18</sup> Crimes Act 1961, s 63.

<sup>19</sup> Crimes Act 1961, s 164.

Lastly, s 179<sup>20</sup> outlines the offence of inciting, counselling, procuring, aiding, or abetting suicide, regardless of whether the suicide actually occurs. This specific section is required as the ordinary provision regarding party liability<sup>21</sup>, would not apply as suicide is not an offence. The result of these interweaving sections, is that suicide is a non-criminal act which is illegal to aid, but legal to use reasonable force to stop, quite possibly more force than may be needed to aid suicide.

### **Section 179 Aiding and abetting suicide**

- (1) Every one is liable to imprisonment for a term not exceeding 14 years who-
  - (a) incites, counsels, or procures any person to commit suicide, if that person commits or attempts to commit suicide in consequence thereof; or
  - (b) aids or abets any person in the commission of suicide
- (2) A person commits an offence who incites, counsels or procures another person to commit suicide, even if that other person does not commit or attempt to commit suicide in consequence of that conduct.
- (3) A person who commits an offence against subsection (2) is liable on conviction for a term not exceeding 3 years.

### ***B. Medical Law***

In the medical sphere the concepts of killing and suicide are more strained. The right to refuse treatment has not been recognised as suicide<sup>22</sup>, nor is starving yourself<sup>23</sup>. Furthermore, removing life sustaining treatment from terminal or futile patients as a medical professional is also not considered killing when in accordance with good medical practice<sup>24</sup>, as the illness is presumed to be the cause of death<sup>25</sup>. This is also not considered killing if the patient is refused care or further care, as illustrated in *Shortland v Northland Health*<sup>26</sup> where the provision of dialysis was removed in accordance with good medical practice, even though the family of the patient sought to retain treatment.

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<sup>20</sup> Crimes Act 1961, s 179.

<sup>21</sup> Crimes Act 1961, s 66.

<sup>22</sup> *Airedale NHS Trust v Bland* [1993] AC 789.

<sup>23</sup> *Corrections v All* [2014] NZHC 1433.

<sup>24</sup> Above n 22.

<sup>25</sup> *Auckland Area Health Board v Attorney-General* [1993] 1 NZLR 235.

<sup>26</sup> *Shortland v Northland Area Health Limited* CA 230/97 10 November 1997.

While the outcome of *Bland*<sup>27</sup> may be taken for granted now, at the time it was a rather radical decision. *Bland* concerned an application to the courts by Airedale NHS Trust for a declaration that they may lawfully discontinue all life sustaining treatment of a patient in a persistent vegetative state, and that if death should occur, it would be attributed to the natural causes and not to their cessation of treatment. The declaration was granted at first instance, but appealed all the way to the House of Lords, where they agreed that where a patient could not give or withhold consent, it was for the doctors to decide what was in the patient's best interests and act accordingly. In this case that meant removing life sustaining treatment, which was viewed as an omission to act, as opposed to if they had delivered a lethal dose of pain relief. Acting in consequence of good medical practice was held to be a justifiable limitation on the sanctity of life.

Consistent with this seemingly odd situation, Lord Goff sought to avoid any confusion in stating that<sup>28</sup> '... in cases of this kind, there is no question of the patient having committed suicide, nor therefore of the doctor having aided or abetted him in doing so. It is simply that the patient has, as he is entitled to do, declined to consent to treatment which might or would have the effect of prolonging his life, and the doctor has, in accordance with his duty, complied with his patient's wishes.'

In the medical sphere the sanctity of life is one of the most vital principles<sup>29</sup>, however as the above suggests, there are limits to it. Lord Goff recognised<sup>30</sup> that 'the principle of self-determination requires that respect must be given to the wishes of the patient, so that if an adult of sound mind refuses, however unreasonably, to consent to treatment or care by which his life would or might be prolonged, the doctors responsible for his care must give effect to his wishes.' This statement supports the view that the patient's autonomy must trump many other factors, even when medical professionals may well be able to save their life, such as in the instance of a Jehovah's witness who refuses a blood transfusion.

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<sup>27</sup> Above n 22.

<sup>28</sup> Above 22 at p 864.

<sup>29</sup> Above n 22 at p 863.

<sup>30</sup> Above n 22 at p 863.

So strong is good medical practice as a rebuttal to the sanctity of life, it has been applied with regards to minors also. In *Hutt District Health Board v B*<sup>31</sup> the patient was a 7-year-old whose PEG tube providing nutrition and hydration had fallen out. To reinsert it would cause the child immense pain and would only prolong the child's life and therefore the court accepted the medical opinion that it was better to avoid another painful surgery but to die sooner.

While physician-assisted suicide has repeatedly been rejected or refused, this is not necessarily an entirely clear picture of what really happens either. Often acts by medical professionals are treated significantly different to those done by ordinary people. For doctors may be protected under the doctrine of double effect<sup>32</sup> where they prescribe pain relief with the incidental consequence of shortening life, as long as the intention was to provide palliative relief, and that was reasonable and proper for the purpose. If these same acts were done as a civilian, they are strictly within ss 179, 160<sup>33</sup> or 167<sup>34</sup>.

When it comes to positive acts however, it does not matter how competent a person is or how sick or terminally ill they may be, there are no grounds for another person to either take the life of another nor help another person take their own life, excluding recognised defences such as self-defence or necessity which are limited in scope. The Crimes Act 1961 provides for all of these instances with very heavy maximum sentences available. This is the state of the current law, it appears to be straightforward and strict. There are no grounds to take a life, even if a person is already dying or they have asked for help in dying.

### ***C. The Sentencing Act 2002***

Lastly, the Sentencing Act 2002 provides judges with guidelines for sentencing; affirming and not limiting Judges' power to look at the mitigating and aggravating factors in each case. The Sentencing Act brought in provisions to allow for more flexibility, discretion and guidance when sentencing. Sections 7-9 provide the principles of sentencing as well as aggravating and mitigating factors. This allows for a range of factors to be considered such as those pertaining to the victim and the actions of the defendant.

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<sup>31</sup> *Hutt District Health Board v B* CIV 2011-485-000863 9 May 2011.

<sup>32</sup> Colin Gavaghan, Mike King "Can facilitated aid in dying be permitted by 'double effect'? Some reflections from a recent New Zealand case" (2016) 42(6) J Med Ethics 361.

<sup>33</sup> Crimes Act 1961, s 160.

<sup>34</sup> Crimes Act 1961, s 167.

Section 102<sup>35</sup> creates a presumption in favour of life imprisonment for murder which may only be rebutted in cases where it would be manifestly unjust. This indicates clear parliamentary support for the harsh vindication of intentional breaches of the sanctity of life. However, during the speeches in the House<sup>36</sup> the Minister of Justice stated that while the presumption is strong, “in a small number of cases, such as those involving mercy-killing... a mandatory life sentence is not appropriate... the court will be able to consider a lesser sentence.” While assisting suicide is not murder, it is intentionally helping someone to end their own life and there may only be a fine line between the two types of case, s 102 could well be read as supporting the position already established by the statutory regime that the sanctity of life must be upheld with harsh penalties in all but the most exceptional cases.

The legal regime clearly paints a very harsh picture for anyone helping someone else commit suicide, with a sentence of up to 14 years reflecting Parliament’s intent to protect the sanctity of life and affirming the view that there is no right to suicide. The following cases however, suggest a different pattern, the facts tend to always be viewed as “exceptional” and sentences a far cry from 14 years’ imprisonment.

Further, they illustrate the difficulty the judges face in trying to find a balance between deterring others and accepting that this breach of the sanctity of life does not seem to carry with it the same blameworthiness as in other instances. They must sentence somewhere between these two positions, and lenient sentences are the outcome.

#### ***D. The New Zealand Cases***

##### *1. R v Ruscoe*<sup>37</sup>

The victim in this case was Nesbit, a friend of Ruscoe’s who had become tetraplegic following an accident. Nesbit had spoken frequently to friends and family about suicide, however as he was paralysed except for limited use of his neck muscles his only means to commit suicide was through starvation. Nesbit discussed his suicide with Ruscoe, they settled on using pills. Ruscoe placed pills in Nesbit’s mouth, which he voluntarily swallowed, they then shared some bourbon and reminisced until Nesbit fell asleep, after which Ruscoe smothered him with a pillow.

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<sup>35</sup> The Sentencing Act 2002, s 102.

<sup>36</sup> Hansard (14 August 2001) 594 NZPD 10910.

<sup>37</sup> Above n 3.

Ruscoe clearly fell within the scope of s 179, in fact he was originally charged with murder, but pleaded guilty to s 179. His actions were viewed as compassionate, Nesbit's family did not seek punishment as they knew that it was ultimately what Nesbit wanted. The trial judge felt that it was necessary to recognise the value and sanctity of human life, that could only be recognised through a custodial sentence – he was sentenced to nine months' imprisonment. On appeal the Court of Appeal referred to English authority<sup>38</sup> and pointed to two key distinct features of this case. In that case the victim was not in pain and the defendant was far too ready to assist, whereas Nesbit's life was at the lowest point for him, and Ruscoe was viewed as helping his friend's last wish. The Court was not prepared to impose a punishment simply for the sake of punishment, however they did impose a sentence of 12 months' supervision as Ruscoe himself had since attempted suicide and developed alcohol and psychological problems.

## 2. *R v Davison*<sup>39</sup>

Davison was initially charged with attempted murder, with the charge changed to one under s 179, which was further amended by the Crown to remove the pejorative implications of "inciting", arguably a recognition that the section itself is too blunt. Davison had returned from South Africa to look after his terminally ill mother, she had attempted to accelerate her death through a water-only diet, however this was not effective. She had asked several people to help her die, in the end she was prescribed morphine tablets, which Davison stockpiled for an overdose. He asked her if she wanted him to be the one to grant her death wish, she told him to "do what you think is best". A morphine pump was installed, likely to cover up the planned overdose, he crushed up the tablets in water and she swallowed it. She died early the next morning. The court identified three key purposes to sentencing: accountability, denunciation and deterrence. The court again referred to the importance of upholding the sanctity of life, noting that he had acted with significant pre-meditation, however he had acted under some pressure from his mother while acting in accordance with her wishes, he was also considered to be of good character. The court settled on five months' home detention.

## 3. *R v Mott*

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<sup>38</sup> *R v Hough* (1984) 4 Cr App R (S) 406 at 409.

<sup>39</sup> *R v Davison* HC Dunedin CRI-2010-012-4876, 24 November 2011.

The facts of this case are the same as those in the introduction, Mott provided his wife with minor assistance, but assistance nonetheless, in helping her end her life. In this case Courtney J viewed Mott as compassionate and that in accordance with the Sentencing Act s 106 the consequences of a conviction would be all out of proportion with the offending and therefore discharged him without conviction.

#### *4. Seales v Attorney General*<sup>40</sup>

Lecretia Seales' case was not a case of assisted suicide, but an application to the High Court on the topic. Her case was highly publicised and drew a lot of attention to this issue. Seales was diagnosed with a brain tumour, she had undergone a substantial amount of therapy, yet her condition continued to deteriorate. She brought a case to the High Court, where she sought a declaration entitling her GP to assist her in committing suicide without risking criminal liability, and in the alternative a challenge that the Crimes Act was inconsistent with the New Zealand Bill of Rights Act. She was unsuccessful on both counts, as Collins J held that it was an issue for Parliament and he could not issue either of the declarations.

#### *E. Mercy killing cases*

Alongside these cases under s 179, there are also cases that fall under murder or attempted murder as "mercy killings". Mercy killing is not statutorily recognised and will fall under either murder or attempted murder, there has been judicial recognition that this is a class of killing that often has similar factors, which is often deserving of lower sentencing even though it is homicide. While it has been recognised as different, the New Zealand Law Commission was not prepared to recommend a separate defence of mercy killing in their report on provocation<sup>41</sup>.

This distinction is consistent with the view taken by the Director of Public Prosecutions (DPP) in England where, in formulating their prosecutorial guidelines, they were strictly only focusing on assisting suicide<sup>42</sup>, and that mercy killing was different enough to require a different approach. However, some judicial confusion does seem to be apparent such as Chisholm J in *R v KJK*<sup>43</sup>

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<sup>40</sup> Above n 2.

<sup>41</sup> Law Commission *The Partial Defence of Provocation* (NZLC R98, 2007).

<sup>42</sup> DPP media release.

<sup>43</sup> *R v KJK* CRI 2009-009-014397 HC Christchurch 18 February 2010.

referring to *Ruscoe*<sup>44</sup> as a mercy killing, which in my view highlights the difficulty in treating the cases as totally different insofar as a principled approach is concerned.

While mercy killing has not been judicially defined, the courts have generally identified them as killings of compassion, where someone's misery has been ended. They are often right at the borders of assisted suicide cases, where the defendant has taken the last step rather than the victim. The question of causation is critical in these cases, if the victim takes the last step, then they have committed the final act which is suicide, whereas if the defendant performs the final act then it is homicide per s 158<sup>45</sup>, due to being killing by another person. Where the defendant cannot be identified as the cause of death, they may be charged with attempted murder for evidentiary reasons.

Assuming the distinction is to be kept, the jurisprudence is nonetheless useful as in many of the cases it appears that either the court or prosecutor, or both, are prepared to push only for a charge of attempted murder, stressing that there may have been another actual cause of death. In any other circumstances the evidence would often be sufficient to justify a murder charge. In my view this practice was common, as until the introduction of the Sentencing Act 2002, s 172 of the Crimes Act 1961 required a life sentence for all murder convictions. Either there was a recognition of the moral difficulty posed by these cases and neither the court nor prosecution was prepared to charge at the highest end, or it was a tactical move in order to prevent the jury from reducing murder to manslaughter, or deciding to acquit.

Attempted murder carries the same maximum sentence of imprisonment as assisting suicide in s 179, therefore the disparity between sentence and the maximum remains useful to understand how the court manages to find the balance between the sanctity of life and the "exceptional factors" that lead them away from punishing the defendants on the harsher end.

The courts have repeated that there is no established sentencing pattern for either mercy killing or assisted suicide, but it is clear that a trend has been established that indicates sentencing on the very light end, with almost all of the cases coincidentally having the term of imprisonment

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<sup>44</sup> Above n 3.

<sup>45</sup> Crimes Act 1961, s 158.

brought down below 24 months, which allows for home detention to be sentenced or applied for instead of a full custodial sentence<sup>46</sup>.

In *Stead*<sup>47</sup> the defendant's suicidal and depressed mother sought his help to kill herself, with multiple failed attempts resulting in him eventually stabbing her in the chest repeatedly with a kitchen knife. He was charged with murder, however the jury brought in a sentence of manslaughter, as was their prerogative even in the face of the judge stressing the sanctity of life. In this case the Court of Appeal held that while it was a sad case, this breach of the sanctity of life was vindicated with a three and a half -year sentence.

In *Martin*<sup>48</sup> the defendant was a trained nurse who was looking after her mother who was suffering from bowel cancer, she was not prosecuted until she published her book and admitted her guilt therein. She injected her mother with 60mg of morphine, as her mother had repeatedly asked for help dying and Martin had agreed to do so when her quality of life reduced intolerably. She was later charged with attempted murder, as her mother was so close to dying, the morphine may not have been the cause. The court found that 15 months' imprisonment was a sufficient sentence to uphold the sanctity of life.

A more difficult case is *Faithfull*<sup>49</sup> where the defendant's wife was terminally ill with pancreatic cancer. One night after drinking he attempted to murder her by smothering her, thinking that it would take away her pain. She resisted and he stopped, calling the police to admit his guilt. Though she was incredibly upset and felt that her trust had been destroyed, they ultimately were able to make amends before her death. This is a clear case of attempting to murder someone without any clear instruction to do so – yet the court accepted that 12 months' home detention was an appropriate sentence in the circumstances. This case seems to be anomalous, or indicative of the courts' general desire not to sentence harshly in these cases, as even where there was no consent, the court did not favour a custodial sentence.

Finally, in *Crutchley*<sup>50</sup> the defendant's mother was terminally ill with stomach cancer and in immense pain. He asked her if she wished him to give her a dose high enough to cause her to die,

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<sup>46</sup> Sentencing Act 2002, s 15A.

<sup>47</sup> *R v Stead* (1991) 7 CRNZ 291.

<sup>48</sup> *R v Martin* CA 199/04, 14 February 2005.

<sup>49</sup> *R v Faithfull* HC AK CRI 2007-044-007451 14 March 2008.

<sup>50</sup> *R v Crutchley* HC HAM CRI 2007-069-000083 9 July 2008.

she affirmed. He overrode the pump that was installed and emptied the syringe into her. She did not die immediately but a few hours later. He was asked if he was involved and was completely honest. The court once again held that because she was so close to death it was difficult to attribute the cause of death to him, therefore he was charged with attempted murder. While stressing the importance of the sanctity of life, the court again referred to the case as exceptional<sup>51</sup> and that a custodial sentence would be too much, therefore a hybrid sentence of community detention and work was imposed to allow him to retain his employment. In sentencing, the court effectively went to some effort to ensure that he would receive a very minimally impacting sentence, while also trying to deter other offenders.

While these cases are not offences under s 179, the facts across the cases are often very similar and the courts tend to rely on the jurisprudence from both types of case. Similar to s 179, both murder and attempted murder have high maximum sentences of imprisonment, life and 14 years respectively. Yet the same disparity between maximum sentence and actual sentence exists when these factors are present, the courts find reasons such as compassion to sentence on the lower end. Further, in a number of the attempted murder cases it is likely that the prosecution could have pushed for a sentence of actual murder, yet for unknown reasons they choose not to. This illustrates the difficulty faced by both prosecutors and judges, that these cases must be brought forward, but they are not necessarily particularly easy to address using the existing framework that was designed for more truly criminal acts.

For better or for worse, the courts are taking on board factors directly relevant to the victim's wishes, even though s 63 clearly states that you cannot consent to your own death, which when read alongside s 179 ought to affirm the fact that the victim's consent cannot justify the assistance provided. This may be justified as respect for the victim's autonomy, in much the same sense as in medical cases, where the patient elects to cease treatment, their autonomy or self-determination is respected and overrides the sanctity of life.

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<sup>51</sup> Above n 50 at [86].

## Chapter II

### The Problems with the Current Regime

#### *A. What is the Real Mischief of s 179?*

Section 179 is incredibly wide in scope, able to catch acts as minor as in *Mott* to the clearly more involved acts in *Ruscoe*<sup>52</sup>. Lord Lane CJ recognised this<sup>53</sup>, describing the equivalent provision in England as applying to acts which can vary from the borders of cold blooded murder down to the shadowy areas of mercy killing or common humanity. This recognition of the section's broad scope contributes, in my view, significantly to the problems that the courts have in applying it without any further guidance.

Five different acts are covered in s 179: aiding, abetting, counselling, inciting, and procuring – all of which are punishable by a sentence of up to 14 years. A new offence was added with the introduction of the Harmful Digital Communications Act 2015, that a person commits an offence who incites, counsels or procures another to commit suicide, even if that other person does not commit suicide or attempt to in consequence of that conduct.

In my view while five different acts are referred to, they are two themes: aiding on the one hand, and encouraging or instigating by the assistant on the other. While the Act itself does not provide guidance on these terms, the terms have developed through party liability case law. The application may be slightly skewed, as ordinarily these terms apply to secondary parties with regards to the principal offender, whereas here they are the principal offence.

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<sup>52</sup> Above n 3.

<sup>53</sup> Above n 38.

Aiding requires actual assistance<sup>54</sup>, with the intent to help with the commission of the crime. This would be the actual acts undertaken in both *Ruscoe* and *Mott*. Abet has been interpreted to mean “urge” or “solicit”<sup>55</sup>. Inciting means to urge, or spur on by encouragement or persuasion<sup>56</sup>. Procure means to produce by endeavour or to take the appropriate steps to ensure an outcome occurs<sup>57</sup>. Lastly, counsel has been interpreted to mean advising or recommending<sup>58</sup>.

From this it should be apparent that to aid suicide means only to help the other party with a decision that they have already made themselves, whereas the other four acts involve some aspect of encouraging or instigating. In my view, splitting these acts into two categories creates two very different types of offence. On the one hand to aid the victim in a decision that they have already made does not require any “motive” to bring about the victim’s death. On the other hand, by encouraging suicide or initiating the conversation, particularly in victims who are not necessarily terminal nor irremediably ill, those offenders are taking a more direct role in bringing about someone else’s death, even though it is not sufficient for homicide.

While the law is clear, that the victim cannot seek another’s complicity in their suicide, the courts appear to recognising that in cases where the defendant is only aiding to the extent that the victim needs their help, they are respecting their autonomy in much the same way as in the medical cases. While the courts cannot be so frank about this consideration, it does appear to guide their hands in determining that the defendants are only minimally culpable.

This view is not necessarily new. More than 50 years ago Glanville Williams identified<sup>59</sup> that ‘it will be universally conceded that one who incites a young person to suicide for example is properly punishable: while on the other hand a physician who give (sic) his dying patient the opportunity of a merciful release may well be regarded as outside the scope of any intelligently conceived prohibition.’ While he does speak specifically of medical professionals, I think that the point remains relevant, especially alongside Lord Lane CJ’s statement, there is an enormous continuum of acts being caught under a single offence. From maliciously causing a person to

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<sup>54</sup> *Larkins v Police* [1987] 2 NZLR 282.

<sup>55</sup> *R v Schriek* [1997] 2 NZLR 139.

<sup>56</sup> *R v Tamatea* (2003) 20 CRNZ 363.

<sup>57</sup> *Cardin Laurant Ltd v Commerce Commission* [1990] 3 NZLR 563.

<sup>58</sup> *R v Baker* (1909) 28 NZLR 536 (CA).

<sup>59</sup> Glanville Williams *Sanctity of Life and the Criminal Law* (New York: Knopf, 1957) at 308.

take their own life in order to gain, to aiding a person along with their final act in order to end their suffering.

Aiding may ultimately be nothing more than reluctant acquiescence in the suicide of someone who is determined to die, acting out of respect for the victim, or perhaps out of a desire to not wish any further harm on them that may occur if they are required to starve themselves to death. On the other hand, the idea of reluctantly encouraging a person to commit suicide is much more difficult to imagine.

In further support of this view the Harmful Digital Communications Act introduced a new offence in 2015, the first significant change to s 179 in at least 100 years, criminalising that act of inciting, counselling or procuring another person to commit suicide, even if they do not do so in consequence of that conduct. This was aimed at<sup>60</sup> reducing bullying and primarily online conduct, but is not restricted to that. This specific conduct has been deemed significant enough to justify an infringement upon our collective freedom of speech, on the basis that it seeks to prevent suicides that would not otherwise occur, but for the encouragement or instigation of another person.

Often the victims in the most sympathetic cases have only asked for help because the only other option is to starve themselves to death, as what happened in *R (on the application of Nicklinson) v Ministry of Justice*<sup>61</sup>, where he had no physical function beyond blinking to communicate, he ultimately refused food, water and treatment until he died of pneumonia. The recent cases<sup>62</sup> that have made their way to both the House of Lords and United Kingdom Supreme Court have concerned exactly this problem, the victims are aware that by asking for help they risk criminal liability for the person who aids them, but it may be a risk they are prepared to take.

In each New Zealand case referred to, the act of aiding is very clearly within the scope of s 179, ranging from very direct aiding as in *Ruscoe* where Nesbit could not have killed himself in any other manner but starvation; to *Mott* where his assistance was effectively the least imaginable. In none of the cases have the Judges felt compelled to give a custodial sentence. In my view this strongly supports the inference that the courts are not prepared to view aiding as the type of

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<sup>60</sup> Hansard: (25 June 2015) 706 NZPD 4830.

<sup>61</sup> *R (On the application of Nicklinson) v Ministry of Justice* [2014] UKSC 38.

<sup>62</sup> Above n 4.

conduct worthy of a 14-year sentence, and very rarely of a custodial sentence at all. However, other acts described in the section may provide a better example of conduct that would be. The court in *Davison* recognised, at least implicitly, that there is something worse about inciting suicide than other forms of assisting by noting the removal of “inciting” from the charge due to the pejorative implications<sup>63</sup>.

While discussion centred around autonomy risks becoming a rights-based debate, the courts are nonetheless looking at these cases and finding that the offence has occurred because of the victim’s desire to commit suicide, rather than the defendant encouraging their conduct, the respect given to autonomy is slowly increasing. In medical cases<sup>64</sup> this autonomy has been held to be a justified limitation on the sanctity of life, entitling patients to refuse or cease treatment even when it means their death will ensue. This was the case in *B v NHS Hospital*<sup>65</sup> where the patient had become tetraplegic following an accident and sought a declaration that she possessed the necessary mental capacity to give or refuse consent to medical treatment. Her request to turn off life support was initially refused, however in overturning that decision of the hospital’s, the court held that where a patient is mentally competent, they have the same right to personal autonomy as any other patient. When assessing the patient’s competence, doctors should not get the question of mental capacity confused with the consequence of the patient’s decision, regardless of how serious it may be. Ms B was sufficiently mentally competent to make decisions pertaining to her treatment and therefore any treatment against her wishes amounted to an unlawful trespass, even though she intended to cause her death.

### ***B. English Case Law***

In support of this view, the following English cases where terms of imprisonment have been upheld have all tended to involve an element of encouragement and instigation beyond mere aiding, as the defendant has been more than just an unwilling assistant.

In *R v Hough*<sup>66</sup> the court held that the defendant was simply too eager to help and the victim was not in pain, she was sentenced to nine months’ imprisonment. The court in *Ruscoe* noted that in instances where the defendant has actively encouraged suicide, they may be prepared to decide

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<sup>63</sup> Above n 39 at [4].

<sup>64</sup> Above n 22.

<sup>65</sup> *B v An NHS Hospital Trust* [2002] EWHC 429 (Fam).

<sup>66</sup> Above n 38.

differently (at p71). Further, in the first case<sup>67</sup> following the revised guidelines issued after *Nicklinson*<sup>68</sup>, the defendant provided petrol to an already suicidal and vulnerable individual, who somehow survived his immolation. The defendant's final sentence was one of 10 years' detention in a young offenders' institute, as the evidence did not suggest<sup>69</sup> that the victim had actually made an informed and settled decision to take his own life. The defendant effectively encouraged him by providing him with the means he could not otherwise obtain at the time, while being fully aware of the victim's mental state.

Ultimately it seems that while five acts are listed, they essentially boil down to two overarching acts, either aid, or encouragement and instigation. I argue that encouraging acts are those that need more careful consideration, and that while acts which aid may not be viewed as entirely innocent, they are so much further down the scale of criminality so as to attract less attention, and perhaps be more justifiable, or in the words of Lord Brown<sup>70</sup>, acts which at the very least may be forgiven rather than condemned.

### ***C. The Seales Dilemma***

Lecretia Seales' brain tumours placed her in a very difficult position, which was also common to the applicants in *Nicklinson*, *Purdy* and *Pretty*. She knew that her future was bleak and she was going to lose function and ultimately die an unpleasant death depending on how the brain tumour developed; however, she could still function and wanted to enjoy her remaining days with her family. She was thus faced with a dilemma: she could commit suicide in any painless manner she wanted to while she remained functional, which would require her to take her life before she was ready, or she could wait until she had lost a significant amount of function and was ready to die, which would unfortunately require her to seek aid in doing so.

This is not an enviable position, yet remains consistent with above quote of Lord Bingham that there truly is no right to suicide. Her options then, if the situation worsened, were to starve herself to death and be in more pain than she already was, to die "naturally" from her tumours which would inevitably cause her significant pain and reduced quality of life, or to enlist the help of someone else to perhaps put pills in her mouth much like *Ruscoe*. Given that she was a lawyer

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<sup>67</sup> *R v Howe* [2014] EWCA Crim 114.

<sup>68</sup> Above n 61.

<sup>69</sup> Above n 67 at [33].

<sup>70</sup> Above n 4 at [86].

I am inclined to believe that she was aware of the options available to her and if a family member had ultimately assisted they would probably have received either a discharge as in *Mott* or a very nominal sentence, but it still remained within the court's power to sentence as high as 14 years' imprisonment. This is a difficult situation that few people would be unable to sympathise with, yet it is the current state of the law.

***D. To what acts does section 179 apply?***

As I have previously stated, s 179 is drafted with a very broad scope, covering the type of very minor assistance as in *Mott* where he simply attached a flow meter to a gas tank and placed it somewhere Rosie could get to it, to Ruscoe's conduct, where he both placed a significant quantity of pills in his friend's mouth and smothered him once he fell asleep. There is also Davison's conduct where he essentially did a similar act to Ruscoe, by stockpiling pills and crushing them up to make them easily consumable by his mother. These are acts that could have otherwise been done by the deceased had they been more capable or functional.

The courts have been less inclined to view the bare provision of information as sufficient to be assisting unless that information was given with the intent to be used by a person actually contemplating suicide, and with the object of assisting or otherwise encouraging<sup>71</sup>. This narrower approach where intent has been emphasised has also been applied in New Zealand in *Tamatea*<sup>72</sup> where the victim had threatened to hang herself and the defendant effectively told her to just go do it, which she later did. The defendant was found not guilty as the essential elements required that the defendant knew the victim was seriously contemplating suicide, and an intentionally formed deliberate encouragement or urging that suicide should take place. A causal relationship between that encouragement and the act itself must at least be a cause of the suicide, if not the only one. Further, if a jury were able to conclude that the suicide would have happened in any event, then the offence was not committed. This may seem somewhat inconsistent with my previous comments regarding the seriousness of encouragement, however in this case the defendant did not actually seriously mean to encourage her, nor believe she was seriously suicidal.

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<sup>71</sup> *Attorney-General v Able* [1984] Q.B. 795.

<sup>72</sup> Above n 56.

This raises questions of how much help can be provided before it becomes assistance. This is particularly difficult in instances where a person has lost significant motor function, due to paralysis or a stroke, or in circumstances such as *Seales* or *Ruscoe*. Devices such as the “Deliverance Machine” have been created in order to ensure that the victim takes the last step. An IV is placed into the victim’s arm and the machine asks a series of questions to confirm the victim’s wish to die, after which a lethal injection is triggered. The victim taking the last step is critical in ensuring that the victim’s death is not “caused by another person” which would be homicide<sup>73</sup>, a requirement for murder. However, someone is likely going to have to assist the victim in obtaining one of these machines, therefore becoming liable under s 179.

In another set of circumstances, a terminally ill patient or a patient with a very poor prognosis decides that they will fly to the Dignitas facility in Switzerland to enjoy a painless death on their own terms. If a family member helps to fund their travel, or fills out their membership information in the event that they lack the motor function to do so themselves – has that family member assisted within the scope of s 179? What about if they simply accompany them on their final journey, or must the victim die alone like Rosie Mott?

The above circumstances have spurred litigation in England making its way to the House of Lords and United Kingdom Supreme Court on multiple occasions. Evidence shows that a British citizen travels to Dignitas once every fortnight<sup>74</sup>, yet these cases are not prosecuted even when they likely fit within their legislative framework for assisting suicide. These cases were brought before the courts in order to provide security for the family members of the victim that they would not be criminally prosecuted on return to the England, or at the very least some information to guide the decision to take that risk. This is the basis of my first solution based on improved prosecutorial discretion.

### ***E. The Trend of Leniency***

It should be clear by now that the cases show a clear disconnect between the law on the books which provides for a very significant maximum sentence of 14 years’ imprisonment, and the reality of the cases which are ordinarily dealt with by much less than any type of custodial sentence. The court in each case must recognise the value of the sanctity of human life and the

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<sup>73</sup> Crimes Act 1961, s 158.

<sup>74</sup> Above n 4.

fact that in most ordinary cases this must be vindicated by a custodial sentence, yet the judges are then forced to recognise that the defendants in these cases are hardly the criminals that the Crimes Act was designed to target. The punishments range from supervision as a reflection that the act should not be encouraged in *Davison*, to a sentence of supervision in order to help the defendant in *Ruscoe*, to a complete discharge in *Mott* to recognise that his employment prospects would be destroyed by a conviction.

A common factor in each case also, is the emphasis placed upon the sanctity of life, the protection of which is recognised as one of the highest priorities of the criminal law. This is unlikely to be particularly difficult to understand in murder cases and most manslaughter cases, however there is a real difficulty in reconciling this highly valued goal in these difficult cases where the victims themselves have sought out assistance, the victim's perspective is arguably that there is more sanctity in dying than in living. The law is clear in both ss 179 and 63 that victims cannot make another person complicit in their suicide without risking their liability, furthermore they cannot consent to acts done to them due to s 63. This again is an odd situation for the criminal law, as there are likely no other crimes that the victim would wish upon themselves like they may do here. The judges are clearly find it difficult to reconcile this principle with the facts of the cases at hand resulting in attempts to simultaneously deter, punish and uphold the sanctity of life while recognising that these circumstances deserve minimal sentences.

#### ***F. Political Obstacles***

The issue of euthanasia and physician-assisted suicide has been a political football, while public opinion on the matter ebbs and flows, particularly following *Seales*. The most recent euthanasia bill that went through parliament was narrowly defeated in the first round of voting 58-60. This was more than 10 years ago, before hugely public and sympathetic cases such as *Seales*. This illustrates the point that while public opinion is not nearly as negative as it once was, there may be some stigma attached to the party that makes significant moves towards introducing legislation. Yet as stated in *Seales* the problem truly is one for Parliament and that is likely to be a particularly drawn out process for a matter that many view as controversial. The solutions I propose do not go quite so far as euthanasia, nor legalisation of assisted suicide, but they can

provide the justice system with a better way to address these cases until there is legislative intervention.

One concern that arises from merely having interim measures is that they may simply be “good enough” and the bigger debates regarding euthanasia and physician-assisted suicide may be put off indefinitely. I do not think that this concern is too worrying as the provisions are unlikely to be entirely satisfactory to either pro or anti-euthanasia groups, which have loud voices and seek to achieve an absolute position, whereas my proposals are much more moderate.

Further, the solutions I propose should be sufficiently future proofed that if limited physician-assisted suicide legislation is introduced, there may still be cases that fall outside the specific wording of that legislation, as some models would limit the provision of assistance to terminally ill people, but some cases of assisted suicide have not involved terminally ill patients. These solutions could account for these sympathetic cases more appropriately than the current law.

The fact is, that looking at *Mott*, even a minor amount of help runs the risk of significant liability. While the sentence may be low or negligible, it still uses valuable court and prosecution resources, the expense of court as well as putting, usually a grieving family member, through the court processes. Even if there is only a minor conviction, it remains a conviction on the defendant’s record that may impact their ability to travel and to work, which has been recognised multiple times as a factor to consider, and in *Mott* appears to be a significant reason why he was discharged without conviction rather than imposing some minor sentence to ensure that there was “deterrence”. This leads to my next chapter where I propose a different approach than the current regime.

## Chapter III

### Solutions

In this chapter I will suggest two solutions to address the difficulties that have arisen in this area of the law.

The first solution is to adopt a similar approach to that which has been developed in England, where the discretion of the prosecutor is guided more specifically on the public interest aspect. Ideally this would prevent a case such as *Mott* from being taken to court and effectively wasting court resources, while also preventing the court having to repeat the same statements about the sanctity of human life, only to find that in the circumstances of this case that they may be overridden. Further, this will likely provide a reliable basis for keeping cases with minimal involvement out of court, while keeping an offence with a heavy penalty in the Crimes Act to reflect societal disapproval in the appropriate circumstances, such as cases lacking sympathy or compassion and where the defendant has taken a more active role in encouraging the victim.

The second solution would involve amending the Crimes Act to include a narrow hybrid offence/defence to apply in circumstances where the defendant has aided in a very limited way. This effectively encapsulates a range of the factors the courts have already considered to be important in determining the overall culpability of the defendant. This would have a much lower maximum sentence compared to s 179, which may provide the courts with a much more appropriate tool to use in these circumstances, rather than having to sentence all the way down from a 14-year maximum penalty. The obvious gulf that exists between the maximum penalty and the cases thus far is likely dissatisfying for proponents of more transparent sentences or the judges who may view s 179 as being heavy handed and the wrong tool for the job.

#### *A Solution 1 – Enhanced Prosecutorial Discretion*

The Solicitor General is empowered under the Criminal Procedure Act s 185 to provide a set of guidelines to be followed by prosecutors in determining when to prosecute. In deciding whether to prosecute under the current guidelines<sup>75</sup>, a two-part test must be followed: first the evidential test must be satisfied, which requires that the evidence which can be adduced in court is sufficient to provide a reasonable prospect of conviction; and the public interest test which

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<sup>75</sup> Above n 13.

requires that the prosecution is required in the public interest. Once the evidentiary test is satisfied, the next consideration is whether the public interest actually requires the case to be prosecuted; in a time honoured statement by Sir Hartley Shawcross QC MP in 1951, then UK Attorney-General “it has never been the rule in this country... that suspected criminal offences must automatically be the subject of prosecution.”<sup>76</sup> This provides prosecutors with discretion to prevent a case from going to court at all, if they believe it is not in the public interest to prosecute.

In England the test is effectively the same, except that their equivalent provision is found within the Suicide Act 1961. Section 2(1) of the Suicide Act 1961 provides for the same factors as in our s 179, but also requires at s 2(4) that the Director of Public Prosecutions must consent to proceedings being instituted under this section. This is already a limit on the ordinary capacity to bring proceedings under this provision, and in *Purdy* the court noted that well over 100 English citizens had been assisted in travelling to the Dignitas facility in Switzerland in the past while no proceedings had been brought. However, it was not until the case of Daniel James<sup>77</sup> that the DPP released the reasons for not bringing proceedings, even though the parents and friend of the family had passed the evidentiary test stage.

Following this release, cases seeking declarations and clarifications of these guidelines were brought before the court, eventually resulting in the DPP releasing guidelines that indicated factors for and against prosecution in each case.

The clarity of these guidelines was challenged in *Purdy*, where the applicant suffered from primary progressive multiple sclerosis, a disease that inevitably leads to chronic pain and significantly diminished function. Knowing that her outlook meant that her life would eventually become undignified and painful, she sought to have the DPP’s guidelines clarified further, as they were viewed as inadequate<sup>78</sup> due to the DPP being effectively forced to use the absence or inapplicability of aggravating factors as mitigating factors.

*Purdy* argued that the lack of clarity infringed her rights under the European Convention on Human Rights articles 8.1 and 8.2. The House of Lords held that the prosecution guidelines

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<sup>76</sup> Above n 13.

<sup>77</sup> Keir Starmer QC (DPP) *Decision On Prosecution: The death by suicide of Daniel James* (9 December 2008).

<sup>78</sup> Above n 4 at [103].

provided little real guidance, and that the DPP was required to ‘clarify what his position is as to the factors that he regards as relevant for and against prosecution’<sup>79</sup>

Following *Purdy* the Crown Prosecution Service (CPS) undertook to release comprehensive, offence-specific guidelines as required by the House of Lords. In doing so there was significant public involvement<sup>80</sup>. However, these guidelines were later challenged in 2014 in *Nicklinson* where the applicants went one step further and sought a declaration of incompatibility between the English law and Article 8 of the European Convention on Human Rights. The UKSC was not prepared to go this far (Lord Kerr and Lady Hale dissenting), however they once again recommended that the guidance could be more specific, allowing anyone considering involving another person in their suicide to weigh up the risks.

While the assisted suicide provision in New Zealand does not require the consent or the approval of anyone beyond the prosecutor, the House of Lords recognised that the consent required in s 2(4) was not especially odd as there was always the public interest test regardless. Further, it would not be totally unfamiliar in New Zealand for a prosecution to require approval of the Solicitor General or Attorney General<sup>81</sup>, or such as in the case of plea bargaining relating to murder.

I recommend that a set of guidelines should be implemented, using the factors derived from the case law thus far, the Sentencing Act guidelines and the CPS guidelines formulated in England and Wales. Further, as in England and Wales this could be opened up to allow for public participation which may be particularly useful following the public interest sparked by *Seales*. Sufficiently formulated guidelines will guide prosecutors to determine whether a case such as *Mott* should even go before the courts. This is particularly useful for a range of reasons, such as that people in the position of Rosie Mott or Nesbit will not need to be so concerned that by asking for help they are putting someone at high risk of criminal liability. This was the basis of both *Purdy* and *Nicklinson*, the applicants in each case sought to travel to the Dignitas facility eventually, but were clearly unable to do so on their own due to being (or would become) paralysed or otherwise incapable. This would have a flow-on effect that would avoid the issues

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<sup>79</sup> Above n 4 at [55].

<sup>80</sup> Crown Prosecution Service *Policy for prosecutors in respect of cases of encouraging or assisting suicide* (October 2014).

<sup>81</sup> Crown Law *Statutory Offences Requiring the Consent of the Attorney-General* (1 July 2013).

present in *Seales* where she wanted to have the option to have assistance in committing suicide, should her circumstances have worsened to such a degree, but ideally she would never need help.

Furthermore, by implementing guidelines that would keep some of these cases from going to court, judges are spared from having to repeat the same tired remarks about the value of life on the one hand, and delivering very light sentences on the other. In my view this affords greater paramountcy to the sanctity of life than to repeatedly override it. While hand constantly repeating the same statements may be viewed as affirming the principle, it begins to sound like merely paying lip service to a principle that is supposed to be a fundamental value of the criminal law.

Lastly, while many people may be disgusted by an argument of economy, it simply saves a significant amount of court resources that could be otherwise allocated elsewhere. Further, when the assister is a member of the deceased's family, they will often bear at least part of the costs of the proceedings. When considered alongside the prosecution guidelines regarding victims<sup>82</sup>, the cost, difficulties and stress faced by the family ought to be an important consideration

### ***1 The guidelines***

Prosecutors must apply the two-part test as set out in the Solicitor General's Prosecution guidelines<sup>83</sup>. If the evidentiary test is not satisfied, then no proceedings are to follow. If the evidentiary test is satisfied, the prosecutor must then apply the public interest test. For the avoidance of doubt, it has never been the rule that prosecution must follow in every instance where an offence is believed to have been committed.

Section 179 remains an offence punishable by a term not exceeding 14 years, reflecting the serious nature of the crime. These guidelines do not constitute a decriminalisation of that offence. They will be read in substitution of the public interest factors outlined in the Solicitor - General's guidelines when considering a charge under s 179, in order to provide prosecutors with more appropriate factors to consider when undertaking the public interest test. They cannot be read as providing an assurance or immunity to criminal proceedings.

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<sup>82</sup> Crown Law *Victims of Crime - Guidance for Prosecutors* (6 December 2014).

<sup>83</sup> Above n 13.

The following factors are not listed in any particular order, nor given a particular weight, as this is likely to be variable depending on the circumstances. The absence of a factor does not necessarily mean that it should be taken as a factor tending in the opposite direction, for example not receiving financial gain does not make that a factor against prosecution.

Investigators are reminded that often in these circumstances the suspect will be the primary source of information, therefore it is critical to pursue all reasonable lines of further enquiry in order to obtain independent verification of the suspect's account.

For the purposes of these guidelines, "victim" refers to the person who commits or attempts to commit suicide.

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

1. The victim was under 18
2. The victim is not mentally capable<sup>84</sup>
3. As a consequence of (2) the victim had not reached a voluntary, informed and clear decision to commit suicide
4. The victim's decision was not clearly or unequivocally communicated to the suspect
5. The suspect was not wholly motivated by compassion and was in a position to gain from the victim's death. A careful approach is required here as often family members assist and are also likely to inherit under the victim's will or insurance policy, purely incidental to any compassionate considerations.
6. The suspect pressured or encouraged the victim
7. The suspect did not take reasonable steps to determine if someone else had pressured or encouraged the victim
8. Whether there was a history of violence or acrimony between the victim and suspect
9. The victim could have committed the act without any assistance
10. There was no prior relationship between the suspect and victim
11. Any payment from the victim to the suspect
12. Whether the suspect's help was any more than reluctant

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<sup>84</sup> While this is not statutorily defined in New Zealand, the common law rules would apply. For further discussion see: PDG Skegg "Consent to treatment: Introduction" in PDG Skegg and Ron Paterson (eds) Health Law in New Zealand. Thomson Reuters, 2015.

### 13. Whether the assistance involved violence

#### Public interest factors tending against prosecution

1. The victim had reached a voluntary, informed and clear decision to commit suicide
2. The suspect was wholly motivated by compassion
3. The actions of the suspect, while within the wide scope of s 179, were only of very minor assistance
4. The suspect had made efforts to persuade the victim from their choice to commit suicide
5. The suspect acted reluctantly in the face of a particularly determined victim
6. The suspect reported the suicide and fully assisted with the police's enquiries in a timely manner.
7. The deceased was in significant pain
8. The victim had been more than minimally involved in caring for the victim
9. The victim took responsibility for their actions

This list is not exhaustive and prosecutors would be entitled to consider additional factors where appropriate.

These guidelines relate to solely to acts assisting suicide, it is important to ensure that in the circumstances the suspect's conduct does not amount to what is commonly referred to as "mercy killing" as a different approach is required.

#### ***B. Solution 2 - Amending the Crimes Act 1961***

If legislation permitting physician-assisted suicide is introduced it is likely to be limited in scope<sup>85</sup>, at least in the earliest phase; it may require the patient to be terminally ill such as in the Green Party policy, yet there will almost certainly still be sympathetic cases that fall outside of the legislative requirements. Both *Mott* and *Ruscoe* are examples of this type of case, as neither victim in those cases was truly terminal as they could have lived for a lot longer, but with intolerably reduced quality of life. In both of those cases the court was not prepared to hold the sanctity of life so far above other considerations, entitling both to very low or non-existent sentencing.

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<sup>85</sup> Above n 7.

Further, by providing an alternative sentence to s 179, it would provide the courts with a better reference point for cases involving very minimal aiding without resort to an offence with a significant maximum penalty. This is consistent with the arguments I have posed above, where the wide ranging nature of s 179 catches two critically different types of assisting with aiding on the lower end and encouraging or instigating on the upper end of culpability. The act of aiding a victim who has settled on the decision to commit suicide may take many forms, often it will only be minimal assistance necessary because the victim is incapable of doing it themselves and the defendant becomes complicit out of necessity and respect for the victim rather than any personal desire.

This assistance may be very minimal, such as placing equipment that was obtained by the victim within reach, or helping them to fly safely to the Dignitas facility. This new provision would maintain Parliament's current position outlawing assisted suicide, while providing the courts with a more appropriate and transparent tool to use in sensitive cases that would more accurately accounts for their compassionate or sympathetic nature.

The new offence will be a hybrid offence/defence section, similar to infanticide. There will be a focus on factors relating to both the victim and the offender. In drafting a potential amendment, I have relied upon the factors that have been commonly referred to in the cases that have come before the courts thus far. The first step is to look at factors pertaining to the defendant, such as what their relationship was to the victim, and what their conduct was: for example, did they act as minimally as possible as in *Mott* or was their assistance much greater as in *Howe*<sup>86</sup>. Was their involvement necessary due to factors limiting the victim, as this deals with the *Seales* dilemma, where assistance would be needed because the victim is unable to accomplish their desired outcome alone. The second step is looking to factors relating to the victim. This includes the extent of their condition or disease, as well as whether they were in a position to make a clear decision. Lastly this needs to occur in circumstances where the defendant was likely to have been psychologically unbalanced or affected due to factors relating to the stresses associated with caring for the victim, the closeness of their relationship or any other factors that the judge deems appropriate. This last aspect may seem dissatisfying or vague at first, however in my view it is necessary in order to account for the exceptional factual nature of these cases.

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<sup>86</sup> Above n 67.

## ***1. The Amendment***

### Section 179A Aiding Suicide

- (1) Where a person would otherwise be guilty of aiding suicide pursuant to s 179, they will be liable under this section instead if
  - (a) The defendant was closely known by the victim; and
  - (b) The defendant's conduct was no more than the victim required to commit suicide; and
  - (c) That conduct was limited to acts that in the circumstances the victim could not do without aid; and
  - (d) The victim was suffering from an irremediable disease or condition that intolerably reduced their quality of life; and
  - (e) The victim engaged the defendant first, having made a sufficiently informed and settled decision; and
  - (f) There is no evidence showing that the defendant encouraged or counselled the victim's decision; and
  - (g) This occurred in circumstances where the defendant's state of mind was likely to have been unbalanced by factors relating to: the stresses associated with caring for the defendant, the closeness of their relationship or other relevant factors to be considered by the judge.
- (2) An offence against this section is punishable by a term of imprisonment not exceeding 3 years.

## Chapter IV

### Challenges to the Proposed Solutions

#### *A. Challenges to the introduction of offence-specific guidelines*

##### *1. Does the introduction of the guidelines amount to de facto legalisation?*

The most difficult criticism to this solution is that it may be viewed as de facto decriminalisation of assisted suicide. While this is a valid concern, in my view this approach strikes the balance between actual decriminalisation and the current position.

The case law goes back further than 20 years, with very minor sentences for very clear cases of assisting. *Ruscoe* was a very clear case of assisting and his sentence was reduced from 9 months' imprisonment at trial down to 12 months' supervision in order to account for the psychological toll it had taken on him, the court was not prepared to punish for punishment's sake<sup>87</sup>. While the law is clear that a very high sentence may be given, no court has elected to do so and neither has there been any legislative action to force judges to sentence on the harsher side of the line. So while this solution may be viewed as de-facto decriminalisation, the case law appears to already be edging towards this slowly, with the most recent case being discharged without conviction. This appears to be the trend developing from the cases, and nominal sentences such as supervision are hardly vindicating the sanctity of life, in fact they are potentially devaluing the principle for when it arises in much more serious circumstances. While some may disagree, ultimately even if it does amount to decriminalisation, it is restricted to that subset of cases that are solely aiding; cases that show any degree of pressure will still be prosecuted.

By emphasising the discretion of the prosecutor, "easy cases" at the very least can be filtered out, while the law remains clear that it is still a crime in the worst circumstances. The law against assisting suicide will remain a crime, signalling societal disapproval and allowing prosecutions when the factors weigh heavier in the direction of prosecution.

Furthermore, much like in *Seales* there would be no right to seek a declaration to absolutely confirm that in these circumstances there will be no prosecution. However, it would allow people to properly plan and adjust their actions in accordance with the law, which would be a better

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<sup>87</sup> Above n 3 at p 72.

position than the law is in currently. The United Kingdom Supreme Court has reiterated the view that they would also be unprepared to view the guidelines as equivalent to a declaration, but generally if people can find themselves balanced on the right side of the line then the risk drops significantly.

### ***2. Could this solution remove the cases that attract public sympathy?***

One key concern from this proposal is that the goal is to remove the more sympathetic cases from the spotlight, which may in turn have the unintended effect of reducing public support or perceived need for more substantial reform, such as euthanasia or fully fledged aid-in-dying legislation. This is a very real concern, however I do not think it justifies inaction, as taking gradual steps can often be important in avoiding the slippery slope. Furthermore, there may still be sympathetic cases that do not quite fall within the guidelines and will likely still attract public attention to keep the debate alive.

### ***3. Is this within the limits of prosecutorial discretion?***

While New Zealand is constitutionally different to England and is not required to be fully compliant with foreign conventions such as the European Convention on Human Rights, and therefore the judiciary cannot force the Solicitor-General's hand, that does not necessarily mean that the principled approach taken thus far is immediately without value. On the contrary, a significant body of law has developed in England that could be utilised in New Zealand, as the DPP has revised the guidelines on multiple occasions, this could help to create more appropriate guidelines.

It may ultimately be constitutionally dissatisfying for proponents of Parliamentary sovereignty and the rule of law<sup>88</sup>, as they may argue that this approach was only developed in England as a result on their obligations as a signatory to the European Convention on Human Rights, however I argue that while this was the catalyst in developing more thorough guidelines, the DPP's consent was required to proceed under any charge of assisting suicide regardless. Guidelines likely would have eventually been released, as occurred with the *Daniel James* case due to seemingly broad discretion conferred under their s 2(4). But, it is accepted that it will take a

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<sup>88</sup> John Finnis "Invoking the Principle of Legality against the Rule of Law" [2010] NZ L Rev 601

particular bold legislature to fully tackle this issue, yet it remains an issue that is going to become more serious as time goes by without addressing it. If the trend develops as the cases have thus far, then it may instead be the judiciary that develops rules like this.

Lastly, the decision not to prosecute is already commonly used, such a diversion given for a first time offender for a minor misdemeanour. It can be used to prevent proceedings being brought in circumstances where there quite strictly has been an offence, but for other reasons, prosecuting would be an inappropriate response or other factors militate against it<sup>89</sup>. I am simply proposing that it should be a tool utilized in seemingly more serious circumstances. The Solicitor General is empowered under s 185 Criminal Procedure Act 2011 to provide and maintain guidelines for the conduct of public prosecutions. This is manifested in the current *Solicitor-General's prosecution guidelines*<sup>90</sup> which is of general application to all criminal prosecutions. Nothing in the Act suggests that the Solicitor-General is not in a position to introduce area-specific guidelines such as what I am proposing.

#### ***4. Could the decision not to prosecute be judicially reviewed?***

One potential problem is that the decision not to prosecute could simply be judicially reviewed by groups who believe that the sanctity of life is inviolable, and this use of discretion would be so far beyond the scope ordinarily expected. However, the case law is consistent with the view that the decision to prosecute or not prosecute is extremely unlikely to be amenable to judicial review unless there is bad faith, or abuse of process can be shown<sup>91</sup>. As a matter of principle, the court, which is entrusted ultimately with determining guilt or innocence, should not become too closely involved in the question of whether a prosecution should be commenced<sup>92</sup>. In one of the few successful cases challenging the decision not to prosecute, *R v Commissioner of Police of the Metropolis, ex parte Blackburn*<sup>93</sup> the court held that where a blanket policy existed to not pursue a particular crime, they would hold that this may be amenable to judicial review as it was a blanket policy rather than the weighing of discretionary factors that the court would not otherwise involve themselves with. This same view has been reached in New Zealand<sup>94</sup> that the

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<sup>89</sup> *Osborne v Worksafe NZ* [2015] NZHC 2991.

<sup>90</sup> Above n 13.

<sup>91</sup> *Polynesian Spa Ltd v Osborne* HC Rotorua CIV-2003-463-521 22 December 2004 at [64].

<sup>92</sup> *Hallett v Attorney-General (No 2)* [1989] 2 NZLR 96 (HC) p 13.

<sup>93</sup> *R v Commissioner of Police of the Metropolis, ex parte Blackburn* [1968] 2 QB 118.

<sup>94</sup> Above n 898.

adoption of a general policy to not prosecute may be amenable to judicial review, but where a number of factors must be considered and balanced the court is far less prepared to get involved.

Therefore, if a set of guidelines is formulated by the Solicitor-General then this would not be a blanket policy and instead would involve a significant amount of weighing of factors and involve discretion that would make it unlikely to be amenable to judicial review, unless it was treated as a policy decriminalising assisted suicide entirely, which is not what I am proposing.

Generally, the courts are reluctant to judicially review the decision of a prosecutor, due to the constitutional divides; the prosecution is an arm of the executive branch while the courts are the judiciary. More concerns tend to lie where a case is brought in bad faith, in those instances the courts have the power to stay or discharge without conviction. Furthermore, no instances of the decision not to prosecute under this have been brought in England, which suggests that it would likely not be entertained here either.

## ***B. Challenges to amending the Crimes Act 1961***

### ***1. Does the Crimes Act need amending at all?***

While some may argue that this amendment resembles diminished responsibility, which ordinarily reduces liability from murder to manslaughter in circumstances where the defendant was not legally insane, but was suffering from an abnormality of the mind sufficient to reduce their culpability, a defence which is not available in New Zealand<sup>95</sup>. Alternatively, it may be argued that the current law can already be applied to the present circumstances, so any new amendment to the Crimes Act is unnecessary. I would argue that the amendment I have proposed is in fact very close to both ss 178 and 180 and would fit in alongside specific circumstances to which they apply.

### ***2. Similar provisions already within the Crimes Act***

In developing a new section to address this issue, both s 178 Infanticide and s 180 Suicide pact may be considered close parallels that are helpful in determining where the borders lie in regards to the relevant factors for both the victim and defendant, as well as justifying this amendment to apply in very limited circumstances that the current statutory regime fails to account for.

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<sup>95</sup> Law Commission Battered Defendants Victims of Domestic Violence Who Offend (NZLC PP41, 2000) at p 42.

### ***3. Infanticide***

Infanticide relevantly provides that where a woman, at the time of the offence was disturbed by reason of not having recovered from the effect of giving birth to that or another child or by reason of lactation, to such an extent that she should not be held fully responsible, she is guilty of infanticide. This is rooted largely in medical and biological factors, but may be useful in developing what would be recognised as reasons to depart from the law in ordinary circumstances due to unique factors. Further, sentencing patterns are often very low, with no custodial sentences imposed. Additionally, and consistent with the proposed solution, the creation of infanticide as an offence was in recognition that juries often acquitted mothers who had killed their babies, as otherwise they would be subject to the penalty for murder, usually death.

While infanticide may be viewed as a rather controversial provision, with the courts in some instances stretching the law to its limits, as in *R v P*<sup>96</sup>, where “child of hers” was extended beyond the biological definition. Further it is rather arbitrary that it stops applying once a child is over 10 years old. Nonetheless it exists and has been developed to ameliorate the law of homicide in circumstances that often attract sympathy.

### ***4. Killing pursuant to a suicide pact***

Killing pursuant to a suicide pact reduces what would otherwise be murder to manslaughter in the event that a party survives, and where a party survives while another party commits suicide, they are liable under s 180 for a maximum sentence of 5 years rather than being liable under s 179. While there are no New Zealand cases thoroughly exploring the rationale for s 180, the English provision found in s 4 of the Homicide Act 1957 justifies the partial defence of killing in pursuance of a suicide pact as providing juries with a means to take pity on those desperate enough to take their own lives along with that of another<sup>97</sup>.

While our provision is broader than that in England, the justification appears to be similar, as the sentences under s 180 have tended to be minimal, ranging from supervision<sup>98</sup>, to being convicted

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<sup>96</sup> *R v P* [1991] 2 NZLR 116.

<sup>97</sup> Law Commission: *Murder, Manslaughter and Infanticide* (Law Com No 304) UK at 1.50.

<sup>98</sup> *R v Karmon* HC AK S14/99 29 April 1999.

and discharged<sup>99</sup>. Williams J found that two important and competing values had to be balanced in sentencing under s 180: the court must send a clear message that the sanctity of life is precious, whilst also keeping in mind that the court administers justice on behalf of the community and must not abandon mercy<sup>100</sup>.

The balancing of these two fundamental values is the exact same issue at the heart of each case of assisting suicide. This further supports my argument that s 180 is a helpful and comparable section to the proposed amendments, and shows that a similar provision to what I suggest already exists to account for a very specific set of circumstances. While a life is lost, merciful factors must also be considered, especially when considering what it takes to become complicit in another's death.

Lastly, this would provide the courts with a legislatively recognised limit on the sanctity of life, rather than the courts being forced to address this in each case and look for reasons to overcome it, as they must use a section with a tough penalty in circumstances where that simply is not appropriate. While the courts currently have to provide their own reasons why a defendant's complicity in another person's suicide is less culpable than the Act makes out, a specific provision gives judges a much clearer starting point than simply rehearsing the same old comments.

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<sup>99</sup> *R v CE HC Palmerston North* CRI-2011-054-000776 26 October 2011.

<sup>100</sup> Above n 99 at [10].

## Conclusion

Through either of these solutions or both, a number of sympathetic cases can be dealt with in a more appropriate and transparent manner, either by being prevented from going to court where culpability is so low it might as well be non-existent; or by the court having at least a more appropriate tool to use than the blunt instrument that is s 179, which is currently too broad, providing no additional guidance for the wide range of conduct to which it should apply. The cases suggest that when certain factors are present, the court is only prepared to deliver nominal sentences, if any sentence at all. If more “exceptional” and difficult cases are going to come before the courts, and there no doubt will be, a better alternative than the current regime is going to be needed sooner or later. These solutions provide at least a solution in the interim, whilst also being consistent with proposed assisted-dying legislation, which is likely to be initially very restricted and therefore will require secondary measure to catch the cases that do not fall within that legislation.

Under my proposal aiding and abetting suicide will remain a crime in s 179, signifying society’s disapproval of those who are too involved in another’s suicide. However, both solutions recognise that there is something inherently less culpable in the offender who acts out of compassion and respect for the victim’s autonomy, rather than seeking to relieve themselves of a burden or to bring about someone else’s death in circumstances where it otherwise would not occur. This different regime in place in England does not seem to have released a murderous horde of carers and loved ones, so the risks are likely more theoretical than real.

Nothing I have suggested should come as an absolute shock to anyone familiar with this area of law. There are essentially two extremes, the first is that Lord Bingham is correct and there is in fact no right to suicide, our Crimes Act justifies the use of reasonable force to prevent it and forbids any complicity in that act. The other end of that spectrum is that respecting autonomy means that people should be able to do whatever they want with their body without any paternalistic interference. Unsurprisingly, the best solution is probably somewhere in the middle, few people would be comfortable with the latter position as it would be impossible to police, and while the former position is indeed what the law appears to be at first glance, it simply does not reflect reality. The courts have already indicated that there are circumstances in which they are

not prepared to sentence how the Crimes Act may expect and it is unlikely that there will be any going back now.

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