

VOLUNTARY REQUESTS, OR VULNERABLE ADULTS? A CRITIQUE OF CRIMINAL SENTENCING IN ASSISTED SUICIDE AND ‘MERCY KILLING’ CASES

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This article examines the sentencing remarks in all publicly reported Australian cases on assisted suicide and mercy killing since 1980. Themes emerging from judicial reasons for sentencing confirm that many traditional aims of sentencing – such as specific deterrence, retribution or rehabilitation – are inapposite in cases where relatives or friends act outside the law to end the suffering of a loved one. Pronounced leniency in sentencing, observed across the spectrum of cases, demonstrates a gap between the law on the books and the sentences imposed in practice. We identify inconsistent outcomes, both in charges laid and sentences imposed, which have the potential to undermine public confidence in the rule of law. We conclude that criminal law simultaneously provides both too much protection and insufficient protection for members of the community. We recommend law reform to enable judges to better distinguish between voluntary and non-voluntary assisted suicides and mercy killings.

I INTRODUCTION¹

Although not frequent, there are regular reports of cases in which individuals – generally a spouse or child, but sometimes also a friend or other relative – take the law into their own hands through ‘mercy killing’ or assisting suicide. Two recent cases are illustrative. In May 2019, Kenneth Attenborough was convicted of administering a poison with intent to murder his father, who was at the time in

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palliative care with a limited life expectancy.² This attempted ‘mercy killing’, done with the consent of his father, attracted a sentence of 20 months to be served by way of an intensive corrections order. And in April 2019, Neil O’Riordan admitted to assisting his wife Penelope Blume (who was in the terminal stages of motor neurone disease) to commit suicide before her disease robbed her of the capacity to do so.³ The Director of Public Prosecutions of the Australian Capital Territory (‘ACT’) exercised his discretion not to prosecute Mr O’Riordan, in the public interest.⁴ These cases often feed into the current debate on voluntary assisted dying, raising the question of how best to balance the competing policy considerations of respecting the autonomous choices of competent adults, and protecting those who may be considered vulnerable.⁵

The purpose of this article is not to assess if regime change – whether through the legislation permitting voluntary assisted dying recently enacted in all six Australian states,⁶ or other proposed regulatory models – will contain sufficient safeguards to protect the vulnerable. Rather, this article explores the status quo: how the criminal law system responds to individuals who have been involved in the death of a loved one with a terminal or chronic illness, whether through assisting suicide like Neil O’Riordan, or active involvement in ‘mercy killing’ as was attempted in Kenneth Attenborough’s case. ‘Mercy killing’ is not a legal term of art, but simply refers to ‘an intentional killing which is prima facie murder but which is carried out for compassionate motives, often by a member of the family or a friend of the victim’,⁷ whether or not the person had expressly requested to

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- 2 *R v Attenborough* (District Court of New South Wales, Graham AJ, 30 May 2019) (‘*Attenborough*’). This case is discussed further below.
 - 3 Michael Inman, ‘Assisted Suicide Charges Dropped against Canberra Man Who Helped End Wife’s Life’, *ABC News* (online, 2 July 2019) <<https://www.abc.net.au/news/2019-07-02/assisted-suicide-charges-dropped-in-canberra-court/11270040>>.
 - 4 Neville Shane Drumgold, ‘*Police v O – CC2019/3260*: Charge of Aiding Suicide under Section 17(1) *Crimes Act 1900*’ (Statement of Reasons, Director of Public Prosecutions (ACT), 28 June 2019) <https://www.dpp.act.gov.au/_data/assets/pdf_file/0007/1382353/Police-v-O-DPP-Statement-of-Reasons.pdf> (‘*Police v O – CC2019/3260*’).
 - 5 Victoria, *Parliamentary Debates*, Legislative Assembly, 17 October 2017, 3060 (Martin Pakula, Attorney-General), 3062 (Samuel Hibbins); Western Australia, *Parliamentary Debates*, Legislative Assembly, 7 August 2019, 5137 (Roger Cook).
 - 6 *Voluntary Assisted Dying Act 2022* (NSW) (‘*NSW VAD Act*’); *Voluntary Assisted Dying Act 2021* (Qld) (‘*Qld VAD Act*’); *Voluntary Assisted Dying Act 2021* (SA) (‘*SA VAD Act*’); *End-of-Life Choices (Voluntary Assisted Dying) Act 2021* (Tas) (‘*Tas EOLC Act*’); *Voluntary Assisted Dying Act 2017* (Vic) (‘*Vic VAD Act*’); *Voluntary Assisted Dying Act 2019* (WA) (‘*WA VAD Act*’). In a previous article we considered whether any of the deceased or injured persons in the assisted suicide or mercy killing cases would have been eligible for voluntary assisted dying if the laws were in operation in the jurisdiction in which they died. It was concluded that only a small minority of people suffered from a qualifying terminal illness: Katrine Del Villar, Lindy Willmott and Ben White, ‘Suicides, Assisted Suicides and “Mercy Killings”’: Would Voluntary Assisted Dying Prevent these “Bad Deaths”?’ (2020) 46(2) *Monash University Law Review* 141.
 - 7 Margaret Otowski, ‘Mercy Killing Cases in the Australian Criminal Justice System’ (1993) 17(1) *Criminal Law Journal* 10, 10. Although in law, these actions constitute murder, the difference between ‘mercy killing’ and murder lies in the motivation – in the former case, the killing is intended to be an act of ‘mercy’ or compassion to the deceased, whereas in the latter case, the killing is motivated by an intention to cause harm.

die. Other terms used in this article include ‘offender’ to describe the person who was convicted of the relevant offence, and ‘deceased’ to describe the person who died as a result.⁸

This article categorises all the publicly reported Australian cases on assisted suicide and mercy killing over a 40 year period from 1980 to 2020⁹ according to the nature of the actions of the accused: whether assisting a person to die at their request; completing a suicide attempt; causing the death of a competent person at that person’s request; or, causing the death of a person (whether or not competent) without that person’s request. It then explores the sentences imposed and the reasons for sentencing, to evaluate how the criminal law currently responds to actions that result in the death of a potentially vulnerable person.

The argument proceeds as follows. Part II briefly outlines the criminal law which is applicable to cases of assisted suicide or mercy killing. Part III then provides an overview of the Australian assisted suicide and mercy killing cases and compares the actual sentences to the maximum penalty which may be imposed. The pronounced leniency which is observed demonstrates a significant gap between the law on the books and judicial sentencing practice. Insight into the reasons for leniency in sentencing can be obtained from a detailed examination of judges’ sentencing remarks. Part IV explores the sentencing remarks concerning the traditional goals of the criminal justice system: protection of the community, prevention of crime, and punishment of wrongdoing. It concludes that many of the traditional aims of sentencing are inapposite in cases involving compassion for the suffering of a loved one. Part V then identifies some significant themes emerging from the sentencing remarks. A dominant theme was the compassionate motive of the offender. Many cases also emphasised the deceased’s desire to remain autonomous and avoid dependence or nursing home care. However, the potential vulnerability of the victim was not often mentioned.

Part VI argues that in many cases, the law is not in line with community values where there was a compassionate motive for causing death. This discrepancy is ameliorated through discretion in charges laid and sentences imposed. But when the just application of the law depends on prosecutorial and judicial discretion, inevitably there will be inconsistent outcomes in some cases, which may undermine public confidence in the rule of law. This leads to recommendations for law reform,¹⁰ which may include introducing a specific offence of mercy killing, a partial defence of compassionate motive, or an offence of completing a suicide, so that the offence charged more accurately reflects community values.

8 This latter term was chosen because it is more neutral than ‘victim’, which is less apt to describe some cases, such as where the deceased was taking their own life and insistent on help from a loved one. However, acknowledging that the term ‘deceased’ is not appropriate to use in those cases where the person did not die, it remains necessary in some instances to use alternative terms such as ‘victim’.

9 This article considers cases reported up to July 2020. Since this article was accepted for publication, further cases have been reported, including: *DPP (Vic) v Sugar* [2020] VSC 338 (‘*Sugar*’); *DPP (Vic) v Stratton* [2021] VSC 810 (‘*Stratton*’); *R v Eckersley* [2021] NSWSC 562 (‘*Eckersley*’).

10 These recommendations are set out in Part VII of this article.

However, we also argue that the lenient sentences imposed in cases of non-voluntary mercy killing reflect too great a preoccupation with the motive of the offender, and too little respect for the vulnerability of the deceased. We recommend excluding non-voluntary mercy killings from the proposed law reforms, to ensure the law provides sufficient protection for vulnerable people.

II CRIMINAL LAW

Assisted dying is currently illegal in every Australian jurisdiction, except in Victoria and Western Australia where a person has a terminal illness and meets the eligibility criteria for voluntary assisted dying.¹¹ Although suicide – the intentional taking of one’s own life – is no longer a criminal offence in Australia,¹² and there is no duty of care to prevent a person from committing suicide,¹³ every state and territory retains the offence of *assisting suicide* or encouraging another person to commit suicide.¹⁴ Assisting or encouraging suicide is unlawful even where assistance is provided at the request of the person who wishes to die. The maximum penalty varies from 5 years to life imprisonment.¹⁵

A person who takes active steps to cause the death of another person also commits a criminal offence. Legally, the intentional killing of another person is

11 *Vic VAD Act* (n 6) s 9; *WA VAD Act* (n 6) s 16. Assisted dying will also become lawful in Tasmania on 23 October 2022 when the *Tas EOLC Act* (n 6) commences; on 1 January 2023 in Queensland when the *Qld VAD Act* (n 6) commences; in early 2023 in South Australia (‘SA’) when the *SA VAD Act* (n 6) commences; and on 28 November 2023 when the *NSW VAD Act* (n 6) commences.

12 The common law offences of suicide and attempted suicide were abrogated in 1967 in Victoria, 1983 in New South Wales (‘NSW’) and SA, and 1990 in the Australian Capital Territory (‘ACT’): *Crimes Act 1900* (ACT) s 16 (‘*ACT Crimes Act*’); *Crimes Act 1900* (NSW) s 31A (‘*NSW Crimes Act*’); *Criminal Law Consolidation Act 1935* (SA) s 13A(1) (‘*SA Criminal Law Consolidation Act*’); *Crimes Act 1958* (Vic) s 6A (‘*Vic Crimes Act*’). Suicide was never a criminal offence in the Code jurisdictions, although attempting suicide was. The crime of attempting suicide was repealed in 1957 in Tasmania, 1972 in Western Australia (‘WA’), 1979 in Queensland, and 1996 in the Northern Territory (‘NT’): *Criminal Law Amendment Act 1979* (Qld) s 4; *Criminal Code Amendment Act 1972* (WA) s 10; *Criminal Code Act 1957* (Tas) s 3; *Criminal Code Amendment Act 1996* (NT). See generally Stephanie Jowett, Belinda Carpenter and Gordon Tait, ‘Determining a Suicide under Australian Law’ (2018) 41(2) *University of New South Wales Law Journal* 355, 358–9 <<https://doi.org/10.53637/QLAU2585>>; John Barry, ‘Suicide and the Law’ (1965) 5(1) *Melbourne University Law Review* 1, 9; Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law* (Thomson Reuters, 4th ed, 2017) 567.

13 *Stuart v Kirkland-Veenstra* (2009) 237 CLR 215, 248 [87] (Gummow, Hayne and Heydon JJ).

14 The precise terminology of the offence varies between jurisdictions and includes aiding, abetting, assisting, procuring, instigating, encouraging, counselling, commanding or inciting a person to commit suicide. For detail as to the terminology employed in the different jurisdictions, see Bronitt and McSherry (n 12) 531–2.

15 In Victoria, the maximum penalty is 5 years: *Vic Crimes Act* (n 12) s 6B(2). In NSW and the ACT, it is 10 years: *ACT Crimes Act* (n 12) s 17; *NSW Crimes Act* (n 12) s 31C(1). In SA, it is 14 years: *SA Criminal Law Consolidation Act* (n 12) ss 13A(5), 13A(6)(a)(i). In Tasmania, it is 21 years: *Criminal Code Act 1924* (Tas) ss 163, 389 (‘*Tas Criminal Code*’). In the NT, Queensland and WA, the maximum penalty is life imprisonment: *Criminal Code Act 1983* (NT) s 162(1) (‘*NT Criminal Code*’); *Criminal Code Act 1899* (Qld) s 311 (‘*Qld Criminal Code*’); *Criminal Code Act Compilation Act 1913* (WA) s 288 (‘*WA Criminal Code*’).

classified as *murder*, even if performed at that person's request. It is punishable in all Australian jurisdictions by life imprisonment.¹⁶ The alternative verdict of *manslaughter* is possible where mitigating circumstances exist, such as diminished responsibility or killing another pursuant to a suicide pact.¹⁷ The maximum penalty for manslaughter ranges from 20 years to life imprisonment.¹⁸ In three states, when death occurs pursuant to a suicide pact, the survivor will not be charged with murder, but with a lesser offence, such as *manslaughter by suicide pact*.¹⁹

III ASSISTED SUICIDE AND MERCY KILLING CASES

In Australia, there have been numerous cases where relatives or friends have been prosecuted for assisting the suicide of a loved one, or causing a family member's death out of compassionate motives.²⁰ The facts of these cases vary: some involved a failed or partially successful suicide pact between an elderly couple;²¹ while others concerned a gravely ill²² or mentally distressed person who requested

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- 16 In Queensland, SA and the NT, the prescribed sentence for murder is 'mandatory life imprisonment': *NT Criminal Code* (n 15) ss 156, 157; *Qld Criminal Code* (n 15) ss 302, 305; *SA Criminal Law Consolidation Act* (n 12) s 11. In WA, a life sentence is mandatory unless this would be clearly unjust in the circumstances, and the person is unlikely to be a threat to community safety, in which case a sentence of up to 20 years may be imposed: *WA Criminal Code* (n 15) s 279(4). In NSW, Victoria, Tasmania and the ACT, life imprisonment is the maximum sentence which may be imposed for the crime of murder: *ACT Crimes Act* (n 12) s 12(1)–(2); *NSW Crimes Act* (n 12) ss 18(1)(a), 19A(1); *Tas Criminal Code* (n 15) ss 157, 158; *Vic Crimes Act* (n 12) s 3.
- 17 Otowski also notes cases where facts amounting to murder or attempted murder have been prosecuted as lesser offences, such as manslaughter or assisting suicide, according to plea bargaining principles or in the exercise of prosecutorial discretion: Otowski (n 7) 16–18. See also Lorana Bartels and Margaret Otowski, 'A Right to Die? Euthanasia and the Law in Australia' (2010) 17(4) *Journal of Law and Medicine* 532, 547.
- 18 In the ACT, the maximum penalty is 20 years: *ACT Crimes Act* (n 12) s 15(2). In Tasmania, it is 21 years: *Tas Criminal Code* (n 15) ss 159, 389. In NSW and Victoria, it is 25 years: *NSW Crimes Act* (n 12) ss 18(1)(b), 24; *Vic Crimes Act* (n 12) s 5. In the NT, Queensland, SA and WA, the maximum penalty is life imprisonment: *NT Criminal Code* (n 15) ss 160, 161; *Qld Criminal Code* (n 15) ss 303, 310; *SA Criminal Law Consolidation Act* (n 12) s 13(1); *WA Criminal Code* (n 15) s 280(1).
- 19 The maximum penalty is 5 years in SA and 10 years in Victoria: *SA Criminal Law Consolidation Act* (n 12) ss 13A(3), 13A(6)(b); *Vic Crimes Act* (n 12) ss 6B(1), 6B(1A). In NSW, the charge is assisting or encouraging suicide, for which the maximum penalty is 10 years: *NSW Crimes Act* (n 12) ss 31B(1), 31C.
- 20 See Otowski (n 7); Bartels and Otowski (n 17). Similar cases have been reported in Canada and New Zealand: see Jocelyn Downie, 'Permitting Voluntary Euthanasia and Assisted Suicide: Law Reform Pathways for Common Law Jurisdictions' (2016) 16(1) *Queensland University of Technology Law Review* 84, 100–3 <<https://doi.org/10.5204/utlr.v16i1.613>>; Andrew Geddis, 'The Case for Allowing Aid in Dying in New Zealand' [2017] *New Zealand Criminal Law Review* 3.
- 21 *R v Marden* [2000] VSC 558 ('Marden'); *DPP v Rolfe* (2008) 191 A Crim R 213 ('Rolfe'); *R v Maxwell* [2003] VSC 278 ('Maxwell'). See also *Walmsley v The Queen* (2014) 253 A Crim R 441 ('Walmsley') for a suicide pact between drug addicts.
- 22 *Tasmania v Godfrey* (Supreme Court of Tasmania, Underwood J, 26 May 2004) ('Godfrey'); *R v Rijn* (Melbourne Magistrates Court, Magistrate Lethbridge, 23 May 2011) ('Rijn'); *Tasmania v Pryor* (Supreme Court of Tasmania, Hill AJ, 19 December 2005) ('Pryor') (assisting suicide of father). In *R v Nielsen* [2012] QSC 29 ('Nielsen'), Frank Ward also felt he was seriously ill, but may not have been.

assistance to take his or her own life.²³ In addition to assisting suicide, in several cases charges of murder²⁴ or attempted murder²⁵ have been brought concerning mercy killings, even where the deceased requested assistance to die.

This part describes all Australian cases of mercy killing or assisting suicide judicially decided between 1980 and 2020,²⁶ whether reported or unreported,²⁷ for which sentencing remarks are publicly available.²⁸ All cases where the dominant motive was compassion for the suffering of the deceased,²⁹ or a desire to comply with the deceased's expressed wishes,³⁰ have been included even if they were not classified as mercy killings by the sentencing judge. Cases were excluded where the motive for the killing:

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- 23 *R v Carter* (Supreme Court of Queensland, Byrne J, 24 July 2001) ('*Carter 2001*'); *R v Carter* (Supreme Court of Queensland, Mullins J, 17 July 2003) ('*Carter Appeal 1*'); *R v Hood* 130 A Crim R 473 ('*Hood*'); *DPP v Karaca* [2007] VSC 190 ('*Karaca*'); *R v Larkin* [1983] VSC 122 ('*Larkin*').
- 24 *R v Johnstone* (1987) 45 SASR 482 ('*Johnstone*'); *Carter 2001* (n 23) (murder of Gail Marke); *Carter Appeal 1* (n 23) (retrial for murder of Gail Marke); *R v Nicol* [2005] NSWSC 547 ('*Nicol*'); *R v Cooper* [2019] NSWSC 1042 ('*Cooper*'); *R v Blaauw* [2008] VSC 129 ('*Blaauw*').
- 25 *R v Klinkermann* [2013] VSC 65 ('*Klinkermann*'); *R v Nestorowycz* [2008] VSC 385 ('*Nestorowycz*'); *R v Hollinrake* [1992] VSC 289 ('*Hollinrake*'); *DPP v Riordan* [1998] VSC 423 ('*Riordan*'); *Pryor* (n 22) (attempted murder of mother).
- 26 The cases up to 2010 have been described in detail in Otlowski (n 7) and Bartels and Otlowski (n 17) 544. The cases up to 2016 have also been briefly listed in Downie (n 20) 103–4. However, these analyses focus on the fact of leniency in the exercise of prosecutorial discretion or judicial discretion in sentencing, rather than a detailed analysis of the reasons for this leniency. There was also only limited mention made of leniency in cases of non-voluntary mercy killings.
- 27 The methodology used to identify these cases is set out in Del Villar, Willmott and White (n 6) 163–5. A range of search terms were employed across online case reporting databases including AustLII and Jade Case Citorator, as well as the unreported judgments repositories of each of the State and Territory Supreme Courts. Because most sentencing cases constitute the unreported judgment of a single judge, many are not publicly available. It is unusual for unreported judgments to be publicly available prior to the mid-1990s, except in Victoria. Otlowski's research demonstrates that there are also many other similar cases stretching back to at least the 1960s: Otlowski (n 7) 17–18, 20, 28. For most of these cases, the sentencing remarks are not publicly available.
- 28 Because the primary document analysed is the sentencing remarks after criminal conviction, this excludes consideration of discretionary decisions by police and prosecutors not to proceed to trial and conviction. For a more detailed analysis of these decisions, involving interviews with police, all State and Territory public prosecutors, and parole board representatives, see Otlowski (n 7). In most cases written reasons for the prosecution's decision are not publicly available. For exceptional examples where reasons are provided, see Nick Cowdery, 'Dying with Dignity' [2011] (86) *Living Ethics* 12; '*Police v O – CC2019/3260*' (n 4). It also excludes cases where there is a trial by jury, and the jury chooses to acquit a sympathetic accused against what appears to be the weight of the evidence, such as *R v Nixon* (Supreme Court of Queensland, 7 December 2017), referred to in *R v Morant* [2019] 2 Qd R 501, 507–11 [28]–[32] (Davis J). See also Otlowski (n 7) 18–19.
- 29 *Blaauw* (n 24) [36]–[38].
- 30 Two cases involved drug addicts assisting other drug addicts to commit suicide at their request: *Carter 2001* (n 23); *Walmsley* (n 21).

- was mis-conceptualised as ‘mercy’ by the offender due to psychiatric disturbance³¹ or personality disorder;³²
- was solely selfish, such as a desire for financial gain³³ or to be free of the burden of care;³⁴
- appears to have been a heat-of-the-moment reaction to extreme stress;³⁵ or
- appears to have been malice, rather than compassion for the deceased.³⁶

This method resulted in a final sample of 28 cases.³⁷ Table 1 provides a brief summary of these cases, together with the charges, the sentences imposed and the maximum possible sentence. The Table groups the cases into the following four categories: assisting suicide; completing a suicide; voluntary mercy killing (deceased had capacity and voluntarily requested death); and non-voluntary mercy killing (deceased did not have capacity and/or request death).

31 See, eg, *R v Cheatham* [2002] NSWCCA 360, where the offender killed his wife and daughter while suffering from the delusional belief that he had infected them with AIDS; *R v Duthie* [1999] NSWSC 1224, where the offender was a prisoner suffering from the effects of drugs when he formed a suicide pact with his cellmate; and *DPP v Boodhoo* [2016] VSC 458, where an offender suffering from major depression with psychotic symptoms, including paranoia and delusions, unsuccessfully tried to kill himself and his wife in what he considered to be an act of mercy.

32 See, eg, the paranoid and anti-social personality of the offender in *R v Howard* [2009] VSC 9.

33 In *R v Morant* [2018] QSC 251 (*‘Morant’*), a man was convicted of inciting his mentally ill wife to commit suicide, and providing her with the means to do so, so he could obtain the benefit of three significant life insurance policies he had taken out over her life.

34 In *R v Ritchie* [2003] NSWSC 864 (*‘Ritchie’*), a son suffocated his terminally ill mother, claiming she had begged him repeatedly to end her pain. Barr J did not believe his mother had requested to die and found instead that the murder was motivated by his desire to be free from the burden of caring for her. See also *R v McLaren* [2011] NSWDC 115, a paid live-in home carer attempted to kill an elderly man with motor neurone disease, due to his frustration at having to care for him.

35 See, eg, *R v Daves* [2004] NSWCA 363, where a mother strangled her 10-year-old autistic son, to whom she was devoted, when he refused to get ready for school. This out-of-character act was described as the cumulative result of numerous personal stressors such as her marriage breakdown, the death of her father, revelations that her daughter had been sexually abused by her stepfather, and major depression.

36 See, eg, in *R v Davis* [2016] NSWSC 1362 (*‘Davis’*), and *Haines v The Queen* [2018] NSWCCA 269 (*‘Haines’*), nurses in two separate aged care facilities administered large doses of insulin to residents, resulting in their deaths. They were charged with murder. The precise motive for doing so is not specified in the judgment in *Davis*, but in *Haines* it was alleged that the offender murdered two residents after they made complaints about her.

37 There were 26 separate proceedings. However, the sentencing remarks in *Pryor* (n 22) cover two separate offences: assisting the suicide of her father, and the attempted murder of her mother. Similarly, Carter was convicted of assisting the suicide of Patrick Smyth and the murder of Gail Marke: *Carter 2001* (n 23). Each of these offences is counted as a separate ‘case’, although the sentencing remarks are combined.

Table 1: Sentences for assisting suicides and mercy killings

Case	Deceased/ victim's relationship to offender	Deceased/ victim's situation/ condition	Mode of death or injury	Offender's act or assistance	Charge	Maximum penalty	Actual sentence
Assisting suicide							
<i>R v Carter</i> (Supreme Court of Queensland, Byrne J, 24 July 2001) ³⁸	Friend (see also below in Table 1)	Depressed and suicidal	Heroin overdose	Supplied heroin	Aiding and abetting suicide of Smyth	Life imprisonment	2 years imprisonment ³⁹
<i>R v Hood</i> (2002) 130 A Crim R 473	Flatmate and former lover	Financial and relationship troubles; depressed; false belief he had inoperable brain tumours and HIV	Overdose of pills	Emotional support and was present until his friend died	Aiding and abetting suicide	Five years imprisonment	18 month suspended sentence
<i>R v Justins</i> [2008] NSWSC 1194 ⁴⁰	Partner of 20 years	Advanced Alzheimer's; prior suicide attempts	Drank Nembusal	Supplied Nembusal which a friend obtained illegally in Mexico	Manslaughter	25 years imprisonment	At first instance: 22 months periodic detention (weekends) and 8 months of parole
<i>R v Rijn</i> (Melbourne Magistrates Court, Magistrate Leithbridge, 23 May 2011)	Elderly wife	Chronic hip pain	Suffocation	Purchased equipment after consultation with Exit International	Inciting suicide	5 years imprisonment	3 years good behaviour bond

Case	Deceased/victim's relationship to offender	Deceased/victim's situation/condition	Mode of death or injury	Offender's act or assistance	Charge	Maximum penalty	Actual sentence
<i>R v Nielsen</i> [2012] QSC 29	76-year-old man, friend from meditation group	Minor stroke; further minor medical condition, undiagnosed; fear of dependence	Drank Nembutal	Went to Mexico to purchase Nembutal	Aiding and abetting suicide	Life imprisonment	3 years imprisonment (6 months non-parole)
<i>Walmsley v The Queen</i> (2014) 253 A Crim R 441	Friend	Depressed and suicidal	Heroin overdose	Purchased heroin; agreed to suicide pact	Aiding and abetting suicide	10 years imprisonment	2 years 9 months imprisonment (1 year and 8 months non-parole)
Completing a suicide							
<i>R v Larkin</i> [1983] Vic SC 122	Patient, then lover	Bipolar or schizophrenic; depressed and suicidal	Overdose of pills; Insulin injection	Injected insulin	Aiding and abetting suicide	14 years imprisonment	3 year good behaviour bond

38 Carter pleaded guilty to assisting the suicide of Smyth, and was convicted of the murder of Marke after a jury trial: *Carter 2001* (n 23). On appeal, that conviction for murder was set aside: *R v Carter* [2003] 2 Qd R 402. On retrial, Carter again pleaded not guilty to murder but guilty of assisting Marke commit suicide. He was again convicted by a jury of murder and sentenced to life imprisonment: *Carter Appeal 1* (n 23). His appeal against that second conviction was dismissed: *R v Carter* (2003) 141 A Crim R 142 (*Carter Appeal 2*). This article refers to the reasons for sentence in both *Carter 2001* (n 23) and *Carter Appeal 1* (n 23). Some relevant facts are taken from other judicial decisions on this matter.

39 *Carter 2001* (n 23). A summary is contained in *R v Carter* [2016] QSC 86, [3].

40 The initial conviction for manslaughter was quashed on appeal: *Justins v The Queen* (2010) 79 NSWLR 544. On the retrial, Justins pleaded guilty to assisting suicide. No additional sentence was imposed, as the first sentence had already been served in full: *R v Justins* [2011] NSWSC 568. This article focuses on the reasons for sentence in the initial proceedings.

Case	Deceased/ victim's relationship to offender	Deceased/ victim's situation/ condition	Mode of death or injury	Offender's act or assistance	Charge	Maximum penalty	Actual sentence
<i>R v Maxwell</i> [2003] VSC 278	59-year-old wife	Terminal cancer	Helium balloon asphyxiation method from the book <i>Final Exit</i>	Crushed the pills and fixed the plastic bag over her head	Aiding and abetting suicide	5 years imprisonment	18 months suspended sentence
<i>Tasmania v Godfrey</i> (Supreme Court of Tasmania, Underwood J, 26 May 2004)	88-year-old mother	Chronic pain and refused to go into care	Overdose of pills, then suffocation	Son assisted by suffocating her in a plastic bag	Assisting suicide	21 years imprisonment	12 months suspended sentence
<i>Tasmania v Pryor</i> (Supreme Court of Tasmania, Hill AJ, 19 December 2005)	79-year-old father (see also below in Table 1)	Terminal cancer	Injections of pethidine and insulin, then suffocation	Prepared initial injections; administered further injections; suffocated him with a plastic bag	Assisting suicide	21 years imprisonment	12 months wholly suspended
<i>DPP v Karaca</i> [2007] VSC 190	30-year-old flatmate (offenders were 18 years old)	Depressed	Overdose of pills, then bludgeoning with iron bar	Hit him over head with iron bar; left him for dead (he survived)	Attempted murder	25 years imprisonment	3 year suspended sentence
<i>R v Mathers</i> [2011] NSWSC 339	78-year-old long- term partner	Severe back pain	Overdose of pills, then suffocation	Suffocated her with a pillow 36 hours after the overdose	Manslaughter (diminished responsibility)	25 years imprisonment	2 year good behaviour bond

Case	Deceased/ victim's relationship to offender	Deceased/ victim's situation/ condition	Mode of death or injury	Offender's act or assistance	Charge	Maximum penalty	Actual sentence
Voluntary mercy killing							
<i>R v Johnstone</i> (1987) 45 SASR 482	Wife of 36 years	Severe bipolar disorder for 30 years; prolonged alcoholism	Electrocution	Electrocuted wife at her request	Murder	Mandatory life imprisonment	Mandatory life imprisonment (10 days non-parole)
<i>R v Marden</i> [2000] VSC 558	Wife of 48 years	Severe pain; lost contact with their grandsons	Electrocution, then suffocation	Electrocuted then suffocated wife; suicide pact (he survived)	Manslaughter by suicide pact	10 years imprisonment	2 year suspended sentence
<i>R v ANG</i> [2001] NSWSC 758	31-year-old uncle (offender was 16 years old)	Depressed and suicidal	Overdose of pills; drowning	Pushed him into the river as requested	Manslaughter by criminal negligence	25 years imprisonment	2 years wholly suspended with good behaviour bond
<i>R v Carter</i> (Supreme Court of Queensland, Mullins J, 17 July 2003)	Friend of boyfriend (boyfriend was Smyth; see above)	Depressed and suicidal	Heroin overdose	Supplied heroin and injected heroin	Murder of Gail Marke	Mandatory life imprisonment	Life imprisonment
<i>R v Nicol</i> [2005] NSWSC 547	Wife of 63 years	Half leg amputation; avoiding move into a nursing home	Blunt trauma to head, then suffocation	Beat wife with a metal rod, then plastic bag asphyxiation; he then attempted suicide	Murder (pleaded guilty to manslaughter (substantial impairment))	25 years imprisonment	2 year suspended sentence with a good behaviour bond

Case	Deceased/ victim's relationship to offender	Deceased/ victim's situation/ condition	Mode of death or injury	Offender's act or assistance	Charge	Maximum penalty	Actual sentence
<i>Director of Public Prosecutions v Rolfe</i> [2008] VSC 528	85-year-old wife of 55 years	Vascular dementia; avoiding care home	Gassing	Gassing in bed; suicide pact (he survived)	Manslaughter by suicide pact	10 years imprisonment	2 year suspended sentence
<i>R v Attenborough</i> (District Court of New South Wales, Graham AJ, 30 May 2019)	82-year-old father	In palliative care due to a twisted stomach, hiatus hernia and heart conditions	Overdose of morphine and other drugs via his syringe driver	Loaded medication into syringe driver, and pushed button (his father survived)	Administering a poison with intent to murder	25 years imprisonment	20 months intensive corrections order (supervision in the community and 100 hours community service)
<i>R v Cooper</i> [2019] NSWSC 1042	Semi-estranged partner	Chronic pain	Overdose of heroin	Supplied heroin and injected heroin	Murder	Life imprisonment	13.5 years imprisonment (10 years non-parole)
Non-voluntary mercy killing							
<i>R v Hollinrake</i> [1992] Vic SC 289	77-year-old wife of 51 years	Major stroke; did not want to be dependent	Slit wrists	Slit her wrists; then attempted suicide (both survived)	Attempted murder	25 years imprisonment	3 year good behaviour bond
<i>Director of Public Prosecutions v Riordan</i> [1988] VSC 423	71-year-old wife of 48 years	Advanced Alzheimer's disease for more than a decade	Suffocation	Smothered her then slit her wrists; he also attempted suicide (both survived)	Attempted murder	25 years imprisonment	3 year good behaviour bond

Case	Deceased/ victim's relationship to offender	Deceased/ victim's situation/ condition	Mode of death or injury	Offender's act or assistance	Charge	Maximum penalty	Actual sentence
<i>Tasmania v Pryor</i> (Supreme Court of Tasmania, Hill AJ, 19 December 2005)	74-year-old mother	Dementia	Insulin injection	Injected insulin (she survived)	Attempted murder	21 years imprisonment	18 months wholly suspended
<i>R v Suttton</i> [2007] NSWSC 295	29-year-old son	Trisomy 13 syndrome	Not stated	Not stated	Manslaughter (substantial impairment)	25 years imprisonment	5 year good behaviour bond
<i>Director of Public Prosecutions v Nestorowycz</i> [2008] VSC 385	Husband of 45 years	Double amputee with dementia and diabetes	Stabbing	Stabbed him in stomach; also stabbed herself (both survived)	Attempted murder	25 years imprisonment	2 years 9 months suspended sentence
<i>R v Blaauw</i> [2008] VSC 129	54-year-old wife	Paranoid schizophrenia	Stabbing	Slit her throat	Murder	Life imprisonment	11 years (seven years non-parole)
<i>R v Klinkermann</i> [2013] VSC 65	84-year-old wife	Severe dementia; Parkinson's disease; needed full-time care	Gassing	Piped car exhaust through the bedroom window; he also attempted suicide (both survived)	Attempted murder	25 years imprisonment	18 month community correction order
<i>R v Dowdle</i> [2018] NSWSC 240	27-year-old son	Severe disability from car accident; alcoholic and drug user	Suffocation	Gave him sleeping tablets and placed a plastic bag over his head	Manslaughter (substantial impairment)	25 years imprisonment	2 years non- parole plus balance of 1 year release on parole

The sections below describe the sentences imposed for the four categories of cases above. As will be observed, broadly the same approach regarding leniency in sentencing is taken in the majority of cases, regardless of the offender's level of involvement, the violence of the act or the potential vulnerability of the deceased.

A Assisting Suicide

The maximum sentence for assisting a suicide varies greatly, ranging from 5 years in Victoria,⁴¹ to 10 years in New South Wales ('NSW') and the ACT,⁴² 21 years in Tasmania,⁴³ and life imprisonment in Queensland.⁴⁴ Despite this variance in head sentence between jurisdictions, there is little variance in the actual sentences imposed. In both cases where the defendant's assistance to commit suicide was characterised solely as an act of compassion, the defendant received a wholly non-custodial sentence, accompanied only by a short good behaviour bond of 18 months or 3 years.⁴⁵

In the other four cases of assisting a suicide, short custodial sentences were imposed, but all included complicating factors detracting from the purity of the offender's compassionate motivation. Two cases involved a financial motivation arising under the deceased's will,⁴⁶ and two involved criminal activity – the procurement of illegal narcotics (in both cases heroin) – without a clear motivation of compassion, aside from complying with the request of the deceased.⁴⁷

B Completing a Suicide

The boundary between assisting suicide and mercy killing is blurred in cases where the accused takes active steps to complete a suicide attempt after the deceased had begun the process. Examples include suffocating a person who has

41 *Hood* (n 23) 477–8 [32] (Coldrey J); *Rijn* (n 22) 1 [3]; *Vic Crimes Act* (n 12) s 6B(2).

42 *R v Justins* [2008] NSWSC 1194 ('*Justins*'); *Walmsley* (n 21) 442 [3] (Ross J); *ACT Crimes Act* (n 12) s 17.

43 *Tas Criminal Code* (n 15) ss 163, 389. See *Pryor* (n 22).

44 *Nielsen* (n 22) 1–22; *Carter 2001* (n 23); *Qld Criminal Code* (n 15) s 311.

45 See *Hood* (n 23); *Rijn* (n 22). These sentences can be contrasted with the sentence of 10 years imposed on Morant for assisting in his wife's suicide. Although his actions in purchasing and preparing the equipment for his wife's suicide are comparable with the actions of Rijn and Hood, his motivation was different. He was not motivated by a compassionate desire to ease his wife's suffering, but by a desire to benefit from the three large life insurance policies he had deliberately taken out in his wife's name, worth a total of \$1.4 million. Morant had actively encouraged his wife to commit suicide so he could use the proceeds from the insurance payouts to set up a religious community: *Morant* (n 33) [18]–[35], [78] (Davis J).

46 In *Justins* (n 42), the offender's primary motivation was compassion and a desire to give effect to her partner's enduring wish to die: at [2] (Howie J). However, a week before his death she had procured an alteration to her partner's will in her favour: at [19]. At first instance she was sentenced to 22 months periodic detention: at [57]–[59]. In *Nielsen* (n 22), the deceased had executed a will in favour of Nielsen, whom he knew only as a friend through attendance at a meditation group: at 1–8, 1–16 (Dalton J). He was sentenced to 3 years imprisonment.

47 See *Carter Appeal 1* (n 23) [2] (Mullins J); *Walmsley* (n 21) [7]–[9] (Ross, Refshauge and Penfold JJ agreeing). In *Walmsley* (n 21), the judge doubted that it amounted to a mercy killing: stating that the offence was 'more serious than a "mercy killing" at the lower end of the spectrum, in that it was not within the same range of circumstances as assisting a terminally ill person who is in a lot of pain': at [35].

taken an overdose and is already unconscious;⁴⁸ and injecting a person with insulin, at their request, to ensure the overdose was successful.⁴⁹

Technically in law, an action causing death performed with the intention to cause death constitutes murder. Attempted murder was the charge laid in *DPP v Karaca*,⁵⁰ but in most cases the offender was charged with assisting suicide instead.⁵¹ Notwithstanding the very substantial head sentence applicable in most cases (ranging from 14 years⁵² to 25 years imprisonment),⁵³ in all six cases of completing a suicide the offender received a wholly suspended sentence, ranging from 12 months⁵⁴ to 3 years.⁵⁵ These sentences are directly comparable to the two suspended sentences imposed for assisting suicide solely from compassionate motives (discussed directly above).⁵⁶

Further, leniency is evident irrespective of the nature of the offender's act. The defendant, Price, received a 3 year good behaviour bond for attempting to complete a suicide by violently beating his friend with an iron bar,⁵⁷ whereas Rijn received a 3 year suspended sentence for merely assisting his wife's suicide by purchasing equipment.⁵⁸

C Voluntary Mercy Killing

Sentences were similarly lenient in cases of voluntary mercy killings: where the offender performed the act causing death out of compassion for the deceased and at their request. In most of these cases, the offender was charged with murder or manslaughter – crimes of the utmost seriousness.⁵⁹ The maximum penalty for murder in all jurisdictions is life imprisonment, and in several jurisdictions

48 See *Pryor* (n 22); *R v Mathers* [2011] NSWSC 339 ('*Mathers*'); *Godfrey* (n 22).

49 See *Larkin* (n 23).

50 In *Mathers* (n 48), the charge of murder was reduced to manslaughter on the ground of diminished responsibility.

51 See *Larkin* (n 23); *Maxwell* (n 21); *Pryor* (n 22) (father); *Godfrey* (n 22).

52 See *Larkin* (n 23). When section 6B was first inserted into the *Vic Crimes Act* (n 12) by the *Vic Crimes Act 1967* s 2, the maximum penalty was 14 years imprisonment. This was reduced to 5 years in 1997: *Sentencing and Other Acts Amendment Act 1997* (Vic) s 60, sch 1 item 6. Maxwell was therefore subject to the reduced maximum of 5 years: *Maxwell* (n 21).

53 See *Karaca* (n 23); *Mathers* (n 48).

54 *Pryor* (n 22) (assisting suicide of father).

55 See *Larkin* (n 23); *Karaca* (n 23).

56 See *Hood* (n 23); *Rijn* (n 22). Additional facts concerning this case are found in Adrian Lowe, 'Husband's Suicide Push Driven "By Love"', *The Age* (online, 22 May 2011) <<https://www.theage.com.au/national/victoria/husbands-suicide-push-driven-by-love-20110523-1f00m.html>>; 'No Jail for Victor Rijn after Inciting Inger Rijn to Commit Suicide', *Herald Sun* (online, 23 May 2011) <<https://www.heraldsun.com.au/news/man-who-incited-wifes-suicide-gets-bond/news-story/48d6eb1109d011a8175da587020049aa>>. Note that although Hood had briefly attempted to suffocate his friend once he became unconscious, by placing his hand over his nose and mouth, but this act made him feel ill, so he desisted, and there was no suggestion that this caused the deceased's death: *Hood* (n 23) [23]–[24] (Coldrey J).

57 *Karaca* (n 23).

58 *Rijn* (n 22).

59 Two cases involved the lesser statutory offence of manslaughter by suicide pact: *Marden* (n 21); *Rolfe* (n 21).

this sentence is mandatory.⁶⁰ Despite the heavy head sentences, most offenders received a sentence of two years or less, wholly suspended,⁶¹ which is dramatically less than the average sentence for murder.⁶² The most striking example is the early case of *R v Johnstone* (*Johnstone*), where the trial judge imposed the mandatory life sentence on a husband who electrocuted his mentally ill wife, then fixed a non-parole period of only 10 days.⁶³

In this context of overwhelming leniency, the substantial custodial sentences imposed in *R v Carter* (*Carter*)⁶⁴ (life imprisonment) and *R v Cooper* (*Cooper*)⁶⁵ (13.5 years imprisonment) for injecting a person with heroin at their request appear anomalous. In both cases, the offender was complying with an explicit request from the deceased,⁶⁶ and was motivated solely by compassion for the deceased's suffering, which in one case was depression caused by heroin addiction,⁶⁷ and in the other was chronic physical pain.⁶⁸ One case was described by the judge as a mercy killing,⁶⁹ but the other was not.⁷⁰ Possible reasons for this different approach to sentencing are explored in Parts IV and V below.

D Non-voluntary Mercy Killing

There are also several mercy killing cases where an offender killed or attempted to kill a spouse, parent or child who had not made a competent request to die.⁷¹ Although these actions were undertaken for compassionate motives, almost all cases⁷² involved a person who was not competent to ask for assistance in dying, by reason of dementia,⁷³ major stroke,⁷⁴ or severe disability.⁷⁵ In most of these, the preferred charge was murder or attempted murder, unless diminished responsibility

60 This was the case in *Johnstone* (n 24) in South Australia; *Carter 2001* (n 23) and *Carter Appeal 1* (n 23) in Queensland.

61 See *Marden* (n 21); *R v ANG* [2001] NSWSC 758 (*ANG*); *Nicol* (n 24); *Rolfe* (n 21). Attenborough's 20 month intensive corrections order was served in the community but included 100 hours of community service: *Attenborough* (n 2).

62 For example, in Victoria, the average sentence for murder from 1997–2001 was 17–18 years. The average sentence for murder of a child or other family member was 13 years: Victorian Law Reform Commission, *Defences to Homicide* (Options Paper, September 2003) [2.78]–[2.79].

63 The prosecution appealed from this sentence, but although the Court of Appeal considered that it was too lenient, they declined to alter it: *Johnstone* (n 24) 485–6.

64 *Carter 2001* (n 23); *Carter Appeal 1* (n 23).

65 *Cooper* (n 24).

66 In *Carter Appeal 1* (n 23), these entreaties were repeated over a period of about two years: at 2 (Mullins J).

67 *Ibid.*

68 *Cooper* (n 24).

69 *Ibid* [78] (Hidden AJ).

70 *Carter Appeal 1* (n 23) 3 (Mullins J). This may be due to the lack of a close relationship between Carter and the deceased, or perhaps because he used illegal drugs to end her life.

71 In two cases there was a suggestion that, although the act intended to cause death was not specifically requested at the time, it was consistent with earlier discussions about the desire to avoid dependence: *Hollinrake* (n 25) 38 (Coldrey J); or desire for euthanasia: *Pryor* (n 22) 1 (Hill AJ).

72 The exceptions are *Blaauw* (n 24) and *R v Dowdle* [2018] NSWSC 240 (*Dowdle*).

73 See *Riordan* (n 25); *Pryor* (n 22); *Nestorowycz* (n 25); *Klinkermann* (n 25).

74 See *Hollinrake* (n 25).

75 See *R v Sutton* [2007] NSWSC 295 (*Sutton*).

reduced the charge to manslaughter.⁷⁶ Despite the seriousness of the offence, and the severity of the maximum penalty (ranging from 21 years to life), in most cases the sentences imposed were no different from those imposed for assisting suicide, completing a suicide or voluntary mercy killing. In five cases, the sentences for attempting to murder a spouse or parent who suffered a major stroke or dementia ranged from 18 months⁷⁷ to 3 years,⁷⁸ wholly suspended. The Suttons' sentence for the murder of their adult son who had a disability was a 5 year good behaviour bond. The defendant in *R v Dowdle* ('*Dowdle*') did receive a short custodial sentence of 2 years⁷⁹ for the murder of her adult son with a disability, which may reflect the mixture of motives: namely, compassion for her son's psychological pain as well as her inability to continue to bear the burden of care for her son, who was an alcoholic and drug user, and abusive towards her.⁸⁰

A different approach to sentencing was taken in *R v Blaauw* ('*Blaauw*'). Although Forrest J accepted that Blaauw's primary motivation in killing his wife was to relieve the pain and psychological suffering he felt she was experiencing as a result of her schizophrenia,⁸¹ he did not consider that the case constituted a mercy killing. It is unclear whether this is because she had not expressed a wish to die, or because she suffered from a mental illness rather than a terminal or chronic physical condition.⁸² Consequently, Blaauw was sentenced to 11 years in prison for murder.

IV PURPOSES OF SENTENCING

As demonstrated in Part III, with a few exceptions,⁸³ courts have shown extraordinary leniency to friends or relatives convicted of assisting or causing the death of a family member who has a serious illness or disability for motives of compassion. Very few cases resulted in any form of custodial sentence.⁸⁴ In this part, we analyse the sentencing remarks on the purposes of sentencing, in search of possible reasons for this leniency. The purposes of the sentencing can broadly be divided into two categories:⁸⁵ protecting the community (through rehabilitation and

76 See, eg, in the cases of *Sutton* (n 75) and *Dowdle* (n 72).

77 See *Pryor* (n 22); *Klinkermann* (n 25).

78 *Riordan* (n 25); *Hollinrake* (n 25). In *Nestorowycz* (n 25), the sentence was two years nine months, wholly suspended.

79 The head sentence was three years but she was released to parole after serving two years: *Dowdle* (n 72) [37]–[38] (Hamill J).

80 *Ibid.*

81 *Blaauw* (n 24) [36] (Forrest J).

82 *Ibid* [38].

83 Notably, *Carter 2001* (n 23) (2 years imprisonment for assisting the suicide of Smythe, life imprisonment for the murder of Marke); *Carter Appeal 1* (n 23) (life imprisonment for murder); *Cooper* (n 24) (13.5 years imprisonment); *Blaauw* (n 24) (11 years imprisonment).

84 Exceptions are, as noted above, *Blaauw* (n 24); *Cooper* (n 24); *Carter 2001* (n 23); *Carter Appeal 1* (n 23); as well as *Dowdle* (n 72) (3 years, 2 years non-parole); *Nielsen* (n 22) (3 years, 6 months non-parole); *Walmsley* (n 21) (2 years 9 months); *Justins* (n 42) (22 months periodic detention, 8 months non-parole); *Johnstone* (n 24) (10 days before parole is so little as to not be counted).

85 Lanham also lists a third purpose of the criminal law: protection of the offender: 'The Purposes of the Criminal Law' in David Lanham et al (eds), *Criminal Law in Australia* (Federation Press, 2006) 1.

deterrence); and punishing the offender (through retribution and denunciation).⁸⁶ As will be revealed below, in the unique circumstances of cases where assisting suicide or causing death occurs out of compassion, imposing a strict sentence may not promote the purposes of the criminal law. This is because there is little risk of recidivism (so limited need for public protection), and there is no need to rehabilitate or reform the offender.

A Protection of the Community

Three of the core purposes of the criminal law are future-focused, with the goal of protecting the community by preventing future harm to others.⁸⁷ These are: rehabilitation,⁸⁸ specific deterrence⁸⁹ and general deterrence,⁹⁰ all of which aim to prevent future crime, either committed by that particular offender or by other potential offenders.

1 Rehabilitation

Rehabilitation⁹¹ was not a significant factor in sentencing in most cases of compassionate killing or assisting suicide,⁹² because the criminal act was often totally out of character, occurred in unique circumstances and was unlikely to be repeated.⁹³ In some cases it was considered that a custodial sentence would actually

However, this purpose compares the criminal law to other, less appropriate, methods of dealing with wrongful action – private revenge or executive control. When considering the purposes of sentencing within the criminal law system, only two purposes are relevant: protection of the community and punishment of the offender.

86 See, eg, *Crimes (Sentencing) Act 2005* (ACT) s 7 (*'ACT Crimes (Sentencing) Act'*); *Crimes (Sentencing Procedure) Act 1999* (NSW) s 3A (*'NSW Crimes (Sentencing Procedure) Act'*); *Penalties and Sentences Act 1992* (Qld) s 9(1) (*'Qld Penalties and Sentences Act'*); *Sentencing Act 1991* (Vic) s 5(1) (*'Vic Sentencing Act'*). See also Kathleen Daly and Rick Sarre, 'Criminal Justice System: Aims and Processes' in Darren Palmer, Willem de Lint, and Derek Dalton (eds), *Crime and Justice: A Guide to Criminology* (Lawbook, 5th ed, 2017) 357. In some jurisdictions, 'accountability' is included as a goal, the purpose of which is also linked to punishing the offender: *NSW Crimes (Sentencing Procedure) Act* (n 86) s 3A(e); *ACT Crimes (Sentencing) Act* (n 86) s 7(e). Because accountability is a factor named only in some jurisdictions, and because it overlaps with retribution and denunciation to some extent, it will not be separately considered here.

87 See generally Lanham et al (n 85).

88 Rehabilitation aims to 'alter the values of the offender so that he or she no longer desires to commit criminal acts', which will protect the community against future offending: Mirko Bagaric, Theo Alexander and Richard Edney, *Sentencing in Australia* (Thomson Reuters, 9th ed, 2021) 260 (*'Sentencing in Australia'*).

89 Specific deterrence aims to protect the community from future criminal acts by that offender (by punishing the offender and thereby dissuading the person from further offending): *ibid* 245.

90 The function of general deterrence is to deter others from committing similar crimes: *ibid* 221–2.

91 Rehabilitation is a process of reform of a person's internal values or attitudes so that they no longer desire to commit criminal acts, generally through programs of treatment or reform, and education to enable the offender to be reintegrated into society: *Sentencing in Australia* (n 88) 260–1.

92 It was frequently remarked that rehabilitation of the offender was not required to be considered in sentencing. See, eg, *Hollinrake* (n 25) 42 (Coldrey J); *Nicol* (n 24) [23] (Hulme J); *Blaauw* (n 24) [31] (Forrest J).

93 Rehabilitation may have a role to play in cases where a medical professional or euthanasia advocate repeatedly assists people to die in open contravention of legal prohibitions, such as Dr Jack Kevorkian in the United States ('US'), Dr Phillip Nitschke in Australia, or Sean Davison. Davison was a euthanasia

hamper the goal of rehabilitation, such as where the offender had made good progress in reintegrating into community life during the pre-trial period,⁹⁴ or where the offender had responsibilities for the care of children.⁹⁵ In *R v Sutton* ('*Sutton*'), where parents killed their adult son, who had severe disabilities, to prevent him undergoing surgery leading to further loss of sensory function, it was noted that separating the couple and imprisoning them would deprive them of support, which would jeopardise any chance of rehabilitation, and pose a real risk of suicide.⁹⁶ So in these cases, leniency in sentencing reflected the specific life circumstances of the offender, and the need to place rehabilitation in its social context.

In contrast, in *Walmsley v The Queen* ('*Walmsley*') and *Cooper*, long-term drug users with ongoing mental health issues were perceived to have more limited prospects of rehabilitation unless they agreed to participate in treatment addressing their substance abuse.⁹⁷ Both were sentenced to significant terms of imprisonment.

2 Specific Deterrence

In the cases on assisting suicide, completing a suicide and mercy killing, it was almost uniformly observed that specific deterrence⁹⁸ was not a factor relevant to be considered in sentencing. This was because most offenders were considered to be responsible citizens who had led 'unblemished' lives,⁹⁹ and were not at any risk of reoffending.¹⁰⁰ In these circumstances, there was no need for imprisonment for the protection of the community. Again, the only exceptions to this were *Walmsley* and *Cooper* where the offenders' substance abuse issues posed a risk of reoffending.¹⁰¹

advocate who assisted his terminally ill mother to die in New Zealand: *R v Davison* [2011] NZHC 1677. He later went on to provide assistance to three people he was not related to in South Africa: Philani Nombembe, 'Right-to-Die Activist Sean Davison Gets Three Years' House Arrest for Murders', *Sunday Times Live* (online, 19 June 2019) <<https://www.timeslive.co.za/news/south-africa/2019-06-19-right-to-die-activist-sean-davison-gets-three-years-house-arrest-for-murders/>>.

94 ANG enjoyed the support of his parents, wider family and counsellors: *ANG* (n 61) [27]–[28] (Ireland AJ).

95 *Larkin* (n 23) 42 (Nicholson J); *Pryor* (n 22) 2 (Hill AJ).

96 Experts agreed that the best chance of rehabilitating them was for them to receive psychiatric treatment in the community, while continuing to support each other: *Sutton* (n 75) [39]–[41] (Barr J).

97 *Walmsley* (n 21) 448 [38(iii)] (Ross J); *Cooper* (n 24) [81] (Hidden AJ).

98 Specific deterrence refers to imprisonment or other punishment in order to dissuade or deter an offender from committing a crime in the future: *Sentencing in Australia* (n 88) 245.

99 See, eg, *Godfrey* (n 22) 1 (Underwood J); *Maxwell* (n 21) [38] (Coldrey J); *Larkin* (n 23) 46 (Nicholson J); *Mathers* (n 48) [81(7)] (Hall J); *ANG* (n 61) [23] (Ireland AJ); *Hood* (n 23) [52] (Coldrey J).

100 See, eg, *Dowdle* (n 72) [30] (Hamill J); *Blaauw* (n 24) [31] (Forrest J); *Attenborough* (n 2) 12 (Graham AJ).

101 A sentence of two years and nine months imprisonment for assisting suicide by purchasing heroin was imposed in *Walmsley* (n 21). *Walmsley* was considered a medium to high risk to others, given his lack of commitment to redressing his drug abuse problem: at 448 [38(iii)]. Specific deterrence was also a relevant factor in the 13.5 year sentence imposed on *Cooper*, because (despite the fact that Hidden AJ considered him unlikely to reoffend in relation to a serious offence such as murder), he had a lengthy criminal history as well as a history of non-compliance with treatment for schizophrenia: *Cooper* (n 24) [80] (Hidden AJ).

3 General Deterrence

General deterrence¹⁰² is usually the most significant factor considered by judges in sentencing,¹⁰³ but was only sometimes significant in circumstances of mercy killing or assisted suicide. In some cases, general deterrence was considered important, sending a message to the community that, contrary to public and media perceptions, assisting suicide and mercy killing are not justifiable.¹⁰⁴ It is important to remind the community that ‘[p]eople cannot be permitted to take life in defiance of the law, however altruistic their personal motives may be’,¹⁰⁵ and even where that person has requested assistance to die.¹⁰⁶

However, empirical evidence fails to demonstrate that more severe sentences have an effect in deterring members of the public from committing crimes.¹⁰⁷ Further, community opinion on sentencing consistently rates general deterrence to be the least significant factor in the criminal justice process.¹⁰⁸ Several judges in sentencing a person for mercy killing or assisted suicide have openly doubted whether imposing a stringent sentence is likely to deter others when faced with a loved one in these unusual circumstances.¹⁰⁹ Additionally, some judges have doubted the need for general deterrence on the basis that such cases rarely occur.¹¹⁰

102 The purpose of general deterrence is to impose a sentence of sufficient gravity to dissuade or deter members of the broader community from committing a similar crime in the future: *Sentencing in Australia* (n 88) 242–3.

103 According to the Victorian Jury Sentencing Study, which compared the attitudes of jurors and judges in sentencing: Kate Warner et al, ‘Why Sentence? Comparing the Views of Jurors, Judges and the Legislature on the Purposes of Sentencing in Victoria, Australia’ (2019) 19(1) *Criminology and Criminal Justice* 26, 34 <<https://doi.org/10.1177/1748895817738557>>.

104 In *Justins* (n 42) at first instance, general deterrence was considered to be a highly significant matter because of media attitudes ‘that somehow the conduct of the offender ... was justifiable or at least of a different moral order than other criminal conduct that results in the loss of life’: at [43] (Howie J).

105 *Johnstone* (n 24) 485 (King CJ). As Hulme J remarked in *Nicol* (n 24), in the context of a voluntary murder-suicide: ‘The Court cannot so deal with the Applicant that a message is sent to the community that old persons, even those suffering from an abnormality of mind and with an intention to kill themselves, can kill their partners with impunity’: at [31]. See also *Justins* (n 42) [43] (Howie J); *Rolfe* (n 21) [27] (Cummins J); *Pryor* (n 22) 2 (Hill AJ); *Maxwell* (n 21) [41] (Coldrey J).

106 *Riordan* (n 25) 34 (Cummins J); *Nielsen* (n 22) 1–14 (Dalton J).

107 Andrew Ashworth, *Sentencing and Criminal Justice* (Cambridge University Press, 6th ed, 2015) 84–5 (*‘Sentencing and Criminal Justice’*). See also Warner et al (n 103) 40.

108 In the Victorian Jury Sentencing Study, of the six purposes of sentencing contained in legislation, general deterrence was ranked sixth by jurors (only 9% of jurors ranked general deterrence most important): Warner et al (n 103) 31. An earlier study of jurors and Australian public opinion had ranked general deterrence as the third most significant factor among the purposes of sentencing: Kate Warner et al, *Jury Sentencing Survey* (Report, Criminology Research Council, April 2010) 55. Other studies have suggested general deterrence is of little importance: Caroline A Spiranovic et al, ‘Public Preferences for Sentencing Purposes: What Difference Does Offender Age, Criminal History and Offence Type Make?’ (2012) 12(3) *Criminology and Criminal Justice* 289, 301 <<https://doi.org/10.1177/1748895811431847>>; Karen Gelb, Sentencing Advisory Council, *Purposes of Sentencing: Community Views in Victoria* (Report, July 2011) 19.

109 See *Nicol* (n 24) [24] (Hulme J); *Godfrey* (n 22) 2 (Underwood J); *Larkin* (n 23) 46 (Nicholson J); *Marden* (n 21) [18] (Vincent J); *ANG* (n 61) [34] (Ireland AJ); *Mathers* (n 48) [98]–[100] (Hall J); *Sutton* (n 75) [33] (Barr J).

110 *Godfrey* (n 22) 2 (Underwood J); *Hollinrake* (n 25) 42 (Coldrey J); *Rijn* (n 22) 4 (Magistrate Lethbridge). Cf *Pryor* (n 22), where Hill AJ took the view that general deterrence was a relevant factor to consider in sentencing, although the circumstances of the case were rare: at 2.

B Punishment of the Offender

In addition to goals of sentencing which aim to protect the community from future offending, some of the purposes of the criminal law are focused on the past. They involve the punishment of the offender for wrongful conduct, through retribution and denunciation.¹¹¹ These are the primary purposes of sentencing, according to community values.¹¹² However, these factors did not figure prominently in sentencing in cases of mercy killing or assisted suicide, because of the unique circumstances of many of those cases.

1 Retribution

Retribution – the punishment of the offender by setting an appropriate penalty in proportion to the gravity of the offence – is one of the primary aims of the criminal law.¹¹³ However, this factor was not significant in sentencing in most cases of mercy killing, assisting or completing a suicide. In the overwhelming majority of these cases, the sentencing judge remarked that there was no need to punish the offender or bring them to account for their actions, despite the gravity of the offence. Such observations are only explicable if retribution is focused primarily on the offender’s moral state rather than the gravity of the offence.

Judicial comments in the Australian cases of assisted suicides and mercy killings have focused on the offender’s conduct after the offence. Most offenders had made a full and early confession of guilt,¹¹⁴ and cooperated fully with police. Many were remorseful for their actions.¹¹⁵ In some cases, it was noted that the loss of the loved one was punishment enough.¹¹⁶ In other cases, the fact of being charged with a serious offence (such as murder) and undergoing a criminal trial was considered sufficient punishment in the circumstances.¹¹⁷ The exceptional

111 See generally Lanham et al (n 85).

112 The recent Victorian Jury Sentencing Study found that 29% of jurors selected retribution as the most important purpose of sentencing, and a further 19% considered denunciation the most important: Warner et al (n 103) 31.

113 Lanham et al (n 85) 1, 6–7.

114 Illustrative examples of this were *Karaca* (n 23) [9] (Teague J); *Marden* (n 21) [23] (Vincent J); *ANG* (n 61) [35] (Ireland AJ); *Mathers* (n 48) [81] (Hall J); *Attenborough* (n 2) 2 (Graham AJ).

115 Notable examples were *Maxwell* (n 21) [33] (Coldrey J), where Maxwell was described as ‘a distressed and confused man who is struggling to come to terms with what he has done’; *ANG* (n 61) [23], [27] (Ireland AJ); *Hood* (n 23) [53] (Coldrey J).

116 The most tragic example in this regard is *Klinkermann* (n 25), where although his wife survived the attempted murder-suicide, she was placed in a nursing home where her devoted husband was prevented from seeing her, either supervised or unsupervised: at [10], [23]–[24] (King J). This was also the case in *Attenborough* (n 2), where Attenborough was unable to see his father again before his death, due to being in custody awaiting trial: at 26 (Graham AJ). See also *Sutton* (n 75) [38] (Barr J); *Rolfe* (n 21).

117 Such as for the grieving parents in *Sutton* (n 75) [35] (Barr J), and the elderly husband in *Maxwell* (n 21) [40] (Coldrey J).

cases, where no acknowledgement of guilt was made,¹¹⁸ or where the offender lied to police,¹¹⁹ all resulted in a custodial sentence.

However, retribution is not solely about the moral responsibility of the offender; it is also about the gravity of the offence. While acknowledging the imperative to consider the other sentencing principles as well, the punishment would generally be expected to be proportionate to the gravity of the offence, not to the offender's level of guilt or remorse. So, for example, the offender in cases of assisting suicide would generally receive a lesser punishment than cases of mercy killing, because the action causing death is that of the deceased, rather than the offender. As Underwood J stated in *Tasmania v Godfrey* ('*Godfrey*'): 'It must not be forgotten that the crime of aiding suicide is quite different from what is sometimes called "mercy killing", for the latter constitutes murder, being a death by the hand of another.'¹²⁰ However, this review indicates that the sentences imposed in the Australian cases do not reflect a clear distinction between acts assisting suicide and acts of mercy killing.

Similarly, although cases of mercy killing or suicide pact fall at the lower end of seriousness in terms of types of homicide,¹²¹ the violence of the assault¹²² and the vulnerability of the victim¹²³ affect the gravity of the offence. Despite this, the violence of the assault did not appear to be relevant to the punishment imposed in

118 Justins only accepted responsibility for her actions towards the conclusion of the trial, and did not appear to fully recognise the extent to which her conduct was morally culpable: *Justins* (n 42) [33] (Howie J). Nielsen and Walmsley also failed to express moral responsibility for their actions: *Nielsen* (n 22) 1-20-1-21 (Dalton J); *Walmsley* (n 21) 448 [38(v)] (Ross J).

119 Walmsley consistently lied to police about his involvement in his friend's suicide: *Walmsley* (n 21) 444 [15]-[16] (Ross J). Nielsen also told many lies in the police interview: *Nielsen* (n 22) 1-19-1-20 (Dalton J). Another falling outside the cases in this analysis is *Ritchie* (n 34), where the assertion of a compassionate motive for killing was not believed, because of the extenuating facts of hiding his mother's body in bushland and denying responsibility for her death for over 3 months, despite repeated questioning by police: at [2]-[3] (Barr J).

120 *Godfrey* (n 22) 2 (Underwood J).

121 *R v Edwards* [2003] VSC 510, [35]-[36] (Gillard J); *R v Vosikata [No 2]* [2016] ACTSC 391, [104] (Burns J); *R v Hoerler* (2004) 147 A Crim R 520, 528 [27] (Spigelman CJ); *R v Cassidy* [2008] ACTSC 13, [18] (Higgins CJ); *Atherden v Western Australia* [2010] WASCA 33, [30] (Wheeler JA, McLure P agreeing at [1], Owen JA agreeing at [3]).

122 Violence is explicitly recognised as an aggravating factor in many sentencing laws. See, eg, *NSW Crimes (Sentencing Procedure) Act* (n 86) s 21A(2)(b); *Sentencing Act 1995* (NT) s 6A(f); *Qld Penalties and Sentences Act* (n 86) s 9(3)(e); *Sentencing Act 1997* (Tas) s 11A(1)(e); *Vic Sentencing Act* (n 86) ss 6C(3) (a), 9B, 10.

123 A 79-year-old physically infirm woman, who was savagely murdered with a garden fork for the purpose of stealing her car was described as an 'extremely vulnerable victim': *R v JPD* [2001] VSC 204, [13], [14] (Vincent J). A 56-year-old publican who was frail and in poor health was gagged, bound and beaten as part of a robbery. Teague J stated that 'his vulnerability made him an easier target': *R v Goral* [2001] VSC 208, [12] (Teague J). The vulnerability of the victim is expressly stated to be relevant in some sentencing legislation: *Sentencing Act 2017* (SA) s 11(1)(b); *Sentencing Act 1995* (WA) s 6(2)(b). See also Sentencing Advisory Council, *Homicide in Victoria: Offenders, Victims and Sentencing* (Report, November 2007) [2.1.3.3], [2.2.3.4]; and the cases mentioned in Ashworth, *Sentencing and Criminal Justice* (n 107) 168-70.

cases such as *R v Nestorowycz*, *R v Nicol*, *R v Marden* or *Johnstone*.¹²⁴ Rather the focus was on the offender's remorse and acknowledgement of guilt. Similarly, the vulnerability of the deceased did not feature in the assessment of retribution, despite the killing of a vulnerable person generally being treated as a case of higher gravity.¹²⁵

2 Denunciation

The final factor relevant to sentencing is denunciation.¹²⁶ Both judges and jurors¹²⁷ consider it important to express community disapproval or condemnation of the offending conduct, with the goal of moral education of the offender and the community as to accepted standards of behaviour. Although individual-focused, it is also a public reaffirmation of community values.

Denunciation was clearly expressed in the case law. Almost every judgment referred to the fact that the offence involved the loss of human life or the attempted taking of life.¹²⁸ One of the criminal law's core functions is to protect the sanctity of life,¹²⁹ irrespective of age, illness, or disability, and to prevent life from being deliberately taken by another.¹³⁰ Life is valued so highly that in law it cannot even voluntarily be relinquished. As was noted by the first trial judge in *R v Justins* ('*Justins*'), '[t]he law holds human life so sacred that a person cannot give some other person permission to take his or her life.'¹³¹

Despite the denunciation of the taking of life, in some cases sympathy was expressed for the offender's actions in the circumstances. For example, in *R v Klinkermann* ('*Klinkermann*'), King J stated:

Our law does not permit people to behave in that manner towards other human beings. It is permissible of course to end the life of a suffering animal but in terms of a human being that remains an exceedingly contentious issue in our community and as a result you have been charged with the offence of attempted murder of the wife that you loved and adored.¹³²

Given the gravity of the offences, and the fact that the taking of life was involved or intended in all cases, it is difficult to interpret the leniency of the sentences

124 In *Nestorowycz* (n 25), Harper J briefly referred to the 'nature of your attack upon your husband', but this was not considered a circumstance of aggravation: at [7].

125 This will be considered further in Part V(D) of this article.

126 Some commentators consider denunciation should not have much of an independent role to play in the criminal law, aside from other aims of punishment such as retribution and deterrence: Lanham et al (n 85) 14.

127 This goal is the second most important factor in sentencing, according to both judges and jurors: Warner et al (n 103) 35.

128 Illustrative examples can be found at *Blaauw* (n 24) [42] (Forrest J); *Marden* (n 21) [18] (Vincent J); *ANG* (n 61) [35] (Ireland AJ). See also *Morant* (n 33) [124] (Davis J).

129 As Hall J stated in *Mathers* (n 48) at [36]: 'There is, of course, nothing more precious than human life'.

130 As Hamill J remarked concerning the mercy killing of Dowdle's son: 'Sympathy which is legitimately aroused, and leniency and compassion that should properly be afforded, must never mask the objective gravity of any offence of homicide, especially a homicide such as this one, where an offender has set about to take human life and acted with an intention to kill': *Dowdle* (n 72) [8]. See also *Nestorowycz* (n 25) where Harper J remarked at [4]: 'Judges do not have the right to decide whether someone else should live or die. Neither do you. Life – any life – is too important for that.'

131 *Justins* (n 42) [30] (Howie J).

132 *Klinkermann* (n 25) [11], [26] (King J).

(generally, non-custodial) as containing any significant element of denunciation or community condemnation, despite the rhetoric in some cases. In addition, there did not appear to be a greater level of denunciation in relation to the non-voluntary mercy killing of vulnerable individuals (including adults with dementia, disability or stroke). The lenient sentences described earlier do not convey the law's or the community's denunciation of such killings.

V THEMES IN SENTENCING

As described in Part IV, in the majority of the cases in this analysis, the traditional purposes of criminal sentencing – protecting the community and punishing the offender – were not promoted by imposing harsh sentences on the accused. Accordingly, non-custodial sentences were generally imposed. However, the leniency of sentences fails to reflect the gravity of the offence where significant violence was involved, where the victim was particularly vulnerable, or the act intended to cause death was not voluntarily requested. It is argued that sentencing should be appropriate to sufficiently denounce the seriousness of such conduct.

This part continues the analysis of the sentencing remarks, going beyond these traditional principles to elucidate four prominent themes that appear to be unique to cases of assisting suicide and mercy killing. The first theme is the (lack of) *moral culpability of the offender*, emphasising factors such as: a close relationship with the deceased; a willingness to shoulder the burden of care; a compassionate motive; and the presence of mental illness in the offender.¹³³ The second theme concerns *community values*, particularly changing views about the sanctity of life and euthanasia or assisted dying. The third theme is *personal autonomy*, which concerns the deceased's reason for wishing to end their life – whether to avoid becoming dependent, to avoid going into institutional care, or to end pain and suffering. The final theme is the failure of courts to consider the *vulnerability of the deceased*.

Part V considers whether the traditional sentencing principles considered in Part IV are apposite in this context. Changing community values centrally affect sentencing principles, as sentencing aims to express the community's denunciation or conduct which is seen as morally blameworthy,¹³⁴ and to protect the community from conduct which offends those values. It is observed that leniency is in step with community attitudes in these types of cases. Some themes that were particularly significant in these cases (eg, the offender's motive of compassion in ending a loved one's suffering,¹³⁵ and the victim's motive of autonomy which underpins the desire to end their life) are matters which are not usually considered under

133 Several of these factors, notably compassionate motives, a 'close and loving relationship', and the 'depressed or imbalanced state of mind of the offender', were identified by Otowski (n 7) 26.

134 See Jeremy Horder, 'Mercy Killings: Some Reflections on Beecham's Case' (1988) 52(3) *Journal of Criminal Law* 309, 310.

135 As to the irrelevance of motive, see JA Laing, 'Assisting Suicide' (1990) 54(1) *Journal of Criminal Law* 106, 108.

traditional sentencing principles. Other issues which are traditionally regarded as critical when passing judgement (eg, the need to protect the vulnerable within our community) were *not considered* in these cases. The relationship between these themes and traditional sentencing principles will be explored further below.

A Moral Culpability of the Offender

1 Close Relationship

The overwhelming majority of these cases of assisted suicide, completing a suicide and mercy killing occurred in the context of a close domestic relationship, generally between spouses,¹³⁶ but sometimes also between parent and child.¹³⁷ Many of these relationships were extremely long-lasting, ranging from 20 years¹³⁸ to over 50 years of marriage (see Table 2).¹³⁹ These close and enduring relationships were, almost without exception, described as characterised by love and devotion.¹⁴⁰ The cases where parents received extremely lenient sentences for killing their adult children with disabilities also demonstrated extremely close, loving relationships where the parents had selflessly and devotedly borne the burden of caring for their children.¹⁴¹

Only a small number of cases involved less intimate relationships. Those involving one flatmate assisting another to commit suicide also received suspended sentences.¹⁴² In the three cases involving friends or acquaintances who did not cohabit, the lack of a close relationship combined with other factors to lessen judicial sympathy towards the offender's conduct, and all three received custodial sentences.¹⁴³

136 See, eg, *Blaauw* (n 24); *Justins* (n 42); *Klinkermann* (n 25); *Larkin* (n 23); *Marden* (n 21); *Maxwell* (n 21); *Nestorowycz* (n 25); *Nicol* (n 24); *Mathers* (n 48); *Riordan* (n 25); *Rolfe* (n 21); *Hollinrake* (n 25); *Rijn* (n 22).

137 *Pryor* (n 22); *Godfrey* (n 22). See also *R v Tait* (Supreme Court of Victoria, Winneke CJ, 13 June 1972) ('*Tait*'), although it occurred prior to the time period considered in the present study.

138 See, eg, *Justins* (n 42), *Maxwell* (n 21); *Mathers* (n 48).

139 The Hollinrakes had been married for 51 years, the Rolfes for 55 years, and the Nicols for 63 years: *Hollinrake* (n 25); *Rolfe* (n 21); *Nicol* (n 24).

140 The comment in *Nicol* that 'right up until Mrs Nicol's death the marriage was happy and both persons were devoted to one another' is representative of this: *Nicol* (n 24) [2] (Hulme J). Even the relatively short relationship between Lynda Larkin, a nurse, and the troubled James Pick, a patient who had been certified insane and whom she brought home to live with her, was characterised by the sentencing judge as one of 'deep attachment' and 'natural compassion': *Larkin* (n 23) 42–3 (Nicholson J). Similarly, the relationship between Cooper and his estranged partner was described as characterised by love, despite his presence at her house being in breach of bail and an ADVO, indicating that she was vulnerable in relation to him: *Cooper* (n 24) [78]–[79] (Hidden AJ).

141 See, eg, *Sutton* (n 75); *Dowdle* (n 72).

142 See *Hood* (n 23); *Karaca* (n 23).

143 See *Nielsen* (n 22); *Carter 2001* (n 23); *Walmsley* (n 21). It is unclear whether Walmsley and Lisa McDonald (the deceased) were friends or lovers.

Table 2: Relationship between deceased and offender in assisted suicide and mercy killing cases

Deceased/ victim is spouse/ partner over 30 years	Deceased/ victim is spouse/ partner under 30 years	Child offender – parent deceased/ victim	Parent offender – child deceased	Other relationship with deceased/victim
<i>Nicol</i> (wife of 63 years)	<i>Mathers</i> (78-year-old partner of 22 years)	<i>Godfrey</i> (88-year-old mother)	<i>Sutton</i> (29-year-old son)	<i>Hood</i> (30-year-old flatmate and ex- lover)
<i>Rolfe</i> (wife of 55 years)	<i>Maxwell</i> (wife of 20 years)	<i>Pryor</i> (74-year-old mother; 79-year-old father)	<i>Dowdle</i> (27-year-old son)	<i>Karaca and Price</i> (30-year-old flatmate)
<i>Hollinrake</i> (wife of 51 years)	<i>Justins</i> (partner of 20 years)	<i>Attenborough</i> (82-year-old father)		ANG (31-year-old uncle)
<i>Marden</i> (wife of 48 years)	<i>Klinkermann</i> (84-year-old wife of nine years)			<i>Carter</i> (friend, acquaintance)
<i>Riordan</i> (wife of 48 years)	<i>Rijn</i> (elderly wife of 15 years)			<i>Walmsley</i> (friend)
<i>Nestorowycz</i> (husband of 36 years)	<i>Cooper</i> (separated domestic partner)			<i>Nielsen</i> (76-year- old acquaintance)
<i>Johnstone</i> (wife of 36 years)				<i>Larkin</i> (former psychiatric patient)
<i>Blaauw</i> (wife of 30 years)				

2 *Accept the Burden of Care*

The second factor frequently remarked on in sentencing, which is intimately connected to the close and loving relationship between the offender and the deceased, is that many offenders had willingly borne the burden of care for a spouse who was ill, frail or had a disability, often over a period of many years.¹⁴⁴ Similar patterns of devotion to care also exist in cases concerning children who were involved in the deaths of their elderly parents (such as *Tasmania v Pryor*

¹⁴⁴ For example, Riordan's wife suffered from Alzheimer's disease, and he was her primary carer for 10 years before she needed to be placed in a care home. Thereafter, he continued to devotedly visit her every day and feed her and take her for a walk: *Riordan* (n 25) 28–30 (Cummins J). See also *Klinkermann* (n 25); *Marden* (n 21); *Rolfe* (n 21); *Nestorowycz* (n 25); *Maxwell* (n 21); *Nicol* (n 24); *Mathers* (n 48).

(‘Pryor’¹⁴⁵ and *Godfrey*¹⁴⁶), and in the cases of parents who killed their children with disabilities (such as *Dowdle*¹⁴⁷ and *Sutton*¹⁴⁸).

The high level of devotion and care shown by the offender is significant, not because killing a loved one or assisting them to die is seen as a legitimate response when the burden of care becomes unmanageable, but rather because it provides strong evidence of the depth of love and devotion to the deceased’s wellbeing. It also gives credibility to claims that the offender’s actions in assisting their loved one to die or causing their death were motivated by compassion and mercy (discussed below).

3 Motive Was Compassion

Consistent with the themes of a close loving relationship, and a willingness to accept the burden of care, in almost all cases, the offender was said to be motivated solely by a compassionate desire to end the pain or suffering of their loved one.¹⁴⁹ In many cases, the compassion was apparent as the deceased person begged for assistance to die and the offender agreed to assist, sometimes reluctantly.¹⁵⁰ However, even in cases where the person had not expressly requested to die, the offender’s conduct was frequently described as ‘compassionate’.¹⁵¹ The motive of compassionately providing release from pain and suffering was also powerfully evident in cases where parents killed their children with disabilities.¹⁵²

145 Pryor’s mother lived in a nursing home, but her daughter was described as having ‘a close and loving relationship with her mother’: *Pryor* (n 22).

146 Godfrey, together with other family members, took turns spending the night at his mother’s house, and tried to persuade her to accept nursing home care: *Godfrey* (n 22). See also *Tait* (n 137) where the offender had lived alone with his mother for decades, after the death of her second husband, and had never married partly because of his devotion to her.

147 Susan Dowdle had been her adult son’s carer for eight years since a car accident left him brain damaged and with severe disabilities. She remained ‘relentless in her pursuit of his needs and was his staunchest advocate’, despite the fact that as an alcoholic and drug user he was often abusive towards her: *Dowdle* (n 72) [2] (Hamill J).

148 The Suttons were described as having ‘devoted the best years of their lives to Matthew and to his welfare. No demand was too much for them. They gave up everything for him’: *Sutton* (n 75) [5], [42] (Cummins J).

149 For example, Mathers’ action in suffocating his partner 36 hours after her attempt to suicide by overdose was described as ‘a selfless act borne out of the love the offender held for her and what the offender understood to be in accordance with the deceased’s express wishes’: *Mathers* (n 48) [85] (Hall J).

150 See especially *Maxwell* (n 21); *Carter Appeal 1* (n 23) 2 (Mullins J) (in the latter case, the defendant had been resisting the deceased’s entreaties for about 2 years).

151 For example, Klinkermann attempted to kill his wife ‘to relieve [her] from the advanced dementia and Parkinson’s Disease, which in [his] perception now caused her to have a dreadful quality of life, with no hope for improvement’: *Klinkermann* (n 25) [28] (King J). Riordan was described as a ‘person of compassion and selflessness, totally devoted to his wife’, who acted as he did with the intention to relieve her of her ‘terrible suffering and indignity’: *Riordan* (n 25) 27, 35 (Cummins J). Similarly, Nestorowycz stabbed her husband because she ‘believed that [her] husband was suffering by being kept in a nursing home’, not ‘out of hatred or because [she] didn’t want him around any more’: *Nestorowycz* (n 25) [18] (Harper J). Hollinrake was described as having a ‘motivation, misguided though it was, born of [his] love and compassion’: *Hollinrake* (n 25) 40 (Coldrey J).

152 For example, Dowdle stated that her motive in killing her son was ‘to just stop the pain ... I’ve reached out for years and years and years and watched his pain, pain, pain, pain’: *Dowdle* (n 72) [25] (Hamill J). Likewise, the Suttons ‘released [their son] from any more pain & suffering, he had had enough’: *Sutton* (n 75) [12] (Barr J).

The emphasis on compassionate motive is contrasted with killing for selfish motives, such as to avoid the burden of caring. For example, it was noted that Marden agreed to the suicide pact with his wife out of love and compassion, not out of ‘some sense of frustration arising from the nature and extent of her disabilities’.¹⁵³ By contrast, cases where death was motivated by a desire to avoid the burden of care were not dealt with as mercy killings (and therefore fell outside our sample of cases), and the offender received a substantial term of imprisonment.¹⁵⁴

Compassionate motives are also contrasted with financial motives. In both assisted suicide cases where the offender had a financial motive under the deceased person’s will in addition to compassionate motives, a custodial sentence was imposed.¹⁵⁵ A financial motive negates the motive of compassion and care, and transforms a potentially altruistic act into one of self-interest.

4 Mental Illness of the Offender

Another ameliorating feature in many of the mercy killing cases was that the offender suffered from significant depression or other mental illness, which can affect decision-making and clarity of judgment. Sometimes the offender’s mental state had organic causes,¹⁵⁶ but in many cases it was caused by a long period of caring for a loved one under difficult circumstances.¹⁵⁷ The sense of hopelessness about the future, which is a feature of depression, was a major factor in decisions to assist suicide,¹⁵⁸ as well as decisions to intentionally kill a loved one as part of a suicide pact,¹⁵⁹ and decisions to kill a spouse¹⁶⁰ or child¹⁶¹ without their request or consent.

153 *Marden* (n 21) [22] (Vincent J); See also *Larkin* (n 23) 41 (Nicholson J).

154 See *Ritchie* (n 34) [8], [19] (Barr J) (son frustrated at having to care for his terminally ill mother sentenced to 15 years imprisonment for her murder); *R v McLaren* [2011] NSWDC 115, [1]–[3] (Berman DCJ) (live-in home carer for an elderly man with motor neurone disease frustrated at having to care for him sentenced to eight years imprisonment for attempted murder).

155 Three years imprisonment in the case of Nielsen, who was named the sole beneficiary under Mr Ward’s most recent will: *Nielsen* (n 22) 1-5, 1-16 (Dalton J). The sentence was 22 months in the case of Justins, the deceased’s long term partner, who procured changes to his will substantially in her favour, just weeks before his death, despite knowing that he lacked capacity at that time to alter his will: *Justins* (n 42) [19]–[22] (Howie J). See also Morant, who was sentenced to 10 years imprisonment, but who lacked any compassionate motive: *Morant* (n 33) [78] (Davis J).

156 Dowdle was described as having underlying bipolar disorder or possibly schizophrenia, which had been poorly treated in the past and was currently untreated: *Dowdle* (n 72) [4], [32] (Hamill J). Cooper also suffered from schizophrenia and was not taking his medication at the time of the offending: *Cooper* (n 24) [61] (Hidden AJ). Mathers had a history of severe depression, and this was exacerbated by anxiety over his partner’s planned suicide: *Mathers* (n 48) [64] (Hall J).

157 See, eg, *Blaauw* (n 24); *Larkin* (n 23); *Marden* (n 21); *Maxwell* (n 21); *Nestorowycz* (n 25); *Nicol* (n 24); *Sutton* (n 75); *Riordan* (n 25); *Rolfe* (n 21).

158 See *Larkin* (n 23) 43 (Nicholson J); *Maxwell* (n 21) [32] (Coldrey J); *Mathers* (n 48) [78(5)] (Hall J); *Walmsley* (n 21) 448 [38(vii)] (Ross J).

159 See *Marden* (n 21); *Nicol* (n 24); *Rolfe* (n 21).

160 See *Blaauw* (n 24); *Nestorowycz* (n 25); *Riordan* (n 25).

161 See *Dowdle* (n 72); *Sutton* (n 75).

5 Conclusion

The lack of moral culpability where the offender has a close relationship with the victim, has willingly shouldered the burden of care, and is motivated solely by compassion for the suffering of their loved one lessens the need for punishment to serve the traditional goals of rehabilitation, general or specific deterrence. However, as will be discussed in Part V(D) below, the close relationship of trust and dependence may also serve as an aggravating factor in sentencing, particularly in situations where the offender is responsible for the care of a person who is ill or has a disability, and abuses that trust by seeking the death of the person. This is particularly the case where the person is vulnerable and has not requested assistance to die.

B Community Values

As we observed in Part IV, community values are important in assessing the moral culpability of the offender.¹⁶² Sentencing ‘involves a reaffirmation of society’s values’,¹⁶³ and the denunciation of conduct which falls outside those values.¹⁶⁴ Not only is sentencing practice often sensitive to public opinion,¹⁶⁵ but it has also been argued that if sentencing reflects community views this will ‘enhance the legitimacy of the law and promote compliance and co-operation with criminal justice agencies’.¹⁶⁶

A strong theme in the denunciation of the offending conduct is the sanctity or high value placed on human life by our society.¹⁶⁷ In several cases, judges referred to ‘the community’s entitlement to feel that justice has been done, particularly given the sanctity of human life’.¹⁶⁸

The societal need for justice was, however, tempered with a stronger theme of mercy, also reliant on community values. In several cases, the societal value of mercy was invoked to justify the imposition of a suspended or non-custodial sentence. For example, in *Klinkermann*, King J stated:

162 See Horder (n 134) 310; Warner et al (n 103) 27.

163 *WCB v The Queen* (2010) 29 VR 483, 487 [12(e)] (Warren CJ and Redlich JA).

164 *Ibid* 493 [35] (Warren CJ and Redlich JA):

Central to the purposes of sentencing is public denunciation of the offending conduct and reinforcement of society’s expectations. The sentence communicates society’s condemnation of the offender’s conduct. It signifies the recognition by society of the nature and significance of the wrong that has been done to affected members, the assertion of its values and the public attribution of responsibility for that wrongdoing to the perpetrator.

165 Sentencing Advisory Council, *Public Opinion about Sentencing: A Research Overview* (Report, December 2018) 1. See also Lorana Bartels, ‘Sentencing Review 2018–2019’ (2019) 43(5) *Criminal Law Journal* 355, 357.

166 Warner et al (n 103) 27.

167 See Part IV(B)(2) of this article.

168 *Nicol* (n 24) [27] (Hulme J). An identical phrase was used in *Mathers* (n 48) [101] (Hall J). See also *ANG* (n 61) [28] (Ireland AJ).

Our society is not a vengeful one, and the law recognises this and approves and even requires the exercise of mercy in certain cases and I am unable to see any benefit to you or society in general in incarcerating you for any period of time.¹⁶⁹

In a few cases, judges in sentencing observed that offences of assisting suicide or mercy killing touch on issues raised in the community debate about the morality of euthanasia or voluntary assisted dying.¹⁷⁰ However, the courts were clear that their function is not to question the appropriateness of the criminal law framework, or whether there should be legislative change,¹⁷¹ but to impose a sentence according to the ‘current state of the law’.¹⁷²

Consideration of community attitudes and values is relevant to the level of denunciation to be applied in sentencing in criminal cases. In the present selection of cases, judges balanced the societal interest in the sanctity of life against the community value of mercy towards those who have broken the law out of compassion, and sometimes mentioned changing community sentiment in relation to euthanasia. These considerations led to the overwhelming leniency in sentencing observed above.¹⁷³

C Autonomy/Choice

The theme of personal autonomy is not one which is usually emphasised in sentencing, but it was certainly relevant in cases of assisted suicide and voluntary mercy killing.

1 Avoiding Dependence

In several cases, the deceased’s desire to avoid dependence was a major factor causing them to attempt suicide or request assistance to die.¹⁷⁴ In some cases, the deceased was concerned about the decline in their capacities which is a natural feature of ageing.¹⁷⁵ In other cases, this desire for independence translated into views that people should be able to choose to end their lives voluntarily.¹⁷⁶ Two of the women who committed suicide with the assistance of relatives were active

169 *Klinkermann* (n 25) [30] (King J). Similar sentiments were expressed in many other cases: see, eg, *Maxwell* (n 21) [41] (Coldrey J); *Hood* (n 23) [55] (Coldrey J); *Sutton* (n 75) [42] (Barr J); *Hollinrake* (n 25) 42 (Coldrey J); *Mathers* (n 48) [101] (Hall J); *Godfrey* (n 22) 2 (Underwood J); *Pryor* (n 22) 2 (Hill AJ). See also Bartels and Otlowski (n 17) 547–8.

170 In *Klinkermann*, King J acknowledged that the ‘issue of euthanasia is a very vexed question in our community and one that will have to be resolved in the not too distant future as we face an aging population’: *Klinkermann* (n 25) [26] (King J). See also *Godfrey* (n 22) 2 (Underwood J); *Attenborough* (n 2) 18 (Graham AJ); *Hood* (n 23) 477 [31]; *Riordan* (n 25) 35 (Cummins J).

171 *Godfrey* (n 22) 2 (Underwood J); *Attenborough* (n 2) 18 (Graham AJ).

172 *Hood* (n 23) 477 [31]. See also *Godfrey* (n 22) 2 (Underwood J).

173 See Part III of this article.

174 For example, Frank Ward was described as having a ‘great fear of ill-health’ and a desire to avoid dependence, leading him to form the intention to take his own life: *Nielsen* (n 22) 1-7, 1-13, 1-18 (Dalton J).

175 In *Hollinrake*, the deceased, who had suffered a major stroke, was described as having a ‘horror of an impaired life and ... “almost a phobia” about not being in control of herself and her senses’: *Hollinrake* (n 25) 38 (Coldrey J). See also *Justins* (n 42) [9]–[11] (Howie J); *Nicol* (n 24) [2], [4] (Hulme J).

176 *Attenborough* (n 2) 3 (Graham AJ). See also *Pryor* (n 22); *Maxwell* (n 21) [21]–[22] (Vincent J).

members of pro-euthanasia organisations.¹⁷⁷ Other cases involved individuals who sought assistance from pro-euthanasia organisations about methods of ending one's life.¹⁷⁸

2 Avoiding Nursing Home Care

The desire to avoid dependence generated a specific desire to avoid being placed in a nursing home or palliative care. This was a major factor in four of the attempted murder-suicide cases described above,¹⁷⁹ and in several of the assisted suicide cases.¹⁸⁰ Additionally, in two cases where the victim was already in full-time care, the offender believed they were distressed at this situation,¹⁸¹ and concluded that death would be preferable to life in an institution.

3 Ending Pain and Suffering

A recurring theme running through the cases of assisted suicide and voluntary mercy killing was that many involved strong-willed and determined individuals who planned to take their own lives. Some had made several previous attempts at this.¹⁸² An extreme example was Mrs Maxwell who, suffering terminal cancer, planned to take her life by ceasing to eat and drink,¹⁸³ a plan which required great determination and perseverance.

Several cases referred to a decision to end one's life because of the severity of pain and suffering.¹⁸⁴ It was emphasised that these decisions were the autonomous decisions of the individual wishing to die, freely and autonomously chosen and (at least in assisted suicide cases) carried out by the deceased.¹⁸⁵ In some cases

177 Mrs Godfrey was an active member of the Tasmanian Euthanasia Society: *Godfrey* (n 22) 1 (Underwood J). Mrs Rijn was a member of Exit International: *Rijn* (n 22); Lowe (n 56). In *Justins*, although it is not stated that the deceased was a member of Exit International, his partner's friend, Caren Jennings, who travelled to Mexico to purchase the Nembutal from which he died, was an office-bearer in that organisation: *Justins* (n 42) [13] (Howie J).

178 This included instructions about how to import pentobarbital from Mexico: *Nielsen* (n 22) 1-7 (Dalton J); instructions about asphyxiation using the helium balloon method they had read about in the *Final Exit* book: *Maxwell* (n 21) [21] (Coldrey J); and advice about the legality of being present when a person commits suicide: *Rijn* (n 22).

179 *Klinkermann* (n 25) [4], [25] (King J); *Nicol* (n 24) [9] (Hulme J); *Rolfe* (n 21) [7], [13], [14] (Cummins J); *Hollinrake* (n 25) 38 (Coldrey J).

180 For example, the need to go into care was described as a 'complete anathema' to the independent and strong-willed Mrs Godfrey: *Godfrey* (n 22) 1 (Underwood J). See *Mathers* (n 48) [17]; *Nielsen* (n 22) 1-7 (Dalton J). See also *Tait* (n 137) 3 (Winneke CJ).

181 Mr Nestorowycz had repeatedly pleaded with his wife to take him home from the nursing home he had resided in for the past eight years: *Nestorowycz* (n 25) [18] (Harper J). Mrs Hollinrake was pulling out her feeding tubes when hospitalised after a stroke, which her husband took as an indication that she did not want to go on living like that: *Hollinrake* (n 25) 39 (Coldrey J).

182 See, eg, *Mathers* (n 48) [20] (Hall J); *Justins* (n 42) [7] (Howie J); *Carter Appeal 1* (n 23) 3 (Mullins J); *Pryor* (n 22) 1 (Hill AJ); *Godfrey* (n 22) 1 (Underwood J).

183 *Maxwell* (n 21) [11] (Coldrey J).

184 *Attenborough* (n 2) 22 (Graham AJ); *Mathers* (n 48) [51] (Hall J); *Maxwell* (n 21) [17]–[19] (Coldrey J); *Cooper* (n 24) [26] (Hidden AJ).

185 See *Godfrey* (n 22) 2 (Underwood J).

the assistance provided was at the deceased person's insistence, and with some reluctance on the part of the family member.¹⁸⁶

D Protection of Vulnerable Persons

By contrast, the vulnerability of the victim was not a theme often mentioned in the cases, although it is generally a significant factor which tends to favour a more stringent sentence. As we observed in Part IV, vulnerability is relevant to the gravity of the offence, which is important in considering the need for 'retribution'.¹⁸⁷ The categories of who may be considered 'vulnerable' in law are not settled.¹⁸⁸ Aside from children, who obviously have a special vulnerability,¹⁸⁹ adults are considered 'vulnerable' if they are unable to protect themselves from the harmful consequences of another's action.¹⁹⁰ This is common, although not universal, for the elderly,¹⁹¹ people with disabilities,¹⁹² those with physical illness¹⁹³ or mental illness¹⁹⁴ and those in special relationships of dependence.¹⁹⁵

Many of the cases described here involved determined individuals who were physically ill or in pain, but otherwise were not especially vulnerable.¹⁹⁶ Most cases involved elderly people,¹⁹⁷ and five were in their 80s,¹⁹⁸ although a significant

186 For example, Maxwell's eventual assistance to help his wife end her life was provided to honour a promise she had forced him to make: *Maxwell* (n 21) [13], [20] (Coldrey J). See also *Rijn* (n 22) 2 (Magistrate Lethbridge); *Mathers* (n 48) [78(4)] (Hall J).

187 Bartels (n 165) 360, quoting Queensland Sentencing Advisory Council, *Sentencing for Criminal Offences Arising from the Death of a Child* (Final Report, October 2018).

188 For a general discussion of vulnerability, without an attempt to classify vulnerable groups, see Jane Stapleton, 'The Golden Thread at the Heart of Tort Law: Protection of the Vulnerable' (2003) 24(2) *Australian Bar Review* 135, 142; Paul Finn, 'The Courts and the Vulnerable' [1996] (162) *Law Society of the Australian Capital Territory Gazette* 61.

189 *X v The Sydney Children's Hospitals Network* (2013) NSWLR 294, 308 [60] (Basten JA); *Cattanach v Melchior* (2003) 215 CLR 1, 118 [324]–[325] (Heydon J).

190 *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* (2004) 216 CLR 515, 530 [23] (Gleeson CJ, Gummow, Hayne and Heydon JJ), 549 [80] (McHugh J) ('*Woolcock Street Investments*'). This case was decided in the context of tort liability for economic loss caused to vulnerable persons.

191 This was discussed in depth in Department of Health and Human Services, Government of Victoria, *Ministerial Advisory Panel on Voluntary Assisted Dying* (Final Report, 21 July 2017) ('*Victorian Panel Report*') 88–90. The WA Branch of the Royal Australian and New Zealand College of Psychiatrists also considered 'older, isolated women' to be a group particularly vulnerable to seeking voluntary assisted dying: Department of Health (WA), *Ministerial Expert Panel on Voluntary Assisted Dying* (Final Report, 27 June 2019) 97. See also Martha Albertson Fineman, "'Elderly" as Vulnerable: Rethinking the Nature of Individual and Societal Responsibility' (2012) 20(1) *Elder Law Journal* 71, 85–6 <<https://doi.org/10.2139/ssrn.2088159>>.

192 *Victorian Panel Report* (n 191) 84, 91.

193 See *Woolcock Street Investments* (n 190) 575–6 [168] (Kirby J), citing *Hodgkinson v Simms* [1994] 3 SCR 377, 412.

194 *Victorian Panel Report* (n 191) 82.

195 *Woolcock Street Investments* (n 190) [168] (Kirby J), citing *Hodgkinson v Simms* [1994] 3 SCR 377, 412.

196 As was remarked in *Attenborough*, although the 82-year-old father 'did have significant and challenging physical circumstances which would certainly render him vulnerable', it was clear he retained mental capacity to make decisions, and had formed a desire to end his pain and suffering: *Attenborough* (n 2) 17 (Graham AJ).

197 See *Rijn* (n 22); *Nielsen* (n 22); *Justins* (n 42); *Mathers* (n 48); *Marden* (n 21); *Hollinrake* (n 25); *Riordan* (n 25); *Nestorowycz* (n 25).

198 See *Godfrey* (n 22) 2 (Underwood J); *Nicol* (n 24); *Attenborough* (n 2); *Klinkermann* (n 25); *Rolfe* (n 21).

minority were young people.¹⁹⁹ However, several cases did involve people who were particularly vulnerable, either by reason of mental illness, dementia, or significant disability.

1 *Mental Illness*

As shown in Table 1, eight cases of assisted suicide or mercy killing involved a victim with serious mental illness.²⁰⁰ People with mental illness who are suicidal are obviously in an extremely vulnerable and often irrational state, and the legal prohibition on assisted suicide is ‘designed to protect a vulnerable person who opts for suicide’ at such a time.²⁰¹ Although the vulnerability of the deceased was emphasised in sentencing in *Hood*,²⁰² the vulnerability of suicidal people with mental illness was not mentioned in other cases.²⁰³ This may have been expected particularly in the case of *Larkin*, a nurse who had voluntarily taken a psychotically unwell patient into her home to care for, and then became involved in assisting him to commit suicide.²⁰⁴

2 *Dementia*

Five of the cases involved elderly relatives with advanced dementia or Alzheimer’s disease.²⁰⁵ In *Justins*, Howie J remarked that ‘in the weeks preceding his death, the deceased was completely vulnerable and, to a very substantial degree, reliant upon the offender in a way foreign to their previous relationship’.²⁰⁶ However, similar comments about the special vulnerability of a person with dementia who is dependent on the care of others were *not* made in other cases. Judges tended to focus instead on the devotion and care of the spouse.²⁰⁷

3 *Disability*

The final category of vulnerable people is adults with disabilities. In *Sutton*, the son had severe disabilities since birth,²⁰⁸ and was completely dependent on his parents. Barr J did observe that his parents had ‘the [legal] responsibility to care

199 See *Hood* (n 23); *Karaca* (n 23); *Carter Appeal 1* (n 23); *Walmsley* (n 21); *ANG* (n 61); *Larkin* (n 23); *Sutton* (n 75); *Dowdle* (n 72).

200 See *Walmsley* (n 21); *Hood* (n 23); *Karaca* (n 23); *Larkin* (n 23); *ANG* (n 61); *Johnstone* (n 24); *Carter Appeal 1* (n 23); *Blaauw* (n 24).

201 *Hood* (n 23) 477–8 [32] (Coldrey J).

202 Coldrey J emphasised the responsibility of the offender to assist the victim to seek counselling or medical assistance, rather than assist him in his suicide plan: *ibid* [35].

203 We leave to one side the cases in which there was evidence that the suicidal deceased was dominant over the offender, and exerted duress on them to be involved in the suicide plan: see, eg, *ANG* (n 61); *Karaca* (n 23).

204 *Larkin* (n 23).

205 *Justins* (n 42); *Pryor* (n 22) (mother); *Klinkermann* (n 25); *Nestorowycz* (n 25); *Riordan* (n 25). Two cases decided since this article was accepted for publication also involved people with advanced dementia: *Sugar* (n 9) and *Eckersley* (n 9).

206 *Justins* (n 42) [36] (Howie J).

207 See especially *Riordan* (n 25); *Klinkermann* (n 25).

208 Matthew Sutton had Trisomy 13 (Patau syndrome), was blind, substantially deaf, and had an intellectual disability.

for a severely disabled and vulnerable person²⁰⁹ but the overwhelming focus of the sentencing remarks was on the parents' mental states, not the vulnerability of their son. Four other cases involved adults with significant disability as a result of accident²¹⁰ or illness.²¹¹ The vulnerability and dependence of the victims was not mentioned in passing sentence.²¹²

4 Conclusion

In many of the cases analysed here, victims were aged, had dementia or a disability, and their vulnerability was accentuated by their dependence on the offender for their care. Others were vulnerable by reason of mental illness. In such cases, assisting suicide or mercy killing was a breach of the trust reposed in the offender by virtue of the relationship of care. Despite this, vulnerability and dependence were not expressly considered in sentencing in the majority of cases. This constitutes a failure of the law to exercise its protective jurisdiction. The lack of public commentary on this omission²¹³ stands in stark contrast to the outcry in Canada over the lenient sentencing of a father who killed his daughter who had a disability.²¹⁴

VI IMPLICATIONS

As previously observed, analysis of the cases demonstrates a marked level of leniency across the whole spectrum of assisted suicide and mercy killing cases. This highlights 'a serious discrepancy between the law as it stands in theory and as it is applied in practice'.²¹⁵ Particularly where the accused has been convicted of murder or manslaughter, there is a yawning gap between the nominal head sentence and the actual sentence imposed.

209 *Sutton* (n 75) [36] (Barr J).

210 Dowdle's son suffered a serious accident: *Dowdle* (n 72).

211 See *Nestorowycz* (n 25) (double amputee); *Hollinrake* (n 25) (major stroke); *Nicol* (n 24) (partial amputee).

212 Cf *Dowdle* (n 72), where the victim's vulnerability due to his disability and intoxication was noted: at [26] (Hamill J).

213 Notable exceptions concerning persons with disability are: Phillip French and Rosemary Kayess, 'Deadly Currents beneath Calm Waters: Persons with Disability and the Right to Life in Australia' in Luke Clements and Janet Read (eds), *Disabled People and the Right to Life: The Protection and Violation of Disabled People's Most Basic Human Rights* (Routledge, 2008); Frankie Sullivan, 'Not Just Language: An Analysis of Discursive Constructions of Disability in Sentencing Remarks' (2017) 31(3) *Continuum* 411 <<https://doi.org/10.1080/10304312.2016.1275143>>.

214 See, eg, Barney Sneiderman, 'The *Latimer* Mercy-Killing Case: Ruminations on Crime and Punishment' [1997] (5) *Health Law Journal* 1; M David Lepofsky, 'The *Latimer* Case: Murder Is Still Murder When the Victim is a Child with a Disability' (2001) 27(1) *Queen's Law Journal* 319; H Archibald Kaiser, '*Latimer*: "Something Ominous is Happening in the World of Disabled People ..."' (2001) 39(2) *Osgoode Hall Law Journal* 555; Barney Sneiderman, '*Latimer* in the Supreme Court: Necessity, Compassionate Homicide, and Mandatory Sentencing' (2001) 64(2) *Saskatchewan Law Review* 511 ('*Latimer* in the Supreme Court').

215 Legislative Council Legal and Social Issues Committee, Parliament of Victoria, *Inquiry into End of Life Choices: Final Report* (Parliamentary Paper No 174, 9 June 2016) 176 ('*Victorian Inquiry into End of Life Choices*'). See also Otlowski (n 7) 32–3.

As has been discussed above, there are legitimate considerations which may justify or explain leniency in some cases of compassionate involvement in another's death including: the presence of a close and loving relationship, the fact that the offender is frequently suffering from depression or other mental illness, and the lack of any need to rehabilitate the offender or prevent reoffending. However, the 'exceptional degree of leniency'²¹⁶ shown in many cases threatens to bring the law into disrepute. We identify three reasons for this claim. Firstly, leniency in sentencing reflects the fact that the law is out of step with current community values concerning the moral reprehensibility of the offender in these cases. Secondly, inconsistencies in charges and sentences between similar cases detrimentally affect consistency, certainty and equality, which are fundamental components of the rule of law. And thirdly, in failing to distinguish between vulnerable and non-vulnerable persons, the law fails to protect those most in need of its protection.

A Law Is Out of Step with Community Values

The level of leniency identified in charges brought and sentences imposed in practice demonstrates the gulf that exists between the criminal law on the statute books, and the law in action.²¹⁷ Homicide is traditionally regarded as one of the most serious criminal offences, punishable by life imprisonment. However, in almost all of the cases examined in this article, those convicted of murder or manslaughter received sentences of one to three years, wholly suspended. In this respect, the law in practice (the sentences imposed) is in line with contemporary community attitudes towards mercy killing.²¹⁸ Research on community attitudes to homicide in the United Kingdom ('UK')²¹⁹ clearly demonstrates that mercy killing is regarded as the 'least serious' of all the types of homicide considered, either not deserving of prosecution,²²⁰ or worthy of

216 Otlowski (n 7) 31.

217 These phrases stem from Yale Kamisar, 'Some Non-religious Views against Proposed Mercy-Killing Legislation' (1958) 42(6) *Minnesota Law Review* 969, 971. See also CG Schoenfeld, 'Mercy Killing and the Law: A Psychoanalytically Oriented Analysis' (1978) 6(2) *Journal of Psychiatry and Law* 215, 234.

218 Clough, for example, considers a life sentence for murder would be disproportionate to the social heinousness of a genuine mercy killing case: Amanda Clough, 'Mercy Killing, Partial Defences and Charge Decisions: 50 Shades of Grey' (2020) 84(3) *Journal of Criminal Law* 211, 212 <<https://doi.org/10.1177/0022018320914687>>.

219 There is no research directly concerning community attitudes to mercy killings in Australia. As discussed in Part V(B), some judges have referred to community values when passing sentence, and the ACT Director of Public Prosecutions referred to community attitudes in exercising the discretion not to prosecute in O'Riordan's case: see, eg, '*Police v O* – CC2019/3260' (n 4). The following discussion focuses on important research conducted on community attitudes in the United Kingdom ('UK').

220 Professor Barry Mitchell conducted two important surveys of community opinion on sentencing in homicide cases, in 1995 and in 2003. On both occasions, a bare majority of the English public surveyed (51% in the 1995 survey and 59.7% in 2003) recommended that the offender in such cases should not be prosecuted, at least where the victim requested help to die: Barry Mitchell, 'Public Perceptions of Homicide and Criminal Justice' (1998) 38(3) *British Journal of Criminology* 453, 462, 464 <<https://doi.org/10.1093/oxfordjournals.bjc.a014257>>; Barry Mitchell, 'Appendix C: Brief Empirical Survey of Public Opinion Relating to Partial Defences to Murder' in United Kingdom Law Commission, *Partial Defences to Murder* (Final Report, 6 August 2004) 192 [58] ('Brief Empirical Survey'). See also Barry Mitchell and Julian V Roberts, *Exploring the Mandatory Life Sentence for Murder* (Hart Publishing, 2012) ch 6.

only a short sentence of imprisonment.²²¹ However, the law on the books (the serious nature of the offence charged and the head sentence) bears no relationship to the community's lack of denunciation of the conduct.

Further, the stigma associated with homicide, and particularly murder, does not reflect community values. It is often stated that mercy killers do not deserve to be labelled as 'murderers' for acting out of compassion for the suffering of a loved one.²²² The desire not to stigmatise a person as a 'murderer' has led, in many cases, to the exercise of prosecutorial discretion to proceed with alternative, lesser, charges, such as 'assisting suicide'²²³ or 'manslaughter by reason of diminished responsibility'.²²⁴ But these alternative charges do not always fit the facts. In many cases, the offender's role is more active than merely assisting a suicide, and the offender does not always suffer from a mental condition which would meet the criteria of diminished responsibility.²²⁵

Finally, the emphasis given in the law to the sanctity of life also appears out of step with community values. The criminal law insists that the sanctity of life is a principle of such inviolability that a person cannot voluntarily give permission to someone else to end their own life.²²⁶ However, research on public opinion from the UK demonstrates that the person's autonomous choice to end their life is relevant. In fact, the victim's request to die was the single most significant factor affecting public opinion that a mercy killing was of lower culpability.²²⁷ The recent passage

221 Only 14 out of 62 respondents favoured imprisonment, and 11 preferred a term of less than 10 years: Mitchell, 'Brief Empirical Survey' (n 220) 192 [54].

222 Clough (n 218) 213; Ben Livings, 'A New Partial Defence for the Mercy Killer: Revisiting Loss of Control' (2014) 65(2) *Northern Ireland Law Quarterly* 187, 188; Matthew Gibson, 'Pragmatism Preserved? The Challenges of Accommodating Mercy Killers in the Reformed Diminished Responsibility Plea' (2017) 81(3) *Journal of Criminal Law* 177, 178 <<https://doi.org/10.1177%2F0022018317702801>>; Glenys Williams, 'Provocation and Killing with Compassion' (2001) 65(2) *Journal of Criminal Law* 149, 149–50. This was recognised by Justice John Coldrey, a former Victorian Director of Public Prosecutions and the sentencing judge in *Hood* (n 23) and *Maxwell* (n 21), who stated: 'These cases don't sit comfortably in a court setting. The person goes out into society labelled a murderer when their motive has been compassion and love': *Victorian Inquiry into End of Life Choices* (n 215) 175.

223 See, eg, *Larkin* (n 23); *Maxwell* (n 21); *Godfrey* (n 22); *Pryor* (n 22). See also Lindsay Lincoln, 'How the Legalization of Assisted Suicide Should Inform a More Principled and Ethical Treatment of Mercy Killings' (2017) 30(4) *Georgetown Journal of Legal Ethics* 873, 888, referring to the case of Carol Carr in the US.

224 See *Mathers* (n 48); *Dowdle* (n 72); *Sutton* (n 75); *Nicol* (n 24).

225 Amanda Clough, 'Mercy Killing: Three's a Crowd?' (2015) 79(5) *Journal of Criminal Law* 358, 361; Livings (n 222) 191 <<https://doi.org/10.1177%2F0022018315608031>>. In the UK, it has been suggested that the charge of manslaughter by diminished responsibility is frequently preferred to murder as part of a 'benign conspiracy' between psychiatrists and the courts to ensure that those who kill for compassionate motives are not subject to the full force of the law of murder: RD Mackay, 'Diminished Responsibility and Mentally Disordered Killers' in Andrew Ashworth and Barry Mitchell (eds), *Rethinking English Homicide Law* (Oxford University Press, 2000) 55, 79. Dargue refers to it as an 'uneasy truce': Paul Dargue, 'Mercy Killers and the Sentencing Rules: An Uneasy Fit?' (2011) 75(2) *Journal of Criminal Law* 105, 106. The partial defence is not as frequently employed in the Australian cases, except in cases which seem to genuinely fit the defence: *Mathers* (n 48); *Dowdle* (n 72); *Sutton* (n 75).

226 *Justins* (n 42) [30] (Howie J).

227 66.1% of respondents (41 out of 62) identified this as an important factor: Mitchell, 'Brief Empirical Survey' (n 220) 192 [55]. See also Lincoln (n 223) 889.

of legislation permitting voluntary assisted dying in six Australian states²²⁸ may also reflect contemporary community values on this point.

The task of law reform is to bring criminal offences ‘into line with current community perceptions of justice’.²²⁹ Community attitudes demonstrate considerable sympathy towards mercy killings, particularly in cases where the deceased has voluntarily requested assistance to die. This sympathy is not reflected in the significant stigma and grave maximum penalty attached to the crime of murder. Rather than continue to rely on the exercise of prosecutorial discretion to prefer lesser charges to murder, or the exercise of judicial discretion in sentencing, it would be preferable to change the law on the books to reflect community attitudes. For this reason, this article suggests consideration should be given to explicitly including a specific, lesser offence or partial defence for mercy killing or completing a suicide.²³⁰

B Inconsistent Outcomes Offend the Rule of Law

The gap between the law on the books and the law as applied in practice in cases of mercy killing also results in inconsistent outcomes in individual cases.²³¹ Because the law does not reflect community attitudes concerning culpability, in most cases of mercy killing or assisted suicide, the offender either avoids criminal liability or receives a very light sentence, often wholly suspended.²³² However, the outcomes in these cases depend not on the predictable application of clear legal rules, but rather on prosecutorial discretion to bring lesser charges, or judicial discretion in sentencing. This discretion is not universally applied, and in a small number of cases, the criminal law is strictly applied. This is concerning, because the principle of equality before the law (a hallmark of the rule of law) requires that similar cases should be punished alike.²³³ Consistency of sentencing is of utmost importance to the administration of criminal justice and the maintenance of public confidence in the legal system.²³⁴

Table 1 reveals some concerning inconsistencies in both charging and sentencing. In relation to charging, an almost identical action by the offender – suffocating a loved one (who has taken an overdose) with a plastic bag – led to Mathers being

228 *NSW VAD Act* (n 6); *Qld VAD Act* (n 6); *SA VAD Act* (n 6); *Tas EOLC Act* (n 6); *Vic VAD Act* (n 6); *WA VAD Act* (n 6).

229 Law Reform Commission of Victoria, *Homicide* (Report No 40, 1991) 49 [111] (*‘Homicide Report’*).

230 Clough (n 225) 361.

231 Sarah Elizabeth Mathieson, ‘Live and Let Die: The Legalisation of Euthanasia in New Zealand’ (LLB(Hons) Thesis, University of Otago, 2013) 13. The Victorian Legal and Social Issues Committee also recognised this gap between the law on the books and the law in practice, noting that ‘if our law enforcement agencies, those investigating deaths and those presiding over cases, do not believe that a just outcome would be achieved by enforcing the law, then it is time to question the law’: *Victorian Inquiry into End of Life Choices* (n 215) 176.

232 Otowski’s summary of the cases prior to 1993 remains apposite to describe the more recent cases outlined in the present article: see Otowski (n 7) 33.

233 Gabriel Hallevy, *The Right to Be Punished: Modern Doctrinal Sentencing* (Springer, 2013), 108 <<https://doi.org/10.1007/978-3-642-32388-1>>. See generally Brian Z Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge University Press, 2004) <<https://doi.org/10.1017/CBO9780511812378>>.

234 *R v MacNeil-Brown* (2008) 20 VR 677, 690 [37].

charged with murder,²³⁵ whereas Maxwell and Pryor were charged only with assisting suicide.²³⁶ *R v Larkin* and *Carter* provide further illustrations of inconsistencies in both charging and sentencing. Lynda Larkin injected her lover with insulin at his request, because he had a mental illness and wanted to die. Despite this act satisfying all elements of the crime of murder, Larkin was charged only with assisting suicide, and received a three year suspended sentence.²³⁷ But when Stephen Carter injected Gail Marke with heroin because she had a mental illness and wanted to die, he was charged with murder and received a life sentence.²³⁸ Finally, the 11 year sentence of imprisonment imposed in *Blaauw* for killing his wife who had schizophrenia²³⁹ stands in stark contrast to the short or suspended sentences imposed in other cases of non-voluntary killing²⁴⁰ or attempted killing²⁴¹ of a loved one.

The inconsistencies in charges brought and sentences imposed for similar actions taken in very similar circumstances offend the clarity and consistency principles of the rule of law. These principles require that offences accurately and clearly state the punishment for committing them,²⁴² and that outcomes in individual cases follow from the predictable and consistent application of clear legal rules.²⁴³ Inequality in the treatment of offenders is a clear violation of ‘the internal morality of the law’.²⁴⁴ It creates uncertainty, and affects the ability of the criminal law to exercise effective social control, ensuring individuals know what the consequences of committing an offence will be.²⁴⁵

However, when the law in action depends to a significant degree on prosecutorial discretion in charging, and judicial discretion in sentencing, consistency of outcomes cannot be ensured.²⁴⁶ The existence of inconsistent outcomes undermines the principle of equality before the law and has the potential to undermine public confidence in the administration of justice.²⁴⁷ These inconsistencies underscore the pressing need for law reform in this area.²⁴⁸

235 *Mathers* (n 48). The charge was later reduced to manslaughter on the ground of diminished responsibility.

236 *Maxwell* (n 21); *Pryor* (n 22).

237 *Larkin* (n 23).

238 *Carter 2001* (n 23); *Carter Appeal 1* (n 23). Similarly, when Cooper injected his partner with heroin at her request because she suffered intolerable pain and wanted to die, he was also charged with murder and sentenced to 13.5 years in jail: *Cooper* (n 24).

239 *Blaauw* (n 24).

240 See, eg, *Sutton* (n 75); *Dowdle* (n 72).

241 See, eg, *Klinkermann* (n 25); *Riordan* (n 25); *Hollinrake* (n 25); *Nestorowycz* (n 25).

242 Gabriel Hallevy, *A Modern Treatise on the Principle of Legality in Criminal Law* (Springer, 2010) 8–14 <<https://doi.org/10.1007/978-3-642-13714-3>>.

243 Tom Bingham, *The Rule of Law* (Penguin, 2010) 37, 39, 42; Law Council of Australia, ‘Rule of Law Principles’ (Policy Statement, March 2011).

244 Fuller states that the morality of law requires congruence between official action and the declared rules of law: Lon L Fuller, *The Morality of Law* (Yale University Press, 2nd rev ed, 1977) 81.

245 Hallevy (n 233) 108.

246 Kamisar (n 217) 971. See also Alec Samuels, ‘The Compassionate Taking of Life and Assisted Suicide’ (2014) 54(1) *Medicine, Science and the Law* 35, 39 <<https://doi.org/10.1177%2F0025802413502782>>.

247 *Victorian Inquiry into End of Life Choices* (n 215) 173.

248 This recommendation is not new, having been made in 1993: see Otowski (n 7) 34, and earlier by Glanville Williams in 1958. See also *Larkin* (n 23) 41 (Nicholson J); Ben White and Lindy Willmott, ‘How Should Australia Regulate Voluntary Euthanasia and Assisted Suicide?’ (2012) 20(2) *Journal of Law and Medicine* 410, 427–30.

Another way the law offends the clarity and consistency principles of the rule of law is when sentences do not reflect the gravity of the charge. The law draws a sharp distinction between homicide, punishable by life imprisonment, and assisting suicide, punishable by significantly lesser sentences.²⁴⁹ However, in cases of mercy killings, the line between assisting suicide and homicide can be particularly difficult to draw.²⁵⁰ Some cases are prosecuted as assisting suicide (despite meeting the criteria for murder),²⁵¹ and others are prosecuted as murder or attempted murder.²⁵² However, in almost all cases, short suspended sentences were imposed regardless of the crime charged. The lack of proportionality in sentencing to reflect the gravity of the charge undermines the rule of law and threatens to bring the law into disrepute. For this reason we have recommended the introduction of specific offences, such as completing a suicide or mercy killing, punishable by lesser sentences, to remedy this inconsistency and bring clarity to the criminal law.

C Law Does Not Sufficiently Protect Vulnerable People

We have argued that the leniency in sentencing evident in Table 1 generally reflects community attitudes that compassionately motivated killings are less morally reprehensible than other killings. However, there is a serious discrepancy between the law on the books and the law as practised by judges. The reliance on prosecutorial discretion in charging and judicial discretion in sentencing, rather than legal rules, leads to inconsistent outcomes in a minority of cases. We suggest that these reasons justify reform of the law, to more accurately represent community attitudes and prevailing sentencing practices.

However, we would qualify this recommendation in one respect: in relation to non-voluntary mercy killings. In these cases, rather than reform the law to reflect current practice, sentencing practice should be amended to more closely reflect the purposes of the criminal law. In these cases, the level of leniency in sentencing described above fails to convey a level of punishment which is proportionate to the crime. This is also in accordance with community values concerning the protection of vulnerable people.

It is well established that sentencing in criminal cases should be both adequate and proportionate to the crime.²⁵³ In determining the type of punishment to be imposed on a person, courts are required to balance the impersonal facts of the offence (*in rem*) (that is, the social harm caused by the action), and the personal characteristics of the offender (*in personam*), which influences the offender's culpability.²⁵⁴ Our analysis of sentencing remarks demonstrates considerable focus on the characteristics of the offender. Emphasis was placed on early

249 See Part II of this article.

250 See Table 1, where we introduce the term 'completing a suicide' to more accurately describe the conduct in some cases.

251 See *Larkin* (n 23); *Maxwell* (n 21); *Godfrey* (n 22); *Pryor* (n 22).

252 See *Karaca* (n 23); *Carter 2001* (n 23); *Carter Appeal 1* (n 23). Mathers was charged with manslaughter, but would have been charged with murder if his pre-existing mental illness had not made a plea of diminished responsibility possible: *Mathers* (n 48).

253 Lanham et al (n 85) 2–3; Hallevy (n 233) 60.

254 Hallevy (n 233) 57, 60.

acknowledgement of guilt, cooperation with the police and prosecution, the compassionate desire to relieve suffering, and willingness to accept the often onerous task of caring for a loved one.²⁵⁵ These factors were common to offenders both in cases of assisting suicide or voluntary mercy killing, and cases of non-voluntary mercy killing. They are factors deserving of judicial sympathy and meriting lenient sentencing, as they demonstrate that several of the purposes of the criminal law – namely, rehabilitation, specific deterrence, or retribution²⁵⁶ – are not apposite in these cases.

By contrast, very little attention was devoted to the characteristics of the offence, including circumstances of violence and the need to protect vulnerable people within the community from harm, which is another key function of the criminal law.²⁵⁷ Denunciation and general deterrence assume a key role in deterring others in similar situations from assisting their loved ones to die.²⁵⁸

We recognise that not all who died in the assisted suicide and mercy killing cases were vulnerable. One of the themes noted in sentencing was autonomy and choice.²⁵⁹ Many mercy killings and assisted suicides were voluntary – where individuals consciously and deliberately requested their relatives or friends to assist with their death, for reasons which can be considered rational and enduring. However, in cases where a suicidal person with serious mental illness requests assistance to die,²⁶⁰ doubts may be entertained as to whether that person's request is truly voluntary and enduring. Persons with serious mental illness who are suicidal are, by definition, vulnerable.²⁶¹ In some cases, assistance was provided by the person whose duty was to care for the deceased.²⁶² Cases where a person with mental illness requests help to die are more complex, and it might not be possible to simply assume that an explicit request to help in a suicide attempt is a voluntary and settled rational decision.²⁶³ Any law reform in this area needs to be drafted

255 See Part V(A) of this article.

256 See Part IV of this article.

257 See Part IV of this article. Indeed, as Herring has stated, the 'very existence of the criminal law acknowledges that we are vulnerable to harms at the hands of others and need protection from it': Jonathan Herring, *Vulnerable Adults and the Law* (Oxford University Press, 2016) 222 <<https://doi.org/10.1093/acprof:oso/9780198737278.001.0001>>. Protection of the vulnerable is a major theme in many branches of contemporary law: Finn (n 188) 62. Sometimes the criminal law is the only protection available to the innocent: *R v Collins*; *Ex parte A-G (Qld)* [2009] QCA 350, [35] (Keane JA, Holmes JA agreeing at [39]). See also *R v KU*; *Ex parte A-G (Qld)* (2008) 200 A Crim R 151, 163–4 [114] (Jersey CJ, McMurdo P and Keane JA).

258 See Part IV of this article.

259 See Part V(C) of this article.

260 See *Larkin* (n 23); *ANG* (n 61); *Johnstone* (n 24); *Hood* (n 23); *Karaca* (n 23); *Carter 2001* (n 23); *Carter Appeal 1* (n 23); *Walmsley* (n 21).

261 See Part V(D) of this article.

262 For example, *Larkin* was a nurse, who had formed a deep attachment to an extremely unwell psychiatric patient, and accepted him into her home, before later assisting him complete his suicide attempt: *Larkin* (n 23) 42–3 (Nicholson J). See also *Johnstone* (n 24).

263 In *Larkin* (n 23), Nicholson J commented that 'there are varying social and moral views about the duty of a person in your position in the circumstances': at 44. However, he also made comments which were sympathetic to a nurse who assisted her mentally ill lover commit suicide: at 41–2. See also Isra Black, 'Suicide Assistance for Mentally Disordered Individuals in Switzerland and the State's Positive Obligation to Facilitate Dignified Suicide: *Haas c. Suisse*, Cour européenne des droits de l'homme, 1re

with care in order to protect those with mental illness who may be suicidal and vulnerable.

In addition to those who requested to die and who may be vulnerable and in need of protection, some cases considered in this article involved vulnerable adults who had not requested to die. The cases show a disturbing number of those deceased or injured were vulnerable by reason of dementia, disability, or illness, were dependent on others for their care, and were subject to killing or attempts on their life without their request.²⁶⁴ Because the sentencing remarks focused so heavily on the offender's moral culpability, they largely ignored the victim's vulnerability. In our view, the law should clearly distinguish, both in the charges laid and sentences imposed, between voluntary mercy killing on request (at the request of persons who are not vulnerable, and autonomously request assistance to die), and non-voluntary mercy killing (of people who are vulnerable and have not voluntarily asked to die).²⁶⁵ This would also accord with community values, which consider mercy killing more serious where the victim has not requested to die.²⁶⁶

VII REFORM OPTIONS

From the foregoing analysis, it is clear that law reform is needed. At least in the case of voluntary mercy killings and assisted suicide, the substantial penalties and significant stigma attached to a homicide conviction demonstrate that the law is out of step with community values.²⁶⁷ Although prosecutorial discretion in charging and judicial discretion in sentencing can be used to avoid these undesirable results, and to express the relative lack of moral condemnation from the community of this conduct, this is inadequate. Reliance on discretion inevitably leads to inconsistent

Section (20 Janvier 2011) (Unreported)' (2012) 20(1) *Medical Law Review* 157 <<https://doi.org/10.1093/medlaw/fwr033>>.

264 See Part V(D) of this article. See also *Klinkermann* (n 25); *Sutton* (n 75); *Riordan* (n 25); *Nestorowycz* (n 25); *Dowdle* (n 72); *Hollinrake* (n 25); *Pryor* (n 22).

265 Especially those with disability, dementia or incapacity. It is possible that in some cases an elderly person with dementia may have requested assistance to die in anticipation of later losing capacity. Although not expressly stated, this may have been the case in *Pryor* (n 22). Although this does not affect the legal position, it does make the position of the family member who helps fulfil that request ethically more complex. The moral burden such requests places on family members was most clearly articulated in *Attenborough* (n 2), where a son who had refused his mother's request to end her life when she had terminal cancer 'could see how disappointed she was in his response to that request. He felt like a coward': at 13 (Graham AJ).

266 Research in the UK found voluntary request was the single most important factor in community sympathy for mercy killers, ahead of compassionate motive and the suffering or poor quality of life of the victim: Mitchell, 'Brief Empirical Survey' (n 220) 192 [55]; Mitchell, 'Public Perceptions of Homicide and Criminal Justice' (n 220) 460. Members of the public also considered a mercy killing more serious where the person has not requested to die, than where the killing took place at their explicit request: Barry Mitchell, *Appendix A: Report on Public Survey of Murder and Mandatory Sentencing in Criminal Homicides* in United Kingdom Law Commission, *A New Homicide Act for England and Wales?* (Consultation Paper No 177, 2005) 263 [A13] ('*Report on Public Survey of Murder and Mandatory Sentencing*').

267 This was argued in Part VI(A) of this article.

outcomes in some cases, which undermine the principles of clarity, consistency and equality before the law, all of which are essential components of the rule of law. Sentencing offenders is a particularly visible stage in the criminal process. Imposing lenient sentences for the most heinous crimes, such as a suspended sentence for murder, threatens to undermine public confidence in law, which in turn affects the ability of the law to effectively control social behaviour.²⁶⁸ Although voluntary mercy killing is not justified and remains criminal conduct, we agree with Keating and Bridgeman that there is a distinctive wrong committed in these cases which ought to be reflected in the legal categorisation of the wrong done, not viewed as only relevant to the judge in sentencing.²⁶⁹

This final Part considers options for law reform. First, it considers whether legalising voluntary assisted dying will alleviate the problems identified above relating to the criminal law. Then it explores three non-mutually exclusive options for reform within the criminal law where the deceased person is not eligible for voluntary assisted dying but nevertheless requested assistance to die. These are: creating a less serious category of homicide called ‘mercy killing’; introducing a specific statutory offence of ‘completing a suicide’; and creating a partial defence to murder in cases of ‘compassionate motive’.

A Decriminalise Assisted Suicide and Mercy Killing

There have been calls for many decades among academic commentators and others for law reform to decriminalise assisted suicide and mercy killing.²⁷⁰ In the last few years, all six Australian states have passed legislation authorising voluntary assisted dying for people who are terminally ill and follow a prescribed statutory assessment and approval process.²⁷¹ However, these laws will not apply in the majority of the cases described above,²⁷² where the person has a disability, or is suffering from a physical or mental illness that is not terminal. Accordingly, the criminal law has an important and ongoing role to play in this area. Further, even if a person would have been eligible for voluntary assisted dying under those systems, it is appropriate that those acting outside those processes (which include safeguards to ensure appropriate decision-making) would be captured by the criminal law.

268 See Part VI(B) of this article for a more detailed exposition of this argument. See also Mitchell and Roberts (n 220) ch 4, 57–9.

269 Heather Keating and Jo Bridgeman, ‘Compassionate Killings: The Case for a Partial Defence’ (2012) 75(5) *Modern Law Review* 697, 721 <<https://doi.org/10.1111/j.1468-2230.2012.00921.x>>. See also *Homicide Report* (n 229) 51 [116]; Livings (n 222) 203.

270 Glanville Williams, *The Sanctity of Life and the Criminal Law* (Faber & Faber, 1958); Otlowski (n 7) 38–9; Bartels and Otlowski (n 17) 555. See also Clough (n 218) 224–5.

271 *NSW VAD Act* (n 6), *Qld VAD Act* (n 6); *SA VAD Act* (n 6); *Tas EOLC Act* (n 6); *Vic VAD Act* (n 6); *WA VAD Act* (n 6). See also Bartels and Otlowski (n 17) 549.

272 Del Villar, Willmott and White (n 6) 153, 160.

B Specific Offence of Mercy Killing

Creating a specific offence of mercy killing – a separate category of homicide with a lower head sentence than murder – has been recommended by commentators in England and the United States.²⁷³ It has also been considered on several occasions by law reform commissions, both in Australia²⁷⁴ and in the UK.²⁷⁵ This would enable the law to reflect the lower moral culpability²⁷⁶ present in mercy killing cases because of the motive of compassion and the wishes of the deceased, and enable lenient sentences to be imposed in appropriate cases without bringing the law into disrepute, while still sending a clear message to the community that such conduct is criminal.

Murder has been described as an ‘ancient and powerful word ... carrying the strongest possible overtones of moral condemnation’.²⁷⁷ As such, it represents the ‘most serious level of culpability’.²⁷⁸ In view of this, a person should not be convicted of murder unless their conduct is sufficiently heinous or blameworthy. Community surveys in the UK have shown that members of the public consider mercy killings the least culpable form of homicide, and many consider it to be ‘in a class of its own’, not as serious as murder.²⁷⁹ The criminal law’s principle of ‘fair

273 Lincoln (n 223) 888; Clough, (n 225) 372.

274 For over 40 years, law reform commissions have engaged with this suggestion. See, eg, Law Reform Commissioner (Vic), *Law of Murder* (Report No 1, August 1974) (*‘Law of Murder Report’*); Law Reform Commissioner (Vic), *Report for the Year Ended 30 June 1984* (Report No 27, 1985) 6; Criminal Law and Penal Methods Reform Committee of South Australia, *Fourth Report: The Substantive Criminal Law* (Report No 4, 1977) 57–8; See also Otlowski (n 7) 34.

275 The Criminal Law Revision Committee (UK), *Working Paper on Offences Against the Person* (London, 1976), proposed a new offence of ‘mercy killing’, punishable by a maximum term of two years: at 31–4 [79]–[87]. This offence was ‘not well received’, so was not recommended in the Committee’s final report: Criminal Law Revision Committee, *Offences Against the Person* (Report No 14, 1980) 53 [115]. In 1989, the Select Committee of the House of Lords on *Murder and Life Imprisonment* addressed the issue of ‘mercy’ killing by sentencing reform rather than amending the substantive offence. It recommended that ‘mercy killing’ remain classified as murder, but that the mandatory sentence of life imprisonment should be removed. The recommendation has not been adopted: Dargue (n 225) 109. The 2006 report, considered the issue of mercy killings but declined to make any specific recommendations: Law Commission (UK), *Murder, Manslaughter and Infanticide* (Report No 304, 28 November 2006).

276 The Law Reform Commission of Western Australia has commented that ‘[i]ntentional killing of another person for compassionate reasons and with that person’s consent would generally be considered significantly less morally culpable’ than killing for other reasons: Law Reform Commission of Western Australia, *Review of the Law of Homicide* (Final Report, September 2007) 4. See also Victorian Law Reform Commission, *The Forfeiture Rule* (Report, September 2014) [4.45], [4.49]; South Australian Law Reform Institute, *Review of the Common Law Forfeiture Rule* (Background Information and Consultation Questions, 5 March 2019) 2.

277 GD Woods, ‘The Sanctity of Murder: Reforming the Homicide Penalty in New South Wales’ (1983) 57(3) *Australian Law Journal* 161, 162. See also Mitchell, ‘Public Perceptions of Homicide and Criminal Justice’ (n 220) 454.

278 See the four guiding principles articulated by the Law Reform Commission of Victoria: *Homicide Report* (n 229) 49 [112].

279 In Mitchell’s 1995 study, 403 out of 822 respondents placed mercy killing in a ‘class of its own’, and 43% rated it 1/20 on a scale of seriousness of homicide, with an average rating of 3.4/20, indicating that it ranks as one of the least serious homicides: Mitchell, ‘Public Perceptions of Homicide and Criminal Justice’ (n 220) 469. In fact, when committed in response to a voluntary request from the victim, many do not consider it should be prosecuted at all: see Mitchell, ‘Brief Empirical Survey’ (n 220) 192 [55].

labelling' requires the law to employ appropriately labelled offences and distinct sentencing provisions, 'so that offenders can be formally stigmatized in proportion to their blameworthiness'.²⁸⁰ In mercy killing cases, the motive of compassion for another's suffering reduces the blameworthiness of the killing, and this should be reflected by creating a separate offence distinct from murder.²⁸¹

The most specific proposal in this regard was made in 1976 by the Criminal Law Revision Committee in the UK. It suggested the introduction of a specific offence of mercy killing, limited by two factors: the compassionate motive of the offender, and the grave physical condition of the victim.²⁸² This would encompass many of the mercy killing cases described in Table 1, both voluntary and non-voluntary,²⁸³ with the exception of those suffering solely by reason of mental illness.²⁸⁴ The introduction of a specific offence of mercy killing was also suggested by the Law Reform Commissioner of Victoria in 1984.²⁸⁵ This proposal did not specify whether it would be restricted to deaths which were voluntarily requested, or to people suffering from certain types of conditions.²⁸⁶

Several European countries, such as Germany,²⁸⁷ the Netherlands²⁸⁸ and Switzerland,²⁸⁹ already have a specific offence of voluntary killing carried out

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- 280 Mitchell, 'Public Perceptions of Homicide and Criminal Justice' (n 220) 454. See also James Chalmers and Fiona Leverick, 'Fair Labelling in Criminal Law' (2008) 71(2) *Modern Law Review* 217, 229 <<https://doi.org/10.1111/j.1468-2230.2008.00689.x>>; Thomas Crofts, 'Two Degrees of Murder: Homicide Law Reform in England and Western Australia' (2008) 8(2) *Oxford University Commonwealth Law Journal* 187, 195–200 <<https://doi.org/10.1080/14729342.2008.11421496>>.
- 281 See Lord Justice Lawton, 'Do We Need a New Offence of "Mercy Killing"?' Mercy Killing, the Judicial Dilemma' (1979) 72(6) *Journal of the Royal Society of Medicine* 460 <<https://doi.org/10.1177/014107687907200613>>; Mitchell and Roberts (n 220) ch 4, 57.
- 282 The victim needed to be either: (i) permanently subject to great bodily pain or suffering; or (ii) permanently helpless from bodily and mental incapacity; or (iii) subject to rapid and incurable bodily or mental degeneration: *Working Paper on Offences Against the Person* (n 275) [82]. See also David Farrier, 'The Criminal Law Revision Committee Working Paper on Offences against the Person' (1977) 40(2) *Modern Law Review* 206, 211; Otlowski (n 7) 35.
- 283 See examples of both voluntary and non-voluntary killings given in Lawton (n 281). For criticisms both of the inclusion of non-voluntary killings and the exclusion of mercy killings of those with mental illness, see Farrier (n 282) 212.
- 284 See, eg, *Johnstone* (n 24); *Blaauw* (n 24); *Larkin* (n 23); *Karaca* (n 23).
- 285 It had previously been considered and rejected in 1974: *Law of Murder Report* (n 274).
- 286 Victoria Law Reform Commissioner, *Murder: Mental Element and Punishment* (Working Paper No 8, 1984) 27; *Law of Murder Report* (n 274) 6. See also Otlowski (n 7) 35.
- 287 In Germany, 'Whoever is induced to kill at the express and earnest request of the person killed incurs a penalty of imprisonment for a term of between six months and five years': *Strafgesetzbuch* [Criminal Code] (Germany) § 216.
- 288 Article 293 of the *Wetboek van Strafrecht* [Criminal Code of the Kingdom of Netherlands] (Netherlands) 3 March 1881 states that 'Any person who terminates the life of another person at that person's express and earnest request shall be liable to a term of imprisonment not exceeding twelve years or a fine of the fifth-category.' This offence does not apply to a physician who terminates a person's life in accordance with article 2 of the *Wet Toetsing Levensbeëindiging op Verzoek en Hulp bij Zelfdoding* [Termination of Life on Request and Assisted Suicide (Review Procedures) Act] (Netherlands) 12 April 2001.
- 289 In Switzerland, 'A person who, for decent reasons, especially compassion, kills a person on the basis of his or her serious and insistent request, will be sentenced to a term of imprisonment.' The minimum term is three days, and the maximum is three years: *Schweizerisches Strafgesetzbuch* [Swiss Criminal Code] (Switzerland) 21 December 1937, SR 311.0 arts 40, 114 (in force since 1 January 1942). See Christian Schwarzenegger and Sarah J Summers, *Criminal Law and Assisted Suicide in Switzerland: Hearing*

at the victim's 'express and earnest request'. These offences do not require a compassionate motive,²⁹⁰ and carry a lower head sentence than traditional homicide offences.²⁹¹ They apply only where the killing was expressly requested by a competent person, not in cases of non-voluntary mercy killing. As noted above, in Australia a considerable minority of 'mercy killings' or attempted mercy killings are carried out without the request or consent of the victim.²⁹²

In our view, if a lesser class of homicide in the case of 'mercy killing' were to be introduced, it should combine elements from both of these models. First, like the European examples, it should be limited to deaths which are expressly and voluntarily requested by a person who has capacity and has an enduring desire to die. Although some commentators consider an offence of 'mercy killing' should apply in both voluntary and non-voluntary cases,²⁹³ we consider that it is an essential function of the criminal law to protect vulnerable people who have not chosen to die from life-endangering acts at the hands of those closest to them.²⁹⁴ Where the person has persistently expressed a settled wish to die, the argument based on vulnerability has less force than the argument based on respect for autonomy.²⁹⁵

Second, like the English model, the offence should only be available where there is clear evidence that the motive of killing is compassion or love.²⁹⁶ This accords with community values,²⁹⁷ and with existing practice in exercising discretion to press lesser charges, or impose lenient sentences in cases of compassionate motive.²⁹⁸ It is

with the Select Committee on the Assisted Dying for the Terminally Ill Bill, House of Lords (Report, 2005). Similar offences exist in other jurisdictions, including Colombia and Japan: Sabine Michlowski, 'Legalising Active Voluntary Euthanasia through the Courts: Some Lessons from Colombia' (2009) 17(2) *Medical Law Review* 183 <<https://doi.org/10.1093/medlaw/fwp012>>; *Penal Code* (Japan) Act No 45 of 1907, art 202. See also Stanley Yeo, 'Right to Die' (2003) 28(2) *Alternative Law Journal* 89.

290 Although a compassionate motive is relevant in Switzerland, it is not a requirement, and is not specifically mentioned in the relevant offence in either Germany or the Netherlands.

291 It carries a maximum of 3 years imprisonment in Switzerland, 5 years in Germany, and 12 years in the Netherlands.

292 See Part III(D) of this article.

293 Clough, 'Mercy Killing: Three's a Crowd?' (n 225); Lincoln (n 223). A further unresolved issue is whether a voluntary request must be made at the time of death or whether it could be made at an earlier time when the deceased was competent, but acted upon at a later time when the deceased lacked capacity. This issue of a previous request for death arose, for example, in *Pryor* (n 22) (Hill AJ).

294 As Mullock has observed, it is difficult to conceive of an act causing death being 'compassionate' unless the person has indicated a clear wish that death is preferable to ongoing suffering: Alexandra Mullock, 'Overlooking the Criminally Compassionate: What Are the Implications of Prosecutorial Policy on Encouraging or Assisting Suicide?' (2010) 18(4) *Medical Law Review* 442, 455 <<https://doi.org/10.1093/medlaw/fwq027>>. Crofts agrees that it should be limited to voluntarily requested killing: Crofts (n 280) 203.

295 See Barney Sneiderman, 'Latimer, Davis, and Doerksen: Mercy Killing and Assisted Suicide on the Op Ed Page' (1997) 25(3) *Manitoba Law Journal* 449, 464.

296 This would exclude neutral or disinterested motives, as in the cases *Carter 2001* (n 23); *Carter Appeal 1* (n 23).

297 Focus group participants in the UK considered it was 'vital to know whether the case was a "genuine mercy killing" – had the victim truly and freely wanted to die, and was the killer's motive a "good" one?': *Report on Public Survey of Murder and Mandatory Sentencing* (n 266) 263 [A13]. See also *Report on Murder, Manslaughter and Infanticide* (n 275) [7.17].

298 See, eg, the Director of Public Prosecutions (UK), 'Suicide: Policy for Prosecutors in Respect of Cases of Encouraging or Assisting Suicide' (Policy Statement, 2014). This policy introduced guidelines not to

commonly objected that it is difficult to translate the emotion of compassion into a precise legal definition.²⁹⁹ Keating and Bridgeman's work constitutes an important first step towards an adequate definition of compassionate motive.³⁰⁰ It may also be possible to define it negatively, as being an other-focused motivation, not a self-focused motivation (such as financial gain,³⁰¹ or relief from the burden of caring for a relative who is sick or has a disability). Compassionate motive is also often objected to on the basis of difficulties of proof. While it is undeniably difficult to prove a motive of compassion in circumstances where the person who is uniquely positioned to bear witness to the suspect's true motives has died,³⁰² commentators believe juries and judges are experienced and equipped at finding facts in similar circumstances.³⁰³ As was seen in *R v Ritchie* ('*Ritchie*'), the courts are prepared to reject the assertions of a family member that their loved one requested assistance to die, where the evidence on this point is equivocal.³⁰⁴ To alleviate this concern, the circumstances of the death or the person's wishes may even be video recorded, as occurred in *R v Attenborough*.³⁰⁵

Third, as in the UK proposal, the offence should be restricted to those with serious or chronic illness, pain or disability.³⁰⁶ Although concern has been expressed by some that this offence would decrease the protection afforded by the criminal law to vulnerable people, particularly those with disability,³⁰⁷ if the offence were restricted to those clearly and voluntarily wish to die, no one else is involved in assessing that certain lives are intolerable or not worth living. It would also be important to consider, in the case of mental illness, whether a person was suicidal and lacking capacity, or the desire to die was competent, settled and enduring. This would alleviate the concern that vulnerable people are not being protected.

C 'Compassionate Motive' as a Partial Defence to Murder

An alternative to recognising 'mercy killing' as a specific, lesser class of homicide would be to recognise 'compassionate motive' as a partial defence which reduces murder to manslaughter, analogous to the defence of provocation. This was suggested

prosecute those who assist a suicide particularly where the motive was compassionate, in response to the decision in *R (on the application of Purdy) v Director of Public Prosecutions* [2010] 1 AC 345: Mullock (n 294) 443.

299 Criminal Law Revision Committee, *Offences Against the Person* (n 275) 53 [115]; House of Lords, *Report of the Select Committee on Medical Ethics* (HL Paper 21–1, Session 1993–94), [260], cited in Mackay (n 225) 79–80; Lawton (n 281) 461.

300 See Keating and Bridgeman (n 269) 712–15.

301 As was the case in *Morant* (n 33); *Justins* (n 42) and *Nielsen* (n 22). See also Victorian Law Reform Commission, *The Forfeiture Rule* (Consultation Paper, March 2014) 28 [3.65].

302 Mullock (n 294) 453.

303 Lincoln (n 223) 889; Williams (n 222) 157; Sneiderman, '*Latimer* in the Supreme Court' (n 214) 537–8.

304 *Ritchie* (n 34).

305 *Attenborough* (n 2).

306 In the US, the proposal articulated by Lincoln is limited to those with terminal illness or in severe, intractable pain: Lincoln (n 223) 888. Comments to this effect were made in *Hood* (n 23) [35] (Coldrey J) and *Blaauw* (n 24) [38] (Forrest J). Some judges have also expressed sympathy for people with disability who desire assistance to end their lives: *Godfrey* (n 22) 1 (Underwood J); *Nielsen* (n 22) 1–14 (Dalton J), citing *R v Johnstone* (n 24).

307 See, eg, Lepofsky (n 214).

by the Law Reform Commissioner of Victoria in 1984,³⁰⁸ and was considered briefly by the United Kingdom Law Commission in 2006, without leading to any recommendations.³⁰⁹ It has also been suggested by several commentators, including Barney Sneiderman in Canada, Amanda Clough in England, and Thomas Crofts in Australia.³¹⁰ The basis of this suggestion is parity with other emotional excuses recognised by the law. It is argued that the partial defence of provocation recognises the role played by anger in provoking criminal violence and recognises the role of fear when ‘battered women’ kill their abusive partners when no immediate threat is present.³¹¹ Compassion is no more morally blameworthy than anger and fear, since it is a moral virtue. Compassion is also one of the foundations of our system of justice, whereas fear or anger are not. Accordingly, it is argued that introducing a partial defence of compassionate motive for cases of mercy killing would bring the law ‘in line with other emotional response defences’.³¹² To date, the only relevant model is the Model Penal Code (US), which provides a partial defence in cases of ‘extreme mental or emotional disturbance’.³¹³ This covers a broad range of extreme emotions, including anger, fear and distress.³¹⁴

A partial defence operates to reduce a charge of murder to manslaughter,³¹⁵ which would remove the stigma associated with a murder conviction, and lessen the disparity between the maximum head sentence and the lenient sentence which

308 This recommendation had also been rejected in 1974: *Law of Murder Report* (n 274).

309 *Murder, Manslaughter and Infanticide* (n 275) 147–52.

310 Barney Sneiderman, ‘Why Not a Limited Defence? A Comment on the Proposals of the Law Reform Commission of Canada on Mercy-Killing’ (1985) 15(1) *Manitoba Law Journal* 85, 95 (‘Why Not a Limited Defence?’); Sneiderman, ‘The *Latimer* Mercy-Killing Case’ (n 214); Clough (n 225); Clough, (n 218); Crofts (n 280) 203.

311 See Clough (n 225) 359. See also Susan SM Edwards, ‘Anger and Fear as Justifiable Preludes for Loss of Self-Control’ (2010) 74(3) *Journal of Criminal Law* 223 <<https://doi.org/10.1350%2Fjcla.2010.74.3.638>>; Suzanne Uniacke, ‘Emotional Excuses’ (2007) 26(1) *Law and Philosophy* 95 <<https://doi.org/10.1007/s10982-006-0003-y>>.

312 Clough (n 225) 372. See also Mackay (n 225) 81, citing Joshua Dressler, ‘Reaffirming the Moral Legitimacy of the Doctrine of Diminished Capacity: A Brief Reply to Professor Morse’ (1984) 75(3) *Journal of Criminal Law and Criminology* 953 <<https://doi.org/10.2307/1143651>>; Keating and Bridgeman (n 269) 710–11; Sneiderman ‘Why Not a Limited Defence?’ (n 310) 95. In 2006, the United Kingdom Law Commission stated: ‘Under the current law, the compassionate motives of the ‘mercy’ killer are in themselves never capable of providing a basis for a partial excuse. Some would say that this is unfortunate. On this view, the law affords more recognition to other less, or at least no more, understandable emotions such as anger (provocation) and fear (self-defence)’: *Report on Murder, Manslaughter and Infanticide* (n 275) [7.7].

313 Model Penal Code § 210.3(1)(b) (Am Law Inst, Proposed Official Draft 1962). See also Joshua Dressler, ‘Reflections on Excusing Wrongdoers: Moral Theory, New Excuses and the Model Penal Code’ (1988) 19(3) *Rutgers Law Journal* 671.

314 Indeed, Glenys Williams has recommended that mercy killing could be incorporated within the existing defence of provocation, in line with the recognition of battered women who kill. The defence of provocation has been expanded from crimes of passion and anger, to include loss of self-control arising from prolonged exposure to abuse. Williams suggests that the sense of futility, exhaustion, despair and pity experienced by watching a loved one suffer and repeatedly beg to be killed may cause a similar loss of control: Williams (n 222) 156. See also Paul R Taylor, ‘Provocation and Mercy Killing’ [1991] (February) *Criminal Law Review* 111.

315 See Bronitt and McSherry (n 12) 307, 329.

is usually imposed in practice in such cases, in line with community sentiment.³¹⁶ Although Jeremy Horder has asserted that compassionate motive should be a complete defence,³¹⁷ most commentators believe it should operate as a partial defence, akin to provocation, recognising that the conduct is morally wrong, but the offender's culpability is reduced given the emotional distress experienced by someone watching a loved one suffer.

The primary focus of a partial defence would be on the existence of clear compassionate motive.³¹⁸ According to Clough, the fact the offender has a close and personal relationship with the victim is an important part of developing compassion for the victim's suffering and willingness to assist them to achieve their desire.³¹⁹ Sneiderman proposes that compassion should be tested both subjectively (from the perspective of the offender) and objectively (according to an 'ordinary person' test),³²⁰ which Clough also supports.³²¹ Ultimately, it is a matter for the jury as finder of fact to distinguish genuine compassion from selfish or ignoble motives, as it does in other cases.³²²

This partial defence should also be available only in cases where the victim had serious or chronic illness, pain or disability.³²³ Whether the victim has expressly and voluntarily requested assistance to die would be relevant in sentencing, but given the focus on the offender's emotional state, the defence may be available in some cases where the deceased had not requested to die.³²⁴

D Specific Offence of Completing a Suicide

A third possibility, which has not been suggested in any law reform proposals or the academic literature, but which stems from an analysis of the facts of the mercy killing cases described above,³²⁵ is creating a new offence of 'completing a suicide'. This would apply only in some instances of mercy killing. It would enable recognition that some conduct – for example, in suffocating a loved one who has

316 This idea was considered, and rejected, by the Victorian Law Reform Commission in 1974: *Law of Murder Report* (n 274). See also Otlowski (n 7) 36.

317 Horder (n 134) 313–14. Horder considers it should be a complete defence to both murder and assisted suicide. For a counter-argument, see Laing (n 135).

318 The same problem of defining 'compassionate motive' would apply as applies to a specific offence of mercy killing: *Report on Murder, Manslaughter and Infanticide* (n 275) [7.7].

319 Clough (n 225) 370–1. This may also explain why Carter was not considered a case of 'mercy killing': *Carter 2001* (n 23); *Carter Appeal 1* (n 23).

320 Sneiderman, 'Latimer in the Supreme Court' (n 214) 538.

321 Clough (n 225) agrees that it is necessary that the offender had a reasonable and genuine belief that the act was necessary to end the victim's suffering: at 370–1.

322 Sneiderman, 'Latimer in the Supreme Court' (n 214) 538; Otlowski (n 7) 37; Horder (n 134) 312–13.

323 Sneiderman would limit his proposal to grievous suffering, not mere disability: Sneiderman, 'Latimer in the Supreme Court' (n 214) 537–8. Clough restricts hers to terminal illness or a disease/disability which would substantially impair both life expectancy and the quality of life: Clough (n 225) 370–1.

324 Clough states that mercy killing could be a partial defence in both voluntary and non-voluntary situations (that is, where the person believes it is in the best interests of the victim to end their pain and suffering, as in the case of *R v Inglis* [2010] EWCA Crim 2637). However, she also considers it would be a relevant consideration if the victim had reached a clear and informed decision to die, and the actor had attempted to dissuade the person: Clough (n 225) 371.

325 See Table 1.

already taken an overdose with the intention of ending his or her life – is less morally culpable than murder, but more culpable than merely assisting a suicide.³²⁶ To ensure this offence is only charged in appropriate cases, it may be desirable to limit it to circumstances where the deceased had a serious or chronic illness, pain or disability; the deceased had a definite intention to die and had taken steps towards this end;³²⁷ and the offender was motivated by compassion in completing the suicide attempt. As with the proposed offence of ‘mercy killing’, definitional issues would be critical to the workability of this suggestion.

E Summary

The legalisation of assisted dying, at least in the narrow version introduced in Australian states, will not alleviate all the concerns raised in this article. The majority of cases of assisted suicide and mercy killing determined by the courts did not involve a person in the final stages of a terminal illness.³²⁸ The recent case of *Stratton* also demonstrates that a person may not be willing to go through the procedural hurdles required by assisted dying laws, and may still request a loved one to assist them to commit suicide outside the legal framework.³²⁹ Thus, there remains a need for regulation by the criminal law. However, the gulf between the head sentences and sentences typically imposed by judges demonstrates a significant discrepancy between community values in relation to mercy killing and the law on the books.

Reform of the criminal law to introduce a lesser class of homicide termed ‘mercy killing’, a specific offence of ‘completing a suicide’, or a partial defence of ‘compassionate motive’ (as described above), would enable the prosecution to effectively exercise discretion in charging to reflect the moral blameworthiness of the conduct. These offences are not mutually exclusive, and on the same facts the prosecution would have the discretion to charge a person with completing a suicide (as in *Pryor*), mercy killing (as in *R v Thompson*),³³⁰ or murder (as in the case of *Ritchie*, where the suffocation was not an act of compassion for the suffering

326 See, eg, *Larkin* (n 23); *Maxwell* (n 21); *Pryor* (n 22); *Karaca* (n 23); *Mathers* (n 48).

327 The requirement of a voluntary request to die, proposed in the context of a specific offence of ‘mercy killing’, is less relevant in the context of completing a suicide. This is because the deceased has already demonstrated an intention to die by taking action to end her life. It is suggested that the deceased would appreciate assistance to complete the suicide, even if that assistance was not expressly requested.

328 Del Villar, Willmott and White found that only 4 out of 27 cases met the criteria of terminal illness: Del Villar, Willmott and White (n 6) 178.

329 In *Stratton* (n 9), an 80-year-old man suffering incurable bowel cancer (among other conditions) attended his doctor and expressed a wish to access assisted dying: at [5], [10]. His doctor told him the process might take two weeks, and his cancer specialist would also need to be involved: at [11]. Stratton insisted he did not want to wait, and requested his son assist him to die that day: at [17]–[18]. The son was charged with murder, but pleaded guilty to aiding or abetting his father’s suicide.

330 Thompson suffocated his wife with a pillow, at her request. She had multiple sclerosis, her condition was progressively deteriorating, and she did not want to go into residential aged care or palliative care. Thompson had been her devoted carer for 15 years: *R v Thompson* (Local Court of NSW, Magistrate Railton, 21 February 2005), discussed in Cowdery (n 28) and Sarah Steele and David Worswick, ‘Destination Death: A Review of Australian Legal Regulation around International Travel to End Life’ (2013) 21(2) *Journal of Law and Medicine* 415, 419–20.

of the deceased).³³¹ Introducing these additional offences would also enable sentencing judges to impose suspended sentences where the circumstances were sympathetic,³³² but jail terms where the circumstances were less sympathetic,³³³ without bringing the criminal justice system into disrepute.

However, because, in our opinion, a statutory offence of mercy killing should be limited to cases where the victim voluntarily requested to die, non-voluntary killings would generally continue to be dealt with by the ordinary law of homicide.³³⁴ This clear distinction between voluntary and non-voluntary mercy killings may strengthen the argument for stricter sentences in non-voluntary cases, and would provide greater protection of vulnerable people.

VIII CONCLUSION

Mercy killings are some of the most difficult cases dealt with by judges in sentencing. This is because they often involve a combination of aggravating features (such as a vulnerable victim, breach of trust, and often significant planning and premeditation), alongside the mitigating factor that the offender genuinely believed that the killing was an act of compassion.³³⁵

This article has shown how the criminal law simultaneously provides both too much protection and not enough protection for members of the community. By continuing to treat all actions causing death as murder, even where the deceased has requested assistance to die, the law is out of step with community values. Sentences showing sympathy for a person's actions in such cases are usually extraordinarily lenient, which undermines the rule of law principles of clarity and predictability. On the other hand, the lenient sentences handed down in cases of non-voluntary killings intended to relieve the perceived suffering of a loved one also bring the law into disrepute, by providing insufficient protection to some of the most vulnerable in our community. It is time to rethink the criminal law, to ensure it strikes a proper balance between protection of the vulnerable and mercy for those who act out of compassion to fulfil the requests of their loved ones.

331 The authors are indebted to an anonymous reviewer for suggesting this point.

332 See, eg, *Maxwell* (n 21).

333 See, eg, *Nielsen* (n 22).

334 There may be limited exceptions if a partial defence of 'compassionate motive' is introduced, as that would be broad enough to apply to both killings of persons who voluntarily requested assistance, and those who were suffering but had not requested to die.

335 Keating and Bridgeman (n 269) 704. See also *Inglis* (n 324) [51] (Lord Judge CJ, Irwin J and Holroyde J).