

## Impact case study (REF3)

<b>Institution:</b> King's College London		
<b>Unit of Assessment:</b> 18 Law		
<b>Title of case study:</b> Assisted dying: influencing the global debate and changing the law		
<b>Period when the underpinning research was undertaken:</b> 2007 – 2013		
<b>Details of staff conducting the underpinning research from the submitting unit:</b>		
<b>Name(s):</b>	<b>Role(s) (e.g. job title):</b>	<b>Period(s) employed by submitting HEI:</b>
Penney Lewis	Professor of Law	From 1/8/95
<b>Period when the claimed impact occurred:</b> Aug 2013 – Dec 2020		
<b>Is this case study continued from a case study submitted in 2014?</b> Y		

### 1. Summary of the impact

Research by King's College London's Professor Penney Lewis informed and influenced in many jurisdictions the complex ethical debate as to whether and how assisted dying should be decriminalised. She provided an evidence-based approach that offers the public, courts and policymakers an informed critique of the options for regulating medical assistance in dying (MAiD). Lewis's research, coupled with her expert submissions to courts and legislatures, contributed directly to legal changes in Australia and Canada, and significantly influenced heated policy and public debates on the issue in England and Wales, and Ireland. Her evidence debunking the claim that Belgian-style legalisation creates a 'slippery slope' to non-voluntary euthanasia was influential in a landmark decision by the Supreme Court of Canada that led to the decriminalisation of assisted suicide in Canada in June 2016. Over 13,000 Canadians have now received MAiD, and medical practitioners can prescribe or administer drugs without fear of prosecution. In turn, the Canadian experience is informing the debate in other countries.

### 2. Underpinning research

Lewis's comparative research (all conducted at King's prior to her secondment as a Law Commissioner for England and Wales from January 2020) examined the effectiveness of different legislative models for assisted dying. The debate in this area tends to be dominated by partisan arguments that address assisted dying as a transcendent and ethical question, neglecting the contexts in which individual jurisdictions make decisions about it. Existing comparative research tends to focus on the experience of assisted dying in practice, rather than on the effects of the *process* of legalisation. Lewis's contribution has avoided these pitfalls. Her work is premised on the idea that it is essential to understand the context of different legal frameworks in order to interpret meaningfully the data from jurisdictions that allow assisted dying.

Lewis's research achieved three important goals: it demonstrated the significance of the choice of route towards permitting MAiD; it assessed the effectiveness of different legal and regulatory regimes; and it found that there was no evidence to support the slippery slope argument.

#### **Choice of route and assessing the effectiveness of existing regulatory regimes**

The legalisation of MAiD has been effected in different ways: by constitutional courts finding that individuals have a right to end their lives; by criminal courts reinterpreting existing defences to criminal charges; and by legislatures passing specific legislation. Evidence from jurisdictions that allow assisted dying provides important information about how different mechanisms work in practice. To interpret this data meaningfully, however, it is essential to understand the context of different legal frameworks.

Lewis's work includes a comparative evaluation of regulation in the permissive jurisdictions of Belgium, the Netherlands, Switzerland and the US state of Oregon and the evidence of the effectiveness of individual safeguards [1,2,3]. It has also included a critique of the informal or 'soft law' approach taken in England and Wales in which decisions about pursuing prosecutions for assisting another person to die are based on guidance issued by the Director of Public Prosecutions (DPP) [4]. Lewis found that this has not worked well. She argued that a shift of focus

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away from the ‘victim’, and a desire to avoid appearing to create a regulatory regime, facilitates assisted suicide in cases that would not be permitted by most regimes, whilst also exposing helpers to the risk of prosecution. Lewis showed that elements of the DPP’s guidance ensure that assistance remains an amateur activity carried out by inexperienced individuals without – as happens in Switzerland – the assistance of professionals or professional organisations. The risks associated with this approach are significant, most notably a higher risk of botched suicides [4]. Lewis recommended that the most effective regime for England and Wales would be a two-track regulation that gives greater weight to prospective assessment (granting permission or legal immunity before assistance occurs) coupled with strong retrospective scrutiny (deciding not to prosecute after assistance has occurred) [2].

#### Debunking the ‘slippery slope’ arguments

Lewis’s research evaluated the impact of slippery slope arguments in the context of different regimes. She concluded that current evidence does not indicate there is either a *logical* or an *empirical* slippery slope [4,5,6].

Opponents of MAiD often cite the Netherlands as evidence of a slippery slope. Physicians there originally used the defence of ‘necessity’ to avoid criminal charges (namely that helping the patient to die was necessary to prevent the patient suffering). In the first cases that allowed this defence to be used, the patient had requested MAiD. The defence was then used to allow termination of life in cases where the patients were unable to communicate but doctors deemed it necessary to relieve suffering. One of Lewis’s most important conclusions was that this was not due to a slippery slope but rather was a logical application of the principle of ‘necessity’. It is the grounding of the permission in doctors’ duties (rather than patients’ rights) that explains the Dutch legal acceptance of euthanasia where necessary to relieve the suffering of an incompetent patient [5].

Lewis also found that there was no empirical evidence that legalisation increases the rate of non-voluntary euthanasia (in Belgium and the Netherlands) or that such rates were necessarily higher under a prohibitive approach where the law prevents MAiD (such as in England and Wales). Lewis’s research indicates that cultural factors may significantly influence baseline rates [4,5,6].

### 3. References to the research

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[1] is an expert briefing paper commissioned by the Commission on Assisted Dying, which was set up in 2010 to review the approach to assisted dying in England and Wales. It was later adapted for publication in peer reviewed journals as [2] and [3]. [4] was positively reviewed in the *Medical Law Review*, the leading UK medical law journal. [5] and [6] went through strict peer review processes.

- [1] Lewis, P. & Black, I. (2012). *The effectiveness of legal safeguards in jurisdictions that allow assisted dying*. Demos, London.
- [2] Lewis, P. & Black, I. (2013). Reporting and scrutiny of reported cases in four jurisdictions where assisted dying is lawful: A review of the evidence in the Netherlands, Belgium, Oregon and Switzerland, *Medical Law International*, vol. 13, no. 4, pp.221-239. DOI:10.1177/0968533213508973
- [3] Lewis, P. & Black, I. (2013). Adherence to the request criterion in jurisdictions where assisted dying is lawful? A review of the criteria and evidence in the Netherlands, Belgium, Oregon, and Switzerland, *The Journal of Law, Medicine & Ethics*, vol. 41, no. 4, pp.885-898. DOI:10.1111/jlme.12098
- [4] Lewis, P. (2011). Informal Legal Change on Assisted Suicide: The Policy for Prosecutors, *Legal Studies*, vol. 31, no. 1, pp.119-134. DOI:10.1111/j.1748-121X.2010.00184.x
- [5] Lewis, P. (2007). *Assisted Dying and Legal Change*. Oxford University Press, Oxford. DOI:10.1093/acprof:oso/9780199212873.001.0001
- [6] Lewis, P. (2007). The Empirical Slippery Slope from Voluntary to Non-voluntary Euthanasia, *Journal of Law, Medicine and Ethics* vol. 35, no. 1, pp.197-210. DOI:10.1111/j.1748-720X.2007.00124.x

#### 4. Details of the impact

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Lewis's work helped to inform significant public and political debate in multiple jurisdictions. Providing an evidence-based approach, the research offered judges and policymakers an informed critique of possible regulatory regimes, which is needed for effective decision making. As such, Lewis's work contributed directly to legal change in Canada and Australia, and influenced policy debates in Ireland, and England and Wales.

##### **Changing the law to permit MAiD**

###### Canada

Lewis's work contributed directly to legal change on assisted dying in Canada. The Supreme Court of Canada struck down the federal prohibition on assisted suicide in 2015, resulting in the legalisation of MAiD by statute in June 2016 (Statutes of Canada 2016, ch. 3 – Royal Assent on 17 June 2016) [A].

In the REF period 2008-2013, Lewis acted as an expert witness for the claimants in the British Columbia Supreme Court case *Carter v Canada (Attorney General)* 2012 BCSC 886. Her affidavit drew on her underpinning research [1,4,5] and was cited 11 times in the British Columbia Supreme Court judgment to rebut the slippery slope arguments, which were central to the Canadian Government's unsuccessful case. The Canadian Government had argued that, without criminal prohibition, it would be impossible to protect vulnerable people and the country would descend into condoning murder. Lewis's evidence rebutting this included her research examining the Dutch data on termination of life without request and her evidence that the number of life-ending acts without explicit request in Belgium had declined since the legalisation of assisted dying [1].

The British Columbia Supreme Court's decision was overturned on appeal: the Canadian Government argued that the Court had not been entitled to revisit the constitutionality of the legislation prohibiting assisted suicide because the Supreme Court of Canada had previously considered the issue in 1993. The claimants appealed to the Supreme Court of Canada and Lewis's affidavit was again influential. In fact, her evidence was crucial to the appeal even being heard (*Carter v Canada (Attorney General)* 2015 SCC 5) [B]. In 2015, the Supreme Court of Canada overturned the appeal decision on the basis that there had been "*a change in the evidence that fundamentally shifts the parameters of the debate*" [B, paras 44-45]. This new evidence included Lewis's argument rebutting the slippery slope allegation [B, para 47]. Once the hearing began, the Government asked the Supreme Court of Canada to consider fresh evidence of a slippery slope in Belgium [B, paras 110-113]. The Supreme Court of Canada concluded: "*... The trial judge, after an exhaustive review of the evidence [which included Lewis's affidavit], rejected the argument that adoption of a regulatory regime would initiate a descent down a slippery slope into homicide... We find no error in the trial judge's analysis*" [B paras 120-121].

Since MAiD was legalised, there have been at least 13,000 reported cases of it [C]. For the individuals concerned (and others who are suffering and wish to receive MAiD), the change in the law provides both choice and control over their end-of-life decisions – something they did not have when MAiD was criminalised. Kate Alexander, whose father chose a medically assisted death, spoke of her "*gratitude to the Canadian government for passing legislation allowing MAiD*" for this reason [D].

###### Australia

Legislative reports from the Australian States of Victoria and Western Australia [E], where assisted dying was legalised in 2017 and 2019 respectively, also cite Lewis as having been a strong influence on the decision to legalise MAiD. In the Victorian report, for example, Lewis's evidence was cited during the discussion of the Parliamentary Committee's proposal for safeguards [E1]. The report refers to Lewis's research [3], which proves that the requirement that a request must precede the provision of lawful assistance to die is respected in all reported cases in countries where MAiD is already legal [E1 p.113]. Lewis's evidence reassured lawmakers about the effectiveness of the prior request procedure, which they then enacted.

##### **Influencing policy debates**

In jurisdictions where assisted dying remains criminalised, the experience of other countries is often drawn upon. Due to the sensitivity of the issue, the law will not change without lengthy political and public debate (as the Supreme Court of Canada acknowledged [B, paras 5-10]).

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Lewis's work informed and enriched these debates in several countries, including England and Wales, and Ireland.

### England and Wales

In the REF period 2008-2013, Lewis wrote a commissioned briefing paper for the Commission on Assisted Dying [4]. Together with her work critiquing the existing regulatory regime [5], the briefing paper significantly influenced policy debate in England and Wales. Her key conclusion – that the current policy ensures that assistance in suicide remains an amateur activity – is regularly invoked in Parliament, the media and the courts by those who emphasise the need to change the law. For example, in 2014, during Tony Nicklinson's appeal to the United Kingdom Supreme Court [F], his counsel stressed that the current policy "*encourages amateur assisted suicides, with the obvious risks of botched attempts and the considerable burden on friends and family members who will be treated as criminal suspects*" [F, p.755].

In 2014, the former Lord Chancellor Lord Falconer referred to Lewis's critique of the existing regime during a discussion of the Assisted Dying Bill in Parliament [G]. In articles written for *The Guardian* and *The Economist* [H], Lord Falconer advocated for a change in the law that enables MAiD while providing for effective safeguards that prevent pressure or abuse – the model recommended by Lewis. Her critique was again cited during a Westminster Hall Debate on Assisted Dying Law in January 2020 [G]. During this debate, Karin Smyth MP expressly rejected the slippery slope argument on the grounds of the lack of evidence [G], reflecting Lewis's findings in [1]. This debate in the United Kingdom has begun to shift policy and practice, with Lord Falconer introducing to the House of Lords a new Bill in early 2020 (Assisted Dying Bill [HL] 2019-2021).

### Ireland

In Ireland, Lewis's oral and written evidence to the Joint Committee on Justice and Equality was cited 24 times in their June 2018 Report on the Right to Die With Dignity [I]. This reflected Lewis's reservations about the DPP's Policy for Prosecutors in England and Wales, and the desirability of bringing the practice into the open and regulating it [2].

During recent legislative debate on the Dying with Dignity Bill 2020 in the Oireachtas (Parliament), Deputy Gino Kenny rejected the slippery slope argument based on the experiences of other countries, including Belgium and the Netherlands [J], which was laid out in Lewis's research [4]. The Bill provides for assistance in achieving a dignified and peaceful end of life for qualifying persons. It is currently progressing through the legislature.

## 5. Sources to corroborate the impact

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- [A] Parliament of Canada (2016) Government Bill (House of Commons) C-14 (42-1) – Royal Assent – An Act to amend the Criminal Code and to make related amendments to other Acts (medical assistance in dying).
- [B] *Carter v Canada (Attorney General)* 2015 SCC 5.
- [C] Department of Justice Canada (24 February 2020) Government of Canada proposes changes to medical assistance in dying legislation [press release].
- [D] Dignity in Dying Canada (24 Nov 2017) *Kate's Story: my dad chose a medically assisted death. This is my celebration of his life and choice* [blog post].
- [E] Reports from the Australian States of Victoria and Western Australia citing Lewis's research, including: [E1] Victorian State Government Health and Human Services (2017) *Ministerial Advisory Panel on Voluntary Assisted Dying: Final Report, 2017*; and [E2] Government of Western Australia Department of Health, *Ministerial Expert Panel on Voluntary Assisted Dying: Final Report, 2019*.
- [F] *R (Nicklinson) and another v Ministry of Justice and others (CNK Alliance Ltd and others intervening)* [2014] UKSC 38; [2015] AC 657.
- [G] Report containing selected instances of King's research mentioned in UK Parliamentary debates [collated in document from Hansard records].

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- [H] Charles Falconer refers to Lewis's arguments in: [H1] *The Economist* (21 August 2018) *The law on assisted dying in Britain is incoherent and hypocritical*; and [H2] *The Guardian* (27 May 2015) *Jeffrey Spector deserved better than our cruel law on assisted dying*.
- [I] Houses of the Oireachtas (Ireland) Joint Committee on Justice and Equality (June 2018) *Report on the Right to Die with Dignity*, 32/JAE/18.
- [J] Houses of the Oireachtas (Ireland) Dáil Éireann Debate (1 October 2020) *Dying with Dignity Bill 2020: Second Stage [Private Members]* vol. 998, no. 4.