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Dear Christine,

Assisted Suicide (Scotland) Bill – oral evidence on 28 October

At the meeting of your Committee on 28 October, I undertook to respond in writing to some of the points made by the witnesses. In doing so, I have structured this letter broadly to follow the order of questioning at the meeting. I have also included responses to some additional points made by the witnesses in their written submissions, where these were not referred to directly in oral evidence.

Solicitors as proxies (section 16 of the Bill, particularly (6)(a))

The Law Society of Scotland (LSS) raised concerns that the role envisaged for a proxy in s.16 goes beyond the normal "notarial" function solicitors fulfil in signing documents on behalf of persons unable to sign themselves – in particular, that the obligation on the proxy not to "sign a document unless satisfied that the person understands its effect" (subsection (4)) amounts to an obligation to assess capacity that most solicitors are not qualified to meet. The LSS suggested that it was the irreversible nature of an assisted suicide that makes the difference between this and existing situations where a solicitor may act as proxy. (OR, cols 3-6).

There are three key points to make in this connection. Firstly, the Bill authorises solicitors to serve as proxies but does not oblige any particular solicitor so to act. A solicitor with a conscientious objection to assisted suicide, for example, could decline to be a proxy. Similarly, if the person had complex communication impairments which prevented the solicitor being confident that the subsection (4) test could be met, that could be another reason for declining.

Secondly, it is important to note that the test of understanding set out in s.16(4) is intended to be a common-sense test of comprehension and not a medical test of capacity. Each of the documents that may be signed by proxy – a preliminary declaration, a first request or a second request – must also be considered by one or two registered medical practitioners; and it is for those practitioners (rather than any

proxy) to assess the person's capacity in the context of a first or second request. This is made clear by the wording of the Bill – see, in particular, s.12(1) which defines capacity specifically for the purposes of s.9(2)(a) and s.11(2)(a), with no cross-reference to s.16. Having said that, if it was felt appropriate to extend the list of people qualified to act as proxy to include registered medical practitioners, that is something I would be open to considering at Stage 2.

Thirdly, while an assisted suicide itself is of course irreversible, each of the procedural stages which a proxy may be involved in can be cancelled by the person, at any time (ss. 7 and 15).

In this connection, I would like to respond to a related point made by the LSS in its written submission (page 5), where it suggests that paragraph (d) of s.16(6) – which allows a proxy to be a person with relevant authority under the law of another country or territory – may not be compatible with s.29(2)(a) of the Scotland Act 1998 (which prevents an Act of the Parliament making provision for the law of any country or territory other than Scotland, or conferring functions exercisable in or as regards any such other country or territory).

I have received clear advice to suggest that there is no substance to this suggestion. Section 16(6)(d) doesn't – and doesn't try to – change the law concerning who can perform notarial functions in any other jurisdiction; all it says is that where a person can, under the law of another jurisdiction, perform such functions in that other jurisdiction, that person's proxy signature will be recognised as valid in Scots law. I am therefore quite confident that s.16(6)(d) is consistent with the statutory limits on the Parliament's legislative competence.

<u>Definition of assistance</u>

Both the LSS and the Faculty of Advocates suggested (cols 9 and 10) a need for additional definitions within the Bill, including a definition of the assistance that the Bill authorises, to distinguish such assistance from other actions that could amount to homicide.

It is important to understand that the whole scheme of the Bill is to outline a process – in which various parties play a part – that would constitute lawful assistance to suicide. The assistance in question is therefore defined by its compliance with that scheme, rather than by a specific textual definition. In addition, s.18 plays an important part in defining the assistance that is authorised, by making clear that "assistance must not be such as to infringe the requirement … that the cause of the other person's death must be … that person's own deliberate act".

Most definitions in legislation provide a complete or "exhaustive" explanation of what the defined term means (so that only something that matches the definition qualifies as the thing defined). In the current context, that would presumably involve a list of what would constitute lawful "assistance" – but that would be a near impossible task, given that the Bill is intended to deal with a wide range of possible circumstances and to afford protection to anyone who assists with a suicide (conducted according to the process set out), not just medical practitioners and facilitators. It seems almost certain that something would be inadvertently omitted from the list, with the result that entirely reasonable, even necessary, acts of assistance would be found to fall outside the Bill's protections. The alternative of a

non-exhaustive definition (for example, one giving examples of lawful assistance) is unlikely to address the demand for "clarity", and could even make things worse, as it could make it more difficult to argue that a type of assistance not explicitly mentioned was covered by the Bill's protections than it would be in the absence of such a definition.

I can understand why some witnesses have called for maximum clarity. But striving for such clarity via statutory definition is bound to be unsuccessful – the Bill deals with an inherently complex subject-matter, which does not lend itself to a mechanistic approach. It is partly for this reason that provision is made for directions and guidance. Such documents, by their nature, can more easily deal with the wide range of possible scenarios, and be adapted over time as practical experience of the legislation is gained.

In this connection, it is also worth reiterating the point made by Professor Millar (cols 10-11) – namely, that there is lack of accessibility and foreseeability in the current criminal law, making it difficult or impossible for people to know what assistance they can lawfully offer to someone wishing to end their own life. My firm belief is that the Bill, by setting out a clear legal process within which such assistance can be provided, and by providing a system to oversee and regulate that process, can significantly improve on that current situation. Of course, if the Bill could be further improved in this respect, I would be receptive to considering the relevant amendments.

<u>Savings provision – careless actions</u>

David Stephenson QC, recognising that s.24 was necessary to protect people from prosecution as a result of errors in complying with a complex process, questioned whether it struck the right balance. He said that "to make the test – of whether people will be exposed to prosecution – whether there has been carelessness on their part … [is] at best, unfortunate."

However, this interpretation does not fully reflect the terms of s.24(1), which provides that a person who has acted inconsistently with the Act remains protected from criminal or civil liability so long as he or she acted "in good faith and in intended pursuance of the Act" *and* "has not been shown to have been careless in doing so". The test of whether someone is exposed to prosecution (or civil liability) is not, therefore, just one of carelessness.

In addition, even if carelessness can be shown, the consequence in terms of s.24 is simply that the blanket protection from criminal and civil liability otherwise afforded by the Bill is removed. It does not follow that careless non-compliance renders a person liable to prosecution (or civil action), as most acts of non-compliance would not be the sort of thing that would (in the absence of the Bill) provide a basis for either. No-one would be "at risk of going to jail" because of a careless failure to endorse a request properly, for example, or because of careless agreement to act as a witness when disqualified.

In this connection, it is worth pointing out that Stephen McGowan's understanding of section 24 is incorrect. He suggested (at cols 32-33) that "if a facilitator acted in good faith and intended pursuance of the Act, their conduct would have to be of a reckless rather than careless quality for a prosecution to be pursued". However,

section 24 (as currently drafted) makes clear that conduct need only be shown to have been careless, and not also reckless, in order to allow a prosecution (or civil action) to be pursued.

As noted above, my current view is that this draws the line in the right place, but I would be open to persuasion that replacing "careless" with "negligent" or "reckless" would strike a better overall balance.

Enforcement of the 14-day time-limit (ss.17 and 19(d))

Professor Britton (col 15) questioned how the requirement on facilitators to remove unused drugs within 14 days would work, and how the 14-day time-limit on the act of suicide itself would be enforced.

In terms of the former requirement, this is qualified in two ways – it is one of the things that a facilitator must "use best endeavours" to do, and it is to be done "as soon as practicable" after the expiry of the 14-day time-limit. This drafting deliberately provides some flexibility, and a recognition that the facilitator may not always be in a position to remove unused drugs immediately, or at all, however conscientious they are in carrying out their functions.

The second requirement is different, and there is no equivalent flexibility in the drafting. Because compliance is one of the essential safeguards listed in s.3 – see paragraph (c) – everyone involved in providing assistance has a direct interest in compliance, in order to retain the legal protection afforded by the Bill. In other words, while there is no formal enforcement mechanism, there are good reasons for thinking that the time-limit will be complied with. At the same time, however, the drafting aims to ensure that a breach of the time-limit does not result in people being exposed to legal sanction unfairly or unreasonably (see s.24(2)).

Facilitators – disqualification of those with a financial interest (s.21(1) and paragraph 2(g) of schedule 4)

In your question (col 18) you suggested that the provision in schedule 4 disqualifying as a facilitator anyone who "will gain financially in the event of the person's death" may be flawed, as a prospective facilitator may not know that they are the beneficiary of the person's will. And Coral Riddell, in response, suggested that ignorance might not be a defence, and that the approach taken in the Bill "creates more uncertainty".

I do not accept, however, that this aspect of the Bill gives rise to a significant problem. Anyone who knows or has good reason to believe themselves to be a beneficiary of the person's will has every reason not to take on the role in the first place; and if they only find out afterwards, they would be protected from adverse consequences by s.24. In addition, this latter scenario is surely very unlikely to arise, since anyone who has sufficient regard for a person to make them a beneficiary of their will is very unlikely knowingly to put them in such a potentially awkward position (that is, of being subject to suspicion that they undertook their facilitator role out of self-interest).

However if the Committee believes that a serious concern remains in this area, one possible solution would be to require the person seeking assistance to certify that to the best of their knowledge the facilitator they engage will not gain any such benefit.

Facilitators – minimum age (s.21(2))

Professor Britton expressed a concern that 16 is too young, and in response I pointed out (col 25) that age is only one qualification for becoming a licensed facilitator, and that the most important thing is being able to demonstrate relevant skills and experience to the licensing body. I might also have added that Ministers' right to regulate the licensing and training processes via regulations and guidance (under s.22(2) and s.23(3)) would enable them to require a level of skills and experience that would, in practice, be very difficult for someone at the minimum age to meet.

However if this approach is not considered adequate by the Parliament, I am open to considering amendments to raise the minimum age.

Capacity and mental disorders (s.12(1)(a))

David Stephenson initially suggested that the Bill prevents anyone with a mental disorder – which includes a mental illness – being eligible for assisted suicide, regardless of the severity of the disorder in question. In my exchange with him at cols 25-26, I pointed out that a disqualifying disorder is only one "which might affect the making of the request". Mr Stephenson then argued that the word "might" would require any possibility of the disorder affecting the making of the request being excluded.

However, this does not seem to me a reasonable interpretation of this provision. The test in s.12 is to be applied by the medical practitioner required (under ss.9(2)(a) and 12(2)(a)) to check that the person has capacity to make a first or second request. Like any assessment of capacity, there are few absolutes or certainties in terms of the impact a mental disorder has on specific decisions, and a practitioner would be expected to take a balanced view, rather than expecting complete certainty. However, if the evidence suggests that the current drafting might be an obstacle to the sort of balanced consideration of capacity that I have described, I would certainly be receptive to Stage 2 amendments that would fine-tune this provision accordingly.

Definition of qualifying illnesses and conditions

In its written submission, the Law Society says that the drafting of s.8(5) – specifically, the wording "for the person" – implies that "it is the person alone who will decide" whether their illness/condition is terminal or life-shortening. However, with respect to the Society, this entirely misunderstands the drafting. Those words are to allow for the fact that some illnesses/conditions vary in severity between patients (so what may be a terminal or life-shortening diagnosis for one person may not be for another). There is no suggestion of subjectivity in diagnosis, which remains a matter solely for the two registered medical practitioners under sections 9(2) and 11(2) – who may only endorse the first or second request "if, *in the opinion of the practitioner* … the person has an illness that is, for the person, either terminal

or life-shortening or a condition that is, for the person progressive and either terminal or life-shortening".

Role of the police

Chief Superintendent Flannigan expressed some uncertainty about the nature of the police's role in investigating, after an assisted suicide, whether a crime has been committed (cols 29-30). He also agreed with Stephen McGowan's suggestion (col 30) that it would be more appropriate for the facilitator to report directly to the procurator fiscal rather than to the police (as is currently required under s.20).

For me, the key point is to ensure that the relevant authorities have an opportunity to investigate the circumstances of an assisted suicide in appropriate cases, as a safeguard against abuse, without this leading to the people who have been involved in a carefully regulated process being subjected to unnecessary suspicion or anxiety. I would certainly be happy to bring forward an amendment to s.20 to require the facilitator's report to be made direct to the procurator fiscal, on the understanding that the fiscal would then involve the police if (but only if) there were reasonable grounds for suspicion that the process had been abused, and that an investigation would therefore be in the public interest. While there are bound to be difficult judgements involved in that exercise, the evidence from the witnesses was that there are already teams within Crown Office who have the relevant training, and are expected to make similar judgements in other circumstances (such as when a patient dies following the withdrawal of life-sustaining treatment).

Implications for insurance

In response to a question about the implications for life insurance policies, Mr McGowan noted (col 35) that comparable legislation in some other jurisdictions ensures that the intended beneficiaries of such policies still receive the payments when the cause of death is an assisted suicide.

Had it been possible to do so, I would also have preferred such a provision within this Bill, but this was not possible because of the reservation of insurance in the Scotland Act (Section A3 of Part II of Schedule 5). I would certainly expect insurance providers to clarify their approach if the Bill was enacted, so that people contemplating an assisted suicide would be able to understand the insurance implications, and so be in a position to factor that into their decision-making.

Chief Superintendent Flannigan mentioned (col 36) the possibility of a complaint being made if someone involved in providing assistance also stood to benefit from the person's life insurance. On this point, it is worth noting that paragraph 2(g) of schedule 4 would prevent any such beneficiary acting as a witness, proxy or licensed facilitator. While the Bill does not prevent the beneficiary of an insurance policy (such as a spouse or other close relative) having some involvement in the process, there are a number of safeguards to prevent anyone's financial interest having an inappropriate influence on the outcome. In many cases, of course, the only difference that an assisted suicide will make is to bring forward by weeks or months a death that would occur in any event, so the implications for insurance providers will generally be small (depending, for example, on whether a premium payment would be foregone). As a result, it is unlikely that the involvement in the

process of people who are life insurance beneficiaries creates much scope for abuse, even in principle.

I hope the above comments are helpful to your Committee in its scrutiny of the legal aspects of the Bill, and I would be happy to provide further clarification if required.

A copy of this letter goes to Duncan McNeil, Convener of the Health & Sport Committee, for information. Copies also go to the witnesses whose evidence is referred to.

Yours sincerely,

Patrick Harvie MSP