



The Scottish Parliament
Pàrlamaid na h-Alba

Justice Committee

3rd Report, 2015 (Session 4)

Report to the Health and Sport Committee on the Assisted Suicide (Scotland) Bill

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The Scottish Parliament
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Justice Committee

Remit and membership

Remit:

To consider and report on:

- a) the administration of criminal and civil justice, community safety and other matters falling within the responsibility of the Cabinet Secretary for Justice; and
- b) the functions of the Lord Advocate other than as head of the systems of criminal prosecution and investigation of deaths in Scotland.

Membership:

Christian Allard
Roderick Campbell
John Finnie
Christine Grahame (Convener)
Alison McInnes
Margaret Mitchell
Elaine Murray (Deputy Convener)
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The Scottish Parliament
Pàrlamaid na h-Alba

Justice Committee

3rd Report, 2015 (Session 4)

**Report to the Health and Sport Committee on the Assisted Suicide
(Scotland) Bill**

The Committee reports to the Health and Sport Committee as follows—

SUMMARY OF CONCLUSIONS AND RECOMMENDATIONS

General

1. The Parliament designated the Health and Sport Committee as the lead committee and the Justice Committee as secondary committee for Stage 1 consideration of the Assisted Suicide (Scotland) Bill.¹ Whilst the Health and Sport Committee is examining the Bill in its entirety², the Justice Committee focussed its evidence-taking on the practical application and legal aspects of the Bill, as well as compliance of its provisions with the European Convention on Human Rights (ECHR). This Committee has therefore intended to inform, rather than duplicate, the work of the Health and Sport Committee in considering the general principles of the Bill. The report provides a brief overview of the provisions in the Bill to set the evidence in context and to allow it to be read as a standalone report. The Committee focuses solely on the areas set out above and makes recommendations on the processes and possible practical implications of the provisions in the Bill. It does not take any view on the moral or ethical issues surrounding the Bill; that is rightly the role of the lead committee.

Lawfulness of assisted suicide

2. The Committee notes that the approach taken in the Bill, of defining what is not a crime rather than what is a crime, is unusual. The Committee recommends, in the interests of clarity, that the Health and Sport Committee explores this issue further with the relevant witnesses.

The three-stage process

3. The Committee notes the concerns of some witnesses regarding the interpretation of 'life-shortening' and 'terminal' for the purposes of the Bill.

¹ The Parliament agreed to motion S4M-8411 on 26 November 2013.

² The Health and Sport Committee issued a call for written evidence on 13 March, which closed on 6 June 2014 and received 886 submissions. An analysis of submissions received was published on 25 September 2014.

The Committee further notes the requirement for two medical practitioners to determine diagnosis.

Capacity

4. The Committee agrees with witnesses that the definition of capacity in this Bill should be consistent with other related legislation.

5. The Committee notes that there is a lack of clarity in the way the Bill is drafted as to whether everyone with a mental illness would be excluded from the provisions, regardless of the severity of their condition. The Committee therefore welcomes the indication from the member in charge that he would be receptive to amendments at Stage 2 “to fine-tune this provision”.

6. The Committee also notes the view of the Faculty of Advocates that only a psychiatrist would have the necessary skills to make a decision on capacity and asks the lead committee to explore this issue further during its Stage 1 scrutiny.

Recording

7. The Committee considers that, in ensuring individuals are not unnecessarily subject to police investigations, the recording requirements in the Bill should be more clearly defined. The Committee notes the view of the Law Society that all records of assisted suicides should be held in a central registry, similar to the Office of the Public Guardian, to provide a more secure and centralised location.

Signature by proxy

8. The Committee notes the strong view of the Law Society of Scotland that solicitors should not be included in the list of possible proxies under the Bill on the basis that, in general, they would not have the appropriate experience to assess capacity. The Committee also notes the explanation from the member in charge that a solicitor would not be obliged to act as a proxy and that the test that they would apply is a “common-sense test of comprehension” not a medical test of capacity.

9. Some members of the Committee consider that solicitors should be removed from the list of possible proxies in the Bill, while others are not convinced by the arguments put forward by some witnesses that solicitors would not have the relevant experience to assess capacity. The Committee notes that the member in charge is open to considering amendments at Stage 2 to include medical practitioners as possible proxies in the Bill.

The act of suicide

10. The Committee notes that the 14-day time-limit aims to strike a balance between giving the individual enough time to consider and prepare themselves and ensuring that they retain capacity when the act of suicide takes place. However, some members of the Committee have concerns that this time limit could place pressure on an individual to go through with the act of suicide. The Committee considers that setting a time-limit between the issuing of a prescription and act of suicide is a complex area that requires

further consideration and therefore recommends that the lead committee explores it further during its Stage 1 consideration.

11. The Committee recommends clarifying the recording requirements in the Bill and ensuring the secure storage of drugs or other substances between prescription and use or retrieval if required. The Committee recommends that these requirements be placed in Regulations on the licensing of facilitators provided for under the Bill.

Licensed facilitators

12. The Committee accepts the view of witnesses that more clarity is required regarding the role of licensed facilitators to ensure that individuals taking on this function are not open to prosecution. The Committee agrees that more detail on this role should be specified on the face of the Bill rather than in Regulations or Ministerial directions.

13. The Committee notes the view of some witnesses that a 16 year-old would be too young to take on the function of licensed facilitator, but also notes the view of the member in charge that anyone applying to become a facilitator would need to demonstrate that they have the necessary skills and experience to be considered for the role of licensed facilitator. The Committee recommends that the lead committee gives further consideration to these issues during its Stage 1 scrutiny of the Bill.

14. The Committee welcomes the commitment from the member in charge of the Bill to look again at whether there is any scope for a licensed facilitator to unwittingly fall foul of the provision that they should not act if they are to gain financially from a person's death.

15. The Committee welcomes the commitment from the member in charge to bring forward an amendment at Stage 2 to require the facilitator's report to be made to the procurator fiscal rather than to the police, in line with existing legislation relating to medical deaths.

Savings for certain mistakes and things done in good faith

16. The Committee notes the views of witnesses that the savings provision in section 24 has been drafted so widely that it is open to interpretation and may lead to potential difficulties with enforcement. The Committee also notes that the member in charge is "open to persuasion" on the wording of this provision and therefore recommends that the lead committee explores the issue further.

Overall clarity of the provisions in the Bill

17. The Committee considers it essential that, given the potential consequences for those involved in assisting suicide, the provisions in this Bill must be drafted as clearly as possible. To that end, the Committee recommends that the lead committee explores in more depth with witnesses improving clarity by including clear definitions on the face of the Bill where required.

Conscience clause

18. **The Committee recommends that the lead committee gives further consideration to whether the guidelines or codes of practice for professional bodies could address the issue of a conscience clause, as suggested by the member in charge, as opposed to on the face of the Bill.**

Penalties

19. **The Committee draws the attention of the lead committee to the view of the Faculty of Advocates that specific penalties for breaching the provisions should be included in the Bill.**

Insurance implications

20. **The Committee notes that there may be insurance implications arising from this Bill.**

Human rights

21. **The Committee notes the view of the Scottish Human Rights Commission (SHRC) that the Bill would have an impact on some of the fundamental elements of the dignity and autonomy of individuals and their families. The Committee also notes the view of the member in charge that the Bill enhances the human rights of individuals.**

22. **The Committee notes the view of the Crown Office and Procurator Fiscal Service that the prosecution code provides sufficient clarity around the current law and that it does not, at this time, see a need for the Lord Advocate to publish guidelines along the lines suggested by the SHRC.**

INTRODUCTION

23. **The Parliament designated the Health and Sport Committee as the lead committee and the Justice Committee as secondary committee for Stage 1 consideration of the Assisted Suicide (Scotland) Bill.³ Whilst the Health and Sport Committee is examining the Bill in its entirety⁴, the Justice Committee focussed its evidence-taking on the practical application and legal aspects of the Bill, as well as compliance of its provisions with the European Convention on Human Rights (ECHR). This Committee has therefore intended to inform, rather than duplicate, the work of the Health and Sport Committee in considering the general principles of the Bill. The report provides a brief overview of the provisions in the Bill to set the evidence in context and to allow it to be read as a standalone report. The Committee focuses solely on the areas set out above and makes recommendations on the processes and possible practical implications of the provisions in the Bill. It does not take any view on the moral or ethical issues surrounding the Bill; that is rightly the role of the lead committee.**

³ The Parliament agreed to motion S4M-8411 on 26 November 2013.

⁴ The Health and Sport Committee issued a call for written evidence on 13 March, which closed on 6 June 2014 and received 886 submissions. An analysis of submissions received was published on 25 September 2014.

Background

24. The Assisted Suicide (Scotland) Bill⁵ was introduced in the Scottish Parliament on 13 November 2013 by Margo MacDonald MSP⁶. On the Bill's introduction, Patrick Harvie MSP was designated as an additional member in charge⁷ of the Bill and is taking the Bill through its various stages in the Parliament.

25. The Committee heard from the Law Society of Scotland, Faculty of Advocates, Scottish Human Rights Commission (SHRC), Crown Office and Procurator Fiscal Service (COPFS) and Police Scotland at its meeting on 28 October 2014. It also received written submissions from these organisations in advance of this evidence session.

Policy objectives of the Bill

26. The Policy Memorandum states that the policy objective of the Bill is to “provide a means for certain people who are approaching the end of their lives to seek assistance to end their lives at a time of their own choosing, and to provide protection in law for those providing that assistance”.⁸ A more detailed explanation is provided in the Explanatory Notes—

“The Bill enables people with terminal or life-shortening illnesses or progressive conditions which are terminal or life-shortening and who wish to end their own lives to obtain assistance in doing so. It does this by removing criminal and civil liability from those who provide such assistance, provided that the procedure set out in the Bill is followed. This procedure for accessing a lawful assisted suicide is designed to ensure that the individual seeking it meets the Bill's eligibility criteria, has made his or her own informed decision to end his or her life and has had the opportunity to reflect before moving forward at key stages”.⁹

Existing law

27. Suicide and attempted suicide are not in themselves illegal in Scotland. The decision on whether or not to prosecute is for the COPFS, taking into account the circumstances of the case, including whether prosecution would be in the public interest¹⁰. The Policy Memorandum explains that “it is possible that a person who

⁵ The Assisted Suicide (Scotland) Bill. Available at:

http://www.scottish.parliament.uk/S4_Bills/Assisted%20Suicide/b40s4-introd.pdf

⁶ In 2010, the Scottish Parliament considered a Bill with similar aims – the End of Life Assistance (Scotland) Bill – also introduced by Margo MacDonald MSP, and agreed not to approve the general principles of the Bill at Stage 1.

⁷ Standing Orders provide for the member who introduces a Bill to designate an additional 'member in charge'.

⁸ Policy Memorandum on the Assisted Suicide (Scotland) Bill, paragraph 2. Available at:

http://www.scottish.parliament.uk/S4_Bills/Assisted%20Suicide/b40s4-introd-pm.pdf

⁹ Explanatory Notes on the Assisted Suicide (Scotland) Bill, paragraph 3. Available at:

http://www.scottish.parliament.uk/S4_Bills/Assisted%20Suicide/b40s4-introd-en.pdf

¹⁰ In a written submission, the Lord Advocate stated that the criteria for deciding whether a prosecution is in the public interest are set out in the COPFS Prosecution Code and that there is a high public interest in prosecuting all aspects of homicide where there is sufficient, credible and

assists someone else to commit suicide would be prosecuted for homicide (i.e. murder or culpable homicide), or for some lesser offence (such as assault or culpable and reckless injury/behaviour), although the lack of relevant case-law makes it difficult to establish how likely this is to happen in any particular case”.¹¹

28. In England and Wales, assisting a suicide is a statutory offence under section 2 of the Suicide Act 1961. Decisions on prosecution are taken by the Director of Public Prosecutions (DPP). The law relating to the DPP’s role has been clarified by two high-profile cases. In the first, the case of Diane Pretty, the House of Lords upheld the DPP’s refusal to give an undertaking in advance not to prosecute Ms Pretty’s husband if he assisted her in ending her own life¹². In the second, the case of Debbie Purdy, the House of Lords ruled that the DPP’s refusal to issue guidance on whether Mr Purdy’s husband would face prosecution for helping her to travel to Switzerland to die, contravened the ECHR. Following this judgment, the DPP issued guidelines aimed at clarifying the approach to cases of encouraging or assisting a suicide. These guidelines do not have the force of law and have no direct bearing on cases in Scotland.¹³

Current proposals for England and Wales

29. Lord Falconer of Thoroton introduced the Assisted Dying Bill in the House of Lords on 5 June 2014. The Bill provides for “a person who is terminally ill and has six months or less to live to seek and lawfully be provided with assistance to end their own life”. In order to be eligible, a person must be a terminally ill adult who is aged 18 or over and have a clear and settled intention to end their own life; a declaration to that effect is required in the Bill. The Bill only extends to England and Wales and a person must have been ordinarily resident in England and Wales for at least one year when a declaration is made.¹⁴

30. Although the two Bills share a common purpose and set out similar processes, there are some differences. In particular, under the Assisted Dying Bill, the person providing the assistance must be the attending doctor, medical practitioner or registered nurse, whereas, under the Assisted Suicide (Scotland) Bill, the person providing assistance (the facilitator) can be any person of 16 years and over. The Assisted Dying Bill also contains a sunset clause, which would enable the Bill to be repealed by resolution of each House of Parliament and without the need for further primary legislation, after the Act (if passed) has been in force for ten years.¹⁵ There is no such provision in the Assisted Suicide (Scotland) Bill.

reliable evidence. He also indicated that if the Crown considers there to be sufficient evidence that a person has caused the death of another, it is difficult to conceive a situation where it would not be in the public interest to raise a prosecution, but each case would be considered on its own facts and circumstances.

¹¹ Policy Memorandum, paragraph 10.

¹² The European Court of Human Rights subsequently held that Ms Pretty’s right to respect for her private life under Article 8 of ECHR has been interfered with, but it upheld the UK’s right to continue to prohibit assisted suicide on the grounds of protecting the vulnerable.

¹³ Policy Memorandum, paragraph 9.

¹⁴ Explanatory Notes on the Assisted Dying Bill, paragraph 2.

¹⁵ Explanatory Notes on the Assisted Dying Bill, paragraph 2.

THE BILL: OVERVIEW AND EVIDENCE RECEIVED

Lawfulness of assisted suicide

Overview

31. The Bill (sections 1 and 2) provides legal protection to those involved in providing assistance to the person who commits suicide. That protection is against both criminal and civil liability and is subject to the essential safeguards in section 3 of the Bill being complied with. The Policy Memorandum clarifies that the Bill does not authorise any form of euthanasia, and its protections from liability apply only where the act of suicide (or attempted suicide) is carried out by the person him- or herself within 14 days of the second request (see below) in his or her medical records.¹⁶

Approach taken

32. Some witnesses commented on the approach taken in sections 1 and 2 of the Bill. The Law Society highlighted that “it is noteworthy that the provisions in section 1 are unusual in that it defines what is not a crime, as opposed to the normal legislative provisions, which generally set out what will amount to a crime”.¹⁷ Stephen McGowan of the COPFS also commented that, “if passed, the legislation would be unusual, because it defines something that has been a crime as not being a crime”. He stated that—

“As a general principle, although the approach is unusual, we can deal with it if we have to. Its unusualness causes no specific issues in itself. It is knowing what the law is and applying that law that is important to us as prosecutors”.¹⁸

33. The Committee notes that the approach taken in the Bill, of defining what is not a crime rather than what is a crime, is unusual. The Committee recommends, in the interests of clarity, that the Health and Sport Committee explores this issue further with the relevant witnesses.

The three-stage process

Overview

34. The Bill sets out a process for a person seeking an assisted suicide to follow which consists of three stages: (1) a preliminary declaration; (2) a first request; and (3) a second request. Each stage contains eligibility criteria and third parties have a role in ensuring that these criteria are met and that each step in the process is correctly followed. The Policy Memorandum states that each stage must be recorded and that there are minimum time-limits between the stages to provide a “cooling-off” period, in addition to the maximum time-limit at the end of the process as a further safeguard against deterioration of capacity.¹⁹

¹⁶ Explanatory Notes, paragraph 5.

¹⁷ Law Society of Scotland, written submission.

¹⁸ Scottish Parliament Justice Committee. *Official Report*, 28 October 2014, Col 27. Available at: <http://www.scottish.parliament.uk/parliamentarybusiness/28862.aspx?r=9588&mode=pdf>

¹⁹ Policy Memorandum, paragraph 33.

Preliminary declaration

35. The preliminary declaration (sections 4 to 7 of the Bill) is intended to ensure that no-one chooses an assisted suicide without giving the matter consideration over an appropriate period of time. To be eligible to make a preliminary declaration a person must be: (a) registered as a patient with a medical practice in Scotland, and (b) at least 16 years old. There is no requirement at the preliminary declaration stage to have a terminal or life-shortening illness. The declaration specifies that the person is willing, in principle, to consider seeking an assisted suicide if they meet the necessary eligibility criteria, either at the time of the declaration, or at some point in the future.

36. The declaration must be signed by the person in the presence of a witness who is aged at least 16 and is not disqualified under the Bill.²⁰ The declaration must then be endorsed by a registered medical practitioner. The practitioner's role at this stage is not to carry out any professional assessment but simply to check that the terms of the declaration and witness statement comply with the legislation and that the documents do not, so far as the practitioner is aware, contain any false information. The preliminary declaration will be recorded in the person's medical records, but can be cancelled by the person by a written notice, which is signed and dated, and would also be recorded in their medical records by a registered medical practitioner.

First and second requests for assistance

37. Following a preliminary declaration, a person seeking an assisted suicide must make two requests for assistance separated by a minimum period of 14 days (sections 8 to 11). The first and second requests are in near-identical terms and each request requires to be endorsed by two registered medical practitioners. A person making a first request for assistance must:

- be registered with a medical practice in Scotland;
- be at least 16 years old;
- have signed a preliminary declaration which has been witnessed and not cancelled at least 7 days before signing the request;
- have concluded that their quality of life has, as a result of an illness that is either terminal or life-shortening, or a condition that is progressive and either terminal or life-shortening, become unacceptable.

38. The second request requires that a first request for assistance has been made and endorsed but, for obvious reasons, does not include the age criteria.

39. The Policy Memorandum highlights key safeguards at both request stages, including that two registered medical practitioners must separately confirm the person's diagnosis and satisfy themselves that the person has the capacity to make the request. In addition, both practitioners must take a view on how consistent the person's conclusion about the unacceptability of their quality of life is with the medical facts known to the practitioner. It goes on to state that:

²⁰ Schedule 4 of the Bill sets out a number of disqualifying relationships including family, financial and medical and nursing relationships.

“The aim is not to substitute the person’s judgement about the quality of their own life with a medical opinion (i.e. the test is not whether the person’s quality of life would be acceptable to the practitioner, or even whether the person’s view of their quality of life is reasonable), but it does entitle each doctor to withhold their endorsement of the request if they feel that the person’s own assessment of their quality of life is clearly at odds with the evidence”.²¹

40. A further safeguard is that the second medical practitioner must be identified by the first practitioner rather than by the patient. The Policy Memorandum indicates that this is intended to address any concerns that a person whose eligibility is doubtful would be able to keep asking different doctors for endorsement in the hope of finding two prepared to support their request.²²

41. As referred to above, there is a 14-day minimum interval between requests which provides a “cooling-off period”. There is no upper time-limit between the two requests. The Policy Memorandum states that this is deliberate to allow the person to make a first request as soon as they become eligible to do so, without them feeling under pressure to move to a second request until they are ready.²³

42. As with the preliminary declaration, the making of each request must be recorded in the person’s medical records to ensure that all the necessary steps have been taken. Either request may be cancelled at any time, with any cancellation also being recorded in the medical records. Cancelling either request does not itself cancel any earlier step in the process. The Policy Memorandum explains that “this allows a person who has had second thoughts to go back a stage, without necessarily having to start the whole process anew”.²⁴

Definition of qualifying illnesses and conditions

43. The Policy Memorandum states that qualifying illnesses or conditions must satisfy certain conditions: “if it is an illness, it must be, for that person, either terminal or life-shortening; and if it is a condition, it must also be, for that person, progressive”.²⁵ It explains that “the aim here is to capture those diagnoses which involve an on-going deterioration in the person’s ability to live a normal life, regardless of the medical treatment they receive”.²⁶

44. The Bill does not include a time-limit as part of the definition of ‘terminal’. The Policy Memorandum explains that “the idea is that an illness or condition can qualify so long as it is recognised that the eventual outcome will be death, however far in advance of that outcome the diagnosis is made”. It goes on to state that “this recognises that setting any particular time-limit (such as death being expected within six months) is arbitrary and may be inappropriate (quite apart from the practical difficulties of reliable prognosis)”.²⁷

²¹ Policy Memorandum, paragraph 31.

²² Policy Memorandum, paragraph 32.

²³ Policy Memorandum, paragraph 33.

²⁴ Policy Memorandum, paragraph 35.

²⁵ Policy Memorandum, paragraph 27.

²⁶ Policy Memorandum, paragraph 28.

²⁷ Policy Memorandum, paragraph 30.

45. The Committee heard concerns regarding the interpretation of what would constitute a 'life-shortening' or 'terminal' condition. For example, the Faculty of Advocates noted that many conditions are life-shortening, including common conditions such as type 2 diabetes and hepatitis, but questioned whether the intention of the Bill is that such common conditions should justify assisted suicide.²⁸

46. Professor Alison Britton of the Law Society indicated that it is "very difficult to come up with a clear definition" of life-shortening as "it is clearly a subjective decision in every case"; however, she concluded that a clearer definition of 'life-shortening' should be included on the face of the Bill.²⁹ She argued that "it is extremely difficult to attach a time period to a terminal illness [as] all illnesses manifest themselves in different ways". Professor Britton further suggested that, "rather than trying to be precise about that, it would probably be more sensible to try to ascertain why we would want to do that and what value would be had from attaching a time limit to a terminal illness at that point".³⁰

47. David Stephenson QC from the Faculty of Advocates highlighted that, "for the purposes of the Bill it is not sufficient that a life-shortening condition exists; it has to have a current impact on quality of life", and suggested "that might go some way towards restricting what is otherwise a fairly general provision in relation to the condition".³¹

48. In correspondence to the Committee, the member in charge, Patrick Harvie stated that the drafting does not, as suggested by the Law Society, allow for subjectivity in diagnosis, "which remains a matter solely for the two registered medical practitioners ... 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'".³²

49. The Committee notes the concerns of some witnesses regarding the interpretation of 'life-shortening' and 'terminal' for the purposes of the Bill. The Committee further notes the requirement for two medical practitioners to determine diagnosis.

Capacity

Overview

50. Section 12 defines what is meant by the person having capacity to make a first or second request.³³ It provides that a person has capacity to make a request if they are not suffering from any mental disorder (as set out in the Mental Health

²⁸ Faculty of Advocates, written submission.

²⁹ Scottish Parliament Justice Committee. *Official Report*, 28 October 2014, Col 8.

³⁰ Scottish Parliament Justice Committee. *Official Report*, 28 October 2014, Col 8.

³¹ Scottish Parliament Justice Committee. *Official Report*, 28 October 2014, Col 9.

³² Correspondence from Patrick Harvie to the Justice Committee (27 November 2014). Available at: http://www.scottish.parliament.uk/S4_JusticeCommittee/Inquiries/20141127_PH_to_CG.pdf

³³ The definition is based on that contained in section 1(6) of the Adults with Incapacity (Scotland) Act 2000, adapted to relate specifically to the context of making requests under the Bill.

(Care and Treatment) (Scotland) Act 2003³⁴) which might affect making the request and are capable of:

- making a decision to make the request;
- communicating that decision;
- understanding the decision; and
- retaining the memory of the decision.

51. The assessment of capacity outlined in the Bill does not require specialist assessment by a psychiatrist. On this point, the Explanatory Notes state that:

“Assessment of capacity is not generally something which requires psychiatric expertise, in the absence of any reason to suspect that the person has any form of mental disorder. However, it is open to a medical practitioner dealing with a first or second request to seek any specialist input he or she feels is needed to inform his or her assessment.”³⁵

Inconsistency with other legislation

52. A number of witnesses noted inconsistency in the definition of capacity between the Bill and other legislation, for example, the Adults with Incapacity (Scotland) Act 2000 and the Mental Health (Care and Treatment) (Scotland) Act 2003.³⁶ The Law Society noted that the 2003 Act uses the Significant Impairment of Decision-making Ability (SIDMA) test to determine capacity with regard to making decisions about medical treatment, yet this is not mentioned in the Bill.³⁷ It argued that any reference to capacity to make a request within the Bill must be consistent with both the 2000 Act and the 2003 Act. The Faculty of Advocates agreed that the definition of capacity should be consistent to avoid any conflict between statutory regimes.³⁸

53. The Faculty also questioned whether the intention of section 12 was to exclude everyone with any degree of mental disorder from the scope of the Bill and suggested that, while “there may be good policy reasons for [this, it] would be concerned such a general exclusion might be seen as discriminatory”.³⁹ Mr Stephenson QC from the Faculty also highlighted this issue during evidence, stating “we do not usually assume that everyone who has a mental illness of whatever severity is incapable of making decisions, yet that seems to be what the Bill sets out to establish”.⁴⁰

54. However, in correspondence to the Committee submitted following the evidence session, Mr Harvie disputed the Faculty’s interpretation of section 12 of the Bill.⁴¹ He argued that those individuals with mental disorders are not automatically prevented from seeking an assisted suicide under the Bill, but it

³⁴ Section 328 of the 2003 Act provides that “mental disorder” means a mental illness; or a personality disorder; or a learning disability.

³⁵ Explanatory Notes, paragraph 28.

³⁶ Faculty of Advocates and Law Society of Scotland.

³⁷ Law Society of Scotland, written submission.

³⁸ Faculty of Advocates, written submission.

³⁹ Faculty of Advocates, written submission.

⁴⁰ Scottish Parliament Justice Committee. *Official Report, 28 October 2014*, Col 20.

⁴¹ Correspondence from Patrick Harvie to the Justice Committee (27 November 2014).

would be for the medical practitioner to take a balanced view on the impact a mental disorder has on their decisions at first and second stage. He did, however, indicate that, “if the evidence suggests that 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”.⁴²

Assessment of capacity

55. As referred to above, section 12 does not require specialist assessment of capacity by a psychiatrist. However, the Faculty, in its written submission, questioned whether the practical consequences might be that only a psychiatrist would have the necessary skills to make a decision on capacity.

56. The Committee agrees with witnesses that the definition of capacity in this Bill should be consistent with other related legislation.

57. The Committee notes that there is a lack of clarity in the way the Bill is drafted as to whether everyone with a mental illness would be excluded from the provisions, regardless of the severity of their condition. The Committee therefore welcomes the indication from the member in charge that he would be receptive to amendments at Stage 2 “to fine-tune this provision”.

58. The Committee also notes the view of the Faculty of Advocates that only a psychiatrist would have the necessary skills to make a decision on capacity and asks the lead committee to explore this issue further during its Stage 1 scrutiny.

Recording

Overview

59. Section 13 makes provision for recording of the first and second requests and the associated medical statements, while Section 14 makes provision for these requests and associated statements to be contained in a single document.

Lack of recording requirements

60. There was concern amongst some witnesses about the lack of detail in the Bill regarding recording requirements at various stages of the process. The Faculty suggested that “a centralised system of reporting and collation of information in relation to assisted suicides might be desirable, in order to monitor the system and compliance with its requirements”.⁴³

61. Police Scotland also highlighted the consequences if adequate recording mechanisms are not place. It argued that “the potential for an enquiry to be instigated for any death where there is any accusation or uncertainty over the meeting of the Bill’s eligibility conditions needs to be considered, including clarity over recording, monitoring and accountability”.⁴⁴ Stephen McGowan from the COPFS agreed that “nothing in the Bill specifies where the single record of a

⁴² Correspondence from Patrick Harvie to the Justice Committee (27 November 2014).

⁴³ Faculty of Advocates, written submission.

⁴⁴ Police Scotland, written submission.

person's intention and the various steps that were taken will be ... so there is perhaps a gap, which could mean a police investigation".⁴⁵

62. The Law Society also questioned how multiple documents signed at multiple locations by different practitioners would be collated and stored together, and suggested that "there should be a central registry which operates in a manner similar to the Office of the Public Guardian that may provide a more secure and centralised location for such documents".⁴⁶

63. In addition, a number of witnesses had concerns around the absence of any duty on the facilitator to record the amount of drugs or other substances taken by the person wishing to commit suicide and what happened thereafter.⁴⁷ The Law Society suggested that "a duty should be placed on the facilitator to record when and what was administered by the assisted person and this record should subsequently go for storage with the requests and associated statements of the assisted person".⁴⁸ Professor Britton from the Law Society stressed during oral evidence that facilitators should be given a reasonable timeframe in which to record what occurred, as their priority at the time would be the individual concerned and their family members.⁴⁹

64. The Committee considers that, in ensuring individuals are not unnecessarily subject to police investigations, the recording requirements in the Bill should be more clearly defined. The Committee notes the view of the Law Society that all records of assisted suicides should be held in a central registry, similar to the Office of the Public Guardian, to provide a more secure and centralised location.

Signature by proxy

Overview

65. Section 16 of the Bill makes provision for a preliminary declaration, a first or second request or a cancellation to be signed by a proxy where the person is blind, unable to read, or unable to sign the document. The Policy Memorandum states that this provision is important in the context of this Bill, where the people who are eligible to request an assisted suicide are more likely than others to be unable to complete the forms unaided. It explains that, "given the significance of what is involved in the declarations made at each stage of the process, section 16 includes important safeguards in relation to signature by proxy – the proxy must be a solicitor, advocate or justice of the peace (or, in other jurisdictions, a notary public or the equivalent) who does not have a disqualifying relationship with the person, and must be satisfied that the person understands the effect of the document being signed on their behalf".⁵⁰

66. Where a document is to be signed outwith Scotland, Section 16(6) of the Bill allows a notary public or other person with authority under the law of that place to

⁴⁵ Scottish Parliament Justice Committee. *Official Report*, 28 October 2014, Cols 33-34.

⁴⁶ Law Society of Scotland, written submission.

⁴⁷ Scottish Parliament Justice Committee. *Official Report*, 28 October 2014, Cols 21-22.

⁴⁸ Law Society of Scotland, written submission.

⁴⁹ Scottish Parliament Justice Committee. *Official Report*, 28 October 2014, Col 22.

⁵⁰ Policy Memorandum, paragraph 37.

sign or otherwise execute documents on behalf of individuals who are blind or unable to read or to sign.

Solicitors as proxies

67. The Law Society is of the view that solicitors should not be included as proxies under the Bill, as it would require them, not only to take the usual notarial function, but also to make a judgement on mental capacity and vulnerability.⁵¹ It argued that generally solicitors will not have the appropriate experience to undertake such a role and medical practitioners would be better placed to assess capacity. The Law Society also noted that the Assisted Dying Bill makes no such provision; it places a responsibility on the registered medical practitioner and makes an assumption that a person can physically make a declaration.⁵²

68. The Law Society expanded on these concerns during oral evidence. Coral Riddell told the Committee “you might say that solicitors assess capacity every day, but the clear distinction is that they do not assess capacity in such a different situation, with such a significant outcome, as assisted suicide”. She highlighted that, while there may be some solicitors who are well-qualified to take on the role, such as those working in mental health law, with an anticipated 27 requests a year, it is unlikely that solicitors would be able to build up experience in this area.⁵³

69. The Faculty also questioned “whether a solicitor is an appropriate individual to perform this function ... as it introduces additional responsibility ... to make assessments in relation to a person’s capacity and understanding”.⁵⁴

70. In his letter to the Committee, the member in charge, Mr Harvie, set out three points in response to the concerns of the Law Society and Faculty. He stated that: (a) the Bill authorises solicitors to serve as proxies, but does not oblige any particular solicitor to so act; (b) the test of understanding in the Bill is intended to be a common-sense test of comprehension and not a medical test of capacity, and (c) while an assisted suicide itself is irreversible, each of the procedural stages in which the proxy may be involved can be cancelled by the person at any time. Mr Harvie also indicated that he would be open to considering amendments at Stage 2 to extend the list of people qualified to act as a proxy to include registered medical practitioners “if it was felt appropriate”.⁵⁵

71. The Law Society questioned the legality of proxies operating outwith Scotland as the Scotland Act 1998 forbids the introduction of legislation which would form part of the law of another country.⁵⁶

72. The Committee notes the strong view of the Law Society of Scotland that solicitors should not be included in the list of possible proxies under the Bill on the basis that, in general, they would not have the appropriate experience to assess capacity. The Committee also notes the explanation from the member in charge that a solicitor would not be obliged to act as a

⁵¹ Law Society of Scotland, written submission.

⁵² Law Society of Scotland, written submission.

⁵³ Scottish Parliament Justice Committee. *Official Report, 28 October 2014*, Col 4.

⁵⁴ Faculty of Advocates, written submission.

⁵⁵ Correspondence from Patrick Harvie to the Justice Committee (27 November 2014).

⁵⁶ Law Society of Scotland, written submission.

proxy and that the test that they would apply is a “common-sense test of comprehension” not a medical test of capacity.

73. Some members of the Committee consider that solicitors should be removed from the list of possible proxies in the Bill, while others are not convinced by the arguments put forward by some witnesses that solicitors would not have the relevant experience to assess capacity. The Committee notes that the member in charge is open to considering amendments at Stage 2 to include medical practitioners as possible proxies in the Bill.

The act of suicide

Overview

74. Section 17 requires that the act of suicide must take place within 14 days of the second request being recorded in the person’s medical records. The Explanatory Notes indicate that this “time-limit ensures so far as possible that the person retains the capacity when the act of suicide takes place [and] that assisting a premature act of suicide (before the making of the second request is recorded) is not permitted”.⁵⁷ The Policy Memorandum envisages that, following completion of a second request, the person’s doctor will prescribe for them drugs suitable to enable them to end their life painlessly and that “pharmacists presented with such a prescription would be expected to dispense the medicine”.⁵⁸ It also anticipates that the “relevant professional organisations (the General Medical Council for GPs and the Royal Pharmaceutical Society for pharmacists) would amend their guidelines and codes of practice to reflect any change in the law”.⁵⁹

75. Section 18 provides that neither euthanasia nor any other form of direct killing is authorised by the Bill and clarifies that the cause of death must be the person’s own deliberate act. In the case of an attempted suicide, the attempt must be constituted by the person’s own deliberate act.

14-day time limit

76. The Law Society had particular concerns that the 14-day time-limit between issuing the prescription and the act of suicide is too short and could lead to the possibility of an individual feeling under pressure to commit suicide.⁶⁰ Professor Britton from the Law Society expanded on this position during oral evidence.⁶¹ She referred to figures relating to Oregon’s Death with Dignity Act 1995 which, she suggested, shows that just over a third of people who initially receive prescriptions to end their life change their mind and choose to extend their life. She explained that “once people knew the option of assistance with death was available to them, they almost took a step back and made other plans”. She indicated that a time-limit “is a very arbitrary thing to try to impose [as] some people will need a great deal of time; others may not have time, due to the nature of their illness and infirmity”. She argued that “one would err on the side of protecting the individual’s

⁵⁷ Explanatory Notes, paragraph 33.

⁵⁸ Policy Memorandum, paragraph 38.

⁵⁹ Policy Memorandum, paragraph 39.

⁶⁰ Law Society of Scotland, written submission.

⁶¹ Scottish Parliament Justice Committee. *Official Report*, 28 October 2014, Col 20.

life, and we would want to ensure that any decision made is fully informed and that requisite time has been given to the individual to make the decision”.⁶²

77. The Law Society highlighted that licensed facilitators are to have responsibility for the removal of the drug or other means after expiry of the 14-day time-limit (if necessary).⁶³ Professor Britton questioned how this would be achieved: “will someone come and take it away immediately [or] will someone come knocking on the door a matter of hours later?” She stressed that, in considering this issue, “we cannot lose sight of the fact that any legislation that is passed must consider the individual at the centre of it”.⁶⁴

78. Mr Harvie advised that the requirement to remove from the person any drug, substance or other means, is qualified – “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 expiry of the 14-day time limit. He indicated that “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 duties”.

79. The Committee notes that the 14-day time-limit aims to strike a balance between giving the individual enough time to consider and prepare themselves and ensuring that they retain capacity when the act of suicide takes place. However, some members of the Committee have concerns that this time limit could place pressure on an individual to go through with the act of suicide. The Committee considers that setting a time-limit between the issuing of a prescription and act of suicide is a complex area that requires further consideration and therefore recommends that the lead committee explores it further during its Stage 1 consideration.

Definition of ‘assistance’

80. A number of witnesses called for a definition of ‘assistance’ to be included in the Bill or in guidance accompanying the Bill. The Law Society suggested that, “given the nature of the Bill, [assistance] must be clearly defined and set out on the face of the Bill” and warned that “failing to define this may cause difficulties in interpretation”.⁶⁵ Professor Britton expanded on the Law Society’s position during oral evidence, arguing that “the demarcation lines on assistance – putting pills in someone’s hand, or holding up their head to allow them to ingest tablets – are by no means clear”. She added that “it has to be very clear where assistance stops and being complicit in homicide starts”.⁶⁶

81. Mr Stephenson QC highlighted that it was unclear whether those prescribing or dispensing drugs that they know are to be used by a person to end their life would be part of the ‘assistance’ that is covered in the Bill. He told the Committee that “it should be possible to define the circumstances that are covered by the Bill in much the same way as Lord Falconer’s Bill in England”, adding “I think that such

⁶² Scottish Parliament Justice Committee. *Official Report, 28 October 2014*, Col 20.

⁶³ Law Society of Scotland, written submission.

⁶⁴ Scottish Parliament Justice Committee. *Official Report, 28 October 2014*, Col 15.

⁶⁵ Law Society of Scotland, written submission.

⁶⁶ Scottish Parliament Justice Committee. *Official Report, 28 October 2014*, Col 9.

a definition is not beyond the wit of man”.⁶⁷ Mr McGowan from the COPFS argued that the lack of definition of “what it is to assist suicide” could lead to uncertainty for prosecutors and therefore “discretionary judgements would have to be made”.⁶⁸ Chief Superintendent Gary Flannigan of Police Scotland also warned that, if the uncertainty regarding assistance remains, “the likely consequence would be a police investigation, which would by its nature be intrusive”.⁶⁹

82. In correspondence to the Committee, Mr Harvie responded to some of the concerns raised in evidence. He argued that “it is important to understand that the whole scheme of the Bill is to outline a process ... that would constitute lawful assistance to suicide [and] the assistance in question is therefore defined by its compliance with that scheme, rather than by a specific textual definition”.⁷⁰ He suggested that section 18 provides an important part in defining the assistance that is authorised and highlighted that producing an exhaustive explanation of the meaning of lawful assistance would “be a near impossible task”, while a non-exhaustive list would not provide the clarity sought by witnesses. Summarising his position, Mr Harvie stated that his “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 the current situation”.⁷¹

Means by which a person could end their life

83. The Policy Memorandum states that, “although it is envisaged that prescribed drugs will be the normal method used, the Bill is drafted widely enough to allow for the use of other substances or means, should those be preferred or become available”, leaves it open for a range of methods to be used.⁷² A number of witnesses commented that the means by which a person would be permitted to end their life is not fully described in the Bill.⁷³ Police Scotland suggested that consideration be given to providing further detail around the method and means by which a person could end their life.⁷⁴

84. The Law Society noted that the Bill does not provide for secure storage of drugs or other substances prescribed for assisted suicide. As referred to earlier in this report, witnesses also had concerns regarding the lack of recording requirements throughout the different stages of the process and this issue arose again in relation to the recording of the quantity of drugs taken and what remains.⁷⁵

85. The Committee recommends clarifying the recording requirements in the Bill and ensuring the secure storage of drugs or other substances between prescription and use or retrieval if required. The Committee

⁶⁷ Scottish Parliament Justice Committee. *Official Report*, 28 October 2014, Col 13.

⁶⁸ Scottish Parliament Justice Committee. *Official Report*, 28 October 2014, Col 30.

⁶⁹ Scottish Parliament Justice Committee. *Official Report*, 28 October 2014.

⁷⁰ Correspondence from Patrick Harvie to the Justice Committee (27 November 2014).

⁷¹ Correspondence from Patrick Harvie to the Justice Committee (27 November 2014).

⁷² Policy Memorandum, paragraph 40.

⁷³ Police Scotland and Law Society.

⁷⁴ Police Scotland, written submission.

⁷⁵ Law Society of Scotland, written submission.

recommends that these requirements be placed in Regulations on the licensing of facilitators provided for under the Bill.

Licensed facilitators

Overview

86. The Bill provides for ‘licensed facilitators’ who are trained and licensed to provide assistance to those seeking to end their lives. Under section 19 of the Bill, licensed facilitators are to “use best endeavours”:

- to provide practical assistance which a person reasonably requests before, during and after the act of suicide (or attempted suicide);
- to provide the person with comfort and reassurance;
- to be with the person when any drug or other substance supplied for the suicide of the person is taken or used by the person; and
- to remove from the person any drug or other substance in the event that a suicide has not taken place or been attempted in the period of 14 days from the second request being recorded.

87. The Policy Memorandum states that the first two functions have been described in very broad terms, “recognising that the nature and extent of the assistance that each person will need or want will vary greatly according to their illness or condition (for example, whether they are physically capable of lifting a cup to their lips unaided), and their particular circumstances (for example, whether they also have family members supporting them at the end)”.⁷⁶ Section 20 places a duty on facilitators to report to the police the person’s death, or where the person has attempted suicide but not died, “as soon as practicable”.

88. Facilitators must be aged 16 or over, and cannot provide assistance to anyone with whom they have a certain relationship, including a family, financial or medical or nursing relationship (section 21). People other than the facilitator, such as family members, can attend and provide assistance.

89. The Bill provides that facilitators must be licensed by an authority appointed by Scottish Ministers by order under the affirmative procedure (section 22). The Scottish Ministers may, under section 23, issue directions about how licensed facilitators are to “act in pursuance of the Act” and a licensing authority must “use its best endeavours” to ensure that the facilitators to whom it has granted licences comply with these directions.

The role of licensed facilitators

90. A number of concerns were raised about the role of facilitators. The Faculty argued that the role “should be clearly defined in the legislation and not left to directions or guidance that may be issued by the Scottish Ministers”.⁷⁷ Professor Britton of the Law Society argued that the role of facilitator “is a new role or function that an individual will undertake, so we need clarity around what the role involves and its parameters”. She went on to argue that “you are moving responsibility for something that was originally very much the preserve of medical

⁷⁶ Policy Memorandum, paragraph 48.

⁷⁷ Faculty of Advocates, written submission.

and clinical decision-making [and] if that role is being entrusted to another individual, it must be made clear what the role involves for them". Ms Riddell, also from the Law Society, endorsed this point and highlighted that it would be helpful to have further clarity on what "comfort and reassurance" and "such practical assistance as the person reasonably requests" would involve.⁷⁸

91. The Faculty noted that the requirement in the Bill for facilitators to "use best endeavours" to be present when the person commits suicide (or attempts to commit suicide) is set too high, and suggested that the phrase "reasonable endeavours" or "all reasonably practicable endeavours" may be more appropriate.⁷⁹ However, during evidence, Mr Stephenson QC of the Faculty said that it was a matter of concern that the Bill does not require the assistance of a facilitator at the point when the prescribed drugs or other means are taken, arguing that "perhaps the process should involve a form of compulsory supervision".⁸⁰

92. Noting that the detail of the licensing scheme for facilitators is to be set out in subordinate legislation, Police Scotland said it would "welcome any future opportunity to contribute to the development of Regulations governing all aspects of the operation of the relevant licensing scheme". It highlighted two particular areas for further consideration, including the maintenance of written records by facilitators and "how, if acting alone with the person at the time of the suicide, they would be legally protected if there was a subsequent allegation of impropriety".⁸¹

Age of facilitators

93. A number of witnesses argued that someone aged 16 would be unlikely to have the required experience, emotional maturity or skills to undertake the role. The Faculty, for example, questioned "whether an unqualified 16 year old ... is, in practice, likely to be able to provide the person with adequate 'comfort and reassurance'", as required under section 19 of the Bill.⁸² The Law Society argued that the minimum age is too low "taking into account the high degree of responsibility which the role of licensed facilitator involves", and argued that the minimum age be raised to 18.⁸³ Professor Britton expanded on the Law Society's position in evidence, arguing that "one would hope that [facilitators] would have experience of life and a certain empathy, so that they could understand the circumstances in which another individual might find themselves". She added that, although many 16-year-olds might feel that they possess those qualities, "they would more usually be found in someone older".⁸⁴

94. In response to the concerns raised, Mr Harvie argued that "age is only one qualification for becoming a licensed facilitator, and the most important thing is being able to demonstrate relevant skills and experience to the licensing body". He

⁷⁸ Scottish Parliament Justice Committee. *Official Report, 28 October 2014*, Col 21.

⁷⁹ Faculty of Advocates, written submission.

⁸⁰ Scottish Parliament Justice Committee. *Official Report, 28 October 2014*, Col 24.

⁸¹ Police Scotland, written submission.

⁸² Faculty of Advocates, written submission.

⁸³ Law Society of Scotland, written submission.

⁸⁴ Scottish Parliament Justice Committee. *Official Report, 28 October 2014*, Col 18.

confirmed that “if this approach is not considered adequate by the Parliament, I am open to considering amendments to raise the minimum age”.⁸⁵

Disqualification from acting as a facilitator (financial gain)

95. Under section 21 of the Bill, a licensed facilitator would be disqualified from acting as a facilitator for a person if they would gain financially in the event of that person’s death “whether directly or indirectly and whether in money or money’s worth”. Witnesses were asked whether there was a possible flaw in the legislation, as a prospective facilitator may not be aware that they are a beneficiary of the person’s will. Ms Riddell responded “that has not been tested so ignorance might not be a defence”, adding “it would just have to be tested against the facts and circumstances, the capacity in which the person acted and whether or not they were aware of being in the will”.⁸⁶

96. In his letter to the Committee, Mr Harvie said “I do not accept ... that this aspect of the Bill gives rise to a significant problem”. He explained that “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 section 24⁸⁷. He suggested that “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”. Finally he added that, “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 with will not gain any such benefit”.⁸⁸

97. The Committee accepts the view of witnesses that more clarity is required regarding the role of licensed facilitators to ensure that individuals taking on this function are not open to prosecution. The Committee agrees that more detail on this role should be specified on the face of the Bill rather than in Regulations or Ministerial directions.

98. The Committee notes the view of some witnesses that a 16 year-old would be too young to take on the function of licensed facilitator, but also notes the view of the member in charge that anyone applying to become a facilitator would need to demonstrate that they have the necessary skills and experience to be considered for the role of licensed facilitator. The Committee recommends that the lead committee gives further consideration to these issues during its Stage 1 scrutiny of the Bill.

99. The Committee welcomes the commitment from the member in charge of the Bill to look again at whether there is any scope for a licensed facilitator to unwittingly fall foul of the provision that they should not act if they are to gain financially from a person’s death.

⁸⁵ Correspondence from Patrick Harvie to the Justice Committee (27 November 2014).

⁸⁶ Scottish Parliament Justice Committee. *Official Report, 28 October 2014*, Col 18.

⁸⁷ Section 24 relates to savings for certain mistakes and things done in good faith.

⁸⁸ Correspondence from Patrick Harvie to the Justice Committee (27 November 2014).

Reporting to the police

100. The Law Society argued that reporting to the police rather than the procurator fiscal is unusual given that, in other legislation relating to medical deaths, reporting is to the procurator fiscal.⁸⁹ The Faculty also raised this point, arguing that “it is not clear why deaths or attempts to commit suicide should be reportable to the police and not, as is generally the case in Scotland, to the procurator fiscal”.⁹⁰

101. Other witnesses also agreed that the facilitator should advise the procurator fiscal when they have assisted a person to end their life rather than the police, as specified in the Bill. Mr McGowan of the COPFS argued that currently, where someone dies under medical care when there is a degree of supervision, such deaths are reported to the procurator fiscal and therefore it would be “slightly anomalous” for deaths under the Bill to be reported to the police, adding “that would provide the necessary safeguard that the Bill attempts to provide”.⁹¹ Chief Superintendent Flannigan agreed that this “would simplify matters and be consistent with the role of the police, which is to act on behalf of the Crown in investigating deaths and to take instruction”.⁹²

102. Patrick Harvie, in his correspondence to the Committee, suggested that “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”. He said that he “would certainly be happy to bring forward an amendment to section 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”.⁹³

103. The Committee welcomes the commitment from the member in charge to bring forward an amendment at Stage 2 to require the facilitator’s report to be made to the procurator fiscal rather than to the police, in line with existing legislation relating to medical deaths.

Savings for certain mistakes and things done in good faith

Overview

104. Section 24 provides for the protection of people who, acting in good faith and in pursuance of the Act (but, not carelessly), make an incorrect statement or other action inconsistent with the Bill. Under the provision, the individual concerned would be protected from criminal and civil liability. It also protects those who provide assistance in good faith and in intended pursuance of the Bill but who are not compliant with the requirements of the Bill due to the action or actions of another individual.

⁸⁹ Law Society of Scotland, written submission.

⁹⁰ Faculty of Advocates, written submission.

⁹¹ Scottish Parliament Justice Committee. *Official Report*, 28 October 2014, Col 30.

⁹² Scottish Parliament Justice Committee. *Official Report*, 28 October 2014, Col 30.

⁹³ Correspondence from Patrick Harvie to the Justice Committee (27 November 2014).

Definitions

105. A number of witnesses commented on the drafting of the savings provision. The Law Society, for example, argued that the savings provision is worded so broadly that enforcement would be difficult and noted the wide discretion for a court to interpret the meaning of 'intended pursuance of the Bill'.⁹⁴ In evidence, Professor Britton of the Law Society suggested that section 24 "is almost a catch-all provision that is trying to provide enabling or flexible legislation to deal with the complexities and the moral personal and legal issues the Bill brings". She went on to argue that, "as soon as sections such as section 24 are included, you leave room for a broad range of practices, whether they be actions or omissions".⁹⁵

106. The Faculty had similar concerns that "the width of the protection extended by section 24 may blunt the essential safeguards elsewhere in the Bill".⁹⁶ It suggested that the terms 'careless' and 'in good faith' should be defined, as they are "the dividing line between conduct that is lawful and protected by the Bill and conduct that exposes a person to the risk of prosecution".⁹⁷ Mr Stephenson QC from the Faculty added that "we are all careless from time to time, but is that to be the test of whether somebody is at risk of going to jail and having a life sentence for murder?"⁹⁸

107. Mr McGowan of the COPFS agreed with other witnesses that the definitions under section 24 could be tighter. He said he was unclear about the meaning of 'in intended pursuance of the Act' and gave his view, as a prosecutor, "that any step towards trying to comply with the Act would cause difficulty in a prosecution if we were to bring one".⁹⁹

108. In correspondence to the Committee, the member in charge, Mr Harvie, disputed Mr Stephenson's interpretation of the savings provision. He argued that section 24(1) "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'". He added that "the test of whether someone is exposed to prosecution (or civil liability) is not, therefore, just one of carelessness". Mr Harvie went on to state that "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".¹⁰⁰

109. The Committee notes the views of witnesses that the savings provision in section 24 has been drafted so widely that it is open to interpretation and may lead to potential difficulties with enforcement. The Committee also notes that the member in charge is "open to persuasion" on the wording of this provision and therefore recommends that the lead committee explores the issue further.

⁹⁴ Law Society of Scotland, written submission.

⁹⁵ Scottish Parliament Justice Committee. *Official Report*, 28 October 2014, Cols 13-14.

⁹⁶ Faculty of Advocates, written submission.

⁹⁷ Faculty of Advocates, written submission.

⁹⁸ Scottish Parliament Justice Committee. *Official Report*, 28 October 2014, Cols 14-15.

⁹⁹ Scottish Parliament Justice Committee. *Official Report*, 28 October 2014, Col 31.

¹⁰⁰ Correspondence from Patrick Harvie to the Justice Committee (27 November 2014).

Overall clarity of provisions in the Bill

110. The Committee heard general concerns that the provisions in the Bill lack clarity and that there could therefore be difficulties in their interpretation and application. The Faculty, for example, stated that—

“If the Parliament is to pass legislation to protect individuals from what would otherwise be the legal consequences of assisting another person to commit suicide, the Faculty consider it is important that the legislation is clear, readily understood (not just by lawyers), that key terms are well defined and not open to a variety of interpretations, and that any penalties for breach of the requirements of the legislation are spelled out”.¹⁰¹

111. In highlighting the complexity of the Bill, the Faculty said that “the complexity of the Bill is well-illustrated by the essential safeguards in section 3 of the Bill [as] to understand these requires reference to sections 4, 5, 8, 10, 17 and 18”.¹⁰²

112. In its written submission, the Scottish Human Rights Commission (SHRC) suggested that the law in this area must be formulated “with sufficient precision”.¹⁰³ Ms Riddell of the Law Society also had concerns regarding the lack of definitions of key aspects of the Bill.¹⁰⁴ She told the Committee that “the intention behind the Bill is very much to set up a dignified, systematic process, and there is something to be said about its simplicity and directness”. However, she went on to argue that, “as the Law Society has found, the challenge is that once you start to probe beneath all that, you begin to understand that the absence of definitions does not give the certainty or meet the intention to provide the simplified, process-driven approach that I think the Bill seeks to achieve”.¹⁰⁵ Mr Stephenson QC agreed that “there is an advantage to having a simple system, if for no other reason than that people who are not lawyers or are not regularly engaged in the process of considering assisted suicide can understand it”, but suggested that “clarity does not necessarily involve complexity”.¹⁰⁶ He went on to highlight that “Lord Falconer’s Assisted Dying Bill seems to me, as a lawyer, to be more clearly expressed” in what is a shorter Bill.¹⁰⁷

113. The Law Society stated that “clarity and precision of definitions is deemed essential to ensure there is no scope for uncertainty and that people are protected within the clear boundaries of the law”.¹⁰⁸ Mr McGowan of the COPFS also suggested that “some of the definitional elements have to be tightened up”, arguing that the lack of definitions may lead to an increase in the number of investigations in this area which would go against the intention of the Bill.¹⁰⁹ Mr Stephenson QC of the Faculty agreed “that there would be a danger that individuals would fall through the gaps and would, due to uncertainty, find

¹⁰¹ Faculty of Advocates, written submission.

¹⁰² Faculty of Advocates, written submission.

¹⁰³ Scottish Human Rights Commission, written submission.

¹⁰⁴ Scottish Parliament Justice Committee. *Official Report*, 28 October 2014, Col 17.

¹⁰⁵ Scottish Parliament Justice Committee. *Official Report*, 28 October 2014, Col 17.

¹⁰⁶ Scottish Parliament Justice Committee. *Official Report*, 28 October 2014, Col 17.

¹⁰⁷ Scottish Parliament Justice Committee. *Official Report*, 28 October 2014, Col 26.

¹⁰⁸ Law Society, written submission.

¹⁰⁹ Scottish Parliament Justice Committee. *Official Report*, 28 October 2014, Col 38.

themselves exposed to prosecution”, adding that “it would be better to get it right now than to get it right through a process of a series of criminal prosecutions in the High Court, when individuals would be at risk of losing their liberty”.¹¹⁰

114. The Committee considers it essential that, given the potential consequences for those involved in assisting suicide, the provisions in this Bill must be drafted as clearly as possible. To that end, the Committee recommends that the lead committee explores in more depth with witnesses improving clarity by including clear definitions on the face of the Bill where required.

Conscience clause

115. A number of witnesses suggested that a conscience clause should be added to the Bill. The Law Society noted that the Assisted Dying Bill expressly provides for conscientious objectors in section 5 of that Bill: “a person shall not be under any duty (whether by contract or arising from any statutory or other legal requirement) to participate in anything authorised by this Act to which that person has a conscientious objection”. The Law Society suggested that consideration needs to be given to incorporate a similar provision into the Assisted Suicide (Scotland) Bill.¹¹¹

116. The Faculty of Advocates stated in its written submission that it considers such a provision “may be desirable”.¹¹² It went on to argue “if there is to be a ‘conscience’ clause, the Faculty suggests that it should impose an obligation on the person declining to assist to inform the person making a preliminary declaration or first or second request that their reason for declining to assist is based upon conscience rather than upon a failure by the person to meet the statutory qualifying criteria”.¹¹³ In evidence, Mr Stephenson QC explained that this would enable a person “to understand that they can go somewhere else and seek assistance from someone who does not have conscientious objections”.¹¹⁴

117. Professor Britton agreed with the member in charge that guidelines¹¹⁵ for professional bodies could address the issue of a conscience clause, given that regulation of medical professionals is reserved.¹¹⁶

118. The Committee recommends that the lead committee gives further consideration to whether the guidelines or codes of practice for professional bodies could address the issue of a conscience clause, as suggested by the member in charge, as opposed to on the face of the Bill.

¹¹⁰ Scottish Parliament Justice Committee. *Official Report, 28 October 2014*, Col 12.

¹¹¹ Law Society of Scotland, written submission.

¹¹² Faculty of Advocates, written submission.

¹¹³ Faculty of Advocates, written submission.

¹¹⁴ Scottish Parliament Justice Committee. *Official Report, 28 October 2014*, Col 24.

¹¹⁵ The Policy Memorandum (paragraph 39) anticipates that relevant professional organisations would amend their guidelines and codes of practice to reflect any change in the law.

¹¹⁶ Scottish Parliament Justice Committee. *Official Report, 28 October 2014*, Col 25.

Penalties

119. The Faculty of Advocates noted that the Bill does not contain sanctions or penalties for any contravention of its provisions and argued that a person assisting another to commit suicide is likely to want to be clear as to the potential consequences of a failure to comply with the requirements of the Bill. The Faculty considers that breaches of the terms of the Bill should attract specific penalties rather than being subject only to common law.¹¹⁷

120. Mr Stephenson QC expanded on the Faculty's views during evidence. He suggested that the reason behind the absence of sanctions or penalties in the Bill may be "because its approach is not to create any offences but to provide freedom from risk of prosecution for common-law offences that stand outside it".¹¹⁸ He added that "an alternative approach would be that taken in the English Suicide Act 1961, which decriminalised assisted suicides subject to specific offences that were created in the legislation".¹¹⁹

121. The Committee draws the attention of the lead committee to the view of the Faculty of Advocates that specific penalties for breaching the provisions should be included in the Bill.

Insurance implications

122. In its written submission, Police Scotland highlighted that "life insurance policies may require further consideration given many insurers will not pay out if the policy holder commits suicide in the first 12 months of the policy or there has been non-disclosure about medical or psychiatric treatment".¹²⁰ Mr McGowan of the COPFS noted that "other jurisdictions that have similar legislation have clauses in their legislation that allow people to have the benefit of life insurance that must still be paid out in such circumstances".¹²¹

123. Mr Harvie explained that he would have preferred, if it had been possible, to have included within this Bill a provision similar to the comparable legislation referred to by Mr McGowan, but this was not possible due to the reservation of insurance in Schedule 5 to the Scotland Act 1998. He did, however, state that he "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".¹²²

124. The Committee notes that there may be insurance implications arising from this Bill.

¹¹⁷ Faculty of Advocates, written submission.

¹¹⁸ Scottish Parliament Justice Committee. *Official Report*, 28 October 2014, Col 17.

¹¹⁹ Scottish Parliament Justice Committee. *Official Report*, 28 October 2014, Col 17.

¹²⁰ Police Scotland, written submission.

¹²¹ Scottish Parliament Justice Committee. *Official Report*, 28 October 2014, Col 35.

¹²² Correspondence from Patrick Harvie to the Justice Committee (27 November 2014).

Human rights

Rights of person wishing to commit assisted suicide

125. The Policy Memorandum states that “the member is pursuing this Bill in the belief that the current law does not fully respect people’s rights to control the timing and manner of their own deaths, and their right to a dignified death”, adding “to that extent, the Bill enhances human rights, in the members’ view”.¹²³ It goes on to explain that “the Bill clearly has implications for human rights under ECHR – particularly Article 2 (right to life) and Article 8 (right to respect for private and family life) ... however, the member is confident that it is consistent with ECHR case-law, which suggests that states have some “margin of appreciation” in deciding whether and how to legislate for assisted suicide”.¹²⁴

126. In its written submission, the Law Society suggested that the Bill may be in direct contrast and possibly incompatible with human rights law, in particular, with Article 2 of the ECHR.¹²⁵ In its written evidence, the SHRC stated that, “recognising the complexity and sensitivity of the topic, the SHRC has restricted itself at present to outlining the human rights framework within which determinations on whether to adopt legislation permitting assisted death may be made”. The SHRC therefore provides a broad overview of relevant human rights law, including the principles of ‘dignity’ (inner worth of human beings) and ‘autonomy’ (self-governance of individuals)¹²⁶ which, it argued, have played an important role in human rights. The SHRC concluded that the Bill would have an impact on some of the fundamental elements of the dignity and autonomy of individuals and their families.¹²⁷

127. Professor Miller of the SHRC told the Committee that “from a human rights point of view, the real test will be whether the person exercised free will and whether the decision was based on information that was sufficient to satisfy us that the person who was seeking to bring an end to their life did so with free will”.¹²⁸ He indicated that “capacity has to be tested and, of course, medical conditions have to be satisfied ... but is what is happening really an expression of their own free will?”, adding that “it might well be, but before I made any such decision I would want to be very satisfied that I knew about anything that was lurking in the undergrowth”.¹²⁹

128. The Committee notes the view of the Scottish Human Rights Commission that the Bill would have an impact on some of the fundamental elements of the dignity and autonomy of individuals and their families. The Committee also notes the view of the member in charge that the Bill enhances the human rights of individuals.

¹²³ Policy Memorandum, paragraph 67.

¹²⁴ Policy Memorandum, paragraph 68.

¹²⁵ Law Society of Scotland, written submission.

¹²⁶ The Scottish Human Rights Commission state that autonomy and dignity are predominantly used in contemporary discussions of medicine health care and bioethics.

¹²⁷ Scottish Human Rights Commission, written submission.

¹²⁸ Scottish Parliament Justice Committee. *Official Report*, 28 October 2014, Col 16.

¹²⁹ Scottish Parliament Justice Committee. *Official Report*, 28 October 2014, Col 16.

Existing law

129. The SHRC argued that, until a policy or legislative change in Scotland is agreed, the Lord Advocate should issue interim guidelines to further clarify the current position for the public in relation to the prosecution of assisted suicide.¹³⁰ Professor Miller expanded on the SHRC's suggestion during evidence. He reiterated that, "if the Parliament decides not to approve the Bill, there is still a problem that has to be tackled: the lack of foreseeability on, and of accessibility to knowledge of, whether any informal action that individuals and families might take to assist suicide would lead to criminal sanctions being taken against them". He added that "families and legal professionals need much more certainty" in this area of law.¹³¹

130. However, Mr McGowan of the COPFS argued that interim guidelines were "not necessary because of the factors that are set out in the prosecution code" and said that he was not sure that he accepted there is currently a lack of clarity. He confirmed that, "if a person takes steps to assist suicide, they would be liable to prosecution under the law of homicide, depending on what those steps were [and] if someone is so liable, the factors that would be taken into account are in the prosecution code, which provides a degree of certainty".¹³²

131. The Committee notes the view of the Crown Office and Procurator Fiscal Service that the prosecution code provides sufficient clarity around the current law and that it does not, at this time, see a need for the Lord Advocate to publish guidelines along the lines suggested by the Scottish Human Rights Commission.

¹³⁰ Scottish Human Rights Commission, written submission.

¹³¹ Scottish Parliament Justice Committee. *Official Report*, 28 October 2014, Col 10.

¹³² Scottish Parliament Justice Committee. *Official Report*, 28 October 2014, Col 36.

ANNEXE A: EXTRACTS FROM THE MINUTES OF THE JUSTICE COMMITTEE

9th Meeting, 2014 (Session 4) Tuesday 18 March 2014

Work programme (in private): The Committee considered its work programme and agreed to: (a) invite Police Scotland and the Crown Office and Procurator Fiscal to give evidence on the Assisted Suicide (Scotland) Bill and to consider its approach to the Bill after the summer recess; [. . .]

24th Meeting, 2014 (Session 4) Tuesday 30 September 2014

Assisted Suicide (Scotland) Bill (in private): The Committee considered its approach to the scrutiny of the Bill at Stage 1 and agreed: (a) the proposed timetable for its scrutiny of the Bill; and (b) proposed witnesses for its meeting on 28 October 2014.

26th Meeting, 2014 (Session 4) Tuesday 28 October 2014

Assisted Suicide (Scotland) Bill: The Committee took evidence on the Bill at Stage 1 from—

Professor Alison Britton, Convenor, Health and Medical Law Committee, and Coral Riddell, Head of Professional Practice, Law Society of Scotland;
David Stephenson QC, Faculty of Advocates;
Professor Alan Miller, Chair, Scottish Human Rights Commission;
Chief Superintendent Gary Flannigan, Head of Major Crime, Specialist Crime Division, Police Scotland;
Stephen McGowan, Procurator Fiscal, Major Crime and Fatalities Investigation, Crown Office and Procurator Fiscal Service.

Roderick Campbell indicated that he is a member of the Faculty of Advocates.

33rd Meeting, 2014 (Session 4) Tuesday 16 December 2014

Assisted Suicide (Scotland) Bill (in private): The Committee considered a draft report to the Health and Sport Committee. Various changes were agreed to and the Committee agreed to further consider the draft report at its next meeting.

1st Meeting, 2015 (Session 4) Tuesday 6 January 2015

Assisted Suicide (Scotland) Bill (in private): The Committee further considered a draft report to the Health and Sport Committee. Various changes were agreed to and the Committee agreed its report.

ANNEXE B: ORAL EVIDENCE AND ASSOCIATED WRITTEN EVIDENCE

[26th Meeting, 2014 \(Session 4\) Tuesday 28 October 2014](#)

Professor Alison Britton, Convenor, Health and Medical Law Committee, and Coral Riddell, Head of Professional Practice, Law Society of Scotland;
David Stephenson QC, Faculty of Advocates;
Professor Alan Miller, Chair, Scottish Human Rights Commission;
Chief Superintendent Gary Flannigan, Head of Major Crime, Specialist Crime Division, Police Scotland;
Stephen McGowan, Procurator Fiscal, Major Crime and Fatalities Investigation, Crown Office and Procurator Fiscal Service.

Written evidence is included in the meeting paper for 28 October 2014 and is available at:

http://www.scottish.parliament.uk/S4_JusticeCommittee/Meeting%20Papers/Papers20141028.pdf

Correspondence

[Letter from Patrick Harvie to the Convener \(27 November 2014\)](#)

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