

Justice Committee

Assisted Suicide (Scotland) Bill

Written submission from the Faculty of Advocates

Introduction

The Faculty of Advocates is the independent bar in Scotland. It is committed to human rights and to equal opportunities for all. Its members include advocates with expertise in all fields of law. The Faculty welcomes the opportunity to offer evidence in relation to the Assisted Suicide (Scotland) Bill. The Faculty does not express views on matters of social policy and neither supports nor opposes the policy which this Bill pursues. The comments which the Faculty makes are on technical and legal features of the Bill.

Response to Questions in the Call for Written Evidence

In relation to the specific questions to be addressed the Faculty has the following comments.

1. Do you agree with the general purpose of the Bill to make it permissible, in the circumstances provided for, to assist another to commit suicide?

The Faculty considers that it would not be appropriate for it to comment on this question.

2. Do you have any views on how the provisions in this Bill compare with those from the previous End of Life Assistance (Scotland) Bill?

No. The Faculty considers that the Bill currently under consideration should be the focus of attention.

3. The Bill precludes any criminal and civil liability for those providing assistance, providing the processes and requirements set out in the Bill have been adhered to. Do you wish to make any comment on this?

Yes, please see the Appendix to this response

4. The Bill outlines a three stage declaration and request process that would be required to be followed by an individual seeking assisted suicide. Do you have any comment on the process being proposed?

Yes, please see the Appendix to this response.

5. Do you have any comment on the provisions requiring that the person seeking assisted suicide must have a terminal or life-shortening illness, or a progressive condition which is either terminal or life-shortening?

In general terms, yes. Many conditions are life-shortening, including common conditions such as type II diabetes and hepatitis. The Faculty questions whether it is the intention of the proponents of the Bill that such common conditions should justify assisted suicide. The Faculty considers that, if assisted suicide is to be legalised, the circumstances in which assisted suicide attracts the protection of the Bill should be clearly and precisely defined in order to assist persons who wish to rely on the protection such legislation would provide, as well as those persons performing functions in

terms of the legislation. All such persons need to understand clearly what they can do to assist a suicide, and when and how that can be done. Clarity is imperative. Otherwise such persons may find their actions subject to review in the courts by way of a criminal prosecution or otherwise.

6. Are you satisfied with the eligibility requirements as regards age, capacity, and connection with Scotland as set out in the Bill?

Please see the Appendix to this response.

7. Do you have any comment on the roles of medical practitioners and pharmacists as provided for in the Bill?

The Faculty understands that the General Medical Council and the General Pharmaceutical Council would require to amend their regulations before their members could participate in the activities outlined in the Bill. Whether they are willing to do so is a matter for these professional bodies.

8. Do you have any comment on the means by which a person would be permitted to end his/her life under the Bill?

The Bill does not address this issue save by implication at section 19(c) (cf. the Explanatory Notes). Please see further below in the Appendix to this response.

9. Do you have any comment on the role of licensed facilitators as provided for in the Bill?

The Faculty is concerned that the role of licensed facilitators is insufficiently specified. The Faculty wonders whether such a difficult and sensitive role should be carried out only by persons with certain recognised qualifications. What these qualifications might be is a matter which the Faculty considers the health and caring professions are better qualified to address. The Faculty questions whether it is appropriate that such a role should be performed by a person as young as 16 years of age, and particularly so if they have no relevant qualifications to allow them to perform that role.

10. Do you have any comment on the role of the police as provided for in the Bill?

Yes. Please see the Appendix to this response.

11. Do you have any comment to make about the Bill not already covered in your answers to the questions above?

Yes. Please see the Appendix to this response.

Appendix

General observations:

If Parliament is to pass legislation to protect persons from what would otherwise be the legal consequences of assisting another person to commit suicide, the Faculty considers it is important that such legislation is clear, readily understood (and not just by lawyers), that key terms are well-defined and not open to a variety of interpretations, and that the penalties for breach of the requirements of the legislation are spelled out. Otherwise persons wishing the protection of the legislation will be unclear as to whether their acts are protected and may render themselves liable to prosecution for serious crimes or subsequent review of their conduct in a civil court.

The Faculty considers that the Bill as currently drafted may not achieve these essential goals.

The complexity of the Bill is well-illustrated by the essential safeguards in section 3 of the Bill. To understand these requires reference to sections 4, 5, 8, 10, 17 and 18.

The Faculty considers that the requirements in sections 4, 8 and 10 of the Bill that the person making the preliminary declaration, and first and second requests for assistance be a patient registered with a medical practice in Scotland are practicable ways of limiting those to whom the protection of the Bill extends. However, the Faculty also wonders if this should be supported by a requirement that the registration should be for a minimum period before the preliminary declaration and first and second request may be made.

Capacity:

Section 12 of the Bill makes provision for the capacity of the person making the first or second requests for assistance. Capacity is central to the statement to be made by the medical practitioner in terms of sections 9 and 11. The Faculty considers it undesirable to define capacity, first by reference to section 328 of the Mental Health (Care and Treatment) (Scotland) Act 2003 (asp 13) - which would e.g., exclude anyone with a mental disorder - and also by reference to what is effectively the converse of an edited version of the definition of "incapable" contained in section 1(6) of the Adults with Incapacity Act 2000. The Faculty considers that it is important that the definition of "capacity" in the Bill is consistent with both the Adults with Incapacity Act 2000 and the Mental Health (Care and Treatment) (Scotland) Act 2003 (asp 13) 1(6) (asp 4), and that conflict between statutory regimes is avoided. There may be good policy reasons for seeking to exclude from the ambit of the Bill those suffering from a mental disorder, but Faculty would be concerned such a general exclusion might be seen as discriminatory. Faculty are not clear whether the policy intention is in fact to exclude everyone with a mental disorder from the scope of the Bill, or why that should necessarily be the case if that person meets the requirements of Section 12(1)(b)(i): "is capable of - (i) making a decision to make the request". Faculty is also concerned as to what would therefore qualify "a medical practitioner" to make a decision as to capacity for the purposes of Sections 9(2)(a) and 11(2)(a), and whether the practical consequences might be that only a psychiatrist would have the necessary skills.

Savings:

Section 24 provides for "Savings for certain mistakes and things done in good faith". The Faculty notes that the terms "careless" and "in good faith" are not (defined in the Bill. The Faculty considers they ought to be defined. These terms 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. As currently drafted it is not clear by what standard carelessness is to be judged. Is it to be tested objectively or subjectively, or by a combination of both? Is the same standard to be applied to medical practitioners as to licensed facilitators and lay persons?

The width of the protection extended by section 24 may blunt the essential safeguards elsewhere in the Bill.

Section 24 (3) is confusing. From paragraph 44 of the Explanatory Notes it appears that the intention is to preserve “the validity” of the acts of a person acting in good faith and in intended furtherance of the Act where someone else has breached the Act in bad faith or carelessly. If this is the intention the words “by another person” should be inserted in section 23 (3) (a) after the word “made”, and in section 23 (3) (b) after the word “done”.

Proxies:

The Faculty has concerns as to the identification of its members as potential proxy signatories for the purposes of Section 16 of the Bill. Section 16(6) defines “proxy” to mean “a member of the Faculty of Advocates”. The Faculty is unclear whether involvement of its members as proxies is seen as being in the performance of a professional function or not, and would have to consider carefully with professional indemnity insurers who provide cover for advocates whether members could, or should, be permitted to perform the function envisaged. The Faculty’s concerns are compounded by the uncertainties in the present Bill as to how the statutory indemnity against criminal sanction and civil liability would apply in practice.

Conscience:

The Faculty notes that the Bill does not contain a “conscience” provision for those who feel that they cannot participate in assisting a suicide. This may be contrasted with the Abortion Act 1967. The Faculty considers such a provision may be desirable.

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. The person can then decide, if they wish, to seek assistance from somebody else.

Facilitators:

The role of a licensed facilitator is unclear. The Faculty considers it desirable that this potentially crucial role should be clearly defined in the legislation and not left to directions or guidance that may be issued by the Scottish Ministers. The Faculty notes that there is no express requirement that a facilitator be engaged, or if engaged that his/her services be used as one of the safeguards – cf. paragraph 7 of the form of second request in Schedule 3 to the Bill. Is the facilitator the only person who can assist a person to commit suicide? Such protections as the Bill provides in relation to the role of a facilitator could readily be elided if persons other than licensed facilitators were able to assist a person to commit suicide. For example, a spouse (who would be disqualified from acting as a facilitator under Schedule 4) could assist her husband or wife to commit suicide. (A spouse might be thought to be equally able to provide “such practical assistance as the person reasonably requests” and better equipped than a facilitator to provide “comfort and reassurance” to the person committing suicide.)

Section 19 provides that the facilitator is to use best endeavours to be present when the person committing suicide takes the drugs or uses other means to commit suicide. Best endeavours sets a high standard of compliance, particularly for someone who has no powers of enforcement. The phrase “reasonable endeavours”

or “all reasonably practicable endeavours” might be more appropriate. It is not clear whether the facilitator requires to remain with the person until he dies. The facilitator is also to provide such practical assistance as the person wishing to commit suicide reasonably requests. The Faculty notes the tension between this provision and the requirement that the person’s death be his own deliberate act. The Faculty questions whether an unqualified 16 year old unrelated to the person who wishes to commit suicide is in practice likely to be able to provide that person with adequate “comfort and reassurance”.

The Faculty notes that the Bill does not specify the means by which a person might commit suicide. Section 19 seems to envisage that a person would commit suicide by ingesting drugs. It is not clear from the Bill who is to prescribe these drugs and whether there is to be any control over what drugs may be prescribed and dispensed for the purpose of assisting a person to commit suicide (although we note that paragraph 39 of the Policy Memorandum envisages that it will be the role of a medical practitioner and that guidelines and codes of practice will require amendment). The Faculty is unclear from the wording of the Bill whether or not it is intended to extend protection to the use of other methods by which a person might commit suicide. The Policy Memorandum seems to envisage that this is so (cf. Paragraph 40). If that is not the intention it is suggested that the present provisions should be looked at again to ensure that the legislative intention is clearly expressed.

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. The Committee might consider amending the terms of the Fatal Accident and Sudden Deaths Inquiries (Scotland) Act 1976 to make deaths covered by the Bill reportable.

Other drafting points:

The Faculty considers that what constitutes “assisting a person to commit suicide” should be clearly defined in the Bill. Other than the fact that the cause of the person’s death must be his own deliberate act (sections 3 (d) and 18 (3)) the Bill offers no guidance as to what assistance comprises. Does it include prescribing or dispensing drugs to the person who wishes to commit suicide? Does it include preparing the means whereby the person can ingest such drugs? Does it cover the actions of the licensed facilitator?

The Faculty considers section 18 to be poorly drafted. From paragraph 34 of the Explanatory Notes it appears that the purpose of the provision is to ensure that the protection of the Bill does not extend to euthanasia and that the cause of death must be the person’s own deliberate act. What is meant by the “cause” of a person’s death? There may be multiple causes. The Faculty considers that this could be more clearly expressed, and suggests that the phrase “final act” is to be preferred to “cause” – cf. clause 4 (4) of Lord Falconer’s Assisted Dying Bill for England and Wales where the procedure requires the assistance of a health professional.

The Faculty also considers that the wording of sections 8 (3) (d) and 8 (4)(b) might be better phrased. The same changes could be made mutatis mutandis to section 10 (3) and (4).

The wording of paragraph 8 of the preliminary declaration in schedule 1 to the Bill might be better phrased.

Penalties and regulation:

The Faculty notes that the Bill contains no sanctions or penalties for contravention of its provisions. 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 it desirable that breaches of the terms of the Bill attract specific penalties rather than being subject only to the common law.

In particular, there is no penalty in the event that a medical practitioner wrongly endorses a request for assistance in terms of sections 9 or 11, or for a failure to comply with procedural matters such as the form of a preliminary declaration or request, the form of endorsement of these by a medical practitioner, the recording of the making of a preliminary declaration or request (or the cancellation of any of these).

The Faculty considers that the consequence of a person's failure to ensure that an attempted suicide takes place within 14 days of the recording of the second request should be expressly stated. As presently drafted, it appears to be implied that the second request will fall after 14 days have expired and that a further second request would be required to give the protection of the Bill to a person assisting in a subsequent attempt to commit suicide.

The Bill lacks detail about the requirements of record keeping by the various parties involved, and the inspection of those records (which would ordinarily be confidential to the patient) to prevent abuse. Is there to be a system of regulation? The Faculty wonders whether 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, coupled with publication of statistical information and an annual report on the operation of the scheme.

Faculty of Advocates