

Stage 1 Briefing

Assisted Dying for Terminally Ill Adults (Scotland) Bill

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Introduction

The Law Society of Scotland is the professional body for over 13,000 Scottish solicitors.

We are a regulator that sets and enforces standards for the solicitor profession which helps people in need and supports business in Scotland, the UK and overseas. We support solicitors and drive change to ensure Scotland has a strong, successful, and diverse legal profession. We represent our members and wider society when speaking out on human rights and the rule of law. We also seek to influence changes to legislation and the operation of our justice system as part of our work towards a fairer and more just society.

Our approach to policy issues is directed by our statutory aims under the Solicitors (Scotland) Act 1980, namely to represent the interests of the solicitors' profession in Scotland and the interests of the public in relation to that profession, and by the regulatory objectives of the Legal Services (Scotland) Act 2010, namely:

- supporting the constitutional principle of the rule of law and the interests of justice
- protecting and promoting the interests of consumers and the public interest generally
- promoting access to justice and competition in the provision of legal services
- promoting an independent, strong, varied and effective legal profession
- encouraging equal opportunities within the legal profession and promoting and maintaining adherence to professional principles

The Assisted Dying for Terminally Ill Adults Bill ("the Bill")¹ was introduced as a Member's Bill by Liam McArthur MSP on 27 March 2024. We submitted written evidence to the Health, Social Care and Sport Committee of the Scottish Parliament (the lead committee) in August 2024.² We provided oral evidence as part of the lead committee's stage 1 consideration of the Bill on 12 November 2024.³ The Health, Social Care and Sport Committee's stage 1 Report on the Assisted Dying for Terminally Ill Adults Bill (the Stage 1 Report)⁴ was published on 30 April 2025. We note that the lead committee has chosen to make no overall recommendation concerning the General Principles of the Bill.⁵

We welcome the opportunity to consider and provide comment on the Bill ahead of the stage 1 debate scheduled for 13 May 2025.

¹ Assisted Dying for Terminally Ill Adults (Scotland) Bill - Sharing your views - Scottish Parliament - Citizen Space

² [Written Evidence](#)

³ [Minutes for Health, Social Care and Sport Committee 31st Meeting, 2024 Tuesday, November 12, 2024 | Scottish Parliament Website](#)

⁴ [Stage 1 report: Assisted Dying for Terminally Ill Adults \(Scotland\) Bill](#)

⁵ Stage 1 Report, at para 5

Executive Summary

We do not adopt a position on the moral and ethical issues of assisted dying. Whether or not to legislate in this area is a matter for Parliament.

We highlight a number of practical and legal matters that would, in our view, require to be addressed if the Parliament were to decide to proceed further with the Bill, including:

- We have specific concerns around the approach to capacity and mental disorder in the Bill- see our comments on section 3, below at pages 4-5.
- We have significant concerns about the proposed role of solicitors as proxies under section 12 of the Bill- see our comments at page 5 below.
- We request clarity on the interaction between the Bill and existing medico-legal principles, and specifically whether assisted dying could be considered a 'reasonable treatment option'- see our comments on below at pages 5-6.
- Whilst we do not seek to express a view on the legislative competence of the Bill, we would recommend that these issues are considered carefully and further assessed during parliamentary scrutiny- see our comments at pages 8-9, below.
- We suggest a number of ways to strengthen the procedural safeguards set out in the Bill, should it proceed to Stage 2. Specifically, we welcome the lead committee's comments in support of a shorter review period and a possible 'sunset clause'.

General Remarks

We recognise that the subject matter of the Bill raises moral and ethical questions and will undoubtedly prompt much public and parliamentary discussion. We are not in a position, nor would it be appropriate for us, to comment on the ethical and moral aspects of the Bill and whether or not to legislate in this area is a matter for Parliament. This has been our position since the introduction of this Bill, and in relation to previous attempts to legislate in this area. Our position remains neutral on the subject matter of the Bill.

We therefore focus our comments on the practical and legal aspects and points, raising these to promote further consideration and debate. They include practical and legal matters that would, in our view, require to be addressed if the Parliament were to decide to proceed further with the Bill.

We have commented on specific sections of the Bill below in Part 1 of this briefing. We have also commented on the general issues of Legislative Competence and Professional Standards and Obligations in Part 2 of the briefing.

Part 1- Comments on sections of the Bill

Eligibility to be provided with lawful assistance to voluntarily end own life

Section 1

Section 1 sets out that an eligible terminally ill adult, may request to be lawfully provided with assistance to end their life, and providing such assistance to end life will be lawfully provided if it is in accordance with the provisions of the Bill.

We have no specific comments on this section of the Bill. We have commented on eligibility, including the definition of an 'adult' for the purposes of the Bill, at section 3 below.

Section 2

Section 2 provides a definition of terminal illness for the purpose of the Bill. We have no specific comments on this section of the Bill, although we do note the definition of terminal illness is broadly drawn.

Section 3

Section 3 makes provisions for the eligibility criteria in order to be provided with assistance. In terms of section 3, a terminally ill adult is eligible to be lawfully provided with assistance to end their own life if they:

- (a) are ordinarily resident in Scotland and have been so resident for at least 12 months before the date of the first declaration (see section 4),
- (b) are registered as a patient with a medical practice in Scotland, and
- (c) have capacity to request that assistance.

We note the Member in Charge of the Bill intends to increase the age threshold for the Bill to 18, should the Bill proceed to stage 2.⁶

We have concerns relating to the definition of capacity in Section 3(2) of the Bill.

Section 3(2)(a) proposes that a person has capacity to make a request if the person is not suffering from any mental disorder- defined as in section 328 of the Mental Health (Care and Treatment) (Scotland) Act 2003 to include mental illness, learning disability and personality disorder- which "might affect the making of the request". This suggests that people with mental disorders may not have capacity to request assisted dying. This is imprecise and could be taken to exclude all people with a mental disorder from being able to make a request, because it is a blanket approach to capacity with regard to mental disorder. We are concerned that this may create a position where mental disorder is deemed to equate to incapacity, which is not the case,⁷ and may also be seen as discriminatory.

⁶ [Assisted dying: Minimum age in Scottish bill to be raised from 16 to 18 - BBC News](#)

⁷ See the comments by the Lord Justice Clerk in the recent case of *Chowdhury v General Medical Council* (Inner House decision 14 March 2023): "There is a clear flaw at the centre of the appellant's approach in this case. That is that the primary focus has been on the mere diagnosis itself, rather than on the manner in which certain features of the condition affect the appellant in specific ways related to the subject matter, conduct and outcome of the proceedings. The diagnosis itself, and a recital of common characteristics which may be, or even are, found in the appellant does not advance the issue."

Mental illness is extremely common, and potentially there may be people with mental illness who would wish to request assisted dying should the Bill become law.

We therefore note and welcome the lead committee's conclusion that, if the Bill progresses, the Scottish Government should consult relevant specialist bodies to determine appropriate wording to ensure the capacity of individuals with a mental disorder is assessed in a fair and non-discriminatory way, whilst also offering suitable protection for vulnerable individuals.⁸

Lawful provision of assistance to end life: preliminary steps

Sections 4-11

In our written evidence to the lead committee, we commented on various practical and legal matters in relation to sections 4- 11 of the Bill as introduced and suggested a number of potential ways to strengthen procedural safeguards, should the Bill proceed to Stage 2. We do not repeat these for the purposes of this briefing, but details can be found in our previous submission.

Section 12

Section 12 provides that if the terminally ill adult is unable to sign their own name, a proxy may be authorised to sign on their behalf.

Section 12 identifies specific categories of individuals as proxies who may sign a document on behalf of a person by reason of physical impairment, being unable to read or for any other reason. We noted in our written evidence detailed comments expressing reasons that solicitors should not be proxies.⁹ This could have the effect of affecting or creating a solicitor-client relationship.

We note the stage 1 report recommends that, if the Bill is to progress to stage 2, these concerns around who could be a proxy and the extent of their role require to be addressed based on further advice and input from the legal profession.¹⁰ We welcome this recommendation.

Sections 13-17

We have no comments on sections 13 and 14. In our written evidence, we commented on sections 15 and 16, suggesting additional safeguards should be Bill proceed to stage 2. We have not repeated these here, but refer to our previous submission. We have no comments on section 17.

Sections 18 - 20

Section 18 sets out that no one is under any legal duty to play an active, participatory role, including any individual health professional, in anything authorised by the Bill. Section 19 sets out that where the requirements of the Bill are complied with, it is not a crime to provide a terminally ill adult with assistance

⁸ Stage 1 report, para 209

⁹ [Written Evidence](#), P8-14

¹⁰ Stage 1 report, para 257

to end their life. Section 20 sets out similar provisions in relation to civil liability which might arise from involvement in the provisions of assistance under the Bill. These provisions may be affected by the regulation of the professions reservation referred to at section 22, limiting the effect of these provisions.

Section 18 of the Bill provides that no one, including any individual health professional, is under any legal duty to play an active, participatory role in anything authorised. Since regulating the medical profession is reserved, the Scottish Parliament can only legislate for conscience rights with express authority under the 1998 Act, which (so far) does not appear to be granted (see our comments below in relation to legislative competence).

Section 18, subsection (2) provides that in any resulting legal proceedings it is for the person claiming a conscientious objection to prove that they are lawfully able to object. An alternative model may be for health professionals to actively opt in to providing lawful assistance under the Bill. This could also allow more effective training and monitoring. We note the lead committee's conclusion that the concept of an 'opt-in' model is an area that would benefit from further exploration through amendment should the Bill progress to Stage 2.¹¹

One important issue about which we consider the Bill as it currently stands is not sufficiently clear is how the medication to be provided is to be understood by reference to current medico-legal principles. We have set out these medico-legal principles in some detail in our written evidence. Our comments concluded there will be significant consequences dependant on whether or not assisted dying is considered a 'reasonable treatment option.' If the Bill proceeds to stage 2, we recommend this is clear within the Bill.

We welcome the conclusion of the lead committee that, should the Bill progress to Stage 2, it will be important to give further attention to the wording of section 18, to ensure it provides an appropriate level of legal clarity and certainty for all parties involved in the assisted dying process.¹²

General and final provisions

Section 21

Section 21 provides that it is an offence to pressure or coerce a terminally ill adult to make a first or second declaration against their will.

Whilst we have no specific comments on this section at this stage, we note the evidence of Ms Buchan of the Crown Office and Procurator Fiscal Service¹³ indicating there may be difficulties in applying the criminal law in this area.

¹¹ Stage 1 report, para 348

¹² Stage 1 report, para 324

¹³ Referred to at paras 397-398 of the Stage 1 Report

Section 22

Section 22 makes provisions clarifying that any provision of the Bill, or made under the Bill, relating to specific reserved matters has no effect.

See our general comments on the issue of legislative competence at Part 2, below.

Section 23

Section 23 provides for Ministerial Guidance regarding the practical operations of the Act.

We have no specific comments on this section.

Section 24 - 27

Section 24-27 of the Bill makes provisions on reporting and review.

Given the need for robust legal and institutional safeguards to ensure compliance with Article 2 ECHR (see our comments on legislative competence, below), we note that the Bill doesn't appear to provide oversight provisions beyond collection and reporting of data. We understand that some countries have review boards and a review committee to provide oversight- especially when the death certificate will only record the terminal illness and won't disclose an assisted death. It may be appropriate for consideration to be given to strengthening oversight measures. See our further comments, below.

We note that section 27 makes provision for reviews of the operation of the Act. The Bill as introduced would require review after 5 years, in light of the potential human rights implications, a shorter review period may be appropriate. With the sensitivity of this legislation in mind, it may be appropriate to consider the application of a formal sunset clause to allow the Parliament to review the legislation in the future. The stage 1 report agrees that a shorter review period and a possible 'sunset clause' would merit further debate and consideration, should the Bill progress beyond stage 1.¹⁴ We welcome this recommendation.

Sections 28-30

We have no specific comments on these sections.

Section 31

Section 31 sets out an ancillary power for Scottish Ministers to make any incidental, supplementary, consequential, transitional, transitory or saving provision they consider appropriate by regulations. Such regulations may modify any enactment, including the Bill once passed. Regulations are subject to the affirmative procedure they add to, replace or omit any part of the text of an Act, and are otherwise subject to the negative procedure.

¹⁴ Stage 1 report, para 445-448

We note the powers under section 31(2) which amount to Henry VIII powers¹⁵ and it is not clear to us why such powers would be necessary in this legislation, beyond the expected amending powers found at section 31(1).

Sections 32 and 33

We have no specific comments on these sections.

Part 2: Further General Comments

Legislative Competence

At the outset, consideration needs to be given as to whether the Bill itself is competent under the Scotland Act 1998 (“the 1998 Act”). The Presiding Officer and Liam McArthur MSP, the member in charge of the Bill, have given statements¹⁶, that in their view, the Bill would be within the legislative competence of the Scottish Parliament. They have, however, not given reasons for their view. The Scottish Government has set out their view that the Bill is outwith the legislative competence of the Scottish Parliament.¹⁷

Section 29 of the 1998 Act prevents any Act of the Scottish Parliament becoming law if it is outside of the legislative competence of the Parliament. An act will be outside of competence if, amongst other things, *‘it is incompatible with any of the Convention rights ...’*¹⁸.

Section 29 of the 1998 Act also provides that a provision is outside competence so far as it relates to reserved matters. There are ongoing concerns as to whether provisions in the Bill as currently drafted might be argued to be out with competence as they relate to reserved matters of the regulations of the professions, misuse of drugs or medicines, however, these matters would ultimately be for the court to decide. It is recognised in the Policy Memorandum of the Bill¹⁹ that an order under Section 30 of the 1998 Act or similar would be required to achieve a truly comprehensive assisted dying scheme. In our view, the possibility of such an order should not be used as a basis for stating that the Bill is at present within legislative competence.

Section 22 of the Bill, which provides that provisions of the Bill which relate to reserved matters are of no effect, raises questions of whether this would be an acceptable way of ensuring that the provisions within the Bill are within the legislative competence of the Scottish Parliament. Section 22 does no more than

¹⁵ Henry VIII powers are delegated powers which allow Ministers to amend primary legislation.

¹⁶ <https://www.parliament.scot/bills-and-laws/bills/assisted-dying-for-terminally-ill-adults-scotland-bill/introduced#topOfNav>

¹⁷ <https://www.parliament.scot/-/media/files/committees/health-social-care-and-sport-committee/correspondence/2024/sg-position-on-ad-bill.pdf>, referred to at para 414 of the stage 1 report.

¹⁸ Ibid Section 29(2)(d)

¹⁹ Policy Memorandum, paras 8-10

re-state what section 29 of the Scotland Act already provides. It uses a similar drafting technique to the one used in the UNCRC case (2021 UKSC 42)²⁰ which criticised and disapproved of leaving it to the courts to interpret the provisions of a Bill in such a way as to bring them within legislative competence.

We consider it particularly important that consideration is given to the competence of the Bill from an ECHR perspective, as well as whether the mechanisms within the Bill for securing competence are appropriate.

Whilst we do not seek to express a view on the legislative competence of the Bill, we would recommend that these issues are considered carefully and further assessed during parliamentary scrutiny. We note the discussion of legislative competence issues in the stage 1 report.²¹

Professional Standards and Obligations

The Bill gives rise to a tension by overlooking the professional obligations and standards which have already been imposed on the medical and legal professionals being asked to help in this process. There is a challenge in treating the process as a dignified, but still primarily a process driven, procedure. This is because the nature of assisted dying and the acute impact of the proposed legislation also necessitates judgment, assessment, and in many cases an element of ethical analysis by the professionals involved in the process. While not accounted for specifically in the Bill, these additional elements cannot be removed from the process as long as these professionals are embedded in the process. It is this juxtaposition between process and professional judgment that creates a tension in the Bill since the professional obligations and standards that medical practitioners and solicitors require to apply are not displaced by the requirements made of them in the Bill.

²⁰ 2021 UKSC 42, at paras 60-79

²¹ Stage 1 report, paras 409- 427



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