

The Scottish Parliament Cross Party Group on End of Life Choices<sup>1</sup> recommends that the Scottish Law Commission as part of its tenth programme on reform, considers law reform on Assisted Dying (AD).

Health services are devolved and thus Assisted Dying lies within Scotland's margin of appreciation.<sup>2</sup> Thus, any initiative for legal change on AD (and in respect of other end of life practices) could be dealt with by way of either a Commission Bill process or the HOL procedure. Given the aspects of inequality and injustice present in and around this issue, we believe that the Scottish Parliament Justice Committee is the most appropriate place for this issue to be considered.

### **Scotland is operating in a Legal Vacuum**

The most prominent issue is that in Scotland there is no statute regulating either Suicide<sup>3</sup> or assisting suicide. This is in direct contrast to England and Wales who benefit from primary legislation,<sup>4</sup> clear guidelines from the prosecutor<sup>5</sup> and an abundance of case law<sup>6</sup>, all of which are not directly applicable to Scotland.

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<sup>1</sup> <http://www.parliament.scot/msps/end-of-life-choices.aspx>

<sup>2</sup> Scotland Act 1998 restored responsibility for all biomedical matters north of the border except in matters relating to abortion, xenotransplantation (but not transplantation), surrogacy arrangements, human fertilisation and embryology, human genetics and medicines for human use. These reservations to the UK parliament were prepared in order to avoid risks of bioethical tourism within the UK (such as with abortion) or issues which were deemed too complex to consider on a non-UK level (such as xenotransplantation, genetics and embryology). In this context, End-of life issues were the remit of the Scottish Parliament.

<sup>3</sup> In Scotland, it would appear that attempting suicide was a crime at common law, at least until the 18th century. By the twentieth century, this crime had become entirely obsolete; neither committing nor attempting to commit suicide seem to be punishable in Scots law.

<sup>4</sup> Suicide Act 1961, s.1 states; 'Suicide to cease to be a crime. The rule of law whereby it is a crime for a person to commit suicide is hereby abrogated' and s.2 states 'Criminal liability for complicity in another's suicide'.

<sup>5</sup> Following the *Purdy* ruling the then Director of Public Prosecution, Keir Starmer, produced offence specific guidance on assisting a suicide. See: [http://www.cps.gov.uk/publications/prosecution/assisted\\_suicide.html](http://www.cps.gov.uk/publications/prosecution/assisted_suicide.html)

<sup>6</sup> See: The cases of *Daniel James*, 'Martin', *R (Pretty) v DPP* [2001] UKHL 61, [2002] 1 AC 800 R (*Nicklinson*) v Ministry of Justice for examples

Scotland has failed to produce legislation to govern this area,<sup>7</sup> condemning the legal landscape to ‘an alarming lack of legal clarity’, a situation described by Scots legal experts as ‘shameful’.<sup>8</sup> The Lord Advocate has refused to produce guidelines, stating that the Scottish prosecution code is suffice. It has been argued that the general prosecution code for homicide is not fit for purpose in the context of AD and that specific guidance should be offered.<sup>9</sup> In Scotland, AD is governed by common law but had never been tested in the Scottish courts until *Ross*.<sup>10</sup>

The petitioner’s objective in this case was to gain legal clarity (by way of specific guidance). Lord Carloway’s engagement with the legal issues in a hypothetical manner, whilst not beneficial to *Ross* in terms of guidelines sought, has divided opinion on whether such clarification was achieved. Some have argued that Lord Carloway’s statements brought greater clarity to the criminal law and its application to AD. One commentator went as far as to say:

“The court declined to force Frank Mulholland to publish additional guidance on how his prosecutors would treat cases - the remedy *Ross* sought. But in the course of reaching that decision, Lord Carloway and his colleagues arguably did something better - they stated the law in this area with a simplicity and a clarity which has hitherto eluded the authorities.”<sup>11</sup>

Tickell goes on to say:

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<sup>7</sup> Both the End of Life Assistance (Scotland) Bill 2010 and the Assisted Suicide (Scotland) Bill 2013 did not proceed past Stage 1 in the Scottish Parliament.

<sup>8</sup> Herald Scotland, *Top Legal Experts Call for Clarity over the ‘shameful’ right to die legislation*. Available from: [http://www.heraldscotland.com/news/13208020.Top\\_legal\\_experts\\_call\\_for\\_clarity\\_over\\_the\\_\\_shameful\\_\\_ri ght\\_to\\_die\\_legislation/](http://www.heraldscotland.com/news/13208020.Top_legal_experts_call_for_clarity_over_the__shameful__ri ght_to_die_legislation/) accessed on 29/7/17

<sup>9</sup> Chalmers, J., *Assisted suicide in Scotland: (not) clarifying the law*, Feb 10, 2015, Available from: <http://schooloflaw.academicblogs.co.uk/2015/02/10/assisted-suicide-in-scotland-not-clarifying-the-law/> accessed on 28/7/17 See also: *ibid* ref 8

<sup>10</sup> There have been other cases ‘in and around’ the question of lawfulness of Assisting in a suicide but nothing directly in point.

<sup>11</sup> A, Tickell (2016) ‘Assisted Suicide: bringing a little light’ available from: <http://lallandspeatworrier.blogspot.co.uk/2016/02/assisted-dying-bringing-little-light.html> (accessed on 14/1/17)

“Lord Carloway suggested ‘the criminal law in relation to assisted suicide in Scotland is clear.’ For my own part, I’m unconvinced this is a particularly convincing interpretation of the law as it stood before Mr Ross’s legal action. But the Lord President’s legal analysis in this decision goes a long way to bringing that clarity about.”

Tickell offers this with reference to Lord Carloway’s statements in *Ross* at paragraphs 30:

“When an adult with full capacity freely and voluntarily consumes a drug with the intention of ending his life, it is this act which is the immediate and direct cause of death. It breaks the causal link between any act of supply and the death.”

and paragraph 31 of the judgment:

“...other acts which do not amount to an immediate and direct cause are not criminal. Such acts, including taking persons to places where they may commit, or seek assistance to commit, suicide, fall firmly on the other side of the line of criminality.”<sup>12</sup>

The above statements are profound and somewhat surprising in this context. Before *Ross* very little opinion had been offered, mostly due to the lack of case law in Scotland. Although Lord Carloway is Scotland’s most senior judge, the comments are obiter statements which have arguably been informed by scant,<sup>13</sup> obsolete<sup>14</sup> or inapplicable<sup>15</sup> legal precedents and thus cannot be regarded as ‘clarifying the law’. It is argued that this case has in fact further muddied the waters.

There is no definitive source or singular document for members of the public to consult in order to discover Scots Law’s position on assisted dying.<sup>16</sup> The law may be ‘clear’ to some

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<sup>12</sup> i.e. that it would not be illegal

<sup>13</sup> As outlined there is minimal case law in relation to AS in Scotland

<sup>14</sup> Carloway relies on rulings such as *Kennedy* which were pre *MacAngus*

<sup>15</sup> In that they do not directly concern Scots Law or Assisted Suicide – *MacAngus* ruling did not agree with ruling in HOL in *Kennedy*

<sup>16</sup> In *Ross* and in earlier public statements, the Lord Advocate’s position was that he would consider the public interest in the prosecution of any case of assisted suicide, amounting to homicide in accordance with the

experts but the layperson has an impossible task of trying to glean information from various sources. For an individual to make an informed decision would involve accessing reports of parliamentary committees, court rulings and reading certain newspaper reports. An effort could be made to promulgate these public statements and the thought process behind prosecution into one easily accessible paper and be put on the CPS website perhaps, this would be helpful for the lay person and further satisfy the accessible and foreseeable criteria required by Article 8.<sup>17</sup>

Whether any prosecution will be deemed to be in the public interest depends on the opinion of the Lord Advocate as does the precise nature of the charge. In theory, the assistant could be charged with murder. In practice, though, the assistant is likely to be charged with culpable homicide. This leaves the matter of sentencing in the hands of the judge, a situation which has led to some unpredictability in sentencing.<sup>18</sup>

Patrick Harvie MSP outlined the above points succinctly during the stage 1 debate of the Assisted Suicide (Scotland) Bill in May 2015:

*...the case has been made clearly that a change in the law is justified and that the current law is not only inadequate but unclear. Members who have looked at the exchange of evidence between the Lord Advocate and legal experts such as Professor James Chalmers will*

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factors which he had identified in his Prosecution Code. The compelling factor would be likely to be the seriousness of the offence. The LA has stated that given the seriousness of the crime of homicide, it is very likely that a prosecution would follow.

<sup>17</sup> Article 8 of the ECHR reads: The rights to respect for private life, family life, home and correspondence are not granted without limits. They may be restricted subject to the conditions laid down in article 8 paragraph 2 ECHR. Paragraph 2 states at (b) Accessible and at (c) Foreseeable

<sup>18</sup> In 1980 *Robert Hunter*, who had ended the life of his senile wife in a so called 'mercy killing', was sentenced to two years imprisonment - a sentence which, Lord Cowie assured him, would have been harsher but for his age. See also, *Paul Brady* 1996, after being initially charged with murder for helping his terminally ill brother to die, he pled guilty to culpable homicide but was eventually exonerated. Brady was Scotland's first recorded criminal case involving euthanasia. Lord McFadyen stressed that the deliberate taking of a life, for whatever reason, was a serious crime, but accepted that there were powerful mitigating factors. Cited in B Christie, "Man Walks Free in Scottish Euthanasia Case" (1996) 313 BMJ 961. See also the High Court Case of *David Hainsworth* 1997. Hainsworth attempted to (unsuccessfully) suffocate his 82-year-old father who was dying from cancer. Once again, the prosecution, after initially charging Hainsworth with attempted murder, accepted his plea of guilty to the lesser offence of assault. He was given a two-year probation order.

*have struggled— as anybody would—to come up with a clear, comprehensible understanding of what the current law actually means. In Scotland, no one who is faced with a terminal illness or with one of the other conditions that would be captured by the bill's provisions and who feels the need to ask for assistance to take control at the end of their lives, and no one who is asked by a friend or loved one for such assistance, is being given any clarity about what actions might be subject to prosecution or what the charge might be. In fact, after an exchange of evidence between Professor Chalmers and the Lord Advocate, Professor Chalmers stated: "It at least leaves open the possibility that provision of the means of suicide would be regarded as the legal cause of death. If the provider knew the purpose for which the means were provided, they would almost certainly have the necessary mens rea for murder, or at least culpable homicide." Is that really the treatment that we expect to see put into practice in all such circumstances? Under the current law, any person who offers that assistance is left subject to the possibility of being prosecuted for murder or culpable homicide. The case for a change in the law is very strong.*

## **Other considerations**

### **International Comparisons:**

There is increasing evidence that people with chronic or terminal illnesses are taking their own lives, in the absence of a regulatory regime which supports them to do this safely. The result is that suicide attempts often fail, are violent, distressing and counterproductive. So called 'botched suicides' leave the individual and family in a state of severe distress and angst.<sup>19</sup>

It is abhorrent and discriminatory that the current law allows those who are physically and financially able to travel to Switzerland or other jurisdictions to have a peaceful death, whilst others are denied this right.<sup>20</sup>

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<sup>19</sup>A HIDDEN PROBLEM: SUICIDE BY TERMINALLY ILL PEOPLE. Dignity in Dying (2014). Available from: [https://www.dignityindying.org.uk/wp-content/uploads/Research\\_FOI\\_Suicides.pdf](https://www.dignityindying.org.uk/wp-content/uploads/Research_FOI_Suicides.pdf) (Accessed on 8.7.17)

<sup>20</sup> At 8 November 2016 347 people from the UK have made use of an accompanied suicide at the Dignitas clinic. Of those, 316 people were from England, 15 from Wales, 13 from Scotland, 1 from Northern Ireland and 2 from Guernsey. This is only a representative example as there are other clinics such as Life Circle in Basel which also assist Scottish residents

Internationally, a growing number of jurisdictions consider a better way to approach this is to legislate for an assisted death, to allow those who are of sound mind to have a safe, painless and compassionate death for both themselves and their family's sake. Six US states have legalised Assisted Dying meaning 58 million Americans now have access to this choice.<sup>21</sup> Other countries include Canada, Switzerland, the Benelux countries and in Victoria, Australia a ministerial advisory panel made up of clinical, legal, consumer, health administration and palliative care experts was established to help draft a "safe and compassionate" legislative framework for assisted dying.<sup>22</sup> These recommendations have been fully accepted and will be turned into a draft Bill which will be put to a vote before the end of the year. Many other jurisdictions, including England,<sup>23</sup> have undertaken exploratory investigations by way of expert commissions – no such exercise has been carried out in Scotland. The Scottish Law Commission is well placed to assume this work.

International approaches are not referenced with the proposal of parachuting frameworks into Scotland, but to highlight that it is not beyond the wit of our legal systems to put the work in and find the most appropriate system for our own jurisdiction.

### **Palliative Care:**

Evidence demonstrates that assisted dying legislation complements palliative care, encourages wider discussions around end-of-life care, increases investment in end-of-life-care, and increases the uptake of palliative care training by health care professionals.<sup>24, 25</sup>

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<sup>21</sup> Dignity in Dying Homepage. Available from [dignityindying.org.uk](http://dignityindying.org.uk) (Accessed on 8.7.17)

<sup>22</sup> Victoria State Government website. Available from: <https://www2.health.vic.gov.au/about/publications/researchandreports/voluntary-assisted-dying-bill-discussion-paper> (accessed on 8.7.17)

<sup>23</sup> See: Commission on Assisted Dying. Available from: <http://www.commissiononassisteddying.co.uk/> accessed on 29/7/17

<sup>24</sup> A Brinkman 'NPTN: palliative care comes under the spotlight in the Netherlands' (2009) *EJPC* 16(3): 151–153.

<sup>25</sup> K van Beek and J Menten 'The organisation of palliative care in Belgium' (2010) 117–136 and K Woitha,, Y Engels, J Hasselaar and K Vissers 'The organisation of palliative care in the Netherlands' (2010) 181–195, both in S Ahmedzai, X Gomez-Batiste, Y Engels et al. (eds.) *Assessing Organisations to Improve Palliative Care in Europe* (2010).

Comparison with other jurisdictions is helpful. In Oregon, for example, the quality of palliative care is considered excellent and the rate of use of assisted dying legislation has been described as 'very low' by researchers, who suggest that the reason for this may be the high quality of care provided by Oregon's hospices.<sup>26</sup> Investment in palliative care has increased in Belgium and the Netherlands since legislation.<sup>27, 28</sup> Physicians in Oregon report that since the Death With Dignity Act was passed they are more aware of their terminally ill patients' needs. 76 per cent of physicians, whose patients include those with terminal illness, made a positive effort to learn more about palliative care after the Act was passed. Of these physicians, 69 per cent said they had also worked since 1994 to improve their ability to identify depression and other psychiatric disorders.<sup>29</sup>

With regards to the doctor-patient relationship, it has been observed that it is a fear of prolonged living rather than doctor initiated death that concerns patients entering hospital.<sup>30</sup> The current UK guidance for doctors does not harbour a safe and open environment for discussing patient concerns.<sup>31</sup> We have heard from numerous members of the public choosing not to speak to their doctors about assisted dying as to not put them in a 'dilemma'. There is a vast amount of research to show that building a legal framework for assisted dying, so that it becomes a legally viable option, allows doctors and patients to counsel each other freely, supports wider discussions around end of life care and promotes a feeling of trust and reassurance.

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<sup>26</sup> Ganzini (n11, Intro).

<sup>27</sup> Centeno *et al.* 'Facts and indicators on palliative care development in 52 countries of the WHO European region: results of an EAPC task force' (2007) *Palliative Medicine* 21: 463–471.

<sup>28</sup> Lien Foundation (n 6).

<sup>29</sup> Ibid

<sup>30</sup> Beauchamp, T.L., & Childress, J.F., *Principles of Biomedical Ethics*, 5<sup>th</sup> Edition, Oxford: Oxford University Press, 2001 p.44. See also Eiseman, M., & Richter, J., 'Relationships between various attitudes towards self-determination in healthcare with special reference to an advance directive' (1999) 25 *Journal of Medical Ethics* 37-41

<sup>31</sup> If a patient is considering an assisted death by either travelling to Switzerland for example or a taking their own life with the help of a loved one, Doctors are told currently told to (a) be prepared to listen and to discuss the reasons for the patients request (b) limit any advice or information in response, to (i) an explanation that it is a criminal offence... (ii) objective advice about the lawful options which are available

There is an argument that parliament has ‘addressed this matter’ by debating previous Bills. But it has not critically engaged with it and scrutiny of its legality and constitutional appropriateness is long overdue. Legal, moral and ethical considerations must be allocated time to be rigorously researched, culminating in evidence presented and weighed up – the Scottish Law Commission is the appropriate platform for this. We urge the SLC to consider this issue as part of their law reform programme, so that they can consider the arguments, test the evidence from experts and decide whether a change would be appropriate.

Medically assisted dying should be available to all mentally competent adults with either a terminal illness or an incurable condition causing hopeless and unbearable suffering with no reasonable alternative to relieve it, provided this is their own persistent request. A change in the law to allow individuals this choice, would bring Scots Law in line with an increasing number of jurisdictions who are legislating responsibly to allow this and would give Scotland the opportunity to lead on this issue, whilst our colleagues in England and Wales continue to grapple with it.<sup>32</sup>

I am happy to offer the services of the Cross Party Group on End of Life Choices in advancing these objectives.

Sadly, instances will inevitably continue to arise in which there is no effective treatment and patients are condemned to either suffer intolerably, risk botched suicide attempts, travel overseas or starve themselves to death. This does not make for a civilised society.

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<sup>32</sup> There have been various ballot measures and Bills proposed since the Scottish Parliament last addressed this in 2015. There are also two cases in the courts at present, that of Omid T and Noel Conway