Friends at the End is a UK membership organisation promoting knowledge and understanding of end of life choices and seeking to change the law to allow Assisted Dying in Scotland. We believe that 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. To that end, we recommend that the Scottish Law Commission as part of its tenth programme of law reform considers the area of Assisted Dying.

Is suicide a crime in Scotland?

Prior to the decriminalisation of suicide by section 1 of the Suicide Act 1961, attempting suicide was a criminal offence in England and Wales. By contrast, Scotland has never had legislation prohibiting suicide, and it has been claimed that suicide is not and never has been a crime in Scotland. However, there is evidence that Scottish legal authorities from as long ago as the early 1800s regarded suicide as a crime, notwithstanding the impracticality of punishing those who committed it. Anderson, for example, said that suicide "is a crime, but it is one as to which it is impossible to visit the principal with punishment."[1]

Assisting in suicide

It has been argued that the normal criminal law principles are not appropriate to deal with the issues that compassionate family members and also medical professionals face when making end of life decisions. Indeed, several commentators have noted the reluctance of the courts to convict medical professionals for murder, except in the most extreme cases. Glenys Williams has made a powerful argument that criminal law concepts are sufficiently vague to enable the courts to reach what the judge regards as the 'right decision'.[2] However, it is not only medical professionals who may seek to assist another to die and several trends may be drawn from documented cases:

[1] A M Anderson, The Criminal Law of Scotland, 2nd Edn (1904) 148:

[2] Williams, G, Intention and Causation in Medical Non-Killing: The Impact of Criminal Law Concepts on Euthanasia and Assisted Suicide (Routledge-Cavendish, 2006), 2.

(i) It is possible that individuals suspected of euthanasia-type offences will escape prosecution, and convictions may be difficult to secure at trial with short sentences likely to be handed down on conviction

(ii) There is a special defence of ‘double effect’ available to physicians

(iii) Partial defences to murder may be available to non-physicians

Noteworthy are the cases of *Brady, Hainsworth* and *Hunter.*[3] See also the cases of Dr Michael Munro who admitted to the GMC that he had injected two dying babies with deadly drugs, in an Aberdeen hospital and Dr Iain Kerr, who admitted to helping several of his patients to die at his practice in Clarkston, Glasgow. This shows that prosecutors are perhaps acting compassionately when it comes to cases of ‘mercy killings’. Due to there being no specific statutory offence of assisted suicide, the CPS in Scotland does not record cases of this, so it is hard to find information on how many cases are being investigated, charged (and with what crime) and then prosecuted or not.

England and Wales have the Suicide Act 1961, s.1 of which 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”.** Thus a clear framework is in place for dealing with instances of suicide and assisting in another’s suicide. Moreover, following the *Purdy*[4] ruling the Director of Public Prosecution produced offence-specific guidance on assisting a suicide. Add to this the abundance of case law[5] which England and Wales have witnessed, and there is a very clear regulatory framework for prosecutors, the judiciary, legislators and individuals to address and be informed by.

In 2010, the Director of Public Prosecutions issued Policy for Prosecutors in Respect of Cases of Encouraging or Assisting Suicide. Whilst it does not change the law, it does give formal recognition that in certain circumstances people should not be prosecuted for helping someone to die. It distinguishes between compassionate and malicious acts of assistance

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[3] Hunter 1980, Brady 1996, Hainsworth 1997 – unreported cases are particularly hard to locate and glean information from.

[4] R (on the application of Purdy) (Appellant) v Director of Public Prosecutions (Respondent) [2009] UKHL 45

[5] See: The cases of Daniel James, ‘Martin’, R (Pretty) v DPP [2001] UKHL 61, [2002] 1 AC 800 R (Nicklinson) v Ministry of Justice

and it seems that someone who assists from wholly compassionate motives would not be charged. Each case is dealt with individually and the public interest factors in terms of who may be prosecuted are also significant. These are set out in the Prosecution Code and would include whether the person providing assistance was in a position of trust or authority and whether that person might benefit from the death.[6] These of course do not apply to Scotland and a thus we are left in a state of uneasy equivocation.

The impact this is having in practice;

Over the years Friends at the End has met with and received correspondence from hundreds of people in Scotland who are in a severe state of distress. Often, they have received a terminal diagnosis, are aware of the struggle ahead of them and need someone to speak to openly and freely. Often these people have tried to discuss the option of an assisted death or visiting Dignitas with their doctor and are told "We cannot discuss assisted dying with you because it is illegal". This puts both the doctors and patients in a predicament at a time which is often the most distressing of a person's life. Having a legal framework for assisted dying would open up conversations about all end of life options. We believe assisted dying is an extension to the currently available end of life options and something which a compassionate responsible society should allow as a choice, for those who are terminally ill or unbearably suffering.

For those who are physically able and with the financial resources to do so, there is the option to travel to another jurisdiction with permissive laws, such as Switzerland. An option which costs around £10,000 for the person alone. 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.[7] This number is only going to increase as the peaceful death that is promised by such organisations is going to become more commonly desired. In our civilised society, we benefit from wonderful technology and medical advancements, but these advancements

[6] Policy for Prosecutors in Respect of Cases of Encouraging or Assisting Suicide available from: http://www.cps.gov.uk/publications/prosecution/assisted_suicide_policy.html accessed on 31/7/17
[7] Figures provided by Silvan Luley at Dignitas Switzerland in November 2016

mean that people are not dying the way we historically did, and death is often prolonged and painful.

That inequity in life should be extended to inequity in death seems to us to be a significant failure in fairness and compassion in our law. David Nicholl, a consultant Neurologist at City Hospital Birmingham wrote recently in the BMJ in a personal capacity “Sir Keir Starmer—who, ironically, as head of the Crown Prosecution Service drafted the current guidance—stated: ‘We have arrived at a position where compassionate amateur assistance from nearest and dearest is accepted, but professional medical assistance is not unless you have the means of physical assistance to get to Dignitas’.”

Those unable to travel may take their own lives in often painful and distressing circumstances, a cause for continuing grief to their families. It is estimated that 300 suicides in England each year involve a person with terminal illness.[8] Friends at the End are currently investigating this number for Scotland via Freedom of Information Requests.

The potential benefits of law reform

We choose our partner, when to have a child and whether to continue with an unplanned pregnancy. We have the right to accept, or refuse, medical treatment for reasons that are good, bad or for no reason at all.[9] We should have the same right to decide when and where to die. The present law is based on traditional beliefs that are no longer held by many Scottish citizens and should not be imposed on those who do not share them.

It is argued that recent improvements in palliative care to manage and relieve pain and to attend the physical, and psychological needs of those approaching the end of their lives are so good that life can end ‘naturally’ with the minimum of suffering. It is true that there has been a huge focus in recent years in improving the quality and availability of palliative care which is to be welcomed. As an organisation we want everyone approaching the end of their lives to have a peaceful death and a meaningful choice. But it is also true that access to and quality of palliative care is variable depending on where you live, where you receive

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[8] Dignity in Dying. Available from: https://www.dignityindying.org.uk/why-we-need-change/suicides/ accessed on 28/7/17

[9] *Re T* (adult: refusal of treatment) ‘…it exists not withstanding that the reasons for making the choice are rational, irrational, unknown or even non-existent’ (per Lord Donaldson)

care ¬– whether in hospital, residential care or at home – and even what you are dying of. Cancer patients are far more likely than those suffering long term degenerative disease to experience good or excellent palliative care.[10] And it is still the case that many of those who would benefit for palliative care receive none at all. There is also evidence that the introduction of assisted dying legislation increases awareness of and referrals to palliative facilities. Around 90 per cent of people who have had an assisted death in Oregon are enrolled in hospice care. [11]

Friends at the End wish to stress that we fully support the palliative profession and the wonderful work that they do but even with the best palliative care, for some people it cannot adequality relieve their suffering. Pain is often a major problem, but not the only one. Nausea, vomiting, coughing, breathlessness, incontinence, and other distressing symptoms can be difficult to treat. Severe weakness and total dependence on others is often inevitable and many people find this the most distressing thing to bear. The final stages are often treated by increasing the dosage of pain-killers such as morphine and by giving sedatives which induce sleep which slides into coma and death — known as 'terminal sedation' — and often the patient takes no part in these decisions.

It has been well documented that the majority of the Scottish public support a change in the law to allow assisted dying, this includes people of faith and people with disabilities.[12] 74 per cent of submissions to the Scottish Parliaments Health and Sport Committee asked for the Scottish legislation to be passed. Despite this no Bill has ever progressed past stage 1.[13]

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[10] Dixon J., King D., Matosevic T., Clark M.and Knapp M.: (2015) "Equity in the Provision of Palliative Care in the UK: Review of Evidence", Personal Social Services Research Unit, London School of Economics and Political Science

[11]LINDA GANZINI. LEGALISED PHYSICIAN-ASSISTED DEATH IN OREGON. QUT Law Revie, Volume 16, Issue 1, pp 76-83.

[12] See: My Life, My Death, My Choice (MLMDMC) Poll, 3 Feb 2015, found that 78% of the Scottish electorate believe it was of medium or high importance that the Assisted Suicide (Scotland) legislation became law and almost 4000 people signed a petition to MSPs in favour of the Bill. Another MLMDMC poll in 2014 showed 69% support assisted dying. Available from: http://www.lifedeathchoice.org.uk/news/news/more-than-three-quarters-of-scots-say-important-assisted-suicide-bill-becomes-law/. The 2010 British Social Attitudes survey found that 82% of the general public agreed that a doctor should probably or definitely be allowed to end the life of a patient with a painful incurable disease at the patient's request. The 2007 BSA survey found that 80% agreed that a person with a terminal and painful illness from which they will die should be allowed an assisted death.

[13] Survey after survey has shown that a large majority of people in the UK support the view that a doctor should be able to assist a patient with an incurable and painful disease to end their life at the patient's request. Most recently the British Social Attitudes survey confirmed that 78% of respondents believed that doctors should definitely or probably be allowed to do so.

Politicians and the medical establishments are out of step with the public.[14][15] The British Social Attitudes Survey consistently finds that 80 per cent of the population of the UK supports assisted dying for terminally ill adults. Vulnerable people usually fall into the groups of people portrayed as opposed, but have been shown to be largely supportive of assisted dying for terminally ill people, with 75 per cent of disabled people[16] believing this should be allowed. This indicates that disabled people recognise that they will eventually become terminally ill just like the non-disabled population. Preparing for one's death, and having an assisted death as part of a cohort of options, including palliative care, allows one to *live* reassured that they have the choice to control the manner and timing of their death.

At a global level, perhaps one of the most famous religious figures in the world, Desmond Tutu, has also written about the issue. He states: 'I revere the sanctity of life—but not at any cost.'[17] He acknowledges many of the issues raised in the context of these discussions and states: 'I think a lot of people would be upset if I said I wanted assisted dying. I would say I wouldn't mind actually'. This view represents an emerging theme that, whilst the sanctity of life is still held in the highest regard, it is not an absolute.

The slippery slope

The slippery slope argument has played a major role in public, political, and professional debates over assistance in dying. It is argued that once assisted dying becomes lawful, however narrowly the permission was circumscribed, the scope of the law would gradually become wider, leading to descent down a 'slippery slope' which would lead to a more permissive interpretation of the law than was originally intended. One example of this would be to condone assisted death for vulnerable people who were not necessarily terminally ill or incurably suffering, but felt their lives were of little worth. Such arguments are empirical in that they rely, not on a principle (though they assume the value of human

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[14] Note that the British Medical Association (BMA) oppose assisted dying, although they have never surveyed their membership on this issue

[15] In 2014, a YouGov poll found that 56 per cent of the public would consider assisted dying if it were legal and they were suffering a painful and incurable disease.

[16] Clery, McLean and Phillips. Additional analysis of survey results supplied by Clery, in correspondence with Dignity in Dying, March 2010.

[17] *Guardian* newspaper 'Desmond Tutu: a dignified death is our right – I am in favour of assisted dying', http://www.theguardian.com/commentisfree/2014/jul/12/desmond-tutu-in-favour-of-assisted-dying Accessed on 31/03/15

life) but on the supposed consequences of introducing an enabling law. The consequences cannot be proved to follow, since they refer to a hypothetical future.[18] However the 'slippery slope' concern is still widely prevalent in statements and position papers from a variety of groups, including many professional medical groups.

Hoppe and Miola[19] have observed the slippery slope argument and comment; 'slippery slope arguments…are inadmissible in serious medio-legal and medical ethics debates. These types of arguments reject fundamental tenets of scientific discourse: because they concern events that may or may not occur in the future, they are not open to either falsification or sensible verification'.[20] Nevertheless that we encounter such arguments every time this subject is debated, especially in the courts[21] attests to the emotional power of this argument which generates fear and ultimately discourages people from supporting assisted dying.

During oral evidence sessions at the Scottish Parliament in February 2015, emotive references were continually made to the holocaust, Harold Shipman and doctors who would get a 'taste for killing'.[22] Concerns were raised about giving such a dangerous legal power to any individual or group. But it is argued that doctors already have such power: they can act without fear of prosecution to relieve suffering, at the same time bringing about a more speedy death for their patient, justified by the doctrine of double effect, but they do so outside any formal legal framework.

Increasingly jurisdictions across the world opt to legislate responsibly for assisted dying in the interests of transparency and accountability. Evidence shows that abuse and descent down a slippery slope is not a consequence, it simply does not happen.[23]

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[18] M Warnock, 'A duty to die?' (2008) Available from: http://fagbokforlaget.no/filarkiv/Mary%20Warnock.pdf
[19] N Hoppe and J Miola, *Medical Law and Ethics*, Cambridge University Press, 2014 at p 286.
[20] ibid.
[21] See quote from *Bland* at 865, per Lord Goff.
[22] P Saunders. H&S committee evidence session on AS (Scot) Bill, 3 Feb 2015. Available via Scottish Parliament official report.
[23] For example see: Penney Lewis and Isra Black, 'Adherence to the Request Criterion in Jurisdictions where Assisted Dying is Lawful? A Review of the Criteria and Evidence in the Netherlands, Belgium, Oregon and Switzerland' (2013) 41(4) Journal of Law, Medicine & Ethics 885-898;
Penney Lewis and Isra Black, 'Reporting and scrutiny of reported cases in four jurisdictions where assisted dying is lawful: a review of the evidence in the Netherlands, Belgium, Oregon and Switzerland' (2013) 13(4) Medical Law International 221-239

Surely, whatever the dangers of legislation are, it must make possible a less dangerous situation through regulation than is already in existence without such legislation.