

Patrick Harvie MSP

Response to Stage 1 report on the Assisted Suicide (Scotland) Bill

Introduction

I am grateful for the work of the Health and Sport Committee in leading the scrutiny of the Assisted Suicide (Scotland) Bill, and for the contribution made by other committees. While many of the issues raised in the Stage 1 report were addressed during my evidence session in February, I would like to take this opportunity to respond to the summary of conclusions and recommendations ahead of the Stage 1 debate, for the convenience of MSPs who were not members of the relevant committees.

I recognise that, as every parliamentary group is treating this issue as a matter of individual conscience, Members will be taking their time to reach a considered view. I would be happy to respond to Members' enquiries about specific details ahead of the debate, if at all possible.

As the "inheritor" of this Bill from the original Member in Charge, the late Margo MacDonald MSP, I have taken on the task of presenting it to Parliament as originally drafted. However I am certainly open to discussing amendments which are intended to improve the operation of the legislation. I hope that all members who support the basic principle that people in Scotland should have the ability to exercise choice at the end of their lives, and who believe that this should include the ability to access assistance to end their lives if they see no acceptable alternative, will vote in favour of the Bill at Stage 1 in order to allow it to proceed to the amending stages, where that discussion on the detail can take place.

I would also make the case, and will do so again during the debate, that evidence heard regarding the lack of clarity in the current law in this area cannot be ignored. Even if the Bill were ultimately to fall at Stage 3 on grounds of the detailed provisions, a strong show of support for the general principle at Stage 1 would help to ensure that the problems which currently exist will be addressed.

I thank all members who have engaged with this debate to date, and look forward to the debate on Wednesday next week.

Patrick Harvie

20th May 2015

Responses to specific conclusions and recommendations

(numbering based on the summary of conclusions from page 47 onward)

292. The Committee is not persuaded by the argument that the lack of certainty in the existing law on assisted suicide makes it desirable to legislate to permit assisted suicide; it considers that the law must continue to provide an effective deterrent against abuse, and to be responsive to the individual facts of particular cases. [Paragraph 52]

I agree that legislation to permit assisted suicide is not the only way in which the current lack of legal clarity can be resolved. Prosecution guidelines, which have been issued in England and Wales but which the Lord Advocate has resisted issuing in Scotland, would be another means of providing increased clarity in the meaning of the current law.

However one argument which has been made against such an approach is that it is a matter for Parliament to decide in a democratic manner.

A far greater level of clarity would be given by the provision of a well-defined and well-regulated system by which people can record their intentions and make a request for assistance, and by which that assistance can be given in the knowledge that the person is acting out of free will and with the capacity to do so. It would leave a clearer case for prosecution in cases where a person had acted outwith the terms of this legally defined system for offering assistance; whereas in such a case today there may be considerable sympathy that a person has acted out of compassion but in the absence of a legally clear option.

293. The Committee acknowledges that there is an ethical duty to respond with compassion to the suffering of others, as well as a need to uphold the dignity of those who are suffering at the end of life, and to avoid endorsing negative attitudes and judgments about disability, illness, and older age.

This is a point of agreement between supporters and opponents of the Bill. The difference of views arises over whether such a compassionate response can and should in certain circumstances encompass a positive response to a person making a competent request for assistance to end their life.

As discussed at some length in Committee, the concept of dignity is a subjective one. Many of those who argue in favour of the Bill consider that their self-defined dignity is related to the control they have over their own life and death, and that it is compromised under the current law. The law should not impose on all people one interpretation of such a subjective concept, but rather should empower people to make choices on their own terms.

Given the subjective nature of the concept of dignity, I remain of the view that it would be inadequate for either support or opposition to the Bill to rest principally on this line of reasoning.

294. The Committee acknowledges that there are ways of responding to suffering (such as increased focus on palliative care and on supporting those with disabilities), which do not raise the kind of concerns about crossing a legal and ethical “Rubicon” that are raised by assisted suicide. [Paragraph 70]

Again, supporters and opponents of the Bill do not disagree about the need for provision of high quality palliative care or for the social, economic, cultural and practical conditions which are required to ensure that disabled people can live well.

As has been argued in committee and in written submission, other jurisdictions which have permitted a form of assisted suicide show no evidence that such systems militate against investment in these priorities. In some cases, the reverse appears to be true.

However the availability of these options, even under better conditions than those which currently pertain in Scotland, does not overcome the issues raised by this Bill or answer the concerns of those for whom palliative care and other forms of support cannot be adequate.

The Bill seeks to widen the choices people have before them, not to narrow them down.

295. Given the qualified nature of the principle of respect for autonomy, and the need to weigh it against other relevant legal and ethical principles, the Committee is not persuaded that the principle of respect for autonomy on its own requires that assisted suicide be permitted in some circumstances. [Paragraph 89-92]

The case for the Bill does not rest on the principle of autonomy alone, nor on a view that it is an absolute and unqualified concept. Rather the role of autonomy is seen as one aspect of a broad case for a change in the law.

However it is also certain that autonomy has been an increasingly important concept in patient care for many years now, as society (including but by no means limited to Scotland) has moved away from a paternalistic approach to care. Inherent in this shift has been a clear tendency to define the goals and outcomes of care in the patient’s terms, rather than in terms imposed upon them solely by medical professionals or others.

296. Having considered assisted suicide alongside other end-of-life practices in healthcare, the Committee considers that assisted suicide is ethically and legally distinct from practices such as the cessation of life-sustaining treatment and the administration of painkilling drugs which incidentally hasten death, and that the reasons which justify these practices do not support or justify assisted suicide. [Paragraph 101 and Paragraph 110]

It is clear that assisted suicide is legally distinct from the examples given above. That would not change under the provisions of the Bill.

While there are also ethical distinctions, I would make the case that these distinctions are not categorical but exist along a spectrum. There are circumstances in which the decision to cease a life-sustaining treatment is so certain to lead to death, and so clearly reliant on the active participation of another person (as in shutting off a piece of equipment) that the ethical distinctions from assisted suicide are far less definitive.

While there is no automatic read-across between society's treatment of these different circumstances, the dramatically different treatment which the law currently demands is hard to justify.

297. The Committee considers that experience from other jurisdictions, although informative, cannot be regarded as evidence either in favour of the Bill or against it, not only because none of the existing regimes is directly equivalent to the proposals in the Bill, but because each cultural context is distinct, so that experience from one jurisdiction cannot be extrapolated straightforwardly into another. [Paragraph 133-134]

I welcome the fact that the Committee appears not to accept the questionable predictions which have been made based on the experience in other jurisdictions, and I agree that the experience elsewhere cannot be taken as a reason why the Scottish Parliament must, or must not, pass the Bill.

However what does seem clear is that the claim made by some that passing the Bill would lead to a reduction in political support or financial investment being given to palliative care is not borne out elsewhere.

298. It seems clear that in numerous respects, some of which go to the heart of the Bill's purpose, the language of the Bill would introduce much uncertainty. In the context of a statute that makes an exception to the law of homicide and permits one person to assist in the death of another, such significant uncertainty must be unacceptable and would require to be addressed were Parliament to approve the Bill at Stage 1. [Paragraph 165]

The Bill would create a clearly defined series of steps by which a person may make a declaration in relation to assisted suicide, and then request assistance. In taking this approach to offering legal clarity, no one is arguing that any piece of legislation removes the ability of courts to make judgements about specific cases and their compliance with the law. In that regard, no legal framework around assisted suicide (including complete prohibition) will involve absolute clarity. The question for Parliament is whether adequate clarity would be provided under the Bill.

It is my view that the Bill does provide adequate clarity, however I am open to discussion about amendments which might be lodged at stages 2 and 3 to refine this further.

Such amendments would however need to avoid the risk of relying on a definitive list of actions which could be undertaken in providing assistance, as lists intended to be definitive often prove not to be so. In any complex area of

legislation, there will be a place for the development of case law, guidance and regulations.

299. The Committee notes the comments made by some witnesses that the Bill does not distinguish adequately between “assisted suicide” (which it seeks to legalise) and “euthanasia” (which it does not); [Paragraph 139] it does not define the criteria for eligibility sufficiently clearly; [Paragraph 147] it describes the role of the facilitator using ambiguous terminology; [Paragraph 148] and it contains a savings clause which may make prosecution difficult in cases where it would be desirable.[Paragraph 156-165]

As above, I am open to proposals to amend the Bill and will welcome those which seek to strengthen it or to improve definitions without being too prescriptive.

I consider that some of the arguments raised against the Bill on grounds of clarity are overstated. For example the suggestion that people would satisfy the eligibility criteria on the basis of minor medical conditions alone simply does not arise from a reading of sections 8(3)(d), 8(4) and 8(5) taken together. Similarly I find it hard to accept the idea that the term “comfort and reassurance” would be interpreted by a court as permitting a facilitator to actively encourage a person to commit suicide.

However if changes are required in order to underline the intentions of the Bill in these areas, and if this can be done without causing unintended consequences which would restrict the operation of the Bill, I am perfectly willing to consider amendments in this regard.

300. The Committee considers that a requirement for mandatory psychiatric assessment would be desirable in relation to any request for assisted suicide by a person who was terminally ill, under the age of 25, and/or with a history of mental disorder. [Paragraph 181-184] The Committee also acknowledges the argument that given the magnitude of the decision to commit suicide, assessment by a psychiatrist ought to be routine in all cases. [Paragraph 168,169]

The availability of psychiatric assessment at every stage, without a requirement that it be mandatory, is the intention of the Bill. This appears to fit with the expectation of the psychiatric profession regarding the role of such assessment. While the Committee has acknowledged the argument for routine assessment, it has also heard the contrary argument from witnesses such as the Royal College of Psychiatrists.

The Committee considers this question in light of the understandable view that a decision to pursue assisted suicide is “not an ordinary treatment decision”; this seems also to be the case in relation to a decision to end dialysis as described in comments quoted at paragraph 166. There does not seem to be a clear rationale for the view that the test of capacity itself is different in the two circumstances.

However if the Committee wishes to introduce amendments to require routine psychiatric assessments in some or all cases, I am not minded to oppose them unless a concern arose that they would impede the operation of the legislation.

301. The Committee considers that if the Bill were to be approved at Stage 1, consideration would need to be given to measures aimed at minimising the risk of coercion; however the Committee notes that the risk of coercion can never be eliminated completely. [Paragraph 193 - 194]

During the stage 1 inquiry I indicated that I would be open to the idea of creating a specific offence relating to coercion. I remain of the view that this may be a worthwhile amendment to the Bill.

If the Committee wishes to propose other additional measures in this regard, I am open to discussing possible amendments.

I agree that the risk of coercion can never be eliminated – but this is true under the current law as well as under the Bill. In particular, it cannot be assumed that the absence of a legal route to assisted suicide provides protection from coercion; indeed the opposite may be true. It is impossible to produce a definitive number of terminally ill people who commit suicide in Scotland at present, precisely because of the lack of any legal option for them to exercise this choice in a supported context. However it has been estimated that the number could be dozens per year, and these people may be vulnerable to coercion at present, not least because the choices made by and about them tend to be hidden from view. The Bill may not be capable of removing entirely any possible risk of coercion, but it should provide a better basis for identifying and countering that risk than is currently available.

302. The Committee notes the views of opponents and supporters of the Bill alike that assisted suicide, even if legal, would not be “medical treatment” in the ordinary sense. The Committee notes that the Bill does not preclude the possibility of the subject of assisted suicide being raised in the first instance by the healthcare practitioner rather than by the patient. [Paragraph 206- 209]

I consider that paragraph 208 captures the important point here, in that guidance issued by professional bodies would be well capable of dealing with the question of how and when it would be appropriate for practitioners to discuss the issue of assisted suicide.

303. The Committee acknowledges that there is demand on the part of professional bodies for protection for individual practitioners’ rights of conscience. The Committee notes the likelihood that statutory provision for conscience cannot be enacted by the Parliament, and considers that alternatives to statutory protection (such as provision in professional guidance) do not provide an equivalent level of protection to that which statute can provide. [Paragraph 221, 228]

304. The Committee understands that, were this Bill to pass into law, it would, in theory, be possible in terms of legal principle under section 104 of the Scotland Act 1998, for an order to be made by a UK Minister and laid before the UK Parliament to provide for a “conscience clause” in Scotland enabling relevant health professionals to refrain from providing assistance under the Bill on the grounds of conscientious objection. Such an order can make provisions on matters that are reserved to Westminster, in consequence of an Act of the Scottish Parliament. [Paragraph 229]

305. The Committee invites the member in charge, should the Parliament approve the general principles of the Bill, to explore the extent to which this possibility might be realistic and to report on this to the Committee in advance of Stage 2. [Paragraph 230, 231]

The fact that assisted suicide itself is a devolved matter for the Scottish Parliament, and that the regulation of healthcare professionals is a reserved one, should not prevent the question of principle from being dealt with.

While a range of views has been expressed about the adequacy of protecting the conscience of medical practitioners by means of professional guidance, I agree with the Committee’s conclusions at paragraphs 229-231, and will certainly explore the possibility of an order under Section 104 of the Scotland Act if the Bill’s general principles are agreed to at Stage 1.

306. The Committee notes a number of respects in which the role of the licensed facilitator would require to be clarified were the Bill to be approved at Stage 1. Clarification would be required in terms of what counts as permissible assistance; the means by which an assisted suicide may be accomplished under the Bill; and whether the facilitator is obliged to be present at the time of the suicide/attempted suicide. [Paragraph 253]

I am open to discussing amendments designed to better define the role of facilitators, however I would once again draw attention to section 23 which allows Scottish Ministers to issue directions and guidance about how licensed facilitators are to act. This would be a far more flexible approach to defining the role of facilitators than primary legislation, and this is the intention of that section.

I would also raise a similar caveat to that raised in relation to paragraph 298 above, namely that a definitive list of actions which could be undertaken in providing assistance is almost certainly impossible and may also be inappropriate.

307. The Committee considers that if the licensed facilitator is to have responsibility for attesting that the correct process has been followed in a case of assisted suicide, any legislation ought to provide that the facilitator must make every reasonable effort to be present when the act of suicide takes place. [Paragraph 255]

This appears to be a relatively minor change from the form of words used in section 19, and I am open to exploring this at Stage 2.

308. The Committee endorses the recommendation of the Delegated Powers and Law Reform Committee that there should be a requirement that, in addition to being published, any Ministerial Guidance or Directions for facilitators must be laid before the Parliament. [Paragraph 254]

309. The Committee considers that it would be preferable to require that deaths and attempted suicides under the legislation be reported to the Procurator Fiscal's office, rather than to the Police. [Paragraph 264]

310. The Committee considers that it would be preferable if provision were made for the creation of an independent supervisory body with responsibility for ingathering and checking of paperwork; collecting, analysing and publishing data on assisted suicide in Scotland; and overseeing and scrutinising the activities of licensed facilitators. The Committee considers that the creation of such a body would be essential both to safeguard the public, and to protect facilitators themselves. [Paragraph 268]

As indicated during the Stage 1 inquiry, I accept the intention behind these proposals and will commit to exploring the best way of addressing them at stage 2.

311. The Committee considers that legislation to permit assisted suicide seems discordant with a wider policy of suicide prevention, in two ways. [Paragraph 275]

312. First, because it involves differentiating between the majority of circumstances in which suicide is to be regarded as a tragedy and prevented wherever possible, and some circumstances in which suicide is to be regarded as a reasonable choice to be facilitated and supported; this risks sending negative messages to, and about, those who would be eligible for assistance under the legislation. [Paragraph 278-280]

313. Second, because legislating to permit assisted suicide could have a corrosive effect on the central suicide prevention message by "normalising" suicide and seeming to endorse it. [Paragraph 278-280]

If there was a genuine conflict between providing a legal system for assisted suicide and efforts to prevent suicide more generally in wider society, we would surely see this in the statistics available from countries which have introduced such a system. However I am aware of no such conflict being identified.

As shown in a SPICe paper to the Health and Sport Committee, there is no evidence of an increase in the general rate of suicide either at the time of a change in the law, or in the years following, in Belgium, the Netherlands or Oregon (see briefing contained in Committee papers available at

<http://goo.gl/GCMQZ6>). In the absence of any evidence of such a link, it is unreasonable to presume that one exists.

There is a very well understood difference between the situations catered for in the Bill, and suicide more generally. To argue that differentiating between them is difficult would imply that the broad public support for assisted suicide (generally shown to be around or above two thirds of people in Scotland) represents a lack of concern about suicide more generally. I cannot accept that such an attitude exists.

There is certainly a genuine concern felt by some people that if others in their own situation were to be supported to take the choice of assisted suicide, this might imply that this is the “correct” choice for all people in those circumstances. For example many organisations representing or working with disabled people express this view, though it should be noted that this does not reflect the majority support found amongst disabled people themselves for the principle of assisted suicide (for example the 2007 British Social Attitudes survey found that 75% of disabled people believe that a person with a terminal and painful illness from which they will die should be allowed an assisted death).

The assumption underlying this concern seems to replicate, albeit unintentionally, the outmoded paternalistic approach to care which implies that one choice is correct for all people. The argument for legalisation of assisted suicide is grounded in a respect for the right of people to make choices on their own terms, and a rejection of the notion that one person’s choice should be imposed on another.

314. The Committee has concerns that specifying that the act of assistance must take place within 14 days of the second request being recorded may create pressure for a person to proceed with an act of suicide prematurely. [Paragraph 286, 287

A balance requires to be struck here between ensuring the recency of the test of mental capacity and the avoidance of any unintentional pressure to act. As I stated during the Stage 1 inquiry I am open to exploring alternative ways of striking this balance, and I note the possible approaches suggested by the Committee at paragraph 287.

One further option would be for the second request for assistance to be renewable at the end of the 14 day time limit, effectively “resetting the clock”. This would require a further statement regarding mental capacity in line with section 11(2), and would avoid the requirement that the drug previously prescribed be removed.

315. The Committee is also concerned at the prospect of lethal doses of drugs being dispensed into the community in an uncontrolled manner; the Committee considers that, if there were any cases in which no time-limit was in operation, some system for controlling/accounting for lethal doses of drugs between the issue of the prescription and the act of suicide would need to be devised.[Paragraph 287]

I appreciate this concern, and consider it a reason to retain some system of time limits.

Overall conclusions

316. The Committee notes the good intentions of the Member in Charge of the Bill and recognises the complexity of the various moral and ethical issues that consideration of this Bill presents.

317. The Committee recognises the strength of feeling expressed by those who have given evidence both in support of and in opposition to the general principles of the Bill. The Committee recommends that the Parliament approach the Stage 1 decision with due respect for this diversity of views.

318. The Committee believes the bill contains significant flaws. These present major challenges as to whether the Bill can be progressed. Whilst the majority of the Committee does not support the general principles of the Bill, given that the issue of assisted suicide is a matter of conscience, the Committee has chosen to make no formal recommendation to the Parliament on the Bill.

In response to the overall conclusions

Once again I thank all Members for their thoughtful consideration of this Bill. There are of course strongly held convictions on both sides of this debate, and I am sure that they will be expressed with respect.

All of us will have constituents who express strong opposition to the provisions in the Bill. All of us will have other constituents who are firmly of the view that their life is their own and that they have a right to make the choice enabled by this Bill, if they find themselves faced with an illness or condition which leaves them with a quality of life they find unacceptable and from which they have no prospect of improvement.

Many of us will have personal experiences, either in our own lives or in our wider family, which inform our position on this matter. I am sure that Members will listen with an open mind to all perspectives on this question. Since taking the Bill on, I have certainly attempted to do so.

Whatever views may exist about the detailed operation of legislation in this area, I would appeal to all those who support the basic argument, and to those who agree that a need exists to address the lack of clarity in the current law, to support the Bill at Stage 1 and allow the debate to continue.