

Assisted Dying for Terminally Ill Adults (Scotland) Bill

Note by the Clerk

Background

1. Liam McArthur MSP introduced the Assisted Dying for Terminally Ill Adults (Scotland) Bill in the Scottish Parliament on 27 March 2024. The Health, Social Care and Sport Committee was designated as lead committee for Stage 1 consideration of the Bill on 16 April 2024.
2. Under the Parliament's Standing Orders Rule 9.6.3, it is for the lead committee to report to the Parliament on the general principles of the Bill. In doing so, it must take account of views submitted to it by any other committee. The lead committee is also required to report on the Bill's Financial Memorandum, taking account of any views submitted to it by the Finance and Public Administration Committee.
3. The Bill and its accompanying documents are available on the [Scottish Parliament website](#).
4. The Scottish Parliament Information Centre (SPICe) have published a [briefing on the Bill](#).

Purpose of the Bill

5. According to the [policy memorandum accompanying the Bill](#): "The aim of the Assisted Dying for Terminally Ill Adults (Scotland) Bill is to allow mentally competent terminally ill eligible adults in Scotland to voluntarily choose to be provided with assistance by health professionals to end their lives".
6. The policy memorandum further states: "The Bill establishes a lawful process for an eligible person to access assisted dying, which is safe, controlled and transparent, and which the Member believes will enable people to avoid the existential pain, suffering and symptoms associated with terminal illness, which will in turn afford the person autonomy, dignity and control over their end of life".
7. The Bill contains 33 sections and 5 schedules, which can be broken down as follows:

Sections 1 to 3 establish the lawfulness of the provision of assistance to a terminally ill eligible adult to end their own life, and deal with the criteria which must be met in order for a terminally ill adult to be eligible to request, and be provided with, assistance to end their life in accordance with the provisions of the Bill.

Sections 4 to 14 set out the preliminary procedural steps which must be taken, and how criteria will be assessed and determined, in order for a person to be eligible to be provided with assistance to end their life.

Sections 15 to 20 deal directly with the provision of assistance to an eligible terminally ill adult for them to end their life by self-administered means. This includes provision that there is no duty on anyone, including registered medical practitioners and other health professionals, to participate in the process if they have a conscientious objection to doing so, and also provides that it is not a crime to provide an eligible person with assistance where the requirements of the Bill have been met, and that there is also no equivalent civil liability. These sections also deal with the process after a terminally ill adult has died as a result of taking the substance supplied, including the completion of a final statement and how to record the death on the death certificate.

Sections 21 to 33 deal with general and final provisions which include making it an offence to coerce or pressure a terminally ill adult into requesting an assisted death, provisions relating to the collection and reporting of data, the publication of an annual report, and a requirement to review the Act after five years of operation.

Schedules 1 to 4 contain the forms which are required to be completed, signed and witnessed at various stages of the process. These consist of a first and second declaration form, in which a terminally ill adult asks to be provided with assistance to end their life, two medical assessment statement forms, to be completed by registered medical practitioners, which assess eligibility, and a final statement form, to be completed after a death has taken place.

Schedule 5 sets out reasons why a person is disqualified from being a witness or proxy for the purposes of the Bill.

8. Further details on the Bill can be found in the [Explanatory Notes](#) and [Policy Memorandum](#) accompanying the Bill.

Scrutiny

9. The Committee issued two calls for evidence which were open for submissions between Friday 7 June and Friday 16 August 2024:
 - A short survey for people who wished to express general views about the Bill as a whole.
 - A detailed call for evidence for people, groups, bodies or organisations who wished to comment on specific aspects of the Bill.

10. The Committee received 13,821 responses to the short survey. Individual responses to this survey were not published, instead a summary of these responses will be published on the Committee's webpage.
11. The Committee received 7,236 responses to the detailed call for evidence, published on Citizen Space. The published submissions can be reviewed here: [Assisted Dying for Terminally Ill Adults \(Scotland\) Bill: Detailed Consultation – Call for Views - Scottish Parliament - Citizen Space](#)
12. The Scottish Parliament Information Centre (SPICe) produced an [overview of high-level quantitative results](#) from both calls for views. SPICe has subsequently produced the following summaries of written evidence:
- [Short survey – summary of responses](#)
 - [Detailed call for evidence – analysis of responses](#)
13. The Committee agreed the following programme of evidence at its meeting on 1 October 2024:

Week 1	<ul style="list-style-type: none"> • Introduction by the Non-Government Bills Unit (in private) • Consideration of the implementation of Assisted Dying in other jurisdictions
Week 2	<ul style="list-style-type: none"> • Legal, human rights and equalities considerations • Mental health considerations, including safeguards, assessing capacity and psychological support
Week 3	<ul style="list-style-type: none"> • Impact on, and considerations for, healthcare professionals • Impact on, and considerations for, palliative care
Week 4	<ul style="list-style-type: none"> • Informal engagement with adults with learning disabilities (in private)
Week 5	<ul style="list-style-type: none"> • Impact on, and considerations for, those with long-term conditions • Impact on, and considerations for, disabled people
Week 6	<ul style="list-style-type: none"> • Groups that support assisted dying • Groups that oppose assisted dying
Week 7	<ul style="list-style-type: none"> • Law enforcement considerations related to the Bill • Scottish Government
Week 8	<ul style="list-style-type: none"> • The Member in charge of the Bill

14. The Finance and Public Administration Committee issued a [call for views](#) on the estimated financial implications of the Bill as set out in its accompanying [Financial Memorandum](#). This was open for submissions between 10 June 2024 and 16 August 2024 and received 22 submissions published on [Citizen Space](#).
15. At its meetings on 28 May and 10 September 2024, the Delegated Powers and Law Reform (DPLR) Committee considered the delegated powers contained in the Bill at Stage 1. The DPLR Committee published its [report](#) on 20 September 2024.

Today's meeting

Law enforcement considerations

16. During today's meeting, the Committee will firstly take evidence from representatives of the Crown Office and Procurator Fiscal Service and Police Scotland concerning law enforcement considerations in relation to the Bill.
17. Police Scotland responded to the Committee's detailed call for views on the Bill and their response can be viewed [here](#).

The current law

18. The current law in Scotland in relation to helping someone to end their life has been argued to be confusing and unclear. The legal position is discussed in more detail in the [Current law on assisted dying section of the SPICe briefing on the Bill](#).
19. The Policy Memorandum which accompanies the Bill states one of its aims as being to provide clarity in this area (paragraph 5):

“The Member believes that the current legal position is unacceptably unclear as there is currently no specific legislation in Scotland which makes assisted dying a criminal offence, yet it is also possible to be prosecuted for offences such as murder or culpable homicide for assisting the death of another person. The Bill improves legal clarity by making it lawful for a person to voluntarily access assisted dying if they meet the various criteria set out in the Bill and for health professionals to assist in that process, while continuing to ensure that assisting death outwith the provisions of the Bill remains unlawful.”
20. It should be noted that the current legal position in Scotland is different from the situation in England where there is a [specific and wide-ranging offence of encouraging or assisting a suicide](#) (Section 2 of the Suicide Act 1961). This carries a maximum penalty of 14 years in prison. The criminal offence in England is considered to cover behaviour such as helping someone to travel abroad to access assisted dying in a country where it is legal.

21. Commentators have argued that the case of *Ross v Lord Advocate* (2016 CSIH 12) has clarified the law in Scotland. This case involved a human rights challenge to the lack of guidance on how decisions to prosecute in cases of assisted dying would be made.

Criminal behaviour relating to the Bill

22. The Bill would create a criminal offence to coerce or pressure a terminally ill adult into making a first or second declaration (section 21). Prosecution under summary procedure (for less serious crimes) would carry a maximum penalty of two years in prison and/or a £5,000 fine. Prosecution under solemn procedure (for more serious offences) would carry a maximum penalty of 14 years in prison and/or an unlimited fine.

23. The Bill requires that the co-ordinating registered medical practitioner (for the first and second declaration) and the independent registered medical practitioner (for the first declaration) must be satisfied that the declaration has been made without pressure or coercion. However, the Bill and accompanying Policy Memorandum is silent as to how this is to be achieved.

The approach in other jurisdictions

24. The UK Parliament's Terminally Ill Adults (End of Life) Bill would create wider offences than are provided by the current Bill. Clause 26 would make it a criminal offence to use "dishonesty, coercion or pressure" to induce another person to make a first or second declaration or to self-administer an approved substance. The maximum penalty would be 14 years in prison.

25. Clause 27 of the UK Bill would create further criminal offences relating to:

- falsifying a first or second declaration or a declaration by the senior courts of England and Wales (as required as part of the process in that Bill)
- deliberately concealing or destroying a first or second declaration
- knowingly or recklessly providing a false or misleading medical opinion
- ignoring or concealing knowledge that a first or second declaration has been cancelled.

26. Clause 27 would provide for imprisonment and fines relating to the severity of the conduct. Where the offence was committed with the intention of causing the death of someone else, the penalty would be life imprisonment.

27. The criminal offences in the UK Parliament Bill would cover activities which might prevent someone from accessing an assisted death as well as those which might lead to someone dying against their will. In particular, concealing or destroying a first or second declaration would be an offence. Members have also heard that, in some Australian states, coercing someone not to access an assisted death is also an offence.

Death investigations

28. Article 2 of the European Convention on Human Rights (ECHR) protects the right to life and prohibits the intentional taking of life (except in very limited circumstances, such as defence against unlawful violence).
29. The European Court of Human Rights has held that Article 2 also includes a procedural obligation to sufficiently investigate deaths so that the rights guaranteed by that article can be upheld. Such investigations must be independent, adequate, prompt and conducted in a manner which allows some public scrutiny. There must also be involvement of next of kin to the extent necessary to protect their interests.
30. All deaths in Scotland which are suspicious or unexplained are investigated by the police under the direction of the Crown Office and Procurator Fiscal Service. Investigations by other bodies (for example the Health and Safety Executive or the NHS) may feed into this.
31. Ultimately, where the statutory framework supports it, the Lord Advocate (head of the Crown Office and Procurator Fiscal Service) may decide to hold a Fatal Accident Inquiry. This is a judge-led process which takes place in public and can involve presentation and scrutiny of evidence from a range of parties.
32. However, the vast majority of death investigations do not result in a Fatal Accident Inquiry. Instead, investigations by the police and other bodies are deemed sufficient to establish the circumstances of death. It has been suggested that investigations of this nature may not always meet the procedural requirements of Article 2 of the ECHR.

Monitoring and death certification

33. Assisted dying legislation needs to balance human rights more generally. The Article 8 right to decide when and how to die must be balanced against the need for sufficient protection for vulnerable groups if an assisted dying process is created. This entails a requirement for ongoing review of the impact of legislation to ensure that it remains human rights compliant.
34. The Bill contains some monitoring and review requirements. Public Health Scotland would be required to report annually on the numbers of people accessing each stage of the assisted dying process, broken down by characteristics such as ethnicity and postcode district. Scottish Ministers would be required to publish a review of the operation of the legislation after five years.

35. Section 17 of the Bill would require that the terminal illness involved is recorded as the cause of death on the death certificate, as opposed to the administration of an approved substance associated with assisted dying.

Evidence from the Cabinet Secretary

36. The Committee will then take evidence from the Cabinet Secretary for Health and Social Care and supporting officials, representing the Scottish Government.

37. The Cabinet Secretary [wrote to the Committee on 30 September 2024](#), setting out the Scottish Government's position on the Bill.

Legislative competence

38. Full implementation of the Bill may require action which is currently outwith the devolved competence of Scottish Ministers and the Scottish Parliament. This issue is [discussed in more detail in the SPICe briefing on the Bill](#).

39. To this end, section 22 of the Bill states that any provision of the Bill which relates to reserved matters, specifically misuse of drugs, and regulation of the health professions or medicines, medical supplies and poisons will have no effect.

40. The Member in charge sets out several options to deal with issues around the current limits of devolved competence in paragraphs 8 to 10 of the [Policy Memorandum](#). These include:

- a **“section 30” order under the Scotland Act 1998** – which allows the UK Government to alter the legislative competence of the Scottish Parliament
- a **“section 63” order under the Scotland Act 1998** – which allows the UK Government to transfer functions to the Scottish Government. This could be used to enable the Scottish Government to make regulations in currently reserved areas
- a **“section 104” order under the Scotland Act 1998** – which allows the UK Government to make consequential changes to reserved areas of law as a result of Scottish Parliament legislation
- **use by the UK Government of existing powers** – e.g. designating a particular substance as appropriate for using in assisted dying under existing medicines and poisons legislation.

Human rights

41. Legislating for assisted dying engages several of the rights in the European Convention on Human Rights (ECHR):

Article 2 – the right to life – the courts have held that the right to life does not include a right to access an assisted death. However, it does include a duty on the state to adequately investigate deaths to ensure the state's obligations under

Article 2 are being met. Where a state has introduced assisted dying, it would also include a requirement for safeguards for vulnerable people.

Article 8 – the right to respect for private life – court decisions have found that this does include a right to choose when and how to die. However, states have wide discretion in the control of this right for the protection of others.

Article 14 – prohibition of discrimination – there must be no discrimination on any grounds in relation to exercising the rights protected by the ECHR.

42. The Scotland Act 1998 requires that, to be within the legislative competence of the Scottish Parliament, legislation must not contravene any of the rights protected by the ECHR.

Financial memorandum

43. The Financial Memorandum (FM) acknowledges that the largest costs are likely to fall on the NHS and sets these out as follows:

	Year 1	Year 2	Year 20
Clinician Hours	£6,795 - £19,254	£6,795 - £19,254	£109,755 - £310,973
Staff Training	£200,000	Minimal	Minimal
Substance provided to end life	£2,000	£2,000	£32,000
Total	£208,795 - £221,254	£8,795 - £21,254	£141,755 - £342,973

44. However, the FM notes that several costs are expected to be either minimal or absorbed within existing roles and budgets, including:

- production and administration of forms,
- translation and interpretation,
- updating guidance,
- clinicians' time.

45. Despite the expectation that the costs will be absorbed within existing budgets, the FM does calculate an estimated cost for clinicians' time.

46. Using figures from 2022/23, it calculates an estimated average hourly salary for all doctors of £34.32. This is based on the premise that all grades of doctor (from Foundation Year 1 to Consultant) will be able to participate in the process, and that doctors work an average of a 40 hour week.

47. Subsequently, the estimated total cost of clinicians' time is set out as:

- Year 1 - between £6,795 and £19, 254 per annum,
- Year 20+ - between £109,755 and £310,973 per annum.

Palliative care

48. According to the [House of Commons report on Assisted Dying](#), assisted dying legislation in New South Wales was accompanied by a £400 million investment in palliative care services and the Government in Victoria took similar action in 2017.
49. Neither the Bill nor its Financial Memorandum contains any kind of commitment to additional investment in palliative care.
50. The Scottish Parliament's [Standing Orders \(Rule 9.12\)](#) require that a Financial Resolution is required where a Bill contains provisions which introduce new payments in or out of the Scottish Consolidated Fund (SCF), or significantly alter existing payments in or out of the SCF.
51. Where a Bill's provisions affect an existing charge or amount payable, or an existing tax or fee/charge, a threshold is applied to determine whether a Financial Resolution is required. The [guidance on public bills](#) specifies that where costs or payments exceed £500,000 in any given year, this is deemed to be "significant" and would trigger the requirement for a Financial Resolution.
52. A Financial Resolution must be passed by the Parliament before the Bill can proceed any further. Only Ministers can bring forward Financial Resolutions, but it is the Presiding Officer who determines whether one is required.
53. The current estimated total costs of the Bill are set out as:
- Between £264,434 - £313,882 in year 1
 - Between £156,067 - £362,230 in year 20.

Ministerial powers

54. The Bill contains ten delegated powers provisions (nine regulation-making powers and one power to issue guidance).
55. The most significant regulation making powers in the Bill include:
- The power to specify what qualifications and experience a registered medical practitioner must have to act as a "co-ordinating registered medical practitioner" or an 'independent registered medical practitioner'.
 - The power to make regulations to specify what forms of proof of identity are acceptable during the process.
 - The power to specify an approved substance/substances which may be used for the purpose of assisted dying.
 - The power to make regulations for the provision of information to PHS (e.g. by medical practices, Health Boards, doctors and other health professionals) which will inform the annual PHS report.

- The power to amend (add, vary, or remove) the information that Public Health Scotland (PHS) must include in its annual report, and/or the characteristics by which the data must be broken down. The regulations may also include what information is to be provided, who should provide it, any circumstances in which information must or must not be provided, prohibited disclosures which may amount to an offence and the associated fine.
- The power to make regulations modifying the forms set out in schedules 1 – 4 of the Bill. These forms cover: the first declaration, the first medical practitioner’s statement, second medical practitioner’s statement, the second declaration and the final statement.

56. The Bill also gives Scottish Ministers the power to produce guidance which would not be subject to subordinate legislation procedures. This guidance would relate to the operation of the Act.

Reporting and monitoring

57. A key aspect of monitoring the appropriate implementation of assisted dying would come in the shape of the reporting provisions set out in the Bill. These include that Public Health Scotland (PHS) would have to report on anonymised data annually to the Scottish Government, and a report would be laid before the Scottish Parliament.

58. This report would include statistics on the number of people having completed each part of the process such as making a first and second declaration.

59. For those who did go on to use the approved substance, PHS would be required to report on the substance provided, where the person died and the type of place in which they died (e.g. at home, hospital, care home) and the reasons given by the individual concerned for seeking to end their own life. PHS would also be required to collect demographic information although all information reported would be anonymised.

60. The Scottish Government would also be required to review the operation of the legislation within 5 years and to lay a report before the Scottish Parliament.

61. The review report must set out the extent to which the legislation has been successful in supporting terminally ill adults in being assisted to end their own lives, as well as any concerns raised about the operation of the legislation.

SPICe and Clerks to the Committee January 2025