End of Life Assistance (Scotland) Bill

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Do you agree a person should be able to request end of life assistance from a registered medical practitioner?

The short answer to this is that I do.

The value that a person ascribes to his own life is irreducibly and overriding important; though a person may be valuable to others, and they may prefer that he continue to live, a person’s own ascription of value to his own life is morally primary. From this, two things follow. First, that no one else has a right to take that person’s life from him without his consent (except, perhaps, in a few highly exceptional circumstances such as self-defence); second, that if he decides that his life is a burden to him and prefers that it should end, no one else has the right to prevent the end of that life.

However, it is also true that ending one’s own life may be difficult – a person may not succeed in a suicide attempt, and stands a reasonable chance of survival in a worse position than he found himself before the attempt. It is also entirely possible that a person would find suicide problematic because of the fact that the burden of finding his body would fall on others (the alternative being that another person would be asked to “stand guard” while the suicide happened, which would currently be both legally problematic and quite possibly unreasonably morally burdensome); he might well prefer his desired death to happen in circumstances affording the highest level of control. Moreover, of course, the ability to kill oneself is merely formal in respect of those whose medical condition is such as to incapacitate them in some way: the current state of the law is not exactly discriminatory towards the disabled (since they do have exactly the same rights as the able-bodied in respect of self-killing – they just find it harder to capitalise on them), but it does place them in a situation of “double jeopardy”, whereby the exercise of those rights is hampered by their condition when that condition is plausibly a contributing factor to their wanting to end their own lives to begin with.

Nor is it clear why a person, motivated by humane considerations, ought not to be allowed to assist a person in the project of ending his own life, granted the supposition that ending his own life is genuinely what that person wants. For this reason, if a person wishes to end his life, and if he is unable or unwilling to set about this task on his own, he ought to be able to seek assistance.

It does not follow from this that he ought always to be provided with assistance – that a person has formulated a certain desire does not indicate that anyone is obliged to help him realise it. That I wish to be shot from a circus cannon does not imply that you have to lend me yours; that I want my broken arm treated with antibiotics does not imply that the NHS ought to provide them to me; and the same principle applies here. If no one is available
or willing to assist a person in bringing about his own death, then he has no moral right to compel assistance; nor ought he to have the legal right. Hence the right to assistance takes the form of a permit rather than an entitlement.

**Are you satisfied with the requirements for age and connection with Scotland as set out in the Bill?**

The age requirements are potentially problematic. I take it as read that laws have to be workable, and that this means that there are requirements for them to be as simple as possible. Therefore an attempt to draw a “bright line” in respect of age restrictions is perfectly understandable.

However, there are potential objections to placing an age limit at 16. One of these is easily dismissed; the other is not so straightforward.

The easy problem is this: that there may be a child under the age of 16 who satisfies the demands of *Gillick* competence, and who would, in normal circumstances, be considered competent. Why should assisted dying be denied to her? Yet two responses can be made here. The first is that competence tests refer to *consent*, rather than requests. Since a patient would not – one can assume – be consenting to a medic’s suggestion of assisted dying, appeals to consent seem to be *de trop*. The second is that, if assisted dying is available as a matter of permit rather than entitlement, it is in the gift of the legislature to allow it or forbid it to whomsoever it pleases.

However, this leads to a more difficult problem. If we accept that a person has the moral right to seek assistance in bringing about their own deaths, and that another person has the moral right to provide it, and if we accept that these moral rights ought to be reflected in law, it is not immediately obvious why there should be a lower age barrier imposed. To insist that Smith has fewer (legal) rights than Jones simply on the basis that Smith is younger looks to be ageist: it makes age do the work of a morally relevant consideration when it is not clear, exactly, what the relevance of age is. It might be that age is felt to be important because of worries about establishing maturity – but, in this case, it is not clear why the specification in the law could not refer directly to a maturity test of some sort. That is to say: if maturity is what matters, then the law should say so. (I have already noted that the right to provide assistance does not imply a duty to provide it, so any maturity test could be quite demanding, on the assumption that refusing assistance to die to someone who actually is sufficiently mature is preferable to providing it to someone who is not.) Appeals to age on this basis would risk depriving some people of their entitlements without justification.

*mutatis mutandis*, the same worries would apply should age be treated as a cipher for any other consideration. In all cases, it’s hard to see why mere chronological age is different from sex or ethnicity; and since we would not think of restricting access to something like end of life assistance to someone based on appeals to sex or ethnicity, it’s not obvious why we think we can restrict access based on appeals to age.
Are you satisfied with the two categories of people who would qualify to be assisted under the terms of the Bill?

No. Sections 4(2)(a) and 4(2)(b) are too restrictive. They represent an improvement on the terminal illness and unbearable suffering criteria articulated in Lord Joffe’s Assisted Dying for the Terminally Ill Bill, but, in the end, they are vulnerable to the same objections.

The first of these is that it is simply not obvious why a person should have to be ill, incapacitated, or suffering at all to make use of end of life assistance. We may not see why a person who is not would want to die, but that is not enough to tell us that there could be no such person; and if someone does want end of life assistance for what seems to us like a trivial reason, then this is up to him. (Again, we do not have a duty to assist; but we could still have the right.) Indeed, granted the reasonable assumption that most people would strongly prefer not to die, then the more unexpected their preference, the stronger the evidence that it is genuinely held. After all, someone suffering from a terminal illness may be more vulnerable to pressure from others to seek assistance; it’s hard to see why a healthy person would succumb to such pressure, though – so this generates the conclusion that the likelihood of any healthy person seeking end of life assistance due to external pressure is minimal.

More importantly, the criteria given seem inhumane, inasmuch as they force people to live an intolerable life for at least a period. It may be, for example, that a person has been diagnosed with an illness that he expects to cause him great suffering at some point in the future, and wishes to avoid ever reaching that point. We might expect a person to prefer a life that never becomes intolerable; if I have a reasonable expectation that my life will become intolerable, I may therefore feel that I have a reason to end it now – to deny this would be a bit like saying that the gambler cannot leave the card table until he is utterly destitute. It is perplexing to think that the law may require a person’s life to become intolerable before offering him the opportunity of assistance to end it.

Nor will it do to say that the certainty of future hardship is itself sufficient to make a life intolerable: there is nothing incoherent about a person who prefers to end his life before its quality falls, notwithstanding that that life is at the moment perfectly acceptable; and while the prospect of future suffering may be an intolerable stain in an otherwise good life, this kind of dread is not what the bill specifies – it refers exclusively to the life itself being intolerable. (I assume, though section 4(2) is unclear, that the intolerability is meant in the wording of the bill to derive from the illness or incapacity in question.)

The very notion of intolerability is also unclear. By what standard is intolerability to me measured? Presumably, it is more than a mere preference – even a strong preference – that something not happen. Yet just about any misfortune is, in the strictest sense, tolerable, inasmuch as that we could imagine some sufficiently strong-willed character tolerating it; therefore if we are to be literal in our interpretation of the intolerability criterion, no one would
be entitled to assistance. Moving away from it, though, makes any restriction seem arbitrary.

Similar concerns apply to the terminal illness and to the incapacity and dependence considerations: it seems arbitrary to restrict assistance in dying to those whose wish for assistance may be wholly in earnest, but who happen not to have the “right” kind of medical problem. The only difference between a terminally ill person and a chronically ill person is the length of their counterfactual survival were they not to seek end of life assistance. But if a person is sovereign over her own life, it’s hard to see why this expected survival time ought to make a difference to the policy. It therefore looks as though assistance should be available to the chronically ill. But, if one is willing to make this move, then it becomes hard to see why assistance should be denied to the non-chronically ill, or to the ill at all. And this is perfectly compatible with the guiding thought that the final say over the continuation of a life properly resides with the person living it.

Incapacity, furthermore, is not obviously important here, just because we might imagine a person who is perfectly able-bodied but who wants assistance to ensure that her death is as certain as possible. Or we might imagine another person who is moderately disabled by a road accident and who is not incapacitated in any particularly strong sense, but who finds his sudden inability to play the violin a crushing loss; such a person would not be incapacitated in the everyday sense of the world, but he may find that the thing that gave his life its meaning has been taken from him.

Of course, it may be true that, given time, a person would come to terms with his situation. However, to insist on this is to adopt a highly patronising view of the would-be dead person: it amounts to the idea that he is not the best person to make decisions about his continued existence after all.

For elaboration of these worries, see I Brassington, “Five Words for Assisted Dying”, *Law and Philosophy* 27(5), 2008, pp 415-444.

**The Bill outlines a two-stage consent and verification process that would be required to be followed for an eligible person to receive end of life assistance. Are you satisfied with this process?**

Yes. A “cooling off” period would seem to be reasonable to ensure certainty.

**Do you consider the level and nature of safeguards as set out in the Bill to be appropriate?**

Yes, subject to the provisos above.

**Do you have any other considerations on the Bill not included in answers to the above questions?**

No.