Assisted Suicide (Scotland) Bill
Response to Question Paper: The Position under Existing Scots Criminal Law

1. Thank you for your email of 28 January inviting me to answer several questions regarding the criminal law of Scotland in relation to assisted suicide. I have done so below, as fully as possible in the time available. Although this is a relatively lengthy note, the core conclusion is a simple one: the scope of the criminal law in this area cannot be stated with any degree of certainty whatsoever.

Introductory comments

2. The initial difficulty with answering the questions raised by the committee is that the most fundamental issue arising in this context is unclear. Remarkably, it is not known whether or not suicide is itself a criminal offence in Scots law. This uncertainty colours the entire debate thereafter, as follows:

    - If suicide is itself a criminal offence in Scots law, then the criminal liability of anyone who assists in a suicide falls to be determined by applying the general principles of "art and part liability" recognised by the law – that is, the same principles which govern the liability of anyone who is alleged to have assisted in the commission of a criminal offence. The position would be similar to that in English law before the Suicide Act 1961 where, because suicide was "self-murder and therefore a felony… a person who aids, abets, counsels or procures another to commit suicide [was] guilty of murder" (*Criminal Law Revision Committee: Second Report (Suicide)* (Cmnd 1187: 1960) para 3).

    - If suicide is not a criminal offence in Scots law, then liability for assisted suicide could arise only when the person who has provided assistance can in law be said to have caused the death of another person, and to have done so with the degree of fault required for guilt of either murder or culpable homicide. The potential scope of liability would be narrower in this scenario.

3. It is commonly asserted that suicide is not a criminal offence in Scots law. For example, an article published in the *Juridical Review* in the aftermath of the decision in *R (on the application of Purdy) v DPP* [2010] 1 AC 345 included the following statement:

    > "Suicide has never been a crime in Scotland. There is no Suicide Act or equivalent…" (SAM McLean, C Connelly and JK Mason, "*Purdy* in Scotland: we hear, but should we listen?" 2009 JR 265 at 276.)

4. The authors, however, cite no authority for this claim. It is not clear what they mean to imply by pointing to the absence of an equivalent of the (English) Suicide Act 1961, because the effect of that Act was to *decriminalise* suicide in English law. If English law had no Suicide Act, suicide would remain a criminal offence there.

5. The authors are not alone in suggesting that suicide is not criminal in Scots law (see e.g. RAA McCall Smith and D Sheldon, *Scots Criminal Law*, 2nd edn (1997) 171; PR Ferguson, "Killing 'without getting into trouble'? Assisted suicide and Scots criminal law" (1998) 2 Edin LR 289 at 290.) But no such claim is found in the leading modern text on Scots criminal law (G H Gordon, *The Criminal Law of Scotland,* 3rd edn by MGA Christie, 2 vols (2000-2001)) and as I have explained elsewhere, such a claim is unsafe and may rest on a failure to appreciate how the issue of criminal liability for suicide was historically far more likely to be an actual issue in English law than Scots law:

"It is sometimes asserted that suicide simply is not a crime in Scotland, in contrast to the pre-1961 English position. In fact, the distinction between the two jurisdictions seems more a consequence of ancillary rules rather than a difference in substantive criminal law. The older Scottish writers do regard suicide as criminal in nature, but with little or no scope for such an act to be regarded as criminally *punishable*. In England, by contrast, the forfeiture of a suicide's goods and chattels, in conjunction with the system of coroner's courts, gave practical application to the theory that suicide was a felony: the point was 'argued backwards' from forfeiture to criminality.

It might be objected that if suicide were considered a criminal offence in Scots law, then this should have been evidenced by way of prosecutions for attempted suicide. The absence of such prosecutions, however, seems to have had more to do with the lack of any general theory of attempts in Scots law prior to 1887. Although there is now a general rule that any attempt to commit a crime is itself criminal, it seems that attempted suicide has not in practice been treated as a crime *per se* in Scots law, no doubt because if a prosecution were felt necessary resort might be made to the offence of breach of the peace." (J Chalmers, "Assisted suicide: jurisdiction and discretion" (2010) 14 Edin LR 295 at 298-299, citations omitted; available at http://eprints.gla.ac.uk/70278/1/70278.pdf.)

6. The question whether suicide is itself criminal in Scotland remains open for the courts to determine should it arise. It may be that it is more likely that it will be determined one way rather than the other, but it is doubtful that making any such prediction would be helpful. The fact that the question remains arguable is simply indicative of the lack of legal certainty in this area.

Question 1

7. You have asked me for the following:

"…views on which of the behaviours on the spectrum of assistance you consider might reasonably [be] regarded as currently lawful or unlawful in Scotland. In particular, can you identify examples of:

a) any assistance which you consider could not reasonably be regarded as unlawful under the current common law position in Scotland?
b) any assistance which you consider would be unlikely to be criminal in Scotland under the common law?
c) any assistance which you consider would be likely to be criminal in Scotland under the common law?
d) any assistance whose status you would regard as particularly uncertain under the common law?"

8. Given the degree of legal uncertainty here, I do not think I can usefully list types of assistance under the headings (a)-(d) in this question. In answering this question as best I can, it is helpful to adopt the categorisation of types of assistance in suicide which Professor Ferguson offered in her 1998 article (cited earlier) on the subject ((1998) 2 Edin LR 289 at 291):

"(1) a positive, direct act, immediately connected with the victim's death;
(2) the provision of the means of suicide;
(3) the provision of information or advice;
(4) an omission to act: failure of the accused to prevent the victim from committing (or attempting to commit) suicide)"

9. Given developments since Professor Ferguson's article was published, the following category should be added:

> "(5) assisting with travel abroad, or arrangements for travel abroad, to commit suicide"

A positive, direct act, immediately connected with the death of another person

10. Assuming such an act (such as the administration of a drug, or suffocation) was intended to cause death, and did so, it would almost certainly amount to murder in Scots law. (The question of whether suicide is criminal in itself is irrelevant here.) In practice, if the act were carried out at the deceased's request, there is a strong possibility that Crown Office would exercise its discretion to prosecute for culpable homicide rather than murder.

The provision of the means of suicide

11. In *Khaliq v HM Advocate* 1984 JC 23, the High Court held that a person who supplied solvents to children knowing they intended to abuse them was responsible for the actions of the children in doing so, and therefore guilty of a form of culpable and reckless conduct. The principle was subsequently extended to supply to adults (*Ulhaq v HM Advocate* 1991 SLT 614). In due course, this led to prosecutions for culpable homicide in cases where drugs had been supplied to persons who took them and died. This practice was challenged in the cases of *MacAngus v HM Advocate; Kane v HM Advocate* 2009 SLT 137. There, it was noted that the House of Lords (in *R v Kennedy (No 2)* [2008] 1 AC 269) had ruled that, in English law, where a fully-informed and responsible adult had chosen to take a drug supplied to them, the supplier could not be held to have caused the consequences which followed from their taking the drug.

12. The High Court of Justiciary was not, however, prepared to make such a categorical statement. After reviewing the Scottish cases, the court concluded (at paras 42 and 48 of *MacAngus* and *Kane*):

> "These Scottish authorities tend to suggest that the actions (including in some cases deliberate actions) of victims, among them victims of full age and without mental disability, do not necessarily break the chain of causation between the actings of the accused and the victim's death. What appears to be required is a judgment (essentially one of fact) as to whether, in the whole circumstances, including the inter-personal relations of the victim and the accused and the latter's conduct, that conduct can be said to be an immediate and direct cause of the death…
>
> The adult status and the deliberate conduct of a person to whom a controlled drug is recklessly supplied by another will be important, in some cases crucial, factors in determining whether that other's act was or was not, for the purposes of criminal responsibility, a cause of any death which follows upon ingestion of the drug. But a deliberate decision by the victim of the reckless conduct to ingest the drug will not necessarily break the chain of causation."

13. The "not necessarily" conclusion reached by the High Court gives little concrete guidance on how the law would approach the facts of any future case. 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. (As with category (1), discretion in prosecution might well be exercised by Crown Office.)

14. As with category (1), this conclusion does not itself depend on the question of whether suicide is itself criminal. However, if the courts held that a decision to make use of the means of suicide *did* break the chain of causation, it would be open to the prosecution to argue that the supplier was nevertheless guilty of murder (or culpable homicide) art and part, on the basis that they had supplied the means for the commission of a criminal act.

The provision of information or advice

15. If suicide is not a criminal offence, it is very unlikely that such actions could result in criminal liability. It has been said that "Where A merely encourages B to commit suicide there can be little doubt that A is not the cause of death." (Gordon, *Criminal Law*, para 4.53.)

16. If suicide is itself a criminal offence, then the possibility of art and part liability arises. Even here, however, advice in general terms is not normally regarded as sufficient for liability. In *HM Advocate v Johnstone* 1926 JC 89, it was held that a woman who passed on the name of an abortionist did not become criminally liable for the abortion which subsequently took place. This, it was suggested, could not amount to the "actual participation in the illegal act" required for liability. However, more extensive advice and advocacy might be held in law to amount to participation (cf the abortion case of *HM Advocate v Semple* 1937 JC 41, although that case also involved the provision of means).

An omission to act

17. There is an extensive discussion of this in Professor Ferguson's article (at 309-313). Broadly speaking, while there is a lack of Scottish authority, the law of omissions holds that in particular circumstances one person (A) may have a duty to prevent harm coming to another (B). This duty is most clearly recognised where there is a dependent relationship, such as that between a parent (A) and a child (B). It may also be recognised between spouses or partners, but different courts in different jurisdictions have reached different conclusions in such cases. Any question of liability here is highly speculative, and there would seem little basis for an argument that a person who failed to intervene in another's decision to commit suicide should incur criminal liability as a result. The argument could only arise with any force where A and B were in a relationship of dependence and A knew that B's decision was not in fact free and voluntary.

Assisting with travel abroad, or arrangements for travel abroad

18. This issue arose in the *Purdy* case. When that case reached the House of Lords, it was suggested that, were Ms Purdy's husband to assist her in travelling abroad to commit suicide, any offence would be outwith the jurisdiction of the English courts. If that had been correct, her husband would not have been at risk of prosecution in England, and the absence of prosecutorial guidelines applicable to assisted suicide would have been irrelevant in his case. The House of Lords, however, held that it was at least arguable that the English courts would have jurisdiction over such a case.

19. In the *Juridical Review* article discussing *Purdy* which I mentioned earlier in this note, the authors state as follows:

> "The current position is that Scots law does not criminalise accompanying a person on a trip, irrespective of the purpose of that person's journey, even if they will thereafter take part in activities that are legal in the host state but not within Scotland." (2009 JR 265 at 280.)

20. The authors, however, cite no authority for that statement, and it goes further than can safely be supported on the basis of the relevant legal authorities. Jurisdiction in Scotland requires a "territorial connection" to Scotland (Gordon's *Criminal Law*, para 3.44). The High Court has held that the Scottish courts are entitled to take jurisdiction over a criminal scheme where steps to

complete that scheme are taken both in Scotland and in another jurisdiction (see *Laird v HM Advocate* 1985 JC 37, a case which involved a fraudulent scheme which took place in Scotland and England, with the payment which was obtained by fraud being made in England).

21. If A assists B with travelling abroad for the purposes of committing suicide – or making arrangements to do so – it would be open to A to argue that the Scottish courts should not assert jurisdiction. In support of that argument, it might be suggested that the legality of suicide in that other jurisdiction would provide a reason of "international comity" for declining to exercise jurisdiction (*cf R v Smith (Wallace Duncan) (No 4)* [2004] QB 1418). The legal position cannot, however, be stated with any certainty.

22. Again, the clarity of the position here is affected by the uncertainty over whether or not suicide amounts to a crime in itself. If it is an offence, it would not be difficult for the courts to conclude that assistance with travel (or arrangements for travel) amounted to sufficient participation to render A liable art and part for murder or culpable homicide. If suicide is *not* an offence, it might be argued that A's actions could not properly be regarded as having caused B's death. However, the approach taken in *MacAngus* and *Kane* to the causation of another person's actions mean that this point is itself uncertain. The courts might well be willing to conclude that A's actions were a cause of B's death, particularly if B would otherwise have been unable to travel abroad and commit suicide.

Question 2

23. You have asked me to "comment on which factors you consider would be important in determining whether conduct was lawful or unlawful within the existing common law framework".

24. Given the uncertainty of the law, there is nothing I can usefully add here to the comments I have already made. I have no doubt that, in deciding whether to prosecute, Crown Office would take into account factors broadly similar to those listed in the Crown Prosecution's Service *Policy for Prosecutors in respect of Cases of Encouraging or Assisting Suicide*. That decision is, however, one of whether a prosecution would be in the public interest. Crown Office would doubtless also take into account the uncertainty of the legal position in making any decision.

Question 3

25. You have asked me "[i]n what way(s) and to what extent would the enactment of the Assisted Suicide (Scotland) Bill in its present form resolve the lack of clarity in the existing law. In what way(s) and to what extent would the law remain unclear after the passing of the Bill, if it were to be passed?"

26. The Bill makes no attempt to set out a general statement of when assisting suicide is criminal. It simply sets out circumstances in which it would *not* be criminal. It would clarify the law only to the narrow extent of stating that assistance in the circumstances set out in section 3 of the Bill would not be unlawful. However, the Bill would provide a clear route which persons wishing to commit assisted suicide would be able to follow. It would allow those persons who met the criteria specified in the legislation to be confident that they were acting lawfully. It would therefore, in practical effect, significantly alleviate the current lack of clarity. Any remaining uncertainty as to the scope of the law, would not be a defect in the legislation itself. It would, instead, be a defect in the general law.

27. I note that in its report to the Health and Sport Committee, the Justice Committee noted that the approach taken by the Bill was unusual, in "defining what is not a crime rather than what is a

crime" (para 33). Such an approach is, however, not unprecedented and should not itself be regarded as problematic. It was, prior to the Sexual Offences (Scotland) Act 2009, the approach taken in Scots law to homosexuality, where legislation (latterly section 13 of the Criminal Law (Consolidation) (Scotland) Act 1995) provided that male homosexual conduct would *not* be criminal provided that it took place in private between consenting adults.

28. That approach was objectionable, because it implied that homosexual conduct was presumptively wrong subject to a legal exception, whereas heterosexual conduct was presumptively legitimate subject to such exceptions as were set out by law. It drew an unsupportable distinction on the ground of sexuality. However, such an approach is not objectionable in the present context. If assisted suicide is to be made lawful, it is quite right that the law should maintain the general position that actions which bring about the death of another person are wrong, while providing for an exception in the case of assisted suicide carried out in accordance with suitable safeguards.

Question 4

29. You have asked me whether, if the Bill were enacted, "how detrimental would it be to the effectiveness of the legislation if some legal uncertainty remains after the passing of the legislation?"

30. If the Bill is enacted, it may be the case that there are persons who wish to commit assisted suicide, are unable to comply with the requirements of the legislation, but take steps to do so nevertheless. The Bill is not designed to clarify the question of criminal liability in such cases, and it would not do so, except insofar as it might influence the courts' approach to any case which fell outwith the terms of the Bill. It should, in principle, also reduce the number of cases in which such uncertainty could arise. However, any remaining uncertainty will not affect the position of those who act within the terms of the legislation, and this uncertainty will not itself impair the effectiveness of the legislation.

Question 5

31. You have asked me whether "there are any possible alternative approaches to clarifying the Scots criminal law position in relation to assisted suicide, <u>other</u> than legislating to permit assisted suicide in certain circumstances and if certain requirements are observed (as the present Bill seeks to do)?"

32. The most obvious approach would be to legislate (a) to make it clear beyond doubt that suicide is not itself a criminal offence in Scots law and (b) to create a criminal offence of criminal liability for complicity in another's suicide, similar to that found in s 2(1) of the Suicide Act 1961 (as amended by s 59 of the Coroners and Justice Act 2009).

33. It should not be thought, however, that the provisions of s 2(1) of the 1961 Act provide a ready-made model for reform. In principle, any offence which makes it criminal to assist someone to do something which *they* can lawfully do is problematic. Moreover, the current s 2(1) can be criticised for encompassing the possibility of prosecution for encouraging or assisting persons unknown, and leaving open the question of jurisdiction in relation to a suicide which takes place abroad. Any reform should follow consideration by the Scottish Law Commission or a suitably constituted expert group.

34. Such a reform would clarify the position of individuals who assist close relatives or friends to commit suicide. It would not, of course, fulfil the aim of the Bill, which is to provide a mechanism for those who wish to commit suicide to do so under certain conditions.

35. Subject to what I say in response to question 6, I do not believe that the legal position can be clarified other than by legislation.

Question 6

36. You have asked me whether "there is anything you wish to add concerning the clarity of the existing law relating to assisted suicide, either in general terms or in relation to the Bill?"

37. In *Purdy*, the House of Lords held that the absence of a specific prosecutorial policy addressing assisted suicide meant that the Director of Public Prosecutions was acting incompatibly with article 8(2) of the European Convention on Human Rights. This was because the offence of aiding and abetting the suicide of another (as it then was) was so special in nature that the general *Code for Crown Prosecutors* did not provide sufficient guidance so as to make the consequences of aiding or abetting suicide foreseeable. The general prosecutorial criteria set out in the *Code* were (as the DPP had admitted in dealing with the Daniel James case) of little or no use in making decisions in such cases.

38. In the aftermath of *Purdy*, the then Lord Advocate noted that the English offence had no Scottish counterpart, and so chose not to take steps to issue a policy similar to that promulgated by the DPP. That approach was wrong. It remains wrong. The problem was that the very special circumstances in which assisting suicide occurs are such that the general prosecutorial criteria could not provide appropriate guidance in such cases. (To the extent that the problem in *Purdy* was based on the fact that suicide was not itself criminal, as the DPP had suggested in the James case, it will be noted from what I have said earlier that this may also be the case in Scotland.) The general criteria set out in the Scottish *Prosecution Code* are similarly inapt to deal with such cases. Following the decision in *Purdy*, I do not see how the absence of prosecutorial guidance on assisted suicide in Scotland can be regarded as compatible with the Lord Advocate's obligations under the European Convention on Human Rights. I have already made this point in the article which I cited earlier in this note ((2010) 14 Edin LR 295).

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