Clare Haughey MSP
Convener Health, Social Care and Sport Committee
The Scottish Parliament
Edinburgh
EH99 1SP

11 April 2025

Dear Ms Haughey and Members of the Health, Social Care and Sport Committee,

We understand that the Health, Social Care and Sport Committee ('the Committee') will report soon on its Stage 1 scrutiny of the Assisted Dying for Terminally Ill Adults (Scotland) Bill. Two of us contributed to that process by giving evidence in person on 12 November 2024.

We now write to you as academic experts in law to express our concerns about the Bill's legislative competence – the question of whether the Bill deals only with matters that are within the legislative competence of the Scottish Parliament, or also with matters that are reserved to Westminster. We first raised these concerns in an article published in *Scottish Legal News* on 01/04/2025 ('Entire Assisted Suicide Bill may be beyond powers of Holyrood'), and we shared the article with the Committee in an email dated 01/04/2025.

It is well established that the Scotland Act 1998 (the 1998 Act) intended, "within carefully defined limits", to provide for "a generous settlement of legislative authority" (*Imperial Tobacco v Lord Advocate* [2012] UKSC 61, at [15]). The approach to determining whether provisions within Scottish legislation are outwith the competence of the Scottish Parliament because they relate to reserved matters is as follows:

1. Identify the purpose of the provision whose legislative competence has been brought into question;
2. Identify the specific tests within the Scotland Act 1998 that are used to determine whether the provisions are outwith competence, namely the scope of s.29(3); and
3. Draw these two exercises together to reach a conclusion as to whether the purpose of the provision in question falls foul of the specific tests for competence.

In determining the purpose of a provision in question, a court is not tasked with undertaking the ordinary exercise of purposive statutory interpretation. Rather, as decided in *Lord Advocate's Reference* [2022] UKSC 31, s.29(3) of the Scotland Act requires courts to consider the, "practical purposes" of the legislation, having regard to its "effect in all the circumstances", extending beyond purely legal effects. The purpose of this test is to determine 'what is this law *really* about?'

Applying the test to the Assisted Dying Bill, there is little doubt that particular provisions exceed Holyrood's legislative competence. Section 15(8), for example, purports to give Scottish ministers the power to make regulations approving substances for use in assisted dying. Under Schedule 5 Head J4 of the 1998 Act, powers relating to "medicines, medical

supplies, and poisons" are reserved. Section 15(8) clearly has the practical purpose and effect of regulating in relation to a reserved matter.

Section 18 of the Bill purports to allow those with a conscientious objection to assisted dying to opt out of direct involvement in it. This, too, relates to a reserved matter, since the conscience clause would be exercised mainly by health professionals seeking to opt out of roles created for them by the Bill, and regulation of the health professions is reserved under Schedule 5 Head G2 of the 1998 Act.

In a memorandum to the HSCSC on 30 September 2024, Neil Gray, the Cabinet Secretary for Health and Social Care, raised the Scottish Government's concerns about the Bill's legislative competence, expressing a "particular concern" about s15(8), but also mentioning parts of the Bill that purport to regulate the health professions. The memorandum concludes by saying that "the issue of what steps will be required to bring the Bill within legislative competence will require to be revisited should the Bill pass Stage 1."

If these were the only issues of legislative competence raised by the Bill, their implications would still be extremely significant. The Bill has been designed to pass into law with or without the provisions relating to reserved matters: section 22 provides that, insofar as any provision of the Bill relates to a reserved matter, it will be "of no effect". This means that parts of the Bill that are *not* competent will simply disappear when the Bill becomes law. If the Bill were to become law without ministers having the power to approve substances, or to specify the qualifications and experience a medical professional needs to have before they can perform the roles set out in the Bill, the new law would be either unworkable or extremely dangerous. If it were to become law without any provision for conscientious objection, this would be completely unacceptable to the professions, as written responses to the Bill from the Scottish sections of representative bodies - such as the British Medical Association, the Royal College of Nursing, and the Royal Pharmaceutical Society - have made clear.

In our view, however, these are *not* the only issues of legislative competence. That problem affects the Bill more fundamentally and generally than has previously been understood, since the central legal change that this Bill seeks to introduce is inextricably linked to the regulation of the medical profession. In providing for an adult to receive assistance in ending their own life, the Bill prescribes a process overseen by a "co-ordinating registered medical practitioner" and involving at least one other registered medical practitioner (and possibly others). All of the medical practitioners involved in the process must act in accordance with the Bill's requirements. These new requirements on physicians can only be fairly understood to constitute regulation of the medical profession. That is the core, primary, purpose of this Bill, having regard to its practical effect in all the circumstances.

The Bill's primary purpose, therefore, relates to the reserved matter of regulating the health professions. Were it to become law, the Bill – together with the regulations issued under it – would specify in some detail the requirements that health professionals must follow at every stage of the process: before, during, and after the death of the patient. As such, in our view, the overall focus and primary purpose of the Bill lies beyond the legislative competence of Holyrood. This is the case independently of any challenges to competency on European Convention on Human Rights grounds, which would also surely follow.

Obviously, none of this matters if the Bill does not progress after the Stage 1 vote. Should the Bill pass Stage 1, however, it will be necessary to deal with the issue of legislative competence,

presumably by seeking a section 30 Order under the 1998 Act. As you know, section 30 Orders are neither straightforward nor guaranteed: they require the consent of three legislative chambers (both Houses of the UK Parliament, and Holyrood). Requests are not always granted, and when they are, the process can take 12-18 months. As previous examples have shown, politics can play a crucial role in any decision about whether or not to make an Order.

In our view, the Bill as a whole requires a section 30 Order. But whether the issues with legislative competence affect the Bill as a whole or are tied to particular provisions, the Bill raises considerable potential for conflict, not only around the hugely controversial issue of assisted dying itself, but also over divisive constitutional questions of devolved versus reserved powers.

We will be grateful if you circulate this correspondence to members of the Committee, and we urge the Committee to explicitly address these competence issues in the Stage 1 Report.

Yours sincerely,

Dr Mary Neal (University of Strathclyde)
Dr Murray Earle (University of Edinburgh)
Dr Michael Foran (University of Glasgow)