

## Justice Committee

### Assisted Suicide (Scotland) Bill

#### Written submission from the Scottish Human Rights Commission

## 1. Introduction

The Scottish Human Rights Commission (the Commission) welcomes the opportunity to submit the following comments and recommendations on the Assisted Suicide (Scotland) Bill.<sup>1</sup>

The central purpose of this response is to ensure an informed and balanced parliamentary and public debate on the subject. Accordingly, the Commission focuses on three key issues:

- the relevant human rights legal framework,
- the principles of dignity and autonomy, and
- the need for clarity both in the current criminal legal system and in procedures where States do permit assisted suicide.

The issue of assisted dying has long been a topic of moral, ethical and jurisprudential discussion. In human rights law it is related to the right to life, the right to freedom from degrading treatment, the right to respect for private<sup>2</sup> and family life, and the right to freedom from discrimination. Each of these is considered in section a). There is also a broader legal framework that includes various human rights instruments, some of them are cited below.

## 2. General Legal Framework

- Scotland Act 1998
- Human Rights Act 1998 (HRA)
- European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)
- European Social Charter
- Adults With Incapacity (Scotland) Act 2000 and the Code of Practice relating to Part 5 (Medical Treatment)
- UN Convention on the Rights of Persons with Disabilities
- Council of Europe's Recommendation 1418 (1999) on the protection of the human rights and dignity of the terminally ill and the dying

As a matter of domestic law, the HRA 1998 and the Scotland Act 1998 incorporate the Articles of the ECHR into our domestic law. According to the HRA a court or tribunal must take into account the jurisprudence of the European Court of Human Rights (ECtHR) when determining a question which arises in relation to a

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<sup>1</sup> The Commission acknowledges the contributions from Dr. Mary Ford and Professor Sheila McLean, which have helped to inform this submission. Both produced background papers which are available from the Commission on request.

<sup>2</sup> See *X and Y v. the Netherlands*, judgment of 26 March 1985

Convention right (section 2 of the HRA). The HRA also provides that it is unlawful for public authorities to act in a way which is incompatible with a Convention right (section 6 of the HRA). Furthermore legislation must be read and given effect in a way which is compatible with the Convention rights (section 3 of the HRA).

### **a) Human rights law framework**

The Commission must emphasise the fact that there is no consensus on the subject of assisted dying at European level. State parties to the ECHR take different positions. There are some countries that have legalised assisted suicide. Some countries expressly forbid it. Others countries do not specifically proscribe assisted suicide in law. Furthermore, the European Court of Human Rights (ECtHR) has not taken the view that the Convention requires either the prohibition or the permission of assisted suicide. The approach of the ECtHR is to recognise that domestic authorities are better placed than the Court to decide on nationally sensitive issues (allowing a 'margin of appreciation'). However, that should be accompanied by the obligation of the State to ensure that offences are clearly defined in law. In other words, a clear policy as to when it would, and would not, be appropriate to prosecute individuals who help others to die is indispensable.

The subject of assisted dying has been discussed extensively in *Pretty v. UK*.<sup>3</sup> Any discussion on this subject should, at least, consider the following Articles of the Convention:

- Article 2 – “Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally...”<sup>4</sup>
- Article 3 – “No-one shall be subjected to torture or to inhuman or degrading treatment or punishment”;
- Article 8 – “the right to respect for his private and family life, his home and his correspondence”;
- Article 14 – the enjoyment of Convention rights “without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”

### **Article 2- “Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally...”**

This Article proscribes the intentional taking of life except in strictly limited circumstances.<sup>5</sup> Article 2 of the Convention also requires the State Party to take

<sup>3</sup> **Pretty v. United Kingdom** [2002] 35 EHRR 1

<sup>4</sup> ARTICLE 2 of the ECHR

1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

2. Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:

- (a) in defence of any person from unlawful violence;
- (b) in order to effect a lawful arrest or to prevent escape of a person lawfully detained;
- (c) in action lawfully taken for the purpose of quelling a riot or insurrection.

preventative operational measures to protect an individual whose life is at risk from the criminal acts of another individual.<sup>6</sup> States thus are required to regulate, through the operation of general criminal laws those activities that are detrimental to the life and safety of other individuals. “*The consistent emphasis in all the cases before the Court has been the obligation of the State to protect life*”, Article 2 is “*unconcerned with issues to do with the quality of living*”.<sup>7</sup> As a matter of UK policy, the prohibition on assisted suicide has been designed to protect some of the most vulnerable members of society.

Article 2 of the ECHR is concerned with the obligation to protect life, not with quality of life and therefore in *Pretty v UK* the Court concluded that a right to die could not be derived from Art 2. While this is the approach taken by the European Court of Human Rights, other bodies, including the Indian Supreme Court and the Inter-American Court of Human Rights have interpreted the right to life in a broader sense to include the requirements to live with dignity, such as access to clean water, sanitation and education.<sup>8</sup>

Article 3- “no one shall be subjected to torture or to inhuman or degrading treatment or punishment”

This Article provides for the right not to be subject to inhuman or degrading treatment or punishment. This also requires appropriate positive action by the State to prevent the subjection of individuals to such treatment.<sup>9</sup> In the *Pretty* case, the ECtHR considered that her “*suffering was not flowing from conditions of detention, expulsion or other measures, for which the authorities can be held responsible*”.<sup>10</sup> The Court concluded in *Pretty v UK* that Article 3 has to be construed in harmony with Article 2. Therefore, Article 3 does not give rise to a positive obligation to prevent or ameliorate suffering attributable to the progression of a disease by authorising killing.<sup>11</sup>

Article 8- “the right to respect for his private and family life, his home and his correspondence.”<sup>12</sup>

The scope of this Article is very broad. The ECtHR has stated that the element of “private life” alone encompasses, among other things, “*aspects of an individual’s*

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<sup>5</sup> See Art. 2 (2) of the ECHR

<sup>6</sup> *Osman v. United Kingdom* [1998] EHRR 101

<sup>7</sup> *Pretty v UK*, para 39.

<sup>8</sup> See *Yakye Axe v Paraguay* (Corte Interamericana de Derechos Humanos Sentencia de 17 de junio de 2005) in “Economic, Social and Cultural Rights in Practice, Interights 2004.

<sup>9</sup> *A. v. United Kingdom* (1998) 27 EHRR 611;

<sup>10</sup> *Pretty v UK*, para 52.

<sup>11</sup> *Ibid*, para 55.

<sup>12</sup> ARTICLE 8 of the ECHR

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others

physical and social identity including the right to personal autonomy, personal development and to establish and develop relationships with other human beings and the outside world”.<sup>13</sup> Or even more broadly “to conduct one’s life in the manner of one’s choosing”.<sup>14</sup> The extent of this right to autonomy and self-determination in relation to end of life decisions has been interpreted differently by the House of Lords and the ECtHR.<sup>15</sup> After concluding that Article 8 was engaged in *Pretty v UK*,<sup>16</sup> the ECtHR went on to consider whether the interference with the rights under Article 8(1) was in accordance with the law, legitimate and necessary in a democratic society for the protection of the rights of others.<sup>17</sup> In other words, whether the blanket nature of the ban on assisted suicide was justified under Article 8(2). The Court concluded that it was not disproportionate.<sup>18</sup> The UK Supreme Court has, however, raised queries regarding the justification for a blanket ban on assisted suicide and invited Parliament to consider making amendments. Their concerns, articulated in the case of *Nicklinson v Ministry of Justice*<sup>19</sup>, were that

*“The interference with Applicants’ article 8 rights is grave, the arguments in favour of the current law are by no means overwhelming, the present official attitude to assisted suicide seems in practice to come close to tolerating it in certain situations [and] the rational connection between the aim and effect of [the legislation banning assisted suicide] is fairly weak.”*

The ECtHR has, in recent years, considered a number of further cases regarding the impact of assisted suicide provisions on Article 8 and has consistently found that it encompasses the right to decide how and when to die, and in particular the right to avoid a distressing and undignified end to life (provided that the decision is made freely)<sup>20</sup>. They have, however, also consistently emphasised the wide margin of appreciation allowed to states to determine whether they will permit assisted suicide. *These cases also highlight a need for clarity in procedures where states do permit assisted suicide*. Thus, they must take appropriate measures to protect abuse and to ensure that procedures are put in place which are capable of ensuring that a person’s decision to end his/her life does in fact reflect his/her free will<sup>21</sup>. They must also ensure clarity as to the extent of the right to assisted suicide, to prevent anguish caused by uncertainty<sup>22</sup>.

<sup>13</sup> *Evans v UK*, Grand Chamber (2007) citing *Pretty v UK* (2002)

<sup>14</sup> *Pretty v UK* 66 BLMR 147 (2002)

<sup>15</sup> See *R (on the application of Pretty v DPP)* [2001] UKHL 61 and *Pretty v United Kingdom* (2002) 35 EHRR 1. In sum, The House of Lords had held that Article 8 was directed at autonomy in decision making while an individual was alive but did not extend to a right to decide how or when to die. The ECtHR disagreed, finding that this was an infringement of Article 8(1).

<sup>16</sup> The Court concluded that Article 8 protects the physical and moral integrity of the individual, “including rights over the individual’s own body, but there is nothing to suggest that it confers a right to decide when or how to die.” *Pretty v UK* 66 BLMR 147 (2002) at p163

<sup>17</sup> *Ibid*, para. 68.

<sup>18</sup> *Ibid*

<sup>19</sup> *R (on the application of Nicklinson) v Ministry of Justice* [2014] UKSC 38

<sup>20</sup> *Haas v Switzerland* (2011) 53 EHRR 33, para 51, *Koch v Germany* (2013) 56 EHRR 6, paras 46 and 51, and *Gross v Switzerland* (2014) 58 EHRR 7, para 60

<sup>21</sup> *Haas v Switzerland* (2011) 53 EHRR 33

<sup>22</sup> *Gross v Switzerland* (2014) 58 EHRR 7. This case was, however, subsequently declared inadmissible and is not therefore legally binding.

Article 14- Prohibition of discrimination in the enjoyment of Convention rights. "without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."<sup>23</sup>

The ECtHR has repeatedly held that this Article is not autonomous, but has effect only in relation to Convention rights. However, there is no need to identify an actual breach of a right to claim discrimination with respect to the enjoyment of it.<sup>24</sup> For the purposes of Article 14 a difference in treatment between persons in analogous or relevantly similar positions was discriminatory if it had no objective and reasonable justification, or there was no reasonable relationship of proportionality between the means employed and the aim sought to be realised. Discrimination could also arise where States, without an objective and reasonable justification, failed to treat differently persons whose situations were significantly different.<sup>25</sup>

The Court concluded in *Pretty v UK* that there was objective and reasonable justification for not distinguishing in law between those who were and those who were not physically capable of committing suicide.<sup>26</sup>

### **b) The principles of dignity and autonomy**

There are a number of general principles at play under the subject of assisted suicide such as autonomy, justice, solidarity and especially dignity. Any interpretation of the rights under the ECHR/HRA have also to accord with their fundamental objectives and their coherence as a system of human rights protection for all people.

Autonomy and dignity are predominantly used in contemporary discussions of medicine, health care and bioethics. The concepts of autonomy (self governance of individuals) and dignity (inner worth of human beings) have played an important role in human rights.

### **Assisted suicide and human dignity**

Human dignity is the foundation and very essence of human rights. Human dignity is central to the work of the Commission.<sup>27</sup> The concept of human dignity arises in both legal and ethical contexts. It is both a fundamental legal consideration and a fundamental ethical value. The concept is of particular relevance in the context of the human rights.<sup>28</sup> The concept of dignity is regarded as 'inherent' and provides

<sup>23</sup> ARTICLE 14 of the ECHR. The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

<sup>24</sup> *Van Raalte v. Netherlands* (1997) 24 EHRR 503 at p. 516, para. 33

<sup>25</sup> Ibid 11. See also *Thlimmenos v. Greece*

<sup>26</sup> *Pretty v UK*, para. 89.

<sup>27</sup> See SHRC Strategic Plan available at <http://www.scottishhumanrights.com>

<sup>28</sup> See for example *Pretty v UK* at para 65

the basis and justification for inalienable human rights. Human dignity is of course invoked by both those in favour of, and opposed to, assisted dying.

Human rights law instruments, most recently the UN Convention on the Rights of Persons with Disabilities endeavour to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity. The Policy Memorandum refers to the concept of securing a “dignified death” In pursuing this aim, it is important to take into account the social model of disability and the concept of human dignity. For example, it cannot be said that a person affected by a loss of, or lack, of autonomy necessarily live a less dignified life than one who is capable of a higher degree of autonomy. In a more general sense, this does not mean that human dignity cannot be violated. In other words, autonomy could be restricted without affecting human dignity (which is inalienable).<sup>29</sup>

Baroness Campbell has highlighted the risk associated with such decisions related to the lives of people with disabilities:

*“Society today still discriminates against people with severe disabilities and illnesses. Our lives are seen by many as inferior to those of non-disabled people. Against this background, there is the inherent danger that actions to withdraw treatment and legalized assisted dying will place disabled people at greater risk.”*<sup>30</sup>

### Assisted suicide and autonomy

Autonomy is a central value in human rights law and healthcare ethics.<sup>31</sup> In case law, autonomy rights appear, at times, to be prioritised over other interests.<sup>32</sup> However, the concept of autonomy is not absolute and it can be outweighed on the facts by the principles of fundamental justice. The ECtHR has clarified that:

*“the more serious the harm involved the more heavily it will weigh in the balance considerations of public health and safety against the countervailing principle of personal autonomy.”*<sup>33</sup> Therefore, neither autonomy or choice can function as the sole criterion or overriding principle in the proposed legislation.

The values of autonomy and dignity are central issues which must be carefully considered in conjunction with other rights

<sup>29</sup> See for example Art 5 of the CRPD (prohibition of discrimination on the basis of disability); The Offences (Aggravation by Prejudice) (Scotland) Act 2009.

<sup>30</sup> Baroness (Jane) Campbell in *Disabled People and the Right to Life*, Edited by Luke Clements and Janet Read. Rutledge 2008. p, 85

<sup>31</sup> See for example the UN Convention on the Rights of Person with Disabilities

<sup>32</sup> *Re T (Adult: Refusal of medical Treatment)* (1992) 9 BMLR 46

<sup>33</sup> *Pretty v UK* at para 74

### **c) The need for clarity:**

#### **In the current criminal legal system**

The criminalisation of assisted suicide is considered by the ECtHR to be an interference with an individual's right to respect for private life under article 8(1) of ECHR, and so it must be justified on the grounds of Article 8 (2). In order to be compatible with the first ground in Article 8(2), the prohibition must be i) identified and established in the law of Scotland; ii) adequately accessible; iii) sufficiently foreseeable.

In Scotland, there is no statutory law that answers the question of whether it is criminal to help another person to commit suicide.<sup>34</sup> This has always been considered a matter of common law. Euthanasia, however, is a criminal offence under the revised Code of Practice relating to Part 5 (Medical Treatment) of the Adults With Incapacity (Scotland) Act 2000. According to these provisions, the Crown Office and Procurator Fiscal Service can opt to charge the assister on a number of criminal grounds such as recklessly endangering human life, murder, culpable homicide, or can choose to bring no charge at all.

In *Purdy v DPP*, the House of Lords considered the Convention principle of legality. This principle “requires the court to address itself to three distinct questions. The first is whether there is a legal basis in domestic law for the restriction. The second is whether the law or rule in question is sufficiently accessible to the individual who is affected by the restriction, and sufficiently precise to enable him to understand its scope and foresee the consequences of his actions so that he can regulate his conduct without breaking the law. The third is whether, assuming that these two requirements are satisfied, it is nevertheless open to the criticism that it is being applied in a way that is arbitrary because, for example, it has been resorted to in bad faith or in a way that is not proportionate.”<sup>35</sup> In that case the House of Lords’ overriding concern was the lack of clarity in prosecutorial policy. This signalled that the law in England and Wales, as it stood, was in violation of Article 8 of the ECHR.

It is possible to imagine a *Purdy*-style challenge being brought in Scotland since at present there is no way of knowing how the prosecuting authorities might respond to a relative who assisted the death of an individual.<sup>36</sup> The concern is the lack of sufficient foreseeability. In order to be sufficiently foreseeable, there must be a sufficient degree of clarity in the law and its application. The law should be formulated with sufficient precision to enable the individual, if need be with appropriate advice, to regulate her conduct.<sup>37</sup>

<sup>34</sup> Niall R. Whitty and Murray Earle 'Reissue Title on 'Medical Law' in (eds) *The Laws of Scotland, Stair Memorial Encyclopaedia* (Butterworths Law (Scotland), 2006), para 384

<sup>35</sup> R (on the application of Purdy) v the Director of Public Prosecutions [2009] UKHL 44, para 40

<sup>36</sup> In addition, the Commission is also concerned that there is a lack of guidance relating to the omission doctrine, whereby doctors may withdraw life sustaining treatment in the certain knowledge that this will bring about the death of the patient. So, adults and in some cases children with incapacity may still lawfully be brought to an end. The Bill is silent on this. The commission finds this area requiring further clarification.

<sup>37</sup> *Hasan and Chaush v Bulgaria* (2000) 34 EHRR 1339, para 84

For this purpose and until a policy, including legislative, change in Scotland has been achieved, the Commission considers that the head of the prosecution service in Scotland, the Lord Advocate, should issue interim guidelines to further clarify the position for the public in relation to the prosecution of assisted suicide.<sup>38</sup>

### In the assisted suicide procedures

The current European experience shows that it is also important to ensure clarity in procedures where states do permit assisted suicide. Thus, legislation must take appropriate measures to protect abuse and to ensure that procedures are put in place which are capable of ensuring that a person's decision to end his/her life does in fact reflect his/her free will. As mentioned legislation must also ensure clarity as to the extent of the right to assisted suicide, to prevent anguish caused by uncertainty.

## **3. Conclusions**

The Assisted Suicide (Scotland) Bill has an impact upon some of the most fundamental elements of the dignity and autonomy of individuals and their families. Recognising the complexity and sensitivity of the topic the Commission has restricted itself at present to outlining the human rights framework within which determinations on whether to adopt legislation permitting assisted death may be made. In this respect, the Commission also emphasised a human rights based approach to this subject whereby the general policy framework should ensure adequate and comprehensive care and support for people with disabilities as well as palliative care for the terminally ill across the NHS in Scotland. Finally, The Commission addressed the need for greater clarification in prosecutorial policy.

On this point, the principle of legality under the European Convention on Human Rights calls for the law to be foreseeable. In the Commission's view there is a strong case for increased clarity in the law of Scotland on the criminalisation of assisted suicide in Scotland, following the decision of the House of Lords in *Purdy v DPP*.

*About the Commission:* The Scottish Human Rights Commission is a statutory body created by the Scottish Commission for Human Rights Act 2006. The Commission is a national human rights institution (NHRI) and is accredited with 'A' status by the International Co-ordinating Committee of NHRIs at the United Nations. The Commission is the Chair of the European Network of NHRIs. The Commission has general functions, including promoting human rights in Scotland, in particular to encourage best practice; monitoring of law, policies and practice; conducting inquiries into the policies and practices of Scottish public authorities; intervening in civil proceedings and providing guidance, information and education.

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<sup>38</sup> the Director of Public Prosecutions (DPP) for England & Wales has issued similar guidelines in February 2010.



Scottish Human Rights Commission  
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