

Health, Social Care and Sport Committee Call for Evidence

Assisted Dying for Terminally Ill Adults (Scotland) Bill

16 August 2024

The Scottish Human Rights Commission was established by the Scottish Commission for Human Rights Act 2006 and formed in 2008. The Commission is the National Human Rights Institution for Scotland and is independent of the Scottish Government and Parliament in the exercise of its functions. The Commission has a general duty to promote human rights and a series of specific powers to protect human rights for everyone in Scotland.

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Executive Summary

The Scottish Human Rights Commission (the “Commission”) welcomes the opportunity to respond to the consultation on the Assisted Dying for Terminally Ill Adults (Scotland) Bill.

The Commission acknowledges the complexity and ethical character of the issues being considered and the need to balance competing principles such as the right to life, respect for personal autonomy, and the protection of vulnerable members of society.

The Commission does not take a position in favour of or opposed to assisted dying or the specific scheme proposed. Instead, in our submission we set out the human rights framework to be taken account of by the Scottish Parliament when determining whether to adopt legislation on this matter, as well as by stakeholders.

Through our submission we identify that, while it is vital that discussions take proper account of the applicable human rights framework, a human rights analysis does not provide a definitive answer on the question of whether or not to adopt legislation permitting assisted dying.

Legislation permitting assisted dying can, in principle, be compatible with currently applicable human rights standards as long as the legislation takes a human rights-based approach and appropriate safeguards are put in place, particularly to protect the rights of disabled people.

However, elements of the specific scheme proposed present concerns in terms of human rights compatibility. These include the minimum age requirement, capacity assessment and arrangements for supported decision-making for all persons, conscientious objection, and the introduction of prior and subsequent independent oversight and review mechanisms.

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Introduction

The Scottish Human Rights Commission (the “Commission”) welcomes the opportunity to respond to the Health, Sport and Social Care Committee’s call for evidence on the Assisted Dying for Terminally Ill Adults (Scotland) Bill.

For the purposes of this submission, the Commission does not take a position on the matter of assisted dying as such, meaning that we neither support nor oppose the enactment of legislation permitting assisted dying. Our approach is directed by our general duty under the Scottish Commission for Human Rights Act 2006, namely, to promote human rights and, in particular, to encourage best practice in relation to human rights, as defined by international treaties to which the United Kingdom is a party.

It is important that any legislation in this area takes proper account of the applicable human rights framework. This consultation response, like our previous responses on assisted dying¹, sets out the human rights framework which the Scottish Parliament needs to take into account. In doing so, particular reference is made to the European Convention on Human Rights (“ECHR”), the UN International Covenant on Civil and Political Rights (“ICCPR”), and the UN Convention on the Rights of Persons with Disabilities (“CRPD”).

Elements of the human rights framework outlined in this submission require careful consideration and application to the present proposals, which we endeavour to do in our responses to the consultation questions. It should be noted, however, that a human rights analysis does not provide a definitive answer on the question of whether or not to adopt legislation permitting assisted death.

¹ The Commission has previously responded to consultations on the Assisted Dying for Terminally Ill Adults (Scotland) Bill in 2021 and the Assisted Suicide (Scotland) Bill in 2013.

Human Rights Framework

European Convention on Human Rights (“ECHR”)

A number of the provisions of the ECHR are engaged in relation to assisted dying:

- The right to life (Article 2)
- The right to freedom from inhuman and degrading treatment (Article 3)
- The right to respect for private and family life (Article 8)
- The right to freedom of thought, conscience and religion (Article 9), and
- The right to freedom from discrimination in the enjoyment of other rights (Article 14).

The European Court of Human Rights (“ECtHR”) has developed a significant body of case law elaborating legal standards within the context of assisted dying. In doing so, the ECtHR has taken the view that the ECHR does not require the prohibition² or the permission of assisted dying³. The approach of the ECtHR is to recognise that domestic authorities are better placed than the Court to decide on nationally sensitive issues, for matters that fall within the domestic “margin of appreciation.”

In its case law, the ECtHR has focused primarily on the need to balance the right to life (Article 2) and the right to respect for private life (Article 8). The legal standards under those provisions are examined in more detail below.

Article 2 ECHR

Article 2 ECHR protects the right to life. Under Article 2 the State has a positive obligation to take preventive measures to protect an individual’s life, even against actions by which they endanger their own life.⁴

While the right to life does not confer a ‘diametrically opposite right, namely a right to die’⁵, it equally does not explicitly prohibit legislating for assisted dying, provided that

² *Mortier v Belgium* App No 78017/17 (Chamber decision of 4 January 2023).

³ *Pretty v The United Kingdom* App No 2346/02 (Chamber decision of 29 July 2002).

⁴ *Haas v Switzerland* App No 31322/07 (Chamber decision of 20 June 2011) para 54.

⁵ *Pretty v The United Kingdom* App No 2346/02 (Chamber decision of 29 July 2002) para 39.

appropriate and sufficient safeguards are in place⁶. These safeguards must ensure that any person accessing assisted dying has capacity and has taken their decision freely.⁷

The ECtHR has repeatedly emphasised that, in view of the complexity of, and the lack of a European consensus on, assisted dying, States are afforded a relatively wide margin of appreciation on whether or not to permit assisted dying. However, this margin of appreciation is not unlimited, and the ECtHR reserves the power to review whether or not Article 2 obligations have been complied with.⁸

Article 8 ECHR

Article 8 contains the right to respect for private life, which in turn encompasses the right to decide the manner of one's death⁹, in particular how and when to die, provided that the decision is made freely and the individual can act in consequence.¹⁰

An interference Article 8 will not be compatible with Article 8(2) unless it:

- i. is in accordance with the law;
- ii. pursues a legitimate aim or aims (such as protecting the rights of others or the protection of health), and
- iii. is necessary in a democratic society for the aforesaid aim or aims (the notion of necessity implies that the interference corresponds to a pressing social need and, in particular, that it is proportionate to the legitimate aim pursued).

When determining whether an interference is 'necessary in a democratic society', the ECtHR recognises the margin of appreciation left to national authorities, the breadth of which varies according to the nature of the issues and the importance of the

⁶ *Mortier v Belgium* App No 78017/17 (Chamber decision of 4 January 2023) paras 137-139.

⁷ *Haas v Switzerland* App No 31322/07 (Chamber decision of 20 June 2011) para 54; *Lings v Denmark* App No 15136/20 (Chamber decision of 12 July 2022) para 49.

⁸ *Mortier v Belgium* App No 78017/17 (Chamber decision of 4 January 2023) para 139.

⁹ *Pretty v The United Kingdom* App No 2346/02 (Chamber decision of 29 July 2002) para 67.

¹⁰ *Haas v Switzerland* App No 31322/07 (Chamber decision of 20 June 2011) para 51.

interests at stake. In the recent case of *Karsai v Hungary*¹¹, the ECtHR summarised its position on the margin of appreciation granted to the State in the context of assisted dying:

“The Court cannot but note that a certain trend is currently emerging towards decriminalisation of medically assisted suicide, especially with regard to patients who are suffering from incurable conditions. Nevertheless, and even if access to assisted dying has recently been or is being deliberated in the parliaments of certain other member States, the majority of [Council of Europe] member States continue to prohibit and prosecute assistance in suicide. [...] As the subject continues to be one that raises extremely sensitive moral and ethical questions and one on which opinions in democratic countries often profoundly differ, the State must be granted a considerable margin of appreciation. From the perspective of Article 8 this margin extends both to [the States’] decision to intervene in this area and, once they have intervened, to the detailed rules laid down in order to achieve a balance between the competing interests.”¹²

UN International Covenant on Civil and Political Rights (“ICCPR”)

The UK is a party to the UN International Covenant on Civil and Political Rights (“ICCPR”). Whilst the ICCPR is not legally enforceable in the same way the ECHR is, its obligations are nonetheless binding and must be reflected in domestic law.

Right to life

Article 6(1) ICCPR guarantees the inherent right to life. General Comment 36 outlines the Human Rights Committee’s understanding of the right to life in relation to end of life matters:

“While acknowledging the central importance to human dignity of personal autonomy, States should take adequate measures, without violating their

¹¹ *Karsai v Hungary* App No 32312/23 (13 June 2024).

¹² *ibid* paras 143-144.

other Covenant obligations, to prevent suicides, especially among individuals in particularly vulnerable situations, including individuals deprived of their liberty.”¹³

However, the Committee also recognised situations where a State may legislate for assisted dying to ‘facilitate the termination of life of afflicted adults, such as the terminally ill, who experience severe physical or mental pain and suffering and wish to die with dignity.’¹⁴ States that legislate for assisted dying must:

“[...] ensure the existence of robust legal and institutional safeguards to verify that medical professionals are complying with the free, informed, explicit and unambiguous decision of their patients, with a view to protecting patients from pressure and abuse.”¹⁵

UN Convention on the Rights of Persons with Disabilities (“CRPD”)

The UK is a party to the UN Convention on the Rights of Persons with Disabilities (“CRPD”). Whilst the CRPD is not legally enforceable in the same way the ECHR is, its obligations are nonetheless binding and must be reflected in domestic law.

Right to life on an equal basis with others

Article 10 CRPD protects the right to life of persons with disabilities on an equal basis with others.

In 2021 the Special Rapporteur on the rights of persons with disabilities; Special Rapporteur on extreme poverty and human rights; and Independent Expert on the enjoyment of all human rights by older persons issued a joint statement (unendorsed by the Human Rights Council) in which they ‘expressed alarm at a growing trend to enact legislation enabling access to medically assisted dying based largely on

¹³ UN Human Rights Committee, General Comment No. 36 on Article 6: right to life (3 September 2019) *CCPR/C/GC/36* para 9.

¹⁴ *ibid.*

¹⁵ *ibid.*

having a disability or disabling conditions, including in old age'.¹⁶ The experts, speaking in their capacity as UN mandate holders, stated:

“Disability should never be a ground or justification to end someone’s life directly or indirectly. Such legislative provisions would institutionalize and legally authorize ableism, and directly violate Article 10 of the UN Convention on the Rights of Persons with Disabilities, which requires States to ensure that persons with disabilities can effectively enjoy their inherent right to life on an equal basis with others.

“[...] even when access to medical assistance in dying is restricted to those at the end of life or with a terminal illness, people with disabilities, older persons, and especially older persons with disabilities, may feel subtly pressured to end their lives prematurely due to attitudinal barriers as well as the lack of appropriate services and support.

“It is paramount that the voices of people with disabilities of all ages and backgrounds are heard when drafting laws, policies and regulations that affect their rights, and especially when we talk about the right to life.”¹⁷

The UN Special Rapporteur on the Rights of Persons with Disabilities has previously examined concerns of disabled people under CRPD.¹⁸ The Special Rapporteur set out that if assisted dying is to be permitted, it must be accompanied by strong safeguards to protect the right to life of persons with disabilities, including:

- Assisted dying should be restricted to those who are at the end of life; having an impairment should never be a reason for assisted dying to be permitted.
- The free and informed consent of persons with disabilities must be secured on all matters relating to assisted dying and all forms of pressure and undue influence prevented.

¹⁶ Office of the High Commissioner for Human Rights, ‘Press Release: [Disability is not a reason to sanction medically assisted dying – UN experts | OHCHR](#) (25 January 2021).

¹⁷ *ibid.*

¹⁸ Human Rights Council, Report of the Special Rapporteur on the rights of persons with disabilities (17 December 2019) *A/HRC/43/41* paras 36-38 and 69-70.

- Access to appropriate palliative care, rights-based support, home care and other social measures must be guaranteed.
- Accurate information about the prognosis and availability of peer-support counselling must be provided.
- Accountability regulations must be established for collection and reporting of information about each request and intervention for assistance in dying.¹⁹

Right to equal recognition before the law

Article 12 CRPD recognises the right of persons with disabilities to exercise legal capacity on an equal basis with others.

In setting out its understanding of Article 12 CRPD, the Committee on the Rights of Persons with Disabilities has noted that the legal capacity of persons with disabilities to make decisions, including in emergency and crisis situations, must be respected and supported at all times.²⁰ Any perceived or actual deficits in mental capacity must not be used as justification for denying legal capacity; rather it requires that support be provided in the exercise of legal capacity.²¹ The Committee further points out:

“The concept of mental capacity is highly controversial in and of itself. It is not, as it is commonly presented, an objective, scientific and naturally occurring phenomenon. Mental capacity is contingent on social and political contexts, as are the disciplines, professions and practices which play a dominant role in assessing mental capacity.”²²

However, the drive to ensure equal recognition of legal capacity must also ensure that sufficient safeguards are provided to ensure that consent is informed and free

¹⁹ Human Rights Council, Report of the Special Rapporteur on the rights of persons with disabilities (17 December 2019) *A/HRC/43/41* para 70.

²⁰ UN Committee on the Rights of Persons with Disabilities, General Comment No.1 on Article 12 CRPD: Equal Recognition before the law (19 May 2014) *CRPD/C/GC/1* para 42.

²¹ *ibid* para 32.

²² *ibid* para 14.

from undue influence. Both the ECtHR²³ and CRPD²⁴ emphasise the State's obligation to put in place a procedure capable of ensuring that a person's decision to end their life does in fact reflect their free will.

²³ *Haas v Switzerland* App No 31322/07 (Chamber decision of 20 June 2011).

²⁴ Article 12(4) CRPD; UN Committee on the Rights of Persons with Disabilities, General Comment No.1 on Article 12 CRPD: Equal Recognition before the law (19 May 2014) *CRPD/C/GC/1* paras 20-22.

Response to consultation questions

Which of the following best reflects your views on the Bill?

The Commission does not take a position on the enactment of assisted dying legislation as such. Regarding the purpose of the current proposals, the Policy Memorandum to the Bill states 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”.*²⁵

The requirement of legality under Article 8(2) ECHR calls for the law to be clear, foreseeable and adequately accessible.²⁶ In this context, ‘law’ means not only legislation but also guidance such as prosecution policy.²⁷ In Scotland, the decision whether, or how to, prosecute a person suspected of having assisted another in ending their life is a discretionary one for the Crown Office and the Procurator Fiscal Service, taking into account a list of public interest factors.²⁸ The lack of a specific prosecution policy in relation to assisted dying was subject to legal challenge before the Court of Session, in which the Inner House held that the lack of specific guidance did not breach the legality requirement of Article 8 ECHR.²⁹ It is therefore up to the Scottish Parliament to consider whether the law regarding assisted suicide requires increased clarity.

This Bill also provides an opportunity for the Scottish Parliament to consider whether the current situation remains a necessary and proportionate interference with the right to private life. Given the wide margin of appreciation for the State to determine its assisted dying laws, the views of national authorities such as the Supreme Court

²⁵ Scottish Parliament, Policy Memorandum Assisted Dying for Terminally Ill Adults (Scotland) Bill (SP Bill 46) (2024) para 5.

²⁶ R (on the application of Purdy) v the Director of Public Prosecutions [2009] UKHL 44, para 40.

²⁷ *Ross v Lord Advocate* [2016] CSIH 12 para 6.

²⁸ Crown Office and Procurator Fiscal Service, Prosecution Code (1 May 2001).

²⁹ *Ross v Lord Advocate* [2016] CSIH 12.

are relevant in assessing the human rights compatibility of any proposed laws. The Supreme Court's assessment in *R (on the application of Nicklinson) v Ministry of Justice* is significant. While the Supreme Court ultimately concluded that it would be institutionally appropriate for Parliament, rather than Court, to consider the matter, they flagged concerns regarding the proportionality of a blanket ban on assisted dying:

“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.”³⁰

A majority of Justices made clear that, if Parliament did not address the situation satisfactorily, there was a “real prospect that a further, and successful, application for a declaration of incompatibility may be made.”³¹

Which of the following most closely matches your opinion on the terminal illness criterion for determining eligibility for assisted dying?

The Bill defines a person as being terminally ill, if that person has ‘an advanced and progressive disease, illness or condition from which they are unable to recover and that can reasonably be expected to cause their premature death.’³²

As noted above, if assisted dying is to be permitted, it must be accompanied by strong safeguards to protect the right to life of persons with disabilities; having an impairment should never be a reason for assisted dying to be permitted. In the Commission’s view this definition of ‘terminal illness’ should be discussed with

³⁰ *R (on the application of Nicklinson) v Ministry of Justice* [2014] UKSC 38 on appeal from [2013] EWCA Civ 961, para 111.

³¹ *ibid* para 118.

³² Section 2 of the Bill.

disabled people's organisations to ensure it could not be taken to apply to people with conditions or impairments who have many years of life ahead of them.³³

Which of the following most closely matches your opinion on the minimum age at which people should be eligible for assisted dying?

The Bill proposes a minimum age of sixteen for assisted dying.³⁴

The UNCRC requirements set out in Schedule 1 Part 1 of the UNCRC (Incorporation) (Scotland) Act 2024, and introduced by section 1(2) of the same Act, define a 'child' as every human being below the age of 18.³⁵ It therefore appears that a minimum age of 16 for assisted dying is inconsistent in its definition of an 'adult' with the UNCRC requirements under the UNCRC (Incorporation) (Scotland) Act 2024, which came into force on 16 July 2024.

We have consulted with our colleagues at the Children and Young People's Commissioner Scotland, who agree with this position.

Which of the following most closely matches your opinion on the Assisted Dying procedure and the procedural safeguards set out in the Bill?

Capacity assessment

The Bill does not assume that every person has capacity and instead sets out a two-fold test to determine capacity for the purposes of requesting assisted dying.³⁶ A person has capacity if they

³³ Human Rights Council, Report of the Special Rapporteur on the rights of persons with disabilities (17 December 2019) *A/HRC/43/41* para 69.

³⁴ Section 29 of the Bill defines an 'adult' as a person who is aged 16 or over.

³⁵ Article 1 Part 1 Schedule 1 UNCRC (Incorporation) (Scotland) Act 2024.

³⁶ Section 3(2) of the Bill.

- a) are not suffering from any mental disorder which might affect the making of their request (mental disorder means any mental illness, personality disorder, or learning disability, however caused or manifested³⁷); and
- b) are capable of
 - i. understanding information and advice about making the request,
 - ii. making a decision to make the request,
 - iii. communicating the decision (a person does not lack capacity by virtue of a speech impairment where this can be made good by human or technological aid³⁸),
 - iv. understanding the decision, and
 - v. retaining the memory of the decision.

The procedure set out in the Bill relies on the assessment of medical professionals.³⁹ As indicated above, when designing the capacity aspect of any assisted dying framework Article 12 CRPD requires careful consideration. The requirement for supported decision-making⁴⁰ is particularly relevant in this context, which encompasses both informal and formal support arrangements of varying types and intensity.⁴¹ At the same time, safeguards must be in place to ensure respect for the rights, will and preferences of the person⁴² and to protect them from undue

³⁷ Section 328 Mental Health (Care and Treatment) (Scotland) Act 2003.

³⁸ Section 3(3) of the Bill.

³⁹ An individual will only be provided with assistance in dying if they make a first declaration to that effect, and the coordinating registered medical practitioner and the independent registered medical practitioner are satisfied that the person is a terminally ill adult meeting the eligibility criteria who made the declaration voluntarily and without coercion or pressure by any other person. The independent registered medical practitioner is to assess specifically whether the person has capacity, using the test outlined. In doing so, the independent registered medical practitioner may, if they have doubts, refer the person for assessment to a psychiatrist or any other medical practitioner with experience in assessing capacity.

⁴⁰ Article 12(3) CRPD.

⁴¹ UN Committee on the Rights of Persons with Disabilities, General Comment No.1 on Article 12 CRPD: Equal Recognition before the law (19 May 2014) *CRPD/C/GC/1* para 17.

⁴² Article 12(4) CRPD.

influence⁴³. One approach in line with CRPD would be to offer all persons considering assisted dying support in the form of peer-support counselling to consider their decision before embarking on the process.⁴⁴

Further attention needs to be given to the role of supported decision-making in the capacity assessment process, with a view to ensuring equal recognition alongside robust safeguards, to ensure the absence of pressure and undue influence. Given the seriousness of decisions regarding assisted dying, human rights standards require very stringent forms of supported decision-making. However, refusing assisted dying to someone on the basis of a diagnosis of mental disorder, which is unrelated to the reason they are seeking assisted dying, could be discriminatory unless justified in the individual circumstances.

Witnesses

The Bill provides that the person must make and sign a first and/or second declaration in the presence of the coordinating medical practitioner and another person.⁴⁵ Certain categories of individuals are excluded from being a witness⁴⁶, including anyone who will gain a financial benefit through inheritance, any health professional who has provided treatment to the person as well as relatives by blood, marriage or adoption.⁴⁷

As outlined by ECHR and CRPD standards above, appropriate safeguards to prevent coercion are crucial to ensuring legislation allowing for assisted dying appropriately protects vulnerable individuals. Whatever procedural safeguards are included in the proposed legislative scheme must be adequate effectively to protect the right to life as well as other rights highlighted above.

⁴³ UN Committee on the Rights of Persons with Disabilities, General Comment No.1 on Article 12 CRPD: Equal Recognition before the law (19 May 2014) *CRPD/C/GC/1* para 22.

⁴⁴ Human Rights Council, Report of the Special Rapporteur on the rights of persons with disabilities (17 December 2019) *A/HRC/43/41* para 70.

⁴⁵ Sections 4(2) and 10(3) of the Bill.

⁴⁶ Section 4(3)(b) of the Bill.

⁴⁷ Schedule 5(2) of the Bill.

Which of the following most closely matches your opinion on the method of dying set out in the Bill?

The Commission does not offer views on this.

Which of the following most closely matches your opinion on how the Bill may affect the medical profession?

The Bill contains a conscientious objection clause which provides that no one, including health professionals, is under any legal duty to play an active, participatory role in anything authorised by the Bill.⁴⁸ In legal proceedings the onus is on the person claiming to rely on their right to conscientious objection to demonstrate that their objection is in fact based on conscience.⁴⁹

The right to freedom of thought, conscience and religion is protected by Article 9 ECHR. This right is qualified, meaning that whilst public authorities cannot interfere with an individual's right to hold or change their belief (whether religious or not), there are some situations in which public authorities can interfere with the right to manifest those beliefs as long as the authority can show that its action is lawful, necessary and proportionate in order to protect public order, health or morals, or for the protection of the rights and freedoms of others. Whilst Article 9 does not explicitly recognise a right to conscientious objection, the ECtHR has found that the safeguards of Article 9 could apply to conscientious objection in certain circumstances, including to a lawyers' professional conscience clause.⁵⁰ Health professionals' conscientious objection to assisted dying has not yet been considered by the ECtHR.

The Supreme Court has previously clarified the ambit of health professionals' right to conscientious objection in relation to the provision of abortion services, holding that delegating, supporting and supervising staff participating in abortion, as opposed to

⁴⁸ Section 18(1) of the Bill.

⁴⁹ Section 18(2) of the Bill.

⁵⁰ *Mignot v France* (Commission decision of 21 October 1998). Note in this case the Court accepted that a lawyers professional conscience clause may in principle fall within the scope of Article 9 but on the merits no violation was found.

actively participating, is not covered by conscientious objection in the Abortion Act 1967.⁵¹ In contrast to the present Bill, however, section 4 of the Abortion Act 1967 provides that the burden of proof can be discharged by making a statement on oath to the effect that a person has a conscientious objection to the provision of abortion services.

Article 9 ECHR will necessitate thorough consideration of how assisted dying may interact with the beliefs of healthcare and other professionals. As the Bill currently stands, consideration should be given to amending the onus of proof on medical professionals to demonstrate that their objection is based on a matter of conscience in line with the conscientious objection clause in the Abortion Act 1967.

Which of the following most closely matches your opinion on recording the cause of death?

The Commission does not offer views on this.

Which of the following most closely matches your opinion on the reporting and review requirements set out in the Bill?

Reporting requirements

1. The Bill provides for the collection and reporting of data to Public Health Scotland, which is to submit a report to the Scottish Ministers on the operation of the Bill each year.⁵²
2. The reporting and collection of data is essential to ensure each use of assisted dying is appropriate and in line with human rights standards. In this regard, the Committee on the Rights of Persons with Disabilities has highlighted the importance of regulations for monitoring medical assistance in dying, data to assess compliance

⁵¹ *Greater Glasgow Health Board v Doogan and another* [2014] UKSC 68, on appeal from [2013] CSIH 36, para 38.

⁵² Sections 24-27 of the Bill.

with the procedural safeguards regarding such assistance, and sufficient support to facilitate civil society engagement with and monitoring of this practice.⁵³ The Committee recommended the introduction of regulations that require the collection and reporting of detailed information on each request and intervention on assisted dying.⁵⁴

3. Review requirements

The Bill does not make any provision for a prior or retrospective independent review mechanism to review the decision of either or both medical practitioners to grant, or not to grant, a declaration.

To the extent that there is a lack of prior independent review mechanism, the UN Human Rights Committee has recommended that, in order to comply with the right to life, States should consider introducing prior reviews by independent or judicial oversight of requests or decisions for physician assisted dying.⁵⁵ The Supreme Court, in *Nicklinson*, also considered systems whereby a judge or independent assessor would make a determination as to the voluntary, clear, settled and informed wish to die, as a robust means of reducing concerns about its inappropriate use.⁵⁶

To the extent that there is a lack of subsequent independent review mechanism, the ECtHR examined for the first time in *Mortier v Belgium*⁵⁷ whether the State had complied with its obligation in the context of a performed assisted death

⁵³ UN Committee on the Rights of Persons with Disabilities, Concluding observations on the initial report of Canada (8 May 2017) *CRPD/C/CAN/CO/1* para 24.

⁵⁴ UN Committee on the Rights of Persons with Disabilities, Concluding observations on the initial report of Canada (8 May 2017) *CRPD/C/CAN/CO/1* para 24(b).

⁵⁵ Human Rights Committee, Concluding observations of the Human Rights Committee: Switzerland (3 November 2009) *CCPR/C/CHE/CO/3* para 1; Human Rights Committee, Concluding observations on the fifth periodic report of the Netherlands (22 August 2019) *CCPR/C/NLD/CO/5* para 29.

⁵⁶ *R (on the application of Nicklinson) v Ministry of Justice* [2014] UKSC 38 on appeal from [2013] EWCA Civ 961, para 318.

⁵⁷ *Mortier v Belgium* App No 78017/17 (Chamber decision of 4 January 2023).

authorised by law. In the context of assisted dying, the positive obligation to protect life places an obligation on the State:

- (i) to put in place a legislative framework regulating acts prior to the performance of euthanasia which ensure that the patient's decision is made freely and fully informed, and
- (ii) to ensure there is adequate *ex post* (subsequent) review securing the procedural protections of Article 2, in particular, the effective, independent, and prompt investigation of deaths.⁵⁸

Relying on its existing Article 2 case law to set out the requirements of an effective subsequent review of an assisted death, the ECtHR noted that the review must be prompt, effective, and independent.⁵⁹ In the particular case the ECtHR found a procedural violation due to a lack of independence of the post-assisted death review board.⁶⁰

The Commission therefore advises that, if legislation is enacted, a system of judicial or independent oversight, both prior and subsequent, is required by human rights standards to provide a higher degree of scrutiny and stronger procedural safeguards for the right to life.

Additional comments

Discrimination

The Policy Memorandum makes clear that the Bill aims to allow mentally competent terminally ill adults in Scotland to voluntarily end their own lives. This advances the individual's right to decide by what means and at what point his or her life will end, provided he or she is capable of freely reaching a decision on this question and acting in consequence.⁶¹ It does not, however, address the situation of people who, because of their physical illness, would be unable to act upon their decision and

⁵⁸ *Mortier v Belgium* App No 78017/17 (Chamber decision of 4 January 2023) paras 141, 146 and 166.

⁵⁹ *Mortier v Belgium* App No 78017/17 (Chamber decision of 4 January 2023) para 168.

⁶⁰ *Mortier v Belgium* App No 78017/17 (Chamber decision of 4 January 2023) para 166-85.

⁶¹ *Haas v Switzerland* App No 31322/07 (Chamber decision of 20 June 2011) para 51.

would require the physical assistance of others. While the ECtHR has not found this to be discriminatory⁶², consideration should be given to the objective and reasonable justifications for maintaining this distinction.

Conclusion

According to international human rights standards, legislation permitting assisted dying may be enacted so long as it includes appropriate safeguards, particularly to protect the rights of disabled people. On the other hand, international human rights standards do not currently require the enactment of such legislation. Nor, given widely ranging approaches amongst states, and the complex character of the issues at stake and necessary safeguards, do human rights standards define a particular scheme.

This briefing highlights some areas of the Bill which we require further attention. In particular, any law enacted must be sufficiently predictable and clearly defined. It must also be substantively compatible with human rights standards, in particular the ECHR, to fall within the Scottish Parliament's competence. The Commission underlines the need for further information and clarification on areas of the Bill relating to the minimum age requirement, capacity assessment and arrangements for supported decision-making for all persons, onus of proof for conscientious objection, and the introduction of both prior and subsequent independent oversight and review mechanisms.

⁶² *Karsai v Hungary* App No 32312/23 (13 June 2024) para 175; *Pretty v The United Kingdom* App No 2346/02 (Chamber decision of 29 July 2002) paras 88-89.