Supplementary Evidence from CARE for Scotland to the Equalities and Human Rights Committee Inquiry on Human Rights and the Scottish Parliament

Introduction

Further to our oral evidence given on 26th April, CARE for Scotland wishes to submit this supplementary evidence for consideration by the Equalities and Human Rights Committee. During the evidence session we raised the issue of the need to have a clear understanding of the philosophical basis of human rights (deeply grounded in the Christian tradition) as a starting point when considering how to advance human rights in the Scottish context.

The Christian Foundation of Human Rights

From the outset, Christianity has understood that the authority of the secular state is not absolute, but limited in nature. The understanding that the state does not have unlimited power is central to all modern human rights jurisprudence. From the outset of Christianity, the role of political rulers was viewed to be the pursuit of the common good of society and to maintain justice under the ultimate authority of Christ. The rooting of human rights in objective right and pursuit of the common good are central to the Christian understanding of the wellbeing of society. These values are also shared by people who adhere to other belief systems. Respect for human rights sits within the wider context of the pursuit of justice. The achievement of justice is predicated upon making right judgements which are informed by truth, the revealed law of God and respect for, including the limitations placed by God on, the authority of human government.

The Modern Human Rights Framework

The modern human rights framework was developed in response to the abuses that had occurred under totalitarian regimes during the 20th Century. In particular, the abuses demonstrated by the Nazis during the 1930s and 40s, culminating in the Holocaust, acted as a spur for the development of human rights instruments and jurisprudence in the post-war period. The Universal Declaration of Human Rights (UDHR) was drafted by an international group of persons reflecting differing cultures, religions and political systems. The UDHR was drafted not to establish new human rights, but rather to consolidate and clearly articulate them in one document. It recognises that the inherent dignity and equal and inalienable rights of all members of the human family is "the foundation of freedom, justice and peace in the world".[1]

It is important to note that the recognition of the inherent dignity of all human beings was articulated in the UDHR. It remains central to all human rights jurisprudence. The secular humanist view that human dignity is conditional and can be lost due to changing physical and mental health or social circumstances undermines the foundation of human rights. Forgetting the roots of human rights is a very dangerous

[1] http://www.un.org/en/universal-declaration-human-rights/

approach to adopt, as it facilitates value judgements about the quality of the lives of other people. Potentially it may lead to denial of the human rights of those who are vulnerable and not in a position to articulate their rights for themselves. In contrast, a transcendent approach to human rights such as that provided to European civilisation by Christianity and shared by other ethical systems, presents a foundation for human rights which upholds the equal and absolute dignity of every human being. Human dignity is inalienable because each of us is made in the image of God and the sanctity of human life should be respected in all cases. This view is based on an absolute and immutable moral authority that is not dependant on changing cultural priorities and majoritarian perspectives.

As we stated in our oral evidence there is a danger of treaty monitoring bodies and international organisations adopting a subjective and fluid view of human rights which reflect their own and changing worldview assumptions, interpretation and desired policy goals (of the 'minute') rather than the original intent of the drafters of human rights treaties. On occasions positions are taken which lack any international consensus.[2] For example, the UN Human Rights Committee's recent draft general comment on the right to life that has been criticised by academic and civil society for seeking to incorporate abortion and assisted suicide when no such international human rights exist. It is argued that the Committee has misrepresented the discussion around abortion which was had by the original drafters of the International Covenant on Civil and Political Rights (ICCPR) in order to justify its position.[3] It is important that the Scottish Parliament is aware of this tendency and treats the reports of such bodies with a sufficient degree of analytical rigour.

Abortion

There is significant pressure being applied for reform of laws relating to abortion. Specifically, interest groups have lobbied the UN, the EU and at national level for human rights to be interpreted in ways in which they were not originally articulated in order to include access to abortion services. This lobbying occurs despite the fact that there is no international human right to abortion.

A general 'right' to abortion is not mentioned in the UN Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). Nevertheless, the CEDAW committee has repeatedly brought pressure[4] to bear on national governments for the extension of abortion laws by way of a broad reading of Article 12 and Article 16(e) of CEDAW. Article 12 of CEDAW says that:

> **"States Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning**."[5]

[2] https://c-fam.org/friday_fax/u-s-rebukes-world-health-organization-abortion-activism/
[3] http://www.thepublicdiscourse.com/2017/09/20037/
[4] https://c-fam.org/wp-content/uploads/CEDAW_Abortion_Pressure_.pdf
[5] http://www.un.org/womenwatch/daw/cedaw/text/econvention.htm

Article 16(e) obliges states to take measures to ensure that women and men, in equality, have:

> **"The same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights."**[6]

The CEDAW committee has taken the view that these articles include access to abortion services despite the fact that the International Conference on Population and Development in 1994 explicitly excluded abortion as a form of family planning from its Programme of Action.[7] In adopting such a broad interpretation of these provisions as the 'right' to abortion, the CEDAW committee oversteps its mandate and reinterprets the Convention in a manner which was not intended by the signatory states.[8]

The CEDAW committee does not limit its recommendations on abortion to the difficult cases of fatal foetal abnormality, rape and incest, but rather advocates for the complete decriminalisation of abortion.[9] Such a course would legalise abortion at any stage during a pregnancy and for any reason. Additionally, it may well undermine the conscience rights of health professionals not to participate in abortions.[10] It should be noted that the right to freedom of conscience is the foundation of a free society. To erode that right for healthcare professionals would contradict the very principles upon which human rights are based and introduce aspects of a tyrannous relationship between the state and the individual.

This advocacy of decriminalisation was recently repeated in CEDAW committee's report on United Kingdom of Great Britain and Northern Ireland from February 2018.[11] However, it would be a mistake to consider that this report should be treated as authoritative and determinative in formulating the UK's approach to legislating on the controversial issue of abortion. CARE recently commissioned an Opinion from Prof. Mark Hill QC to address the status of CEDAW committee's February 2018 report and the standing of the CEDAW committee to make such recommendations. Mr Hill QC states in his Opinion:

> **"The Committee does not have the capacity or standing to give a binding adjudication on the United Kingdom's obligations under CEDAW or on the proper interpretation of CEDAW. The interpretative function under the CEDAW is reserved, not to Committee, but to the International Court of Justice…"**

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[6] Ibid.
[7] https://www.unfpa.org/sites/default/files/pub-pdf/programme_of_action_Web%20ENGLISH.pdf
[8] http://c-fam.org/wp-content/uploads/20101124_CEDAW_testimony_CFAM.pdf
[9] http://c-fam.org/wp-content/uploads/20101022_CEDAWAbortionRulings95-2010.pdf
[10] https://blogs.bmj.com/bmj/2017/03/24/mary-neal-abortion-decriminalisation-and-statutory-rights-of-conscience/
[11] The CEDAW committee's press release can be found at :http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22693&LangID=E, and the report at: http://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/GBR/INT_CEDAW_ITB_GBR_8637_E.pdf

"… the Committee is entitled to take a view as to what constitutes a violation of CEDAW obligations. But it must do so in accordance with the ordinary rules of interpretation set out in the Vienna Convention on the Law of Treaties. The Committee's views are not binding interpretations of the law, nor do they contribute to customary international law when approaching the interpretation of these rights."

"In initiating the present inquiry, and in coming to its conclusions and recommendations, the Committee has instead chosen to rely on its own interpretation of CEDAW. In consequence it initiated an inquiry (and published a report) when it was not properly open to the Committee to do so under its own terms of reference. Further it purported to make an interpretation which, at best, can amount to nothing more than an opinion, but at worst … is demonstrably wrong."

"The text of international treaties such as CEDAW are carefully crafted expressions of intent and belief. There is no reference to abortion in the text of CEDAW. There is nothing in the text of CEDAW which requires a state party to allow abortion on specified grounds and/or decriminalise abortion generally. The absence of such a provision in the formal text gives a clear indication that no such obligation exists…".[12]

In June 2018, the UK Supreme Court (UKSC) issued a judgment which considered the compatibility of the Northern Irish abortion law with human rights.[13] Although the UKSC concluded that the Northern Irish abortion law is incompatible with Article 8 of the ECHR, the judgment is limited to cases of fatal foetal abnormality, rape and incest.[14] The narrowness of that judgment (4 judges in favour of the conclusion and 3 opposed in the cases of rape and incest) suggests that there is no overwhelming consensus even in such difficult cases that restrictive abortion laws are incompatible with human rights. The judgment does not endorse the view that there is any general human right to an abortion and that, therefore, abortion should be decriminalised.

As the UKSC found that the Northern Ireland Human Rights Commission did not have standing to bring the challenge, the consideration of capability of the NI abortion law with human rights in the judgment is not binding. Considering the lack of consensus between the judges on many aspects of the case, it is possible that a differently constituted court considering a case at some point in the future may come to a different decision. The UKSC did find that that there is no human rights requirement to allow for abortion on the grounds of disability in cases of serious foetal abnormality.[15] This completely disposes of the idea that the current provision in the law in Scotland, whereby disabled babies can be aborted after the general 24 week limit and up to birth is required by any human rights consideration. Instead it emphasises the inherent dignity of disabled people.

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[12] Unpublished Opinion of Prof Mark Hill QC, 19th March 2018.

[13] Northern Ireland Human Rights Commission for Judicial Review (Northern Ireland) Reference by the Court of Appeal in Northern Ireland pursuant to Paragraph 33 of Schedule 10 to the northern ireland Act 1998 (Abortion) (Northern Ireland). Judgment available at https://www.supremecourt.uk/cases/docs/uksc-2017-0131-judgment.pdf.

[14] https://www.supremecourt.uk/cases/docs/uksc-2017-0131-judgment.pdf

[15] See for example, para. 2 of the judgment and Lord Mance at paras 42(d) and 133.

In February 2018, the Vice Chair of the CEDAW committee claimed that the Northern Irish abortion law may constitute inhumane, cruel and degrading treatment.[16] However, it should be noted that a majority of the UKSC judges rejected that view, concluding that the law in Northern Ireland does not contravene Article 3 of ECHR. The CEDAW committee's conclusion that restrictive laws on abortion infringe human rights and its recommendation that abortion should be fully decriminalised reflects a particular ideological position rather than an impartial and balanced interpretation of all human rights instruments.

The European Court of Human Rights in Strasbourg views abortion as something falling within the Margin of Appreciation of the contracting State Parties. However, it should be noted that underlying instrument states that 'everyone' has the right to life with the only exception being in relation to the administration of capital punishment after conviction in a court of a crime for which the death penalty is prescribed by law.[17] Moreover, other international human rights treaties, such as the United Nations Convention on the Rights of the Child (UNCRC) and the ICCPR, recognise the right to life of the child both before and after birth.[18] As stated above, CEDAW itself makes no mention of abortion. The CEDAW committee's statements with regard to abortion, therefore, should be treated with a degree of caution being seen as a subjective and politicised interpretation of human rights rather than an objective and uncontested statement of fact.

The 1959 Declaration on the Rights of the Child recognised the need for protection of the child both before and after birth. This declaration was referred to by the drafters of the UNCRC. The need to protect the child before birth was, therefore, included in the UNCRC.[19]

Specifically, the Preamble to the UNCRC states:

> **"Bearing in mind that, as indicated in the Declaration of the Rights of the Child, "the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth"[20]**

Article 1 of the UNCRC includes an upper age limit of 18 in the definition of a child, but no lower age limit. Article 6 recognises the inherent right to life of the child. Similarly Article 6(1) of the ICCPR recognises the inherent right to life of every person. Article 6(5) of the ICCPR applies this right to the unborn child.

Article 6(5) of the ICCPR states:

[16] http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22693&LangID=E.
[17] https://www.echr.coe.int/Documents/Convention_ENG.pdf.
[18] http://www.uffl.org/vol16/flood06.pdf.
[19] http://www.uffl.org/vol16/flood06.pdf
[20] http://www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx

Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.[21]

Article 6(5) of the ICCPR clearly recognises the right to life of the unborn child (as separate from the right to life of the pregnant woman in that it prohibits the death penalty being used against the pregnant woman). It is evident, therefore, that both the UNCRC and the ICCPR give protection to child both before as well as after birth and recognise the inherent right to life of all children. The UK has signed these conventions and, therefore, is under a legal obligation to respect all the rights which they contain.

Assisted Suicide and Euthanasia

Similarly, there is no international human right to assisted suicide and/or euthanasia. Nevertheless, organisations such as the Humanist Society of Scotland, Dignity and Dying and Friends at the End have submitted evidence to the Equalities and Human Rights Committee arguing that a right to choose the time and circumstances of death should be enshrined in Scots law and that there is a human rights basis for doing so.[22] The underlying philosophy of those arguing for legalisation of assisted suicide is one of radical personal autonomy. There will be continuing pressure for the incremental extension of the scope of any limited law to include new categories of people. This is inevitable because the philosophical basis of the campaign for a change in the law is that of autonomy. The ultimate objective is euthanasia on demand for any purpose based purely upon the principle of personal autonomy with little regard to the common good and/or the sanctity of life. The advocates of the legalisation of assisted suicide seek to do so by referring to Article 8 of the ECHR. However, Article 8 is qualified by the need to consider the rights of others. Given that there is abundant evidence that assisted suicide and euthanasia lead to the deprivation of life of persons who do not request assisted suicide, the positive obligation to protect the innocent demands that assisted suicide and euthanasia must be opposed.

The risks to vulnerable people of progressing down the road of legalised assisted suicide and euthanasia are considerable. To agree to legalise assisted suicide is to deny the inherent dignity of every human being. It is to say that dignity can be sacrificed owing to a person's circumstances and that human dignity is based on very limited and transient grounds. However, dignity is not only about autonomy/choice, or about the avoidance of suffering. Despite their slogan, the claim being made by supporters of assisted suicide and euthanasia is not so much about dying with dignity, but that in many cases to respect dignity requires death. The advocates for assisted suicide and euthanasia essentially claim that a commitment to respecting the dignity of other people means that we have to be willing to kill them, or help them to commit suicide. At the very least, we must not object if others are willing to do this.

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[21] https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx

[22] See http://www.parliament.scot/S5_Equal_Opps/Submission_from_Humanist_Society.pdf, http://www.parliament.scot/S5_Equal_Opps/Submission_from_Dignity_in_Dying.pdf and http://www.parliament.scot/S5_Equal_Opps/Submission_from_Friends_at_the_End.pdf

According to this way of looking at things, anyone who sees killing as a moral 'red line' which should not be crossed must be insufficiently respectful of other people. So on this view; it's those who disapprove of killing others who are morally deficient. This demands nothing less than a complete inversion of the moral and legal norms that we've lived by in this country for centuries and undermines the very basis of human rights. It opens up the possibility of the right to life being denied by the state because of value judgements by officials of the state about the quality of a person's life. It undermines the 'positive obligation' which applies to states to respect the right to life. Rather than legalising assisted suicide and euthanasia, improvements to palliative care should be prioritised in order to ensure the maximum number of people can have a dignified death without doctors becoming complicit in killing patients. This is the best way to meet our 'positive obligation' to respect the right to life for those who are terminally ill.

Despite the acknowledgement by the courts that Article 8 is 'engaged' in questions of how and when we die, it is also acknowledged that this does not create any positive right to assisted suicide or euthanasia. Article 8(2) gives states discretion to balance the interests of individuals in how and when they die against a range of other factors. It is perfectly consistent with human rights law for states to choose to protect vulnerable people, or pursue a range of other aims, by prohibiting assisted suicide and/or euthanasia. As stated above, it is in fact incumbent on the state to oppose this threat to life given the evidence that the so-called 'right to die' becomes the duty to die.

By legalising assisted suicide and euthanasia it is likely that in many cases the right to life of vulnerable people will be violated. The number of deaths by euthanasia and assisted suicide in the Netherlands has increased steadily over the years. Official statistics show that euthanasia deaths increased by 151% in the seven year period from 2006 to 2013. There were 1,923 such deaths in 2006 and 4,829 in 2013.[23] By 2017, the number of euthanasia deaths had increased to 6,585.[24] However, a study published in the Lancet in 2012 estimated that 23% of all deaths by euthanasia in the Netherlands go unreported, suggesting that the actual death rate is much higher.[25]

There is concern also over the number of other aspects of end of life care. There has been a steady increase in deaths by continuous deep terminal sedation accompanied by the withdrawal of food and fluids. Deaths from this method increased from 8.2% to 12.3% of all Dutch deaths in a five year period between 2005 and 2010.[26] The most likely explanation for this increase is that the culture surrounding end of life care has been altered to a considerable extent owing to the legalisation of assisted suicide and euthanasia with doctors now seeing this option as a cheaper and normalised alternative to the provision of palliative care.

[23] http://www.cmfblog.org.uk/2014/09/29/euthanasia-deaths-in-the-netherlands-continue-their-relentless-rise/.
[24] http://alexschadenberg.blogspot.com/search?q=Netherlands.
[25] http://www.cmfblog.org.uk/2014/09/29/euthanasia-deaths-in-the-netherlands-continue-their-relentless-rise/
[26] http://www.cmfblog.org.uk/2012/07/11/dutch-doctors-turn-to-continuous-deep-sedation-to-keep-official-euthanasia-figures-low/

There are a number of other deeply troubling characteristics of the practice of euthanasia in the Netherlands. Official Dutch reports show a continuing practice of euthanising people without an explicit request or consent having been obtained. There were 431 such cases cited in the 2015 report.[27] In addition, the scope of the Dutch law has been extended to include not just adults who are terminally ill, but also terminally ill children aged over 12 with parental consent, disabled infants and those suffering from Dementia.[28] Under the Groningen Protocol, disabled infants with spina bifida and/or hydrocephalus are also euthanised.[29] There is a proposal to extend the law to include those who are 'tired of life' without the need for any terminal or chronic diagnosis.[30]

Similar extensions of euthanasia laws have occurred in other jurisdictions. Often the pressure to extend laws comes very quickly after the initial legislation has been passed. For example, Belgium only passed its euthanasia law in 2002. Yet by 2006 legislators announced their intention to extend the law to include infants, children and people with Dementia.[31] In 2014, the law was changed to allow children of any age to be euthanised.[32]

In those jurisdictions which only have legalised assisted suicide, a consistent rise in the number of assisted suicide deaths occurs over time. In Switzerland, the number of assisted suicide deaths increased from 48 in 1998 to in excess of 1,000 in 2015.[33] Increases in assisted suicide death rates have occurred also in the US state of Oregon. Statistics published by the Public Health Division of the Oregon Health Authority show that the number of assisted suicides increased from just 16 in 1998 to 143 in 2017.[34] Only 5 of the 143 patients who died by assisted suicide in 2017 were referred for psychiatric assessment.[35] In view of the fact that it is estimated that 25% of patients with terminal cancer suffer from depression, the fact that such a low number of referrals for psychological assessment occurred is deeply concerning.[36]The evidence, therefore, from both Switzerland and Oregon is that where assisted suicide is legalised, over time there is a significant increase in the number of people choosing to commit suicide with the assistance of the state. That raises the concern that the state parties concerned may be failing to do everything in their power to protect the right to life, particularly where inadequate psychological and psychiatric support is provided. Specifically, it raises the concern that the 'positive obligation' under the ECHR on the

[27] http://alexschadenberg.blogspot.com/2017/06/netherlands-study-431-people-were.html?utm_source=EPC+Contacts&utm_campaign=0cd8eee2e8-EMAIL_CAMPAIGN_2017_07_03&utm_medium=email&utm_term=0_d113c154ac-0cd8eee2e8-157716657
[28] https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3070710/.
[29] Verhagen E, Sauer P. "The Groningen Protocol—Euthanasia in Severely Ill Newborns." New England Journal of Medicine 2005; 352(10):959-62
[30] https://www.bioedge.org/bioethics/dutch-will-probably-legalise-assisted-dying-for-people-tired-of-living/12049
[31] https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3070710/.
[32] http://time.com/7565/belgium-euthanasia-law-children-assisted-suicide/.
[33] http://www.swissinfo.ch/eng/society/right-to-die_exit-reports-jump-in-assisted-suicide-numbers/41992602 and http://www.catholicherald.co.uk/news/2016/03/09/assisted-suicides-in-switzerland-more-than-double-in-the-last-five-years/.
[34]www.oregon.gov/oha/PH/PROVIDERPARTNERRESOURCES/EVALUATIONRESEARCH/DEATHWITHDIGNITYACT/Documents/year20.pdf
[35] Ibid.
[36] https://lozierinstitute.org/assisted-suicide-in-oregon-evidence-of-missed-evaluation-for-depression/

Scottish authorities to protect the right to life may be neglected should assisted suicide ever be legalised in Scotland.

Conclusion

The Equalities and Human Rights Committee should be conscious that subjective interpretations of human rights which are advocated by secularist pressure groups and some treaty monitoring bodies do not constitute a definitive view of human rights. In fact this approach can ultimately detach human rights from the basis that would allow them to qualify as such. In approaching the scrutiny of human rights, therefore, a degree of rigour is required. In applying such rigour, we would encourage the Committee to prioritise the right to freedom of thought, conscience and religion and the right to life of all human beings from conception until natural death. It is from this source that all other human rights flow.

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