

Friends at the End

Promoting end of life choices



Equalities and Human Rights Committee
Scottish Parliament
Edinburgh
EH99 1SP

Dear Ms McKelvie,

RE: Human Rights and the Scottish Parliament

Friends at the End are a membership organisation which provides support around End of Life Issues and which works to legalise assisted dying in the UK. It is clear to us from the people we support around end of life issues that the Scottish Government and public authorities do not take due recognition of people's human rights in their policy or practice in this area.

We believe that this is an area which would benefit from greater examination by this Committee to ensure that in Scotland the rights of citizens are respected by overhauling the law (or lack of) that governs end of life, specifically the right to have an advance directive and assisted death respected, we provide further information on each of these areas below.

Advance Directives (AD)

Council of Europe Recommendation CM/Rec (2009)11 recommends that: "States should promote self-determination for capable adults in the event of their future incapacity, by means of continuing powers of attorney and advance directives" (Principle 1.1) and that: "In accordance with the principles of self-determination and subsidiarity, states should consider giving those methods priority over other methods of protection" (Principle 1.2).

Compliance with the Recommendation, and with the human rights principles underpinning it, requires that Scotland should now have clear legislative provision for advance directives. This should be accompanied by a wider public education programme on the benefits of documents such as advance directives and powers of attorney. Work should be undertaken to ascertain how many people in Scotland currently have AD's or similar instructions, encourage legal recognition of AD's, increase uptake of AD's and comparable measures and identify ways to promote AD's and other measures as a means of sensible life planning.

“We were world leading when we passed the 2000 (Adults with Incapacity) Act, but the international scene has been moving on and we now urgently need to update to comply, not only with the European Convention on Human Rights, but with the United Nations Convention on Persons with Disabilities. Right now, this subject is in a state of rapid development...”¹. Scotland should have made a bold statement and been at the forefront of patient wishes and centred care back in 2000. The issue of AD’s was regarded as politically sensitive and thus omitted, despite recommendations by the Scottish Law Commission. Now is the time to rectify what should have been made law in the first place.

The case has been made that Advance Directives (living will) should be enshrined in law. The committee should support revisions to the Adults with Incapacity Act 2000 to include the provision of Advance Directives.

Assisted Dying

Recognition to principles such as self-determination, autonomy and the right not to suffer needlessly should be borne out in clear legislation.

These rights are featured in the articles of the European Convention on Human Rights.² Namely Article 2 (right to life) applying this to acknowledge that the way one wishes to die, whether that be at home/hospital with or without assistance, is part of life.

Article 3 (prohibition of torture) many people in Scotland are needlessly suffering towards the end of life because there is no clear framework governing end of life decisions and more importantly because their choices for a peaceful death are limited. Scotland’s focus on patient centred care is to be welcomed but it is an incomplete approach if options such as assisted dying are prohibited.

Article 8 (right to respect for family and private life) has been the subject of much case law in England and Wales and internationally. Since the decision of the European Court of Human Rights in *Pretty v UK* it has been accepted that the right to private life enshrined in Article 8 encompasses the “right to choose the manner and timing of one’s death”.

Article 14 prohibition of discrimination. There are an increasing number of Scots travelling to Switzerland for an assisted death. This option is only available to those who can afford it (£10,000) and are physically well enough to travel. We also know that dying people and those with an incurable illness are ending their lives in Scotland. Again, physically able persons can do this, but those so physically disabled do not have the choice. See the case of Tony Nicklinson for example. People are taking the law into their own hands and we are

¹ Adrian Ward, expert in Incapacity Law. See: <http://www.journalonline.co.uk/Magazine/61-1/1021196.aspx>

² https://www.echr.coe.int/Documents/Convention_ENG.pdf

turning a blind eye to instances of suicide tourism to Switzerland and loved ones helping others to die at home. The Scottish Parliament rejected legislating for assisted dying on two occasions between 2010-2015 but much has changed since then and now over 200 million people worldwide have access to this choice, with the majority of law reform being the consequence of human rights violations. Scotland currently has no statute either prohibiting or allowing assisted dying.

The Lord Advocate consistently refuses to publish guidelines on assisting others to end their life. This is despite a clear ruling in England in 2009 that human rights legislation requires prosecutors to issue guidance about the circumstances in which they will prosecute people who assist others to take their life. This reluctance coupled with no legislative authority (the Suicide Act 1961 does not apply to Scotland) or substantial case law (we have one judicial review in relation to Gordon Ross where Lord Carloway said 'it is not a crime to assist another to commit suicide' – this has no real basis in law) on assisted dying, leaves Scots in a state of uneasy equivocation.

The constitutionality of the English prohibition on assisting a suicide had been previously considered by the European Commission on Human Rights in *R v UK* (1983) 6 EHRR 140. The European Commission upheld the prohibition as necessary in a democratic society to prevent abuses and protect health. This reasoning formed the basis for many MSP's rejecting the proposed legislation in Scotland. Currently the sole safeguard is the potential for a police investigation after a person has been assisted to die.

The (often unreported) cases of Robert Hunter, Paul Brady, David Hainsworth and more recently the cases of Ian Gordon and Suzanne Wilson are notable.

Gordon originally stood trial at the High Court in Glasgow, charged with murdering his wife, after admitting smothering her with a pillow. Two days later the Crown accepted his plea to culpable homicide on the basis of diminished responsibility. He was sentenced to 40 months imprisonment in October 2017. The sentencing judge, Lord Arthurson, told Gordon that given the nature of the charge he was convicted of a custodial sentence was "inevitable". However, in January 2018, Lord Brodie, sitting with Lord Turnbull in the Criminal Appeal Court in Edinburgh, overturned the decision and admonished him for the culpable homicide of his wife.

Also, in January 2018, former councillor Susanne Wilson, 72, admitted the culpable homicide of her husband by smothering him with a pillow but was allowed to go free after judge Lady Rae said the retired nurse's case involved "exceptional circumstances". Lady Rae told Wilson: "Punishment would not be in the interests of justice." These cases may be 'yet

another example of the courts operating in a vacuum created by the possibilities of modern medicine and a lack of clarity in the law'.³

Conversations with those who wish to end their own lives taken place behind closed doors, with no official oversight or questioning the motives of those who assist them. This clearly lays open the possibility of abuse. An assisted dying law would protect potentially vulnerable people by providing a safeguarded process but retaining the criminal offence to assist someone to end their lives outside of that framework.

Much of the clarification in this area of law has been brought about by English cases and ECHR rulings such as Pretty, Purdy and Nicklinson and thus it is now beyond doubt that the freedom to decide 'how and when to die' falls within the meaning of the right to private life protected by article 8 ECHR. However, the scope of the freedom, and the circumstances in which the freedom makes out a right to decide 'how and when to die' lie within the State's margin of appreciation. Thus, any initiative for legal change on assisted dying (and in respect of other end of life practices) rests with domestic authorities: in Scotland - the Courts, Lord Advocate, and Parliament and with minimal and confusing case law (Ross), no guidelines coming from the Lord Advocate and no statute, Scotland is undoubtedly not serving its citizens as it should. Scotland should take the lead as jurisdiction such a Colombia, Montana and Canada, have and reformed the law on the basis respect for human rights.

Yours sincerely

Amanda Ward

CEO Friends at the End

³ Herald Scotland. Husband walks free after killing wife in 'final act of love'. Available from: http://www.heraldsotland.com/news/15899084.Husband_walks_free_after_killing_wife_in__final_act_of_love_/