



TEL: +27 (0)74 355 0775

FAX: +27 (0)86 725 0837

EMAIL: INFO@CAUSEFORJUSTICE.ORG

WEBSITE: WWW.CAUSEFORJUSTICE.ORG

POSTAL ADDRESS: P.O. BOX 12622, DIE BOORD, 7613, SOUTH AFRICA

Our reference: UNCRPD

Date: 30 June 2021

**The Secretary
South African Law Reform Commission
CENTURION**

For attention: Mr J Kabini

By email: disabilityresponse@justice.gov.za

Dear Mr Kabini,

RE: PROJECT 148: DOMESTICATION OF THE UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

1. We refer to the abovementioned matter, specifically to the notice issued by the Secretary of the South African Law Reform Commission ("SALRC" and "the Commission") in March 2021, calling for public comments in respect of Issue Paper 39 on Project 148: The Domestication of the United Nations Convention on the Rights of Persons with Disabilities ("UNCRPD") ("the Issue Paper" and "Project 148").
2. Cause For Justice (CFJ) hereby thanks the Commission for the opportunity to make these written submissions and to participate in the law reform process, and for granting us an extension to deliver our submissions by 30 June 2021.
3. We focus our brief submissions on matters affecting rights, values and interests protected and/or promoted in the Bill of Rights as well as related matters affecting the public interest in the context of the foundational values of the Constitution and the advancement of the human rights of persons with disabilities, and the interplay with the rights to, and constitutional values of, human dignity and life.

BACKGROUND TO CAUSE FOR JUSTICE

4. CFJ is an a-political, non-partisan human rights organisation that exists to act in the public interest and in the interest of justice by promoting and protecting constitutional rights, freedoms, and obligations in South Africa. The principal ways in which CFJ does this are through: (1) court proceedings; (2) public education and awareness campaigns; and (3) participating in the policy-making and legislative process, and other state decision-making structures.

CHIEF EXECUTIVE: SA SMIT | NON-EXECUTIVES: NC SNYDERS | JP DICKS

5. All five of CFJ's core values give it a particular interest in the Issue Paper, namely: (1) the promotion of human dignity / worth; (2) the protection of the vulnerable in society (social justice); (3) the responsible exercise of freedom; (4) protecting the institutional authority of the family against undue encroachment from outside forces; and (5) ensuring accountable government action.

Euthanasia

6. CFJ's involvement in matters pertaining to the protection and promotion of human dignity and the inherent worth of all human life, dates back to 2015, when CFJ was admitted as an *amicus curiae* party in the matter of *Stransham-Ford v Minister of Justice and Constitutional Development and Others*,¹ which pertained an application to sanction the physician-assisted suicide or voluntary active euthanasia of a terminally ill patient. While the Pretoria High Court ruled that the patient in question may be assisted in his death by means of euthanasia or physician-assisted suicide, the Supreme Court of Appeal overturned the High Court's ruling.²
7. CFJ is currently involved as an *amicus curiae* party in the matter of *Walter and Others v Minister of Health and Others*,³ which likewise concerns the legalisation physician-assisted euthanasia and physician-assisted suicide, and which is expected to be heard by the Johannesburg High Court in the fourth quarter of 2021.

Inherent Dignity and Value of Unborn Human Life and Abortion

8. CFJ was an *amicus curiae* party in matter of *The Voice Of The Unborn Baby and Another v Minister of Home Affairs and Another*,⁴ which was heard by the Pretoria High Court, and concerns the right of parents to bury the bodily remains of their unborn baby who died prior to 26 weeks of gestation in the womb. While the High Court declared that parents of miscarried babies have the right to their baby's remains, it declined to extend the right to parents' whose unborn babies die

¹ *Stransham-Ford v Minister of Justice and Correctional Services and Others* (27401/15) [2015] ZAGPPHC 230; 2015 (4) SA 50 (GP); [2015] 3 All SA 109 (GP); 2015 (6) BCLR 737 (GP) (4 May 2015). Available at: <http://www.saflii.org/za/cases/ZAGPPHC/2015/230.html>.

² *Minister of Justice and Correctional Services and Others v Estate Late James Stransham-Ford and Others* (531/2015) [2016] ZASCA 197; [2017] 1 All SA 354 (SCA); 2017 (3) BCLR 364 (SCA); 2017 (3) SA 152 (SCA) (6 December 2016). Available: <http://www.saflii.org/za/cases/ZASCA/2016/197.html>.

³ *Walter & Others v Minister Of Health & Others* (31396/2017).

⁴ *The Voice Of The Unborn Baby NPC and Another v Minister of Home Affairs and Others* (16402/17) [2021] ZAGPPHC 161 (26 March 2021). Available at: <http://www.saflii.org/za/cases/ZAGPPHC/2021/161.html>.

due to human intervention. The High Court's decision is now being appealed before the Constitutional Court.

9. CFJ supported the Choice on Termination of Pregnancy Amendment Bill,⁵ which concerned enabling women to make better choices for themselves and for their unborn baby by *inter alia*, ensuring access to ultrasound examinations and sufficient mandatory counselling.

STRUCTURE OF SUBMISSIONS

10. Our submissions are structured under the following headings:

A	The Human Dignity and Rights of Persons with Disabilities	3
B	The Right to, and Foundational Value of, Human Dignity	4
C	Human Dignity and the Right to, and Value of, Life	5
D	Selective Abortion of Unborn Babies with Disabilities	11
E	Euthanasia and Persons with Disabilities	12

A THE HUMAN DIGNITY AND RIGHTS OF PERSONS WITH DISABILITIES

11. The purpose of the UNCRPD⁶ is 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.”⁷

12. The UNCRPD recognises that:

“the inherent dignity and worth and the equal and inalienable rights of all members of the human family as the foundation of freedom, justice and peace in the world.”⁸

“discrimination against any person on the basis of disability is a violation of the inherent dignity and worth of the human person.”⁹

⁵ Choice on Termination of Pregnancy Amendment Bill [B34-2017]. Available at: <https://pmg.org.za/bill/748/>.

⁶ United Nations Convention on the Rights of Persons with Disabilities [A/RES/61/106] (adopted 24 January 2007). Available at: <https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities.html>.

⁷ Article 1 of the UNCRPD.

⁸ Clause (a) of the Preamble of the UNCRPD.

⁹ Clause (h) of the Preamble of the UNCRPD.

13. Persons with disabilities have inherent dignity and worth equal with any other member of the human family, both before and after birth, and we humbly request the SALRC to ensure that the domestication of the UNCRPD explicitly reflects this.

B THE RIGHT TO, AND FOUNDATIONAL VALUE OF, HUMAN DIGNITY

14. According to former Constitutional Court justice, Laurie Ackermann, in the context of the Constitution, ‘dignity’ means ‘human worth’ or ‘inherent human worth’.¹⁰
15. The Constitution of the Republic of South Africa,¹¹ does not only recognise ‘human dignity’ as a specific human right,¹² but also as a foundational constitutional and democratic value.
16. The right to human dignity is enshrined in section 10 of the Constitution, which reads:

“Everyone has the right to human dignity and the right to have their dignity respected and protected.”

17. Dignity, as a value, is reflected in the following sections of the Constitution:

17.1 Section 1(a) lists dignity as one of the founding values of the Republic of South Africa.

17.2 Section 7(1) states human dignity is a democratic value affirmed by the Bill of Rights.

17.3 Sections 36(1) and 39(1)(a) both imply that an open and democratic society is based *inter alia*, on human dignity.

18. In the landmark judgment of the Constitutional Court in *S v Makwanyane and Another (Makwanyane)*,¹³ O’Regan J stated:

“The importance of dignity as a founding value of the new Constitution cannot be overemphasised. Recognising a right to dignity is an acknowledgement of the intrinsic worth of human beings: human beings are entitled to be treated as worthy of respect and

¹⁰ L Ackermann ‘Human Dignity: Lodestar for Equality in South Africa’ 2012 (Juta) at p 98.

¹¹ The Constitution of South Africa, 1996. Available at: <https://www.gov.za/documents/constitution-republic-south-africa-1996>.

¹² Section 10 of the Constitution.

¹³ *S v Makwanyane and Another* (CCT3/94) [1995] ZACC 3; 1995 (6) BCLR 665; 1995 (3) SA 391; [1996] 2 CHRLD 164; 1995 (2) SACR 1 (6 June 1995). Available at: <http://www.saflii.org/za/cases/ZACC/1995/3.html>.

concern. This right therefore is the foundation of many of the other rights that are specifically entrenched in chapter 3.”¹⁴ (own emphasis)

19. In another significant Constitutional Court judgment, *Dawood v Minister of Home Affairs and Others (Dawood)*,¹⁵ O'Regan J again emphasised the centrality of the value of human dignity:

“The value of dignity in our Constitutional framework cannot therefore be doubted. The Constitution asserts dignity to contradict our past in which human dignity for black South Africans was routinely and cruelly denied. It asserts it too to inform the future, to invest in our democracy respect for the intrinsic worth of all human beings. Human dignity therefore informs constitutional adjudication and interpretation at a range of levels. It is a value that informs the interpretation of many, possibly all, other rights. This Court has already acknowledged the importance of the constitutional value of dignity in interpreting rights such as the right to equality, the right not to be punished in a cruel, inhuman or degrading way, and the right to life. Human dignity is also a constitutional value that is of central significance in the limitations analysis. ...”¹⁶ (own emphasis)

20. We humbly request the SALRC to ensure that the domestication of the UNCRPD explicitly reflects and advances the importance of the constitutional right to, and value of, human dignity.

C HUMAN DIGNITY AND THE RIGHT TO, AND VALUE OF, LIFE

21. Practically, human dignity and human life cannot be separated. Life is both a constitutional right and constitutional value.

22. According to O'Regan J in *Makwanyane*,

“[t]he right to life, thus understood, incorporates the right to dignity. So the rights to human dignity and life are entwined. The right to life is more than existence, it is a right to be treated as a human being with dignity: without dignity, human life is substantially diminished. Without life, there cannot be dignity. ...”¹⁷ (own emphasis)

23. In *Makwanyane*, the Constitutional Court reached the conclusion that:

¹⁴ *Makwanyane* at [328].

¹⁵ *Dawood and Another v Minister of Home Affairs and Others ; Shalabi and Another v Minister of Home Affairs and Others ; Thomas and Another v Minister of Home Affairs and Others (CCT35/99)* [2000] ZACC 8; 2000 (3) SA 936; 2000 (8) BCLR 837 (7 June 2000). Available at: <http://www.saflii.org/za/cases/ZACC/2000/8.html>.

¹⁶ *Dawood* at [35].

¹⁷ *Makwanyane* at [327].

“The rights to life and dignity are the most important of all human rights, and the source of all other personal rights in Chapter Three. By committing ourselves to a society founded on the recognition of human rights we are required to value these two rights above all others. And this must be demonstrated by the State in everything that it does, ...”¹⁸ (own emphasis)

24. The right to life is not only centrally and critically important, it is also unqualified (i.e., it can only be limited in terms of the limitation clause – section 36 of the Constitution) and vests in everyone.¹⁹ According to Currie and De Waal, the right to life implies (1) a right not to be killed;²⁰ (2) as well as a duty to protect and preserve life;²¹ and is furthermore (3) practically inseparable from human dignity.²²

25. According to O'Regan J in *Makwanyane*,

“[t]he right to life is, in one sense, antecedent to all the other rights in the Constitution. Without life in the sense of existence, it would not be possible to exercise rights or to be the bearer of them. But the right to life was included in the Constitution not simply to enshrine the right to existence. It is not life as mere organic matter that the Constitution cherishes, but the right to human life: the right to live as a human being, to be part of a broader community, to share in the experience of humanity. This concept of human life is at the centre of our constitutional values. The Constitution seeks to establish a society where the individual value of each member of the community is recognised and treasured. The right to life is central to such a society.”²³ (own emphasis)

26. The right to life protrudes from the constitutional value of life. According to law professor and academic, Professor Tjakié Naudé:

“[A]ll the objects of the individual rights, like 'freedom of expression' and 'life', function not as individual defensive fundamental rights only, but also as 'values’”²⁴ (own emphasis)

¹⁸ Makwanyane at [144].

¹⁹ I Currie and J De Waal 'The Bill of Rights Handbook' 2013 (Juta) at p 258 to 260.

²⁰ The Bill of Rights Handbook p 260 to 262.

²¹ The Bill of Rights Handbook p 262 to 267.

²² The Bill of Rights Handbook p 267 to 268.

²³ Makwanyane at [326].

²⁴ T Naudé 'The Value of Life: A Note on Christian Lawyers Association of SA v Minister of Health' in South African Journal of Human Rights (1999 vol 15 p 451) at p 550. Available at: <https://www.tandfonline.com/doi/abs/10.1080/02587203.1999.11835023>.

[W]hen court considers the sphere of protection afforded by a fundamental right, such as the right to life, it must consider the purpose of entrenching the right, by looking, at least, at the value which the right aims to protect, namely 'life'²⁵ (own emphasis)

"The Constitution has as its purpose the protection and advancement of these values. It can therefore be said that the purposive approach to interpretation is necessarily a value-orientated approach."²⁶ (own emphasis)

"In terms of s 11 read with s 7(2), the state has a duty to promote the right to life. What the state must promote is not just the right to life in its subjective dimension as vesting in a specific person, but the value which the right aims to protect, that is the right in its 'abstract' or objective dimension. On the assumption that only born human beings can be bearers of the right to life, the value that the state must promote is, at least, born human life. The state must take positive steps to ensure that a high regard and respect for born human life be maintained and promoted. It can be argued that, to do that, the state has a duty to protect developing human life by appropriate legislation. Courts must be allowed to review such legislation to ensure compliance with this duty. Otherwise the state could freely allow the termination on demand of a form of biological life with a clear connection to born human life (and which looks very much like born human life at some stage), without a court being able to declare such legislation unconstitutional. The high regard for human life which the Constitution displays, would then be endangered, so that the right to life itself would be threatened."²⁷ (own emphasis)

27. The human dignity of persons with disabilities cannot be recognised, protected and promoted unless their right to life – and value of human life – is unrecognised or violated.
28. We humbly request the SALRC to ensure that the domestication of the UNCRPD explicitly reflects and advances the importance of the constitutional right to, and value of, life.

The value of unborn human life

29. The centrality of the value of human dignity and life in the South African constitutional framework, necessarily holds certain implications for how the law should view and treat unborn human life, i.e. for the state's constitutional duty to protect and promote the value of human life.

²⁵ The Value of Life: A Note on Christian Lawyers Association of SA v Minister of Health at p 551.

²⁶ The Value of Life: A Note on Christian Lawyers Association of SA v Minister of Health at p 551.

²⁷ The Value of Life: A Note on Christian Lawyers Association of SA v Minister of Health at p 551.

30. According to law professor and academic, Professor Denise Meyerson, even though an unborn baby is not the beneficiary of any of the specific rights contained in the Bill of Rights, the value of human dignity is nonetheless implicated by the destruction of pre-natal human life:

“It is the value of human dignity which is most obviously under threat when abortion is permitted, because it is hard to deny that the destruction of foetal life, although it violates no constitutionally protected subject’s right to life, nevertheless undermines human dignity.”²⁸ (own emphasis)

“A foetus is not just a bit of human tissue, comparable to something like the appendix. It is a living human organism, whose destruction is not a morally trivial matter but something to be regretted.”²⁹ (own emphasis)

31. According to philosopher and constitutional jurist, Professor Ronald Dworkin,

“Any human creature, including the most immature embryo, is a triumph of divine or evolutionary creation, which produces a complex, reasoning being from, as it were, nothing, and also of what we often call the “miracle” of human reproduction, which makes each new human being both different from and yet a continuation of the human beings who created it...”³⁰ (own emphasis)

“The life of a single human organism commands respect and protection, then, no matter in what form or shape, because of the complex creative investment it represents and because of our wonder at the divine or evolutionary processes that produce new lives from old ones...”³¹ (own emphasis)

32. Professor Naudé does not agree with Professor Meyerson that the destruction of foetal life only implicates the value of human dignity, and asks:

“Does the destruction of the life of the foetus only affect the respect which the state must show for human dignity and not for human life as well?”³²

²⁸ D Meyerson ‘Abortion: The Constitutional Issues’ in South African Law Journal (1999 vol 116 p 50) at p 56. Available at: <https://researchers.mq.edu.au/en/publications/abortion-the-constitutional-issues>.

²⁹ Abortion: The Constitutional Issues at p 56.

³⁰ R Dworkin ‘Life’s Dominion: an Argument about Abortion, Euthanasia, and Individual Freedom’ 1994 (Vintage) at p 83. Available at: <https://www.jstor.org/stable/24439093>.

³¹ Life’s Dominion: An Argument about Abortion, Euthanasia, and Individual Freedom at p 84.

³² The Value of Life: A Note on Christian Lawyers Association of SA v Minister of Health at p 559.

“Section 7(2) places a *duty on the state to protect and promote the rights in the Bill of Rights*. It is argued that *'rights' in this context must be understood to mean the rights in their dimension as objective values*.”³³

33. According to Professor Naudé, from a constitutional perspective on the proper legal understanding of the value of foetal life, the judgment handed down in *Christian Lawyers Association of SA v Minister of Health*³⁴ – which concerned an unsuccessful challenge of the constitutionality of the Choice on Termination of Pregnancy Act, 1996 (“COTOPA”)³⁵ - is fraught with difficulties: the court followed a purely text-based rather than purposive approach; failed to give serious consideration to the values which the Constitution seek to protect; and failed to consider relevant evidence.³⁶ The implication of foregoing, is that the constitutional value of unborn human life has not been properly considered by South African courts.

State interest in protecting unborn human life

34. The law recognises that the state has an interest in protecting unborn human life:
- 34.1 South African criminal law deems foetal life worthy of protection: Abortion is a common law offence, and the statutory partial non-criminalisation of abortion is conditional.
- 34.2 COTOPA only allows for abortion to take place under certain circumstances. As the unborn baby develops, the conditions under which an abortion may be obtained become more restricted.³⁷

Protection of the unborn’s interest: The nasciturus fiction

35. The law recognises and protects the unborn’s interest in certain circumstances. The Latin adage “*nasciturus pro iam nato habetur quotiens de commodo eius agitur*” embodies the legal fiction that the unborn (or “nasciturus”) can be regarded as already having been born when it is to the unborn’s advantage.
36. According to Davel and Jordaan, the nasciturus fiction:

³³ The Value of Life: A Note on *Christian Lawyers Association of SA v Minister of Health* at p 562.

³⁴ *Christian Lawyers Association of SA v Minister of Health* 2004 (10) BCLR 1086 (T). Available at: <https://www.globalhealthrights.org/wp-content/uploads/2013/01/HC-2004-Christian-Lawyers-Association-v.-Minister-of-Health.pdf>.

³⁵ Choice on Termination of Pregnancy Act 92 of 1996. Available at: <https://www.gov.za/documents/choice-termination-pregnancy-act>.

³⁶ The Value of Life: A Note on *Christian Lawyers Association of SA v Minister of Health* at p 561.

³⁷ Section 2(1) of COTOPA.

36.1 Is used in private law to protect the patrimonial interest of the unborn child.³⁸

36.2 “[D]oes not confer legal subjectivity on the unborn, but ... it ensures only that any benefit due to [the unborn] should be held in *suspense* until [the baby’s] birth.”³⁹

So-called “wrongful life”

37. According to Wrongful life claims are prenatal negligence claims brought on behalf of a child born with birth defects or abnormalities, against a doctor who negligently failed to identify, diagnose, or inform the parents of the child about possible birth defects or abnormalities, and is based on the implication that it had not been for the alleged “misconduct” of the doctor, the child would not have been born.⁴⁰

38. According to the Constitutional Court, the term “wrongful life” is not only a logical paradox,⁴¹ but unfortunate and wrong as the legal issue is not the “wrongful life” of the child.⁴² The Court has held that “*having to compare life with non-existence, [is] something that creates insurmountable problems*” and poses a question that is impossible for the law to answer.⁴³

39. The Supreme Court of Appeal has,

*“pointed out that from whatever perspective one views the matter the **essential question that a court will be called upon to answer** if it is called upon to adjudicate a claim of this kind is **whether the particular child should have been born at all. That is a question that goes so deeply to the heart of what it is to be human that it should not even be asked of the law.** For that reason ... this court should not recognise an action of this kind.”⁴⁴*

Conclusion

40. From the foregoing, it is clear that:

³⁸ CJ Currie and RA Jordaan *Law of Persons* 2005 (Juta) at p 15.

³⁹ *Law of Persons* at

⁴⁰ C Chürr ‘Wrongful Life Claims under South African Law: An Overview of the Legal Framework’ in *Obiter* (2015 Vol 36 No 3) at p754. Available at: <https://journals.co.za/doi/10.10520/EJC184717>.

⁴¹ *H v Fetal Assessment Centre* (CCT 74/14) [2014] ZACC 34; 2015 (2) BCLR 127 (CC); 2015 (2) SA 193 (CC) (11 December 2014) at [20]. Available at: <http://www.saflii.org/za/cases/ZACC/2014/34.html>.

⁴² *H v Fetal Assessment Centre* at [19].

⁴³ *H v Fetal Assessment Centre* at [20].

⁴⁴ *Stewart and Another v Botha and Another* (340/07) [2008] ZASCA 84; 2008 (6) SA 310 (SCA); [2009] 4 All SA 487 (SCA) (3 June 2008) at [28]. Available at: <http://www.saflii.org/za/cases/ZASCA/2008/84.html>.

- 40.1 Even if an unborn baby is not a beneficiary of any of the specific rights contained in the Bill of Rights, the normative framework of the Constitution and South African law nevertheless recognises the value of unborn human life; and
- 40.2 The value of unborn human life and the protection of developing human life, needs to be thoroughly considered.

E THE SELECTIVE ABORTION OF UNBORN BABIES WITH DISABILITIES

41. In its submissions to the United Nations Office of the High Commissioner for Human Rights Committee on the Rights of Persons with Disabilities in respect of General Comment 6 on Article 5 of the UNCRPD, the Alliance Defending Freedom International (“ADF International”), a global legal organisation with special consultative status with the United Nations Economic and Social Council, raised serious concerns about the **“targeted elimination of persons with disabilities is occurring at an increasing rate today through abortion”**.⁴⁵
42. ADF International further pointed out that the Committee on the Rights of Persons with Disabilities, in its Draft General Comment on the Right of Persons with Disabilities to Equality and Non-Discrimination (Article 5),⁴⁶ included the following statement under Article 8, which concerns ‘awareness raising’:
- “States parties should address stigmatization through modern forms of discrimination, such as a disability-selective antenatal screening policy that go against the recognition of the equal worth of every person.”***⁴⁷
43. Unfortunately, this statement was not included in the final Comment – surely, an opportunity missed to confirm the equal worth of the lives of persons with disabilities before and after birth.
44. The constitutional values of human dignity and life must surely be diminished if unborn babies with disabilities are selectively aborted on account of their disability. We humbly request the SALRC to thoroughly investigate the implications of the advancement of the constitutional value

⁴⁵ Alliance Defending Freedom International ‘Submissions to Committee on the Rights of Persons with Disabilities on General Comment No 6 on Article 5 of the UNCRPD: Equality and Non-Discrimination’ (30 November 2017) at [4] on p 2. Available at: https://www.ohchr.org/Documents/HRBodies/CRPD/GC/Equality/ADF_International.docx.

⁴⁶ Committee on Rights of Persons with Disabilities ‘Draft General Comment on the Right of Persons with Disabilities to Equality and Non-Discrimination (Article 5)’. Available at: <https://www.ohchr.org/EN/HRBodies/CRPD/Pages/CallPersonsDisabilitiesEqualityResponsability.aspx>.

⁴⁷ Draft General Comment on the Right of Persons with Disabilities to Equality and Non-Discrimination (Article 5).

of human dignity and life for the protection of unborn babies with disabilities from selective abortion in the context of the domestication of the UNCRPD.

F EUTHANASIA AND PERSONS WITH DISABILITIES

45. CFJ is of the strong view that any form of euthanasia or assisted suicide necessarily and irreversibly violates a person's right to life and human dignity.

The legal status of euthanasia in South Africa

46. Medical assistance in dying ("MAiD") or euthanasia, whether in the form of physician-assisted euthanasia or physician-assisted suicide ("PAE/PAS") is illegal – depending on the circumstances, either the common law crime of murder or culpable homicide – in South Africa. The criminalisation of euthanasia has been unsuccessfully challenged,⁴⁸ and a fresh challenge is currently underway.⁴⁹

Medical-ethical opposition to euthanasia

47. The World Medical Association is "*firmly opposed to euthanasia and physician-assisted suicide*",⁵⁰ and has consistently affirmed its strong belief that euthanasia is in conflict with basic ethical principles of medical practice and consequently strongly encourages all national medical associations and physicians to refrain from participating in euthanasia, even if national law allows it or decriminalizes it under certain conditions.⁵¹
48. The Health Professions Council of South Africa is of the view that the legalisation of euthanasia in South Africa will lead to abuse⁵² – and strong reasons exist to heed this warning.

⁴⁸ *Stransham-Ford v Minister of Justice and Correctional Services and Others* (27401/15) [2015] ZAGPPHC 230; 2015 (4) SA 50 (GP); [2015] 3 All SA 109 (GP); 2015 (6) BCLR 737 (GP) (4 May 2015). Available at: <http://www.saflii.org/za/cases/ZAGPPHC/2015/230.html>.

⁴⁹ See [7] above.

⁵⁰ World Medical Association 'WMA Declaration on Euthanasia and Physician-Assisted Suicide' (13 November 2019). Available at: <https://www.wma.net/policies-post/declaration-on-euthanasia-and-physician-assisted-suicide/>.

⁵¹ World Medical Association 'World Medical Association Reaffirms its Opposition to Euthanasia' (18 May 2001). Available at: <https://www.wma.net/news-post/world-medical-association-reaffirms-its-opposition-to-euthanasia/>.

⁵² Zeldá Venter 'Legalising assisted suicide will make it open to abuse – HPCSA' Independent Online (4 March 2021). Available at: <https://www.iol.co.za/pretoria-news/news/legalising-assisted-suicide-will-make-it-open-to-abuse-hpcsa-e67022e0-043d-4698-a44f-d0efbcf13763>.

Particular vulnerability of persons with disabilities to euthanasia

49. Our submissions will focus on the particular vulnerability faced by persons with disabilities in jurisdictions where euthanasia has been decriminalised, over which there is rapidly growing concern.
50. United Nations human rights experts have recently “**expressed alarm at a growing trend to enact legislation enabling access to medically assisted dying based largely on having a disability or disabling conditions, including in old age**”.⁵³
51. According to these experts,⁵⁴

“[d]isability should never be a ground or justification to end someone’s life directly or indirectly.”

“Article 10 of the UN Convention on the Rights of Persons with Disabilities, ... requires States to ensure that persons with disabilities can effectively enjoy their inherent right to life on an equal basis with others.”

“... when life-ending interventions are normalised for people who are not terminally ill or suffering at the end of their lives, such legislative provisions tend to rest on – or draw strength from – ableist assumptions about the inherent ‘quality of life’ or ‘worth’ of the life of a person with a disability.”

“[T]hese assumptions, which are grounded in ableism and associated stereotypes, have been decisively rejected by the Convention on the Rights of Persons with Disabilities. Disability is not a burden or a deficit of the person. It is a universal aspect of the human condition.”

52. According to ADF International,

“A fair and just society cares for its most vulnerable. International law protects everyone’s inherent right to life and requires countries to protect the dignity and lives of all people, rather than help ending them. Sadly, over the years, we have seen Belgium’s euthanasia law spiral out of control. In one case, the life of a 23-year-old female was tragically ended by euthanasia due to her battle with mental health issues. There is

⁵³ United Nations Office of the High Commissioner for Human Rights ‘Disability is Not a Reason to Sanction Medically Assisted Dying – UN Experts’ (25 January 2021). Available at: <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26687&LangID=E>.

⁵⁴ United Nations Office of the High Commissioner for Human Rights ‘Disability is Not a Reason to Sanction Medically Assisted Dying – UN Experts’ (25 January 2021).

nothing progressive about a government that refuses to provide care and support to those who need it most. We urge the Belgian government to accept the recommendations it has received on this matter: bring an end to euthanasia and redirect resources into improving palliative care for those reaching the natural end of their lives.⁵⁵

53. Academic and international expert in law and bioethics, Professor Trudo Lemmens, has become increasingly concerned by his observation of “***how safeguards focusing on procedural components do not adequately protect against the broader, societal harms of the legalization of PAE/PAS***” especially in relation to vulnerable groups, such as persons with disabilities. According to Professor Lemmens:⁵⁶

“[T]here is reason to be concerned that the normalization of PAE/PAS, particularly in regimes that provide broad access also outside the end-of-life context, such as in the Netherlands, Belgium and Canada, may negatively impact the social value placed on the lives of people who are ill, elderly or disabled. In addition, increasingly negative perceptions about the quality of life that disabled and elderly people have, reflected in policies and practices that confirm an appropriateness of ending their lives, can lead to expectations that people ought to opt for PAE/PAS in circumstances outside of the end-of-life context. This shift in perception can be subtle, and impact both on how others perceive the suffering of elderly and people with disabilities, and how they perceive it themselves. This can influence how people not in an end-of-life situation evaluate the appropriateness of their healthcare choices and their choices with respect to PAE/PAS.”⁵⁷

“Anecdotal reports, including on social media, suggest that people with disabilities are already asking for PAE/PAS in Canada for suffering associated with financial problems, isolation and loneliness and for the sense of being a burden to others.”⁵⁸

54. The vulnerability faced by persons with disabilities in jurisdictions where euthanasia has been decriminalised, is a serious concern, especially as there seems to be a trend of growing numbers of persons with disabilities in these jurisdictions requesting PAE/PAS in circumstances outside of the end-of-life context. We humbly request the SALRC to ensure that the domestication of the

⁵⁵ ADF International ‘Belgium’s euthanasia law criticized at UN Human Rights Council’ (7 May 2021) . Available at: <https://adfinternational.org/news/belgiums-euthanasia-law-criticized-at-un-human-rights-council/>.

⁵⁶ T Lemmens ‘Expert Report’ (26 May 2021) at [180]. See also:

T Lemmens ‘Charter Scrutiny of Canada’s Medical Assistance in Dying Law and the Shifting Landscape of Belgian and Dutch Euthanasia Practice’ in Supreme Court Law Review 2nd Series (2018 Vol 85 at p 459 to 544).

Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3155994.

T Lemmens, H Kim and E Kurz ‘Why Canada’s Medical Assistance in Dying Legislation Should Be C(h)arter Compliant and What It May Help to Avoid’ in McGill Journal of Law and Health (2018 Vol 11(1) at p 61 to 148).

Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3155994.

⁵⁷ Expert Report at [14].

⁵⁸ Expert Report at [48].

UNCRPD explicitly protects the constitutional rights to life and human dignity of persons with disabilities from irreversible violation by way of any form of euthanasia or assisted suicide.

CONCLUSION

55. In summary, we reiterate and emphasize the following:

55.1 The SALRC must ensure South African law promotes, protects and ensures:

*“[T]he full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and **to promote respect for their inherent dignity.**”*⁵⁹

55.2 The SALRC must ensure South African law recognises:

*“**the inherent dignity and worth and the equal and inalienable rights of all members of the human family** as the foundation of freedom, justice and peace in the world.”*⁶⁰

*“**discrimination against any person on the basis of disability is a violation of the inherent dignity and worth of the human person.**”*⁶¹

56. In respect of selective abortion, this means:

Thoroughly investigating the implications of the advancement of the constitutional value of human dignity and life for the protection of unborn babies with disabilities from selective abortion.

57. In respect of euthanasia and assisted suicide, this means:

Ensuring the constitutional rights to life and human dignity of persons with disabilities are protected from irreversible violation by way of any form of euthanasia or assisted suicide.

58. We trust that the above comments and inputs are of assistance to the SALRC. We look forward to your response thereto in due course, if any.

⁵⁹ Article 1 of the UNCRPD.

⁶⁰ Clause (a) of the Preamble of the UNCRPD.

⁶¹ Clause (h) of the Preamble of the UNCRPD.

59. Cause For Justice remains at the Commission's disposal to assist in the further execution of its mandate in respect of Project 148, and specifically in relation to protecting and promoting the values of human dignity, equality and freedom in relation to persons with disabilities.
60. We would appreciate any opportunity that the Commission is willing and able to afford us to take further part in discussions with yourselves and/or to make further contributions to your work on Project 148.

Yours faithfully,

Liesl Pretorius

Legal Advisor: Law and Policy

Stefanie Kotze

Legal Advisor: Law and Policy