Northern Ireland Assembly

Committee for Justice

OFFICIAL REPORT (Hansard)

Justice Bill: Northern Ireland Human Rights Commission

3 December 2014

NORTHERN IRELAND ASSEMBLY

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Members present for all or part of the proceedings:
Mr Paul Givan (Chairperson)
Mr Raymond McCartney (Deputy Chairperson)
Mr Stewart Dickson
Mr Sammy Douglas
Mr Paul Frew
Mr Chris Hazzard
Mr Seán Lynch
Mr Alban Maginness
Mr Patsy McGlone
Mr Edwin Poots

Witnesses:

Mr Les Allamby	Northern Ireland Human Rights Commission
Ms Kyra Hild	Northern Ireland Human Rights Commission
Dr David Russell	Northern Ireland Human Rights Commission

The Chairperson (Mr Givan): I welcome the chief commissioner of the Northern Ireland Human Rights Commission (NIHRC), Les Allamby; Dr David Russell, deputy director; and Kyra Hild, a researcher at the commission. As was the case with previous evidence sessions, this session will be recorded by Hansard and published in due course.

You are very welcome to the meeting. At this stage, I will hand over to Mr Allamby to outline briefly the commission's key issues in respect of the amendment. If you can, will you also deal with the application of violent offences prevention orders (VOPOs) for children. If you want to separate the two issues, I am happy to do that.

Mr Les Allamby (Northern Ireland Human Rights Commission): Yes.

The Chairperson (Mr Givan): You can begin with the Jim Wells amendment.

Mr Allamby: Chair, I hope that you and your colleagues have received the correspondence that we sent to you after the previous meeting.

The Chairperson (Mr Givan): Yes, we have it.

Mr Allamby: Let us deal with this afternoon's main issue. Thank you for inviting us. My two colleagues will introduce themselves, and then I will go straight into our submission. Chair, we are obviously happy to take questions from you and colleagues on the issue.

Dr David Russell (Northern Ireland Human Rights Commission): I am deputy director of the Northern Ireland Human Rights Commission.

Ms Kyra Hild (Northern Ireland Human Rights Commission): I am a researcher with the Northern Ireland Human Rights Commission.

Mr Allamby: This afternoon, I intend to set out which international law and court decisions are relevant to the issue and the current state of play and, having established those principles, to look at the amendment to the Justice Bill that is before the Committee.

Ending the life of an unborn child and the right to a termination is currently prohibited, absolutely, in statute, as you know. It is available in common law, but in very restricted circumstances. In effect, termination is allowed where the continuation of the pregnancy threatens the life of the woman or where there is a real and serious impact on a woman's mental or physical health, and that impact must be permanent or long term. Currently, any breach of the law under the Offences Against the Person Act 1861 can lead to a criminal sanction of up to life in prison.

As we see it, the amendment to the Justice Bill that is before you seeks to further restrict access to support in the limited circumstances in which a termination would be lawful. Our submission, which you have, is based on the current state of international human rights law and, in particular, around article 8 of the European Convention on Human Rights (ECHR), which is the right to respect for private and family life.

A similar provision is also to be found in article 17 of the International Covenant on Civil and Political Rights (ICCPR). Our response reflects our understanding of the legal position and the case law. It is probably important to say that the convention is a living instrument. It moves with the times, and there have been considerable developments in the case law in recent years.

The starting point for us is that the court has recognised that the right to respect for private life is a broad concept. It encompasses a person's physical and psychological integrity and includes the decision whether or not to have a child or to become parents. Article 8's essential object is to protect the individual against arbitrary interference by public authorities, but it is important to say that that is a qualified right. Therefore, any interference must be in accordance with the law, necessary in a democratic society or, for example, for the protection of health and morals and the rights and freedom of others. The right is not absolute; it is qualified. In practice, if there is to be an interference with the right to private life, it must meet a pressing social need, must be proportionate and must be in pursuit of a legitimate aim. The right to private life is also a positive obligation to secure the effective right of that physical and psychological integrity.

It is important to say that the European courts have also recognised that there is no consensus among convention states on the scientific and legal definition of the "beginning of life", although there is a consensus among a substantial majority of contracting states of the Council of Europe on allowing abortion in certain circumstances. Therefore, there will obviously need to be, on occasions, attempts to resolve the conflict between the rights of the fetus on the one hand and the mother on the other.

What the courts have done is recognise that those rights are inextricably linked. In the absence of a common approach among states, a fair balance must be maintained between individual rights and the public interest. There is normally a narrow margin of appreciation where an individual's existence or identity is at stake, but, in the absence of a consensus, the European Court has said in a number of judgements that there is a broader margin of appreciation in dealing with the issues. That discretion is not unlimited, but there is discretion in how you deal with that.

Having talked about the broad margin of appreciation that is given to a state as to the circumstances in which a termination is permitted, I will say that, once there is a decision and some legal framework, that framework must be devised in a way that is coherent and that allows the different legitimate interests to be taken into account adequately and in accordance with the positive obligations derived from the convention. Again, it is important to say that there are no explicit procedural requirements, but those procedural requirements must be sufficient to safeguard the positive obligation.

The court has taken the view, in some jurisdictions and some countries, that those legal restrictions on termination, or abortion, when combined with the risk of incurring criminal responsibility, can have a chilling effect on doctors and clinicians when dealing with an individual case. It is also important to say that the courts have held that provisions regulating the availability of lawful abortion should avoid having that kind of chilling impact. Therefore, there need to be effective procedural mechanisms capable of determining when the conditions for a lawful abortion exist. The court has said that that should not be something that is normally left to domestic courts to decide. Those kinds of clinical decisions should not be readily pushed over to courts to decide. There should be sufficient clarity to allow the clinicians to make decisions, knowing whether they are lawful or not. Finally, the rights guaranteed by the convention must be practical and effective, not theoretical and illusory. The positive obligation of the right to a private life must be enacted in a way that is meaningful.

Having said all of that as a kind of preamble — I recognise that that was a rather lengthy preamble — I want to turn to the proposed amendment in hand today and apply some of those principles in practice. The purpose of the amendment, as the commission reads it, is to propose to make it an offence to end the life of an unborn child at any stage of that child's development, with the sanction of a fine and up to 10 years in prison if a person commits an offence. There are a number of defences provided to that. Where the act — or acts — that ends the life of the unborn child is lawfully performed on the premises by a health and social care trust, that is a defence. If the act — or acts — ending the life of the unborn child is lawfully performed without fee or reward in circumstances of urgency when access to premises operated by a health and social care trust is not possible, that is also a defence.

We have a number of difficulties with the amendment. We have outlined them in our submission to you, but I will set them out very briefly, and then we can move to questions. The first is that the proposed new clause is so widely drawn. There are a number of terms in the clause that are not defined. It could encompass almost anything, including certain forms of contraception, such as the morning-after pill, that are legally available in Northern Ireland. The amendment states:

> *"act or acts ending the life of the unborn child".*

That is a very widely drawn term.

In our view, the amendment lacks clarity, yet it intends to create a criminal offence punishable with up to 10 years in prison. Applying the principles that I annunciated earlier, although you are entitled to interfere with a woman's right to physical and psychological integrity, it is a qualified right — there is a margin of appreciation — it must be applied proportionately, and the courts have regularly held that criminal sanctions that have a chilling effect on doctors and other clinicians are to be avoided. It seems to me that the amendment falls completely into that trap.

It is interesting that, for example, in the A, B and C v Ireland judgement, the court looked at the uncertainty created by the 1861 Act, albeit in Ireland, modified by a number of provisions, including constitutional ones. It felt that the 1861 Act did have a significant chilling factor for both women and doctors in the medical consultation process, regardless of whether those prosecutions had been pursued in reality.

I will finish with a quotation from the court in the A, B and C v Ireland case. It stated that there is:

> *"a striking discordance between the theoretical right to a lawful abortion in Ireland on the ground of a relevant risk to a woman's life and ... its practical implementation."*

In the A, B and C case in particular, where the threat was to a woman's life, it was held that that lack of clarity was contrary to article 8 of the convention. It dealt in a different way with the issue of abortion being sought for health and well-being. Therefore, we think that, if the amendment were to be taken up by the Department of Justice, it would be contrary to human rights standards and, in particular, article 8.

The Chairperson (Mr Givan): OK, thank you very much. There are just a couple of points that I want to raise. In the example that you use — the judgement in the A, B and C v Ireland case — paragraph 214 states:

> *"Article 8 cannot ... be interpreted as conferring a right to abortion".*

Paragraph 241 states that the prohibition of abortion for health and well-being grounds did not exceed the Irish state's margin of appreciation in article 8. How do you counter those elements of the judgment?

Mr Allamby: The starting point of my understanding is that the convention does not create an absolute right to abortion. A state does not have to legislate and create rights to termination, but, where it does, and in Ireland and in common law in Northern Ireland there are rights to termination in very limited circumstances, but they must be regulated in accordance with the right to private life in article 8. I would not disagree that the convention does not say there must be a right to termination, but, where there is, it must then be regulated in a way that is coherent, is clear to women, clinicians and those involved, and is provided in a way that makes the right real. I do not think that that is incompatible with what we have said about paragraph 214.

The Chairperson (Mr Givan): The issue, as I see it, is that the previous, very restrictive abortion law in Ireland was able to sustain challenge on the basis of the ECHR. There was an issue when it came to exceptions for life and health.

Mr Allamby: The answer to that is yes and no, inasmuch as, where you were dealing with health and wellbeing but there was no threat to life, the court held that it was not going to interfere and declare it incompatible with article 8. C was faced with a threat to her life, as the facts were known at the time. In that case, the lack of certainty and clarity in the law as it stood in Ireland for the circumstances involved was at that point contrary to the European Convention. There is not a straightforward yes or no answer.

The Chairperson (Mr Givan): Was it contrary because it was not clear? C had a life-threatening cancer. Was it because there was no clear procedure to determine the outcome in that scenario that the court found against Ireland?

Mr Allamby: My understanding is that the arrangements and the framework that had been set in place were so lacking in clarity and coherence that effectively what the court said was that the article 8 right could not be properly enacted by the woman, and therefore it was contrary to the convention. What was needed was a very clear setting-out of the position so that clinicians and women could understand and know the circumstances in which termination was lawful and when it was not. I look to my colleagues to see whether that is an accurate summary.

Ms Hild: The criminal aspect was obviously considered by the court as an additional concern because of the impact on women and practitioners, as mentioned previously by the chief commissioner.

The Chairperson (Mr Givan): I refer to P and S v Poland. Is it not the case that Poland conferred a very positive right to abortion?

Mr Allamby: There is a right to abortion in Poland, but in rather restricted circumstances. Therefore, the issue in the Polish cases has been how you then enact the rights that have been given. There have been a number of Polish cases, and they have often been about what happens in practice when somebody appears to fall within the legislation. It is a little bit like this amendment. How do clinicians deal in practice with a situation in which the termination appears to be lawful? Again, the issues have often been about the lack of clarity as to how the law operates in practice in Poland.

The Chairperson (Mr Givan): The commission is trying to draw a parallel with Poland, but that is misleading. In the case that you reference, the state had conferred a positive right to abortion. There was a case on how to access the right to abortion that was provided for by the state. Northern Ireland does not provide any positive pathway for abortion. It is only a defence, as you know. I suggest that the parallel that is drawn would be hard to sustain.

Mr Allamby: I am not sure that I agree with you. In Northern Ireland, your right to a termination comes essentially from common law rather than statute. I accept that that is different from the situation in Poland, where the limited rights that you have come from legislation, but, nonetheless, there is a right in limited circumstances in Northern Ireland to a termination. They have been established in common law. It is judge-made law, and that is the law of the land. In those circumstances, there is a need for a proper regulatory framework and the coherence to make sure that those rights that have been set by judges can be properly exercised. That means that the same principle applies in Northern Ireland as in Poland.

The Chairperson (Mr Givan): In what way would the amendment change in law the right to have an abortion? You used language suggesting that it was a barrier or impediment. In what way would the amendment change the law on the grounds for a defence?

Mr Allamby: Let me give you a couple of examples. Under the 1861 Act, if you commit an offence, you face up to life in prison. This amendment starts without prejudice to that and creates a new offence of up to 10 years in prison. I am not sure how you can do that without prejudice to the 1861 Act, if you are saying that you are not attempting to modify it in any way. It is not clear to me that, if you committed an offence under the amendment, you would face 10 years imprisonment as opposed to life imprisonment. That might seem slightly specious, because, in our view, criminalisation is inappropriate in any event.

My second example is perhaps more relevant. You can manifest a defence only if, for example, you can show that it was urgent and that the health and social care trust could not have provided care. There are other organisations, such as NGOs and private organisations, that provide those services in Northern Ireland, and I think that it is probably important that we realise that we are not talking about one organisation. There are a number of organisations that provide alternative services, and I assume that they exist because people use those services, for whatever reason. I do not want to impute a motive for someone deciding to use a service other than the one provided by the health and social care trust, but, nonetheless, people do. Frankly, how do you interpret the amendment if somebody chooses to use a private service for her own reasons? Perhaps the person is worried about her privacy or personal needs, for whatever reason. If her clinician is in the private sector or an NGO, and she does not wish to avail herself of the health service, wishing instead to avail herself of the other service, and it is urgent, is that sufficient for a defence to the amendment? I do not know the answer to that, but I do not think that it is clear. Has it got to be so urgent that the health and social care trust facilities are all closed and are not going to open for a period? There is not the clarity that you need to make a decision as, for example, a clinician, a midwife or a nurse or, indeed, anyone else involved.If you are going to say, "If you get this wrong, you make a judgement and you can face up to 10 years in prison", the idea of the chilling effect of the amendment, to me, is pretty clear.

The Chairperson (Mr Givan): Is it not chilling that it is life imprisonment?

Mr Allamby: Creating any criminal sanction of up to 10 years or life clearly has a chilling impact. I do not think that 10 years will make much difference between whether you face life in prison or 10 years, but the earlier point that I made is simply that it does not seem to me to be clear whether you would face 10 years or life imprisonment if the amendment as drafted, which talks about "without prejudice" to the 1861 Act, were applied. If you asked me candidly, "Does the chilling impact really matter?", I would have to say that I do not think that 10 years in prison will have any less chilling an impact on someone trying to have the wisdom of Solomon and make a decision about these issues than life imprisonment.

The Chairperson (Mr Givan): You made a comment that criminalisation is inappropriate. What do you mean by that?

Mr Allamby: I mean that our law should be sufficiently clear that, if a clinician or somebody in the private or public sector has to make a decision about whether it is appropriate to assist somebody or undertake a termination, that person should know and be clear that they are acting within the law. There should not be any uncertainty. Nobody should feel that they were acting within the law and it turns out that, in their genuine and honest belief, they have stepped the wrong side of the line. It should be absolutely clear.

In my view, the law as it stands in Northern Ireland at the moment, with or without the amendment, is not clear on what that position is in all circumstances, except that, in some circumstances, it may well be clear. If clinicians take certain decisions, it may well be beyond the line where you can say, "I simply did not realise what the law said". I do not think that the law has the clarity that we need to ensure that people understand. I take some reassurance in that view from earlier Department of Health consultations around the guidelines, and we have read that the Royal College of Midwives and the Royal College of Nursing have said that it is not clear. If those people are not clear about what the law says — they are expected to abide by the law — there is a problem with our current framework.

The Chairperson (Mr Givan): It is not that the commission is opposed to criminalisation as a way to regulate the issue of abortion?

Mr Allamby: Any criminalisation needs to be proportionate and clear in respect of action taken. I do not think that the commission's position is that there are no circumstances in which it would be unreasonable to create a criminal offence. What I am saying is that, in the present law, there is no proportionality and a lack of clarity, and, in our view, the chilling impact is contrary to article 8 of the convention.

The Chairperson (Mr Givan): We could have a long discussion about the issues of clarity and proportionality. Is it the commission's view that the law just needs to be very clearly outlined or that the law needs to change?

Mr Allamby: Our position — we have made this clear in correspondence to the Department of Justice — is that there are certain circumstances in which termination should be allowed beyond the current law. That includes circumstances in which there is a serious malformation of the fetus, where there is a lethal malformation of the fetus and in circumstances where people are victims of sexual crimes, for example, rape and incest. In those circumstances, we think that case law and what CEDAW has said mean that our legislation should be extended to allow for termination in those specific circumstances.

The Chairperson (Mr Givan): The issue about the balance of rights leads you into that debate.

Mr Allamby: It does.

The Chairperson (Mr Givan): I think you described the unborn child as a fetus, which I assume means "unborn child" when you translate it.

Mr Allamby: Yes.

The Chairperson (Mr Givan): I noted you chose the word "fetus". When does the commission believe that rights are ascribed to the unborn child? At what stage?

Mr Allamby: The commission starts from a position of, "What does human rights law say on this?". It has been clarified, once again, relatively recently in the Şentűrk v Turkey case. It is a long-held position. I will quote it, because it is important to put it on the record:

> *"The Court reiterates that in its judgment in the case of Vo v. France [...] the Grand Chamber held that, in the absence of any European consensus on the scientific and legal definition of the beginning of life, the issue of when the right to life begins comes within the margin of appreciation which the Court generally considers that States should enjoy in this sphere. The Grand Chamber thus found that 'it is neither desirable, nor even possible as matters stand, to answer in the abstract the question whether the unborn child is a person for the purposes of Article 2 of the Convention'*
>
> *Since then, the Grand Chamber has had an opportunity to reaffirm the importance of this principle in the case of A, B and C v. Ireland [...] in which it pointed out that the rights claimed on behalf of the foetus and those of the mother are inextricably interconnected [...]*
>
> *In the circumstances of the present case, the Court sees no reason to depart from the approach adopted in those cases, and considers it unnecessary to examine whether the applicants' complaint as regards the foetus falls within the scope of Article 2 of the Convention."*

I think that the court is not prepared to make a clear statement of when and if the right of an unborn child commences. It is a matter for the contracting states to decide, in the absence of any consensus, and, importantly, the rights claimed on behalf of the fetus and those of the mother are inextricably linked. In other words, you cannot decouple them and simply say, "There's a right here and a right over here"; the two are linked.

The Chairperson (Mr Givan): So, you accept that it is entirely a matter for the Northern Ireland Assembly to determine.

Mr Allamby: I accept that, beyond the existing rights — they have to be regulated — and in the circumstances that I have outlined in our correspondence with the DOJ, for example, on sexual crimes and in matters of lethal —

The Chairperson (Mr Givan): With respect, that is your view as a commission. The commission is not the legal authority. The margin of appreciation falls to the state. Abortion law is entirely devolved, so it is for the Northern Ireland Assembly to deal with. Does the commission respect that it is for politicians to determine the issue, which current law is very clear on?

Mr Allamby: Yes, I do, with the caveat that the margin of appreciation is not unlimited. It is broad, but it is not unlimited. Therefore, international human rights law plays a role in this, but it does not create an absolute right to abortion in a vast set of circumstances. That is a matter. There are also the caveats of how it is regulated, the circumstances within that margin of appreciation, within what we already have and within some of the parameters I have outlined. Sorry, that is a lot of caveats, but, within those, the politicians can, obviously, decide where the legislation sits.

The Chairperson (Mr Givan): And you accept that it should be for politicians to deal with.

Mr Allamby: Providing they meet the international —

The Chairperson (Mr Givan): That means you are standing in judgement. That is the problem with all of your caveats. You say that politicians can deal with this so long as you think that that is what they are doing. Otherwise, I take it that the commission is considering being a Trojan Horse when it comes to abortion and trying to change the law through the back door.

Mr Allamby: With respect, I do not think it does. When I say that it should be within international human rights law, I do not mean that somehow I am the arbiter of the circumstances. The UK Government and the Irish Government have signed up to international human rights conventions. They have ratified them, and they have to live within them. In some cases, they are justiciable; in other cases, they must report to the treaty monitoring bodies. We are talking about a set of standards that Governments have signed up to, and, in this case, to which the UK Government have signed up. It is not me who signed up to it; you have got to act within what the UK has signed up to.

The Chairperson (Mr Givan): Again, you are wrong in that respect. When we visited the European Court of Justice and questioned its vice-president, he made it explicitly clear that Northern Ireland, within the United Kingdom as a devolved region, would attract the same margin of appreciation that would be afforded to the United Kingdom as a whole. You made the comment that we need to fulfil what the United Kingdom is signing up to, but that is not how the European Court of Justice considered it when I asked. Specifically on the amendment, we asked if it was reasonable for a state to determine that this service, if you want to call it that, should be restricted to the state. That is ultimately what the amendment is about: should the private sector be involved in the ending of life? This is a serious issue. It is not going to the private hospital for a knee replacement or some other operation; it involves the ending of life. Is it proportionate for the state to decide, "We are going to restrict that to the state being in control."? Again, the vice-president — and it might get to his chamber at some point — made it clear to us that, yes, it was reasonable for us to do that.

Mr Allamby: I will make two points. The European Court of Justice takes into account the European Convention on Human Rights, but it normally deals with a different set of issues. I will go back to the A, B and C v Ireland case, because I think it helps answer this question. In Ireland, you had the Offences Against the Person Act 1861; you then had the constitutional amendments around the issue of termination; you had a number of referendums around various aspects of this; and you then had a lack of clarity on the state of the law in respect of how clinicians behaved within it. The European Court felt that it had the right to deal with whether a termination for health and well-being reasons or where the life of the woman was at risk fell within the domain of the court. So, I do not think that I am asserting a personal view. All that I am saying on behalf of the commission is that this is where the law stands. The Offences Against the Person Act 1861 is Ireland-wide, and we have had examples of where it has been looked at and other developments behind it. I do not think it is an untrammelled right for politicians to decide this, but I do say that there is a considerable margin of appreciation.

The Chairperson (Mr Givan): Members, I appreciate that I have taken up a fair amount of time, so let me bring other members in.

Mr A Maginness: I understand your arguments in relation to the amendment. You say that, in the belief of the commission, there is a common law right to abortion. I do not accept that, but that is the basis on which you are presenting your proposition. You go on to say that, because of that, article 8 can be engaged in relation to the amendment. I think that is your basic argument. You go on to say — and I think this is a huge leap — that the commission is also of the view that the right to abortion is something that could arise out of article 8. That is my understanding. I hope I am following your argument accurately. To my mind, there is a big leap from criticism of the amendment to saying, "By the way, in terms of the wider consideration of these matters, a right to abortion could arise out of article 8." That is how I understand your argument. I disagree with your conclusion, but that is your argument, and I want to try to understand it.

Mr Allamby: It is in our submission, so —

Mr A Maginness: I have read your submission, and I have tried to follow it. Most of the authorities that you quote are Polish authorities, and, as the Chair has said, there is a very clear situation in Poland, where abortion is clearly regulated by law. There are restrictions in Poland in relation to abortion, and I suggest to you that Northern Ireland is quite different from that situation.

Mr Allamby: It is probably a similar question to the one that the Chair asked. I accept that, in Northern Ireland, the circumstances in which a termination is allowed have been developed by the common law, not by statute. In Poland, that was developed by statute. I think that the principle then is that, once you have a right in certain circumstances, article 8 is engaged. I think that in the European Court of Human Rights in both the Ireland case, where the legislation is not significantly different, albeit that it is augmented in a different way in terms of constitutional amendment from the position in Northern Ireland, article 8 is engaged. Interestingly, even in circumstances where the case was about the A and B part of the A, B and C case, in other words where termination is about the health and well-being of the woman, the courts held that article 8 was engaged. They decided that it was the circumstances in which a person could deal with the issue, including travelling across the Irish Sea to Britain for an abortion in the case of A and B, was such that there was a sufficient qualified right there. Article 8 is engaged. I do not think that there is any dispute about the engagement of article 8.

Mr A Maginness: I do dispute that because I do not think that there is a right under law in Northern Ireland to an abortion. That is a difference of opinion that we have. If there is no right, article 8 cannot be engaged. That is my view. To reiterate the point further, I am very clear that, in the A, B and C case, article 8 cannot be interpreted as conferring a right to abortion. That is why I talk about the big leap that you have made. Throughout the European cases, it is clear that there is a margin of appreciation given to the state and that article 8 as of itself does not create a right to abortion.

Mr Allamby: I do not think that the commission is arguing that article 8 creates a right to abortion. What we are saying is that the common law —

Mr A Maginness: But, sorry —

Mr Allamby: As I discussed at the beginning, the courts have set out certain circumstances where termination would be lawful. Therefore, where there are circumstances where termination is lawful, a regulatory framework and a woman's right, in this case to a private life, is engaged. That is the position of the commission.

Mr A Maginness: Maybe I am misunderstanding what you are saying. I thought that you went on to say that you believed that there should be the right to abortion under restricted circumstances and that that is the view of the commission.

Mr Allamby: The view of the commission is that, having regard to what the CEDAW committee has said and having regard to the jurisprudence, there are certain additional circumstances where we believe —

Mr A Maginness: Do you mean the jurisprudence based on article 8?

Mr Allamby: Yes. On the issue of sexual crimes, rape or incest, for example, or where there is a lethal or serious malformation of the fetus, our position is that, in those circumstances, termination should be lawful.

Mr A Maginness: You referred to CEDAW. Leave CEDAW aside and forget about it for the time being because it is not justiciable in this jurisdiction as such. Obviously, if article 8 is engaged, you can. I understood that the premise of your argument on abortion — in restricted circumstances, I understand the point that you are making — was based on article 8.

Mr Allamby: It is based on articles 8, 3 and 14 in terms of the absence of termination in circumstances of lethal and serious malformation and sexual crimes. It is beyond article 8.

I am quite happy to put on record that, if you were to ask me, for example, whether there is some kind of legal requirement for the Northern Ireland Assembly to enact the exact equivalent of the 1967 Abortion Act, in human rights terms, the answer to that would be no. I understand the position that the 1967 Act cannot be replicated. I cannot make an argument that says that, under human rights law, the 1967 Act must be enacted in Northern Ireland based on a human rights argument. I understand that. That is not me then saying that there is a kind of position of absolute autonomy of the Northern Ireland Assembly to decide the circumstances. In our view, there are some legal and human rights issues about when termination should be lawful. It is not about imposing the 1967 Act on the Northern Ireland Assembly, and that is putting aside views on it. That is a straightforward legal position rather than a personal one.

Mr A Maginness: One of the principle provisions of the 1967 Act relates to a fetus that is suffering from some form of difficulty in terms of malformation and that sort of condition. There is provision there for abortion, practically right up to birth. Are you saying that the Assembly should consider that provision?

Mr Allamby: The commission's position is clear. International human rights standards do not require the Northern Ireland Assembly to enact the 1967 Act. We think that that is clear.

Mr A Maginness: Forgive me —

Mr Allamby: The commission does not take a position on what the abortion law should be in Northern Ireland. The commission's role is to determine what international human rights standards and jurisprudence say about this issue. We think that they say that this amendment would be proved to be unlawful — that is our considered view — and contrary to article 8. I think that I have come back to where we are with what we are discussing today. That is our position. The commission does not take a specific view on the issue of the law on abortion other than to look at what international human rights standards have to say.

Mr A Maginness: Leaving aside the 1967 Act, you are saying that there ought to be provision for abortion here in Northern Ireland, arising out of article 8.

Mr Allamby: I am saying that, considering articles 3, 8 and 14, the commission's position is that, in circumstances where a woman has been a victim of a sexual crime, for example incest or rape, or where there is a serious malformation of the fetus, termination should be lawful. That is the commission's position, and that is the correspondence that we have had with the Department of Justice.

Mr A Maginness: In the draft bill of rights that the commission presented to Parliament, was there any provision in relation to abortion?

Dr Russell: There was a provision on reproductive healthcare in the advice, but there was no specific provision on abortion.

Mr A Maginness: Can you tell me why there was no provision?

Dr Russell: It was a decision made by the then commissioners.

Mr A Maginness: Yes, but you inherited that commission. You cannot say, "Well, that was somebody else." It is the same commission.

Dr Russell: The commission's mandate under the draft bill of rights was very specific. They were provisions that would supplement the European Convention on Human Rights to address the particular circumstances in Northern Ireland. It was a narrow mandate. It was not a broad mandate. It was not a free-for-all on human rights and what provisions the commission might have liked to have put forward and recommended for a possible bill of rights for Northern Ireland. It was very particular to the mandate arising out of the agreement. In the commission's view at that point, some of the issues that are being raised at the minute probably go beyond the mandate of the commission.

Mr A Maginness: Is another reason not that there was no consensus on this issue?

Dr Russell: Amongst the then commissioners?

Mr A Maginness: No, not amongst the commissioners but amongst the forum that was dealing with the draft bill of rights.

Dr Russell: That is correct. As you know, the forum is very separate from the commission.

Mr A Maginness: Absolutely, and I am not saying that you were in charge of the forum or anything like that. However, the forum failed to reach any consensus on this particular issue.

Dr Russell: That is my understanding, yes.

Mr McCartney: Most of the main issues have been teased out. However, in your earlier comments, you mentioned the idea that the law should be the theoretical position adopted by the legislator. You went on to say that the practical application of it is sometimes unclear and incoherent. Is that your position in this case?

Mr Allamby: Perhaps I should make it absolutely clear. What I am saying is that what the courts have said, not just on this issue but on a number of issues, is that, in convention terms, where a right is engaged, that right should not be theoretical or illusory; it should be practicable and effective. That is the lack of clarity point. In other words, if there is a right — in our view, article 8 is engaged in these terms — you have to make that right meaningful. If, for example, there is a right of physical and psychological integrity of a woman, in this case, the lack of clarity means that she and clinicians are not able to make sure that that right can be enacted in practice. In other words, we are saying that the rights must be effective and practical once they are established. So, it must not be a right that you cannot actually exercise. That is the point that we are making. The right must be exercisable in a reasonable way.

Mr McCartney: I know that we are dealing today just with the amendment. However, in terms of the amendment being an extension to or part of the 1861 Act, your position is that it is not coherent and clear because of a lack of guidelines.

Mr Allamby: As the legislation stands, if you were a clinician, whether a clinician in a private clinic or a clinician in an NGO setting or elsewhere, it is not clear what the parameters are. Our position is that the legislation is unclear for the reasons that I have outlined. However, it continues to have a chilling impact because there is a criminal sanction of up to 10-years' imprisonment. For those two reasons alone, the amendment, in our view, would be unlawful if enacted.

Mr McCartney: OK, so it is the sanction, the proportionality and the chill factor all run together.

Mr Allamby: Yes.

Mr McCartney: Notwithstanding the points that you made around clarity and coherence, would you make any distinction in relation to whether, in the limited circumstances, there is a difference between a termination in a public health facility and a private health facility?

Mr Allamby: The point that I am making is that there is a recognition that, if nobody ever used a private clinic or an NGO service, clearly there would not be a need for this kind of amendment. However, people do use those services for, I suspect, a variety of reasons. I am sure that some of the reasons why people use those services are perfectly legitimate and proper.I struggle to think of any other healthcare treatment where we decree that you should go only to a public health provision.

People can decide to avail themselves of the private health sector or not. They can decide to avail themselves of the NGO sector that provides health services or not. I am not sure that we are prescriptive anywhere else in the law and are saying, "You must only use a public health facility". It is an unusual amendment, to put it mildly, that says that. In these circumstances, as far as I can see, the attempt is to say that people must use a publicly funded health facility rather than a private facility. However, if you choose to go to accident and emergency on the Lisburn Road and pay, you are perfectly entitled to do that. Nobody says that you must go to the emergency department at Altnagelvin or the Royal, for example, as a matter of law.

The Chairperson (Mr Givan): I would certainly expect a good socialist to want it to be restricted to public service though.

Is it not fair to say that other European member states have decreed that there are certain activities that will be carried out exclusively by the state, including medical activities? In France, for example, pharmaceuticals cannot be dispensed outside of a pharmacy. You cannot get them in a supermarket or shop. You can get them only in a properly registered pharmacy licensed by the state. You are saying that this is unusual, and that may well be the case, but is it illegal?

Mr Allamby: I am not suggesting that it is illegal. The point I am making is that it is very unusual. Chair, I have to confess that I am clearly not as well acquainted as you with the laws of other European countries and access to their services in a public and private sphere. All I am saying is that, in a UK context, I am struggling to think of examples where healthcare, whether treatment or provision, is confined to the public sector.

The Chairperson (Mr Givan): I accept that that is the case in a UK setting. However, for the purposes of European law and European human rights, Northern Ireland is just a region in the European Union. Therefore, we can have laws on a Northern Ireland basis. That is why I am a devolutionist. We do not need to follow slavishly what happens in Westminster.

What is actually unclear in the amendment? You say that it needs to be clear and practicable. However, what is unclear in trying to put a provision into law that says that it is only the public sector that can do this and, in effect, only the NHS? Surely the medical profession, when it reads this, will say, "Absolutely and without a shadow of a doubt, this cannot be done in a private clinic. It has to be done on the NHS". There is nowhere in the amendment where that is not clear. You might not agree with it, but surely it is clear.

Mr Allamby: With respect, I am not sure that it is. Subsection 2(b) is the defence that it is lawful to be involved in:

> *"the act or acts ending the life of the unborn child ... lawfully performed without fee or reward in circumstances of urgency when access to premises operated by a Health and Social Care Trust was not possible."*

A woman may say, for whatever reason and in whatever the circumstances that she is not prepared to go to a public facility and that that is her position. A clinician may then try to persuade her by saying, "I think you should use a trust facility", and the person reiterates that they cannot and will not do so, for x or y reasons. If the clinician takes it that the person has genuinely made the decision, and then takes some action, is that a lawful defence under the proposed new clause 11A(2)(b)? The answer is that I do not know. If I were the clinician in that position and the person had convinced me that they were not prepared to go to a health and social care trust facility; is that sufficient to constitute a lawful defence for me? I might have a view, and you might have a different view. I do not think that it is clear what the answer would be in those circumstances.

The Chairperson (Mr Givan): Proposed new clause 11A(2)(b) is saying "without fee or reward". Therefore, there should never be a monetary exchange when it comes to the ending of a life. Therein lies another reason why I think it is necessary to restrict it to the NHS. How can you deal with the perceived conflict of interest, real or not, when there is a financial interest for private service initiatives in this? So, this deals with that. You cannot go somewhere where you will have to pay for it.

Say someone rings 999, and the ambulance is on its way to the hospital. I cannot envisage the circumstances in which subsection (2)(b) would be necessary, but say the ambulance could not get to the hospital in time. I do not know whether they are able to carry out a termination in those circumstances, but if it were to be carried out, there would be a defence allowed under clause

11A(2)(b). It is very difficult to envisage how you could not avail yourself of an NHS hospital in these circumstances. I cannot imagine how, but this deals with the potential exception that I cannot envisage. That is really what 11A(2)(b) is about.

Mr Allamby: It is interesting; we could almost have a table tennis match, batting it back and forth. Whether your view or mine is the correct view of clause 11A(2)(b) is neither here nor there. The issue is that if, eventually, the matter goes to court and it turns out that my view is right or wrong, then apart from an "I told you so", there are no real ramifications for me or you, Chair. On the other hand, if I am a clinician, and I have to make a decision about whether to do something in some circumstances, and I may face up to 10 years in prison as a result of it, the stakes are very different. The point I am making is that, interestingly, we have two views about what might be covered by clause 11A(2), for example, but clinicians have to make decisions that have ramifications for their own liberty, and that is a very different situation.

The Chairperson (Mr Givan): Your point is that the prevailing law in Northern Ireland has a chilling effect on clinicians, and so, whether this amendment is passed or not, the commission's view is that Northern Ireland's law, as it stands, has a chilling effect for clinicians.

Mr Allamby: As you know, the issue of guidance about where we are with the existing law has exercised the courts on several occasions. I am certain that we do not have sufficient clarity about the position, and that is deeply unsatisfactory. The current situation is not, in my view, clear and unequivocal, and it should be made as clear and unequivocal as possible.

The Chairperson (Mr Givan): Some might say that it is actually very clear, but that there has just been an adverse reaction because it has been so clear and because some do not agree with the law as it is in Northern Ireland.

Ms Hild: I will just note that, even if you look at the judgements on the guidance issue from 2004, you can see that the judges in the Court of Appeal were very clear that there is lack of clarity. They also spoke about the impact of penalisation and the criminal effect here. Again, that has been carried through. It was outlined very clearly by those judges that there is a need for guidance, that there is uncertainty among doctors and practitioners and that they were concerned by that. It is something that is widespread. They spoke about the fact that judges also felt that there was a lack of clarity.

The Chairperson (Mr Givan): The difficulty I have with the guidance issue is that it is guidance on criminal law. You may not want abortion to be regulated by criminal law, but it is and has been in Northern Ireland since 1861. This amendment deals with the criminal law, because that is how abortion is dealt with in Northern Ireland. The guidance will only ever be a guide to criminal law. It cannot be — and I used the phrase earlier — the Trojan horse when it comes to abortion law. The guidance cannot do that. It has to be dealt with through criminal law. Do you accept that?

Mr Allamby: I accept that that is the current position we are in, but, as I said earlier, the Royal College of Midwives and the Royal College of Nursing have made it clear that the current position in unsatisfactory for their members. Whatever their members' views are on the legal position, they need clarity on decisions that they may have to make in carrying out their profession. They are saying that it is unclear, and I have to say that, in those circumstances, I understand entirely why that is completely unsatisfactory.

The Chairperson (Mr Givan): Are they not satisfied with the clarity because they do not like the law?

Mr Allamby: I cannot speak for either the Royal College of Midwives or the Royal College of Nursing and give their position.

The Chairperson (Mr Givan): I have heard from a number of their spokespersons, and they would certainly like a change in the law. There is no question about that. My problem with what the commission is saying is this: setting aside this amendment, it is saying that the law in Northern Ireland has a chilling effect. You clearly do not like the law. That is why you are writing to the Department of Justice. You are highlighting issues of rape and foetal abnormalities. You do not like the law, so you are hostile to this amendment from the get-go. Everything is chilling and unclear. Where there is absolute clarity, and you do not agree with it, these are the arguments that are being advanced.

Mr Allamby: It is not that we do not like the law. That is not how I would characterise it. The question for us as a commission is whether it meets international human rights' standards and jurisprudence. Our view is that in certain circumstances it does not do so. That is the position. It is not a matter of whether the commission likes or dislikes the law.

Dr Russell: The role of the commission is not to like or dislike. It is to advise the Assembly on compliance with binding human rights' standards. We do not deviate from that. This is not a question of what the commission may or may not like. It is the role of the commission to advise the Assembly in accordance with the human rights' standards that have been ratified and that bind the Assembly and the Executive.

The Chairperson (Mr Givan): It is your interpretation of those human rights' standards and court judgments. All of this is subjective. The Human Rights Commission is not an expert or an authority on human rights. It is not the Human Rights Commission that would decide when the Assembly is in compliance. Ultimately, the courts would decide. When it comes to legislation, it is the role of the Advocate General, the Secretary of State and the Attorney General. Legislation in Northern Ireland does not go to the Human Rights Commission as part of a tick-box exercise.

Dr Russell: The Human Rights Commission is a national human rights' institution established under the agreement. All legislation introduced to the Assembly is passed to the Human Rights Commission by statutory requirement so that it can provide its advice. The Human Rights Commission is considered to be an expert with regard to human rights' standards in Northern Ireland. Undoubtedly, some issues are justiciable and can be disputed in the courts, but, ultimately, the commission has a formal, functional role to advise the Assembly.

The Chairperson (Mr Givan): Did the Assembly get it wrong when it voted by a majority to pass this amendment?

Mr Allamby: It is not about whether it got it right or wrong.

The Chairperson (Mr Givan): If there had not been a petition of concern, this would be the law.

Mr Allamby: The Assembly is entitled to pass laws. Ultimately, those laws may then be challenged, and it is up to the courts to decide.

You are quite right: the commission could not strike down this amendment, if the Department of Justice decided to implement it. We, or somebody else, might well decide to take a legal action, and then, ultimately, it would be for the courts to decide.

The commission is a national human rights' institution. It does have a role. It has been accepted that we have statutory duties and powers under the Northern Ireland Act 1998. I think there is then a recognition, under the Paris principles, about the pluralism of the commission and that it is expected to have expertise in areas of human rights, and I think we have that. However, we do not have a monopoly on wisdom. Not everything we say will automatically be followed by the courts any more than everything that the Assembly enacts will automatically be upheld by the courts. It would be a matter for the courts to decide in a legal challenge. That is the role of the courts. They are independent of the executive. It is not a matter for us. All we can do is ask the courts whether something is lawful or not.

The Chairperson (Mr Givan): With respect to the correspondence with the Department of Justice, is the commission threatening potential legal action in respect of these issues?

Mr Allamby: Yes, we are considering legal action on those issues.

The Chairperson (Mr Givan): Do you not think that it should be a matter for the Northern Ireland Assembly, and that the Human Rights Commission should not usurp the democratic responsibilities that we have on behalf of the people?

Mr Allamby: I do not think that our role usurps the role of the Assembly. Our role is to examine human rights' international standards and laws and decide whether to offer advice, as in the circumstances where we have offered advice to the Department of Justice. It is then up to the Department of Justice whether to take that advice on board. It is within our statutory remit to ask the courts for a decision if we choose to do so. That will almost certainly happen here on the issues that have arisen in our correspondence with the Department of Justice.

The Chairperson (Mr Givan): So, David Ford might as well put his consultation in the bin. What is the point of having a consultation or seeking legislation through the Assembly? The Human Rights Commission is just going to bypass the Assembly and go to the courts. If the Assembly rejects what David Ford wants to do, you are not going to respect the will of the Assembly. You are going to go to the courts. You are usurping the mandate of democratically elected politicians to deal with these issues.

Mr Allamby: With great respect, our role is to uphold, and to offer advice on meeting, international human rights' standards. The commission does not act lightly. It is perfectly proper for the commission to consider a legal challenge to a democratically elected body — and I have great respect for the democratically elected body that is the Assembly — if it chooses, in our view, to breach international human rights' standards and jurisprudence. It is perfectly proper for us to ask the courts to adjudicate on that matter. We are not seeking to traduce, in some way, the Assembly's democratic mandate. Our mandate is to promote and protect human rights. Frankly, we would not be doing our job if we did not do that.

The Chairperson (Mr Givan): There is no point in me repeating what I said earlier. I take exactly the same view that I took a few minutes ago on your threatened legal action, which, to be honest, I find astounding. I find it astounding that, during a consultation exercise that has been commissioned by the Department, the Human Rights Commission has decided to put in a letter threatening legal action. When politicians are having to deal with this, the Human Rights Commission is, behind the scenes, pulling the strings and threatening legal action. I just find it utterly unacceptable that the commission would conduct itself in this manner. It undermines what David Ford is doing, and it undermines the authority of the Assembly to deal with it. In effect, you are saying that if the Assembly does not deal with it in the way that you believe it should be dealt with, you are going to go to court and try to bypass the Assembly. I am repeating myself, but I do find it astounding that the commission has acted in the way it has.

Mr Allamby: I will repeat myself, but I will be very succinct. The role of the commission is to uphold, protect and promote human rights. It is within the international framework. The framework has not been set by the Human Rights Commission, it was set by international treaties that have been ratified by the UK Government and, therefore, these are not standards that have been set up by the Human Rights Commission. They are international standards that have been signed up to by the UK Government. Part of our role is to promote and protect those rights, and that is what we will do.

Mr McGlone: I have just two points, and I will be brief. Paragraph 46 in your submission says the following about the proposed amendment:

> *"The Commission notes that the restriction in the amendment may be read as being so broad as to include certain forms of contraception which are legally available in Northern Ireland."*

Will you elaborate on what types of contraception are meant?

Mr Allamby: One example is the morning-after pill. As far as I can see, this amendment is so widely drawn that administering or distributing certain forms of contraception that are legally available in Northern Ireland could be contrary to it. I am not suggesting that this is what is intended, but it could be interpreted in that way.

Mr McGlone: Thank you. I will take you back to something you said earlier about the right to life. I refer to paragraph 53 of your submission on taking the appropriate steps to ensure that the life of the patient is protected. I listened very carefully to what you were saying earlier about the rights of the fetus, or pre-birth child, and the mother being inextricably linked. In your interpretation of the interpretation, is the pre-birth child a patient? If they are inextricably linked, their rights are inextricably linked.

Mr Allamby: The first thing to say is that it is not my interpretation. What we have said to you this afternoon in our submission is that it is the interpretation of —

Mr McGlone: Absolutely. Maybe I should say that it is your articulation of the interpretation.

Mr Allamby: — of human rights. I have attempted to be fair minded, measured and objective about what the courts have said. It is not my interpretation or the commission's particular interpretation; it is what the courts have said, and I am keen to stick to that. I am not sure that I know the answer to whether an unborn child is a patient. I do not think that it is an issue that I can fall back on and say, "The court considered this, and here is the answer".

Mr McGlone: That is fair enough. The paper states:

> *"The positive obligations imposed on the State by Article 2 of the Convention imply that a regulatory structure be set up, requiring that hospitals, be they private or public, take appropriate steps to ensure that patients' lives are protected."*

You said that the rights of the fetus, or pre-birth child, and the mother are inextricably linked. I am just seeking some sort of clarity around everything that had been said before in your document around the rights of the mother. Perhaps you want to come back to us if there is something in international law that expands on that or clarifies that.

Dr Russell: We could look at it and come back. The short answer is that you have asked a legal question that probably has not been considered by the courts.

Ms Hild: I can speak specifically to the quote you are referring to. It relates to a case where the mother and the fetus died. The chief commissioner read a quote from the report earlier. The court looked at the situation of the fetus because it was asking about article 2 rights for the fetus in that situation. The court held that it was not something that it needed to consider at that time in that particular case.

In this context, in respect of the right to life, the issue is whether the amendment is clear enough in order to ensure protection for circumstances in which a woman's life may be endangered and that additional threat of prosecution in circumstances where —

Mr McGlone: I understand entirely where you are coming from, but it is where the rights of the fetus, or pre-birth child, are inextricably linked with those of the mother and the interpretation of the "patients' lives are protected". I note that the plural is used there.

Mr Allamby: As I understand the position, in respect of article 2 and the right to life, the court has never said that you look at the right of the mother and the right of the unborn child separately. They are inextricably linked. So, the answer to the question of whether the unborn child has a separate right based on being a patient, on the basis of the jurisprudence of the European court, is no, in my view.

Mr McGlone: Why did they use the plural when they talked about the "patients' life?" That, to me, is taking us into a different area. You are the legal people. Maybe you want to come back on that if there is some sort of legal information.

Dr Russell: We can certainly come back, but when we talked about the margin of appreciation and restrictions that can be put legitimately by the state on access to termination of pregnancy, the state may well be restricting access to termination of pregnancy in order to protect and provide domestic protections for the unborn child. So, there is a balance there around what will be protected by domestic law. Clinicians may well have a view with regard to that.

Mr Allamby: In that particular case, I do not know why the word "patients'" was used, but the court said:

> *"It considers that the life of the foetus in question was intimately connected with that of Mrs Şentürk and depended on the care provided to her."*

So, I do not think, in the particular case that the quote comes from, that there is a separate assessment of, in that case, a child that was being carried that they knew was not going to come to term because there was a lethal malformation. I do not think the courts were saying that there are two separate sets of rights recognised in article 2. It remains the position that they are inextricably linked.

Mr McGlone: I am not talking about two separate sets. It appears to me, from the logic of being inextricably linked, that, to my simple mind, with the use of the plural again, there are co-existing rights linked between mother and child. You may well want to clarify that. As you spoke and as I read it last night I was sure. You may want to clarify if there is any previous law around that. There may well not be, but it has been raised as an issue today here.

Ms Hild: I think I can provide a little bit more clarity for you. Basically, what usually happens in European Court of Human Rights judgements is that you have a set of general principles that set out the requirements on the state. This is one of those general principles. All patients who go to private and public hospitals have to be protected in that way, so the regulatory system has to be set up. This is setting out the general principles at that part of the judgement, and then, later on, those principles are applied to a particular case. So, this does not actually relate to that particular issue. It is simply all patients.

Mr McGlone: But, you agree that it raises a bit of an anomaly in interpretation? It can, depending on the context in which you read it. As I read it last night, I was not reading the rest of the case.

Mr Allamby: I am not sure, if you read the rest of the case, that it does.

Mr McGlone: Maybe so, but —

Mr Allamby: I am happy to take it away and have a look at the issue if that is helpful.

Mr McGlone: Alright, thank you.

Mr Dickson: I will say at the outset that I wholly value the role that the Human Rights Commission plays in Northern Ireland in respect of its relationship with this establishment. It is important that you exist and that the Assembly recognises the role that you have to play. I certainly recognise your role as an appropriate body under the legislation to provide us with the advice, guidance and concerns that you have in respect of this and any other matters.

I turn specifically to the concerns you have that the amendment would have the potential to widen the net to include the morning-after pill. I just want to test how realistic you believe that is. Is it a scaremongering tactic on your behalf or do you have a genuine and real concern? What would the effects of that be? Could we find an organisation that might feel that the morning-after pill is a step too far and takes legal action against someone who either prescribes it or who hands it over at the chemist's counter?

Mr Allamby: I do not think it is scaremongering. What we are saying is that the amendment, as drafted, would allow someone, if they wish to and for whatever reason, to take a legal challenge against somebody who was providing access to the morning-after pill. I do not think that is scaremongering. I do not think the intent of the amendment is to do that. To use the Trojan Horse analogy, I do not think it is a Trojan Horse for that purpose, but that does not mean that it could not happen. That is our concern. I do not think that is scaremongering; it is a genuine objective assessment.

Mr Dickson: And it is not unreasonable to suggest that there are organisations out there that would wish to take that type of action. Even though it is not a Trojan Horse and the proposer is not suggesting that, there are nevertheless those out there who could draw on that part of the amendment and pursue the matter.

Ms Hild: We would certainly refer to the Smeaton case, for example, which was a 2002 case in England that tried to make that argument about the morning-after pill, saying that it in fact fell under the 1861 Act. In that case, the court felt that it did not, and the case did not succeed. It is certainly the case that, as you point out, there are organisations that would take such a case. Furthermore, the issue is that the language that is used in this amendment says:

"the life of an unborn child at any stage of that child's development"

is not language that is used in the existing legislation and is not language that has been considered. That argument could be made.

Mr Dickson: So, in a sense, we are not even debating what we have debated for some time around this table, which is when life begins and things like that. It is quite simply "at any stage", and that has to be at the point where someone knows that they are either pregnant or are likely to be pregnant and takes the morning-after pill.

Mr Allamby: We are saying that it leaves itself open to that kind of challenge. Although that may not be its intent, it is drafted in a way that means that that kind of challenge would be open to someone or an organisation to take. It is drawn very widely indeed.

Mr Dickson: I will take you back to the other point that you referenced, which was on the actions of a clinician acting outside the health service in dealing with the situation. You painted the scenario of an individual refusing or not wishing under any circumstances to use a health service facility. The clinician would then be torn between acting and potentially breaking the law and acting and not taking a fee in the hope that that will protect them, but they will have done it in premises that are not prescribed. All those doubts exist. That is referred to as the chill factor. I understand the concern that that could cause. The question is this: what happens if the clinician says, "I am sorry, but I really cannot help you. I am refusing. I will not help you in these circumstances. There is only one place that you can go to, and that is a health service facility"? Remember that the areas under which this can be permitted include the mother's mental state. In those circumstances, if the mother's mental state led her to walk out of that advice centre and commit suicide or simply refuse any further treatment, what effect could that have on the clinician who refused?

Mr Allamby: It is interesting that, in at least one of the Polish cases, for example, there was a statutory law, and the question was on how clinicians treated the individuals in those circumstances. Ultimately, there was a set of professional ramifications as a result of not providing treatment in a way that allowed the termination in the circumstances under the Polish law. It seems to me that you have to have the wisdom of Solomon as a clinician in this kind of case to decide what you are expected to do in these circumstances. It also seems to me that that is an unfair burden to place on a clinician who may have to make an extremely difficult decision with ramifications that that person cannot foresee. As I said, it does not seem to me to be particularly satisfactory. Going back to the jurisprudence of the European Convention, I do not see how this amendment meets the notion of clarity and proportionality, bearing in mind that, in our view, article 8 is engaged in this case.

Mr Dickson: On the one hand, the clinician is left open to legal action if they take action. If, on the other, they refuse and there are fatal consequences as a result of that refusal, could the survivors or family take legal action against that clinician?

Mr Allamby: I think that the question might become about whether that person was individually liable or whether the state was liable.

Mr Dickson: Indeed. Could the state be liable as well?

Mr Allamby: I think that the answer is that some positive obligations are imposed on the state and that, therefore, there would be legal consequences in those circumstances. We quoted the Şentürk case in our submission, saying:

"The positive obligations imposed on the State by Article 2 of the Convention imply that a regulatory structure be set up, requiring that hospitals, be they private or public, take appropriate steps to ensure that patients' lives are protected."

So, in my view, one has to act within the law on the legal position and when the criminal law applies. Bearing in mind the common law situation, that is not currently clear.

Mr Frew: You made an argument on the morning-after pill, and given that it is not in the amendment, you could argue that that is basically pure speculation on your part. Having said that, from listening to your commentary, it seems that we are being told that human rights do not apply to the unborn child. What is your comment on that?

Mr Allamby: I do not think that the phrase "human rights do not apply the unborn child" is an accurate characterisation of the position. Our understanding of the position on article 2 of the convention, as it has been interpreted by the court, is that the human rights of an unborn child and the mother are inextricably linked. The issue is one in which there is a margin of appreciation in how states deal with this matter, but, once you set some provisions, whether in common law or statute, that say that there are circumstances in which a termination is lawful, it must be effectively regulated to make that right effective and not illusory, because it engages rights in the convention. What the court has not done is make clear exactly what the rights of the unborn child are under the convention.

Mr Frew: What is your comment on the fact that it is unclear?

Mr Allamby: I think that the court has taken the view that there is not a consensus across the contracting states on the issue. It has made clear that the substantial majority of Council of Europe members have some statutory provision for abortion, but there is nonetheless not a consensus about when the rights for an unborn child commence. The court is not prepared to, effectively, make that decision in the absence of a broad consensus. What I or the commission think about that is probably neither here nor there; our role is simply to articulate the current position. That is the position.

Mr Frew: Yet, the commission sees fit to challenge this Government and the actions and the laws that they would pass, yet you will not challenge or make comment other than to say that it is neither here nor here when it comes to an unborn child's rights.

Mr Allamby: I understand that. If there is to be a challenge, it is likely to be under articles 3, 8 and 14. We have offered our advice to the Department of Justice. The Department of Justice is perfectly entitled to accept or reject that advice. If we think that it is in breach of human rights law, our statutory position is that we as a commission are, I think, entitled to make the judgement that the courts should clarify that.

Mr Frew: You have a right to comment, but do you have a right to challenge?

Mr Allamby: We have a right to take legal action. It clearly must be where we genuinely believe that there has been a breach of human rights law, and that is what we genuinely believe. Ultimately, it will be a matter for the courts to decide.

Mr Frew: This may sound like an oxymoron, but what human rights does a dead person have?

Mr Allamby: There is a set of issues about other immediate family matters. I do not have an obvious and pat answer to a dead person's rights. Frankly, I would need to reflect on that.I do not think it would be helpful if I tried to extemporise on that.

Mr Frew: Does the right to a burial or the right to be treated with respect fall within their rights?

Dr Russell: The rights transfer to the next of kin.

Mr Allamby: We might engage family members, as opposed to the dead person, on a right to a burial. There might be a set of issues about the person's wife, husband or partner, for example, rather than the individual who has died.

Mr Frew: I asked because I am wondering whether you, as a commission, have any concerns about the treatment of a child after the abortion.

Dr Russell: I will go back to the initial judgement that Les mentioned about the rights of an unborn child and the rights of a mother. In the instance that you are highlighting, it is clearly the article 8 rights of the mother that are engaged.

Mr Frew: So, there are no rights of a child in the womb, or after the event of an abortion.

Mr Allamby: The rights of the unborn child are inextricably linked with the rights of the mother. The court has said that you cannot decouple those rights. They are not separate rights; they are interlinked. I do not think it is accurate to say that the unborn child has no rights whatsoever. I do not

think that that is what the court has said. I do not think the court has ever gone to the extent of saying that it is a right that is separate from the right of the mother. I think that that is reflected in domestic court judgements as well.

Dr Russell: There are issues in public policy that have, obviously, been outside human rights law. They include the retention of organs and such things that happen as a result of medical procedures. They have been well versed in the UK. I am not clear about that offhand, but I would have to consider whether human rights matters were brought to bear in those cases. Certainly, article 8 rights of parents and family members are engaged when it comes to a death, regardless of whether it is a child or an adult.

Mr Frew: I ask this question genuinely, because I do not know the answer, Chair. After an abortion, is the child a dead person?

Dr Russell: You are asking a straight legal question now rather than about a human rights matter. We would have to go away and look at what the law says.

Mr Allamby: I do not know, in legal terms. I could speculate, but I do not think that that would be helpful. If it would be useful, I would be happy to go away and write to the Committee with a more considered view.

Mr Frew: That would be useful, Chair.

Mr A Maginness: May I make one point on that? The Attorney General for Northern Ireland and Siobhan Desmond brought a case against the senior coroner for Northern Ireland. The Court of Appeal allowed an appeal by the Attorney General and ruled that the coroner can carry out an inquest into the death of a stillborn child who had been capable of being born. In other words, personhood was given to the stillborn child. So, Mr Frew raised a very interesting question about whether an aborted child has personhood or could acquire personhood in the way that the Court of Appeal gave a stillborn baby personhood. Of course, it is interesting that, in our legislation, the baby, to use that term, in the womb is referred to as a "child". That is a significant statement in legislation. Perhaps you could explore that when you come back to the Committee on this, because it is very important.

My other point is that rights develop. In the middle of the 19th century, slaves were slaves; they had no rights. Then, of course, they were granted the right to be people — to be citizens. Could there not be an evolving situation in the jurisprudence of the European Court that could lead to a situation where you would have that separation between mother and child and in the womb and that the fetus could acquire rights?

Mr Allamby: I am not sure that there is great value in me trying to speculate on where this issue will go next as a living instrument. I am familiar with the Attorney General's challenge to the coroner. I have not got the Court of Appeal decision here. I think that it would make much more sense for us to go away and to give you something more considered, and I am happy to do that. That is probably the right way to address Paul Frew's point.

Mr Poots: At the outset, Chair, may I say that we get less evasiveness from our Ministers than we are getting from Mr Allamby today? It really is not conducive to getting to the crux of the issues and dealing with them appropriately. Mr Allamby is dancing around on the head of a pin, as opposed to trying to answer questions, and that limits any benefit to his coming to the Committee to give evidence. Perhaps he will reflect on that.

Last week, we received evidence from Amnesty International and heard its views on human rights law. It was very clear that the unborn child or fetus had no rights until it was born. Do you have a different interpretation of human rights law than Amnesty in that instance?

Mr Allamby: I think that today we have set out our understanding of the legal position from the European Court. I am not in a position to comment on Amnesty International's evidence. I have not heard it or read it. Our position is our view on the position in law, based on the jurisprudence of the court.

Mr Poots: Which is that the unborn child has rights, but they are associated with the rights of the mother.

Mr Allamby: They are inextricably linked with the rights of the mother, yes.

Mr Poots: But they have no independent rights.

Mr Allamby: In our view, in looking at the jurisprudence of the court, they do not have a separate existence. That is our understanding of the law, and I think that that is reflected in domestic and international law.

Mr Poots: OK. There was a case in the United States in which cancer was identified on the lip of an unborn child. They were able to remove that cancer pre-birth. Would a child in that circumstance here in Northern Ireland be entitled to that sort of care from the health service?

Mr Allamby: Off the top of my head, I cannot give you a satisfactory answer. I would have to reflect on that.

Mr Poots: These are legitimate questions, Mr Chairman. I am not asking —

Mr McCartney: The Human Rights Commission is here to answer questions on the amendment. We are being very liberal with our questioning. People have come here to talk about a particular clause and an amendment and have been briefed on that, but they are being asked questions that they are not briefed on. They are being honest by saying they do not know.

Mr Poots: The amendment is about unborn children.

Mr McCartney: No, it is about whether a certain aspect of law can be extended to prohibit something happening in a private clinic. It is nothing to do with the rights of the unborn child. That might be for another day in another debate; I have no issue with that. People have come to the Committee today to talk about a particular clause and then to answer questions. Paul Frew asked legitimate questions and was given the considered answer that the witnesses would come back to him. In fairness, you cannot accuse people of not answering questions that they are not briefed to answer.

The Chairperson (Mr Givan): In fairness, the commission talked quite widely around the issue of abortion. They set the context and then moved on to the amendment. There is an element of them having invited a much broader discussion by their opening remarks.

Mr McCartney: Fair enough; that has been teased out, and that is acceptable. However, to say that people are being evasive when they say that they will come back with an answer is a bit unfair, to be quite fair.

Dr Russell: All I wanted to say was that you are raising an issue, and you are using the language of rights. Where the state may choose to provide a service and where a mother may choose to avail herself of a service, the state provides an entitlement to make an intervention to save the life of the unborn child, which is a perfectly legitimate service to provide and action for the state to take. You are talking, in this instance, about a case in America. Whether that is a human rights matter, as opposed to a protection by the state of the rights of the mother and the unborn child, the two things are not necessarily coterminous. That is not to say that the entitlement would not exist.

Mr Poots: Perhaps it is something that you would reflect on if unborn children have a right to health care.

Dr Russell: The position is quite clear. We can only keep referring back to the European Court's jurisprudence, which we cannot step outside, as it would be outside our statutory remit. The rights of an unborn child are coterminous and inextricably linked to the rights of the mother. Service provision by the state in protecting an unborn child in what services may or may not be provided fall within the margin of appreciation of the state and its health service.

Mr Poots: Do the mother's reproductive rights always trump the rights of the unborn child?

Dr Russell: Clearly not, because the European Court recognises that it is within the margin of appreciation to regulate access to termination of pregnancy.

Mr Poots: You raised the issue of the morning-after pill. When do you first know that a child has been conceived?

Mr Allamby: Different states have set out in statute what they consider on a statutory basis. As I understand the jurisprudence of the European Court, in the absence of a statutory basis, I do not think that there is anything that establishes that. The courts have said that there is neither a legal nor a legislative consensus on that, and the court is not prepared to enter into giving a definitive version. That is the legal position.

Mr Poots: If I was to take a challenge and walked into court three, four days or five days after someone had taken the morning-after pill and three, four or five days after engaging in sexual intercourse, what standing would that have? How could I prove that that person was pregnant in the first instance?

Ms Hild: In Northern Ireland?

Mr Poots: Yes.

Ms Hild: The Smeaton case in England would be informative because, under the current legislation, the morning-after pill is not prohibited. That is why I was pointing out the difference between the language of the proposed amendment and the language of the current legislation, which there is some clarity on because *[Inaudible.]*

Mr Poots: How do I prove that the individual was pregnant? If I decided to take a case, how would I prove that the individual was ever pregnant?

Ms Hild: Under the current legislation those involved in the Smeaton case, which I referred to, went to great lengths to look at the scientific and legal issues on that. The reason why there is a significance in the difference of the language is because one of the points that they talked about was the miscarriage, which is in the 1861 Act but not in the existing legislation. That is why it is a distinction.

Mr Poots: The morning-after pill is a contraceptive method. It is not a means of termination. It is fundamental. You raised the issue that someone could end up in court over this. I asked you a very simple question. If I am standing in a court of law, how do I prove that someone who took the morning-after pill three, four or five days after they engaged in sexual intercourse was pregnant in the first place? How could I bring any challenge in any court of law in that instance? This is a straw man.

Mr Allamby: With respect, the Smeaton case was taken on behalf of an organisation, if I recall correctly. That organisation took the case on the basis that the administration of the morning-after pill is unlawful. If I remember rightly, it was taken by an individual on behalf of the Society for the Protection of Unborn Children. The person who took the case did not take it on the basis of what had happened to that person as an individual; they took it on behalf of an organisation. The point that we are back to is that the amendment is not clear. If an organisation, as opposed to an individual, wished to take a case on the basis of this amendment, in our view, they could do that. They would have to prove that they had standing and sufficient interest etc, but they could do that. They would not necessarily need to produce an individual to do that.

Mr Poots: They would have to prove pregnancy.

Mr Allamby: No. They could —

Mr Poots: You could not go to court on the basis that a pregnancy was terminated wrongfully if you could not prove that there was a pregnancy in the first instance, in which case that would be a misuse of the morning-after pill.

Mr Allamby: That is not the purpose of this amendment or what it is seeking to do. All that —

Mr Poots: I know that it is not. You raised this.

Mr Allamby: Yes, but all that we are saying is that this amendment does not provide clarity on what it is and does and that it can be interpreted in a way that goes beyond what it its intent appears to be.

Mr Poots: When it links to other law and good practice, I think that there is sufficient clarity.

Mr Allamby: I beg to differ. That is fine. I understand the point that you are making. I understand —

Mr Poots: You beg to differ, but you have not demonstrated how it could be done.

Ms Hild: Mr Poots, the language that you are using is the phrase "termination of pregnancy". The language of the amendment specifically is:

"ends the life of an unborn child at any stage of that child's development".

That is a different set of language. The language that you are saying needs to be proven in court is actually not what the amendment is requiring and is not the offence that the amendment is seeking to establish. This is why we say that that is not clear.

Mr Poots: Either you are not getting what I am saying or you do not wish to get what I am saying. What I am saying very clearly is that, for any individual to take this matter to court, they would have to demonstrate in an unequivocal way that conception had taken place in the first instance. How does the individual do it? This is purely a scare tactic on the part of the Human Rights Commission, as opposed to a real threat.

Mr Allamby: I am really sorry, but, no, it is not. I will go back to the A, B and C v Ireland case, which dealt with the 1861 Act. One of the points that it made in its judgement was that, even if prosecutions were not happening in reality, the lack of clarity in the regulatory framework and how things applied was still sufficient to be contrary to the convention. So, in this case, whether somebody decides to prosecute or to take a case or otherwise, the lack of clarity is relevant. As Kyra pointed out, the amendment is so broadly framed that, in our view, it would be contrary to the convention.

I accept that people around this table may have a very different legal view. This is the commission's view, which is based on stepping back and looking at the jurisprudence. I understand that others may take a different view. That is fine. That is perfectly normal and understandable. Ultimately, if it came to a challenge, the courts would have to decide. However, it is a view that is based on international human rights law. It is not based on some kind of, if you like, commission crusade or anything else; it is based on our understanding of the jurisprudence.

Mr Poots: I will be generous and say that your arguments are tenuous at best. The only threat in regard to court is coming from nobody other than the commission itself. Not for the first time, the commission is threatening to take people to court when policy is being devised. That is inappropriate action on the part of the commission. If the Assembly makes a decision that is not compliant with human rights, you are well entitled to challenge it. However, when the Assembly is making and devising law, it is your job to lobby, not to threaten court action. That is something that the commission really needs to reflect on, because one would consider it to be bully-boy tactics.

Mr Allamby: Chair and Edwin, with great respect, it is not our job to lobby; it is our job to advise. I do not see our role in this issue as lobbying; it is about offering advice. That advice is genuinely given and based, as I have said, on the jurisprudence. It is then up to a Department or the Committee to reject or accept that advice. I understand that, but it is not our job to lobby; it is our job to advise.

Mr Poots: Fair enough. It is your job to advise, but it is not to advise with the threat of court action in the midst of policy in the making.

Mr Allamby: I understand the point that you are making. Our —

Mr Poots: It is anti-democratic, to be quite frank.

Mr Allamby: For us, the issue is whether there is a breach of human rights law and international standards signed up to by the UK Government. I understand the point that you made. The Chair made it equally forcefully. I understand —

Mr Poots: We cherish democracy and the right for the people's voice to be heard through elected representation.

Mr Allamby: Part of democracy includes safeguards —

Mr Poots: Correct.

Mr Allamby: — and checks and balances, of which there are many, and the commission plays a small part in that. I cherish that democracy with checks and balances as strongly as you and your colleagues around the table.

The Chairperson (Mr Givan): Let us set aside that some of us will not accept your interpretation: what if the wording "unborn child at any stage" read "unborn child from implantation in the womb"? Would that give clarity? At that point, it will be known whether a woman is pregnant. That can be unequivocally demonstrated through tests. Would that deal with the lack of clarity?

Mr Allamby: To be candid, I do not think that it is for me, as the chief commissioner, to commence a negotiation here this afternoon. If other forms of wording were being put forward, I would want to go back to the commission, talk to my colleagues, reflect on the issues and then come back to you. I do not think that it is appropriate for me as an individual to negotiate. I am only one of eight commissioners. I speak on behalf of the commission, not on behalf of me as an individual. Frankly, I do not think that it would be right for me to start negotiating one way or another on the commission's position based on something that might look very different from this amendment. If another amendment is suggested, I will happily take the commission's collegiate view.

The Chairperson (Mr Givan): Subsection 2(b) is meant to be helpful on exceptional cases of urgency. However, if subsection 2(b) creates uncertainty and that is the area that you are not clear on, remove it and leave subsection 2(a), which is crystal clear:

> *"that the act or acts ending the life of an unborn child were lawfully performed at premises operated by a Health and Social Care Trust".*

So, for the sake of clarity, let us remove the exceptionality aspect. It is trying to be helpful, but let us remove it. At least, then, you would be absolutely clear.

Mr Allamby: For the same reason that I outlined just now, I am not sure that it is for me, as an individual, to negotiate a solution. I speak on behalf of the commission. I do not think that it is appropriate for me, this afternoon, to try to craft something and give a view on behalf of the commission. I have seven other commissioners, and I am sure that they might want to reflect on any different proposed amendment to the Justice Bill. That is not being evasive. That is just proper corporate responsibility.

The Chairperson (Mr Givan): I am just trying to establish the issue. If it is not about the principle behind this, as that is a matter for the state within the margin of appreciation, and is just about the clarity, we could be very clear by stripping out subsection 2(b). In my view, that would make it worse, but it could be very clear.

Mr Allamby: The position for the commission is this: does any amendment breach international human rights law based on the jurisprudence and the standards? We look at it on that basis. So, if there was an alternative amendment, we would reflect on that and come back to you. If our view was that it was no longer a breach of the convention, we would say that. If we felt that it still was a breach, equally, we would have to set out the reasons why.

The Chairperson (Mr Givan): We know what the answer would be because, in your view, existing law is in breach of international law. There is really not much point talking about the amendment, because existing law does not meet the standard. What the amendment does is regulate within the existing law. Your problem is that you are not happy with existing law.

Dr Russell: The amendment deals with the provision of a service, where it may be performed and where it may not be performed. That is entirely different from the issue that you raise with regard to

the criminal law and whether it is compliant with human rights law. An amendment could be drafted in such a way that it, in and of itself, regardless of the wider issue, is compliant with convention law and international standards. The commission would look at that independently, as we always do with anything that comes before us, and give our considered advice.

The Chairperson (Mr Givan): Do you think that, in the interests of social cohesion, it is better that Parliaments deal with sensitive social matters, which is what this is, or should it be for the courts? Take the 1967 Act, which I disagree with, and I think that everyone in the Committee disagrees with it. However, it was brought in by politicians mandated by the people. I may not agree with that decision — in fact, I do not — but, as a democrat, I have to accept it. Take the issue of gay marriage. I disagree with the vote in Parliament, but it was a vote by politicians mandated by the people. It was not brought in by the courts. Therefore, as a democrat, I have to accept that. However, when the courts become responsible for ultimately dealing with sensitive social issues, do you think that that is good or bad for social cohesiveness?

Mr Allamby: I believe in parliamentary democracy and in the split between the Executive and judiciary, so I accept that Parliament and devolved Assemblies are entitled to pass laws. The question of whether those laws are lawful, whether in terms of human rights standards, administrative law or anything else, is a matter for the judiciary. That is a perfectly proper check and balance, and one that I support. In terms of social cohesion, I do not simply look in a narrow sense at parliamentary democracy; I look at the broader sense of checks and balances, and I support a broader conception of checks and balances. I am utterly respectful of the rights of parliamentarians to pass laws. The question of whether those laws stand up to judicial scrutiny then becomes a matter for the courts. That seems to me to be perfectly proper. I am not seeking in any way, shape or form to undermine that form of democratic accountability.

Mr Douglas: Les, when someone asked you earlier about Amnesty International, you said that you cannot speak for that organisation. Its submission to us made a claim about human rights standards. What is your interpretation of that? Also, does the commission believe its comment? It stated:

> *"Human rights standards are clear that access to abortion should not be hindered, should be easily accessible and of good quality and that states should eliminate, not introduce, barriers which prejudice access to abortion services, such as conditioning access to hospital authorities."*

Mr Allamby: As a statement of Amnesty's view of how policy should be provided, I do not demur from its view. As to whether the law requires policy to be implemented in exactly that form, I do not recognise that as a particular quotation from a judgement. The principle that, where abortion is lawful, the regulatory framework should be clear so that everybody knows their position in law — the clinicians, the woman and the inextricable links with the unborn child — that is, I think, the position that the commission takes on the matter. Whether I would frame it as Amnesty International has is not the issue for us. That is our understanding of the core position, and that is the position that we seek to uphold here.

Mr Douglas: I come back to clinicians. You talked about the chill factor. Is that right?

Mr Allamby: Yes.

Mr Douglas: You also mentioned malformation and sexual crimes, including rape and incest. I think that you went on to say that the right to an abortion in some or all of these circumstances is clear. I go back to a question Edwin raised last week with Amnesty International. He asked Amnesty to what point someone should be able to have an abortion: 15 weeks, 20 weeks or whatever. What is your view on a full-term abortion in some of these circumstances? What effect would the chill factor have on a doctor who has to perform an abortion at, say, 37 or 38 weeks?

Mr Allamby: We are saying that termination should be available to a victim of sexual crime or where there is a serious malformation. It should be clear. I do not think that we are starting from a position of saying exactly at what point it should be clear. The state has a margin of appreciation in these circumstances. It should be a right that is real and practical, not theoretical and illusory. Where within that you draw the line is a matter for the state, but, if it is drawn in a way that is far too restrictive, there

is a set of issues. It is not for the commission to say exactly what the number of weeks would be, but the right needs to be real and practical.

Mr Douglas: Amnesty International said clearly that the rights of the mother were paramount, no matter how late the pregnancy, but you are not saying that.

Mr Allamby: We are saying that the right is inextricably linked.

Dr Russell: The paramountcy test applies only under the right to life. In an instance where the life of the mother is clearly at risk, that would be a paramount concern. In all other instances, whether serious malformation of the fetus, rape, incest, or other sexual crime, it falls within the state's margin of appreciation to determine where that line should be drawn.

The Chairperson (Mr Givan): If all those issues are within the state's margin of appreciation, why on earth are you threatening court action? That is what I cannot understand. Dr Russell has just said that fatal fetal abnormality, rape and incest are all within the state's margin of appreciation. We are the state — we decide — so why would you go to court?

Mr Allamby: The margin of appreciation is broad, but it is not unlimited.

The Chairperson (Mr Givan): So Dr Russell was wrong when he said that.

Dr Russell: No, the margin of appreciation is about where the line in the sand is drawn —

The Chairperson (Mr Givan): — by the state.

Dr Russell: Yes, by the state. It is not about access to the service.

The Chairperson (Mr Givan): I still do not understand why, if it is within the state's margin of appreciation, you are threatening court action. That is what you have just said. Those issues are within the state's margin of appreciation. The Assembly and the Executive are the state. Why are you threatening court action?

Dr Russell: At what point provision in those circumstances is made unavailable is within the state's margin of appreciation; providing the service in those circumstances is not.

The Chairperson (Mr Givan): Expand on that point for me.

Dr Russell: The CEDAW committee has been clear in saying to the Northern Ireland Executive and the UK Government that in circumstances of serious malformation of the fetus, rape and incest, there should be access to termination. How that is then regulated is within the margin of appreciation of the state.

The Chairperson (Mr Givan): I met Gary earlier this week. His mother was violently raped, and he was conceived through that rape.Gary is married and has three children, one of whom was adopted, and grandchildren. Does the Human Rights Commission believe that he has the right to life?

Mr Allamby: Of course. The court is very clear: a woman has a right in those circumstances to give birth, and nobody is suggesting —

The Chairperson (Mr Givan): Gary should have a right to be protected under the law. The Human Rights Commission is clear that, as an unborn child, Gary does not have a right to be alive.

Mr Allamby: The right of an unborn child is inextricably linked to the right of the woman. That is our understanding of the legal position, and that is the basis on which we have commented on the amendment that is before you today.

The Chairperson (Mr Givan): Do you find it strange that everyone who is in favour of abortion is alive?

Mr Allamby: I am not sure what I can say in answer to that question. It is not for the commission to get into the question of a woman's right to choose other than in human rights' international law and standards. The right of the unborn child is an issue on which people have very strong views. The commission looks at international human rights standards and offers advice on them. If we feel that there has been a breach, we decide whether to take legal action. That is the basis on which we come to you today. I understand that, given the views represented around the table, some of the things that I have said are not popular, to put it mildly, but that is the basis on which we offer advice to the Committee.

The Chairperson (Mr Givan): It is not just that they are not popular; it is the fact that the Human Rights Commission is even considering going to court on the issue. That should be left to parliamentarians. If the commission were to take that course of action, it would undermine the democratic legitimacy of the Assembly. This is a very serious consideration that the commission should put to the forefront of its mind before embarking on that course of action.

Mr Allamby: I understand, and the eyes of the commission are entirely open to the issue that you have raised. Our role is to promote and protect international human rights standards. That is part of our mandate. It is to offer advice, and that is what we will do. I understand the point that you are making, but that is the mandate of the Human Rights Commission. It is a statutory mandate and one of the wider checks and balances, of which parliamentary democracy is a very important and cherished one.

The Chairperson (Mr Givan): OK. We move on to violent offences prevention orders (VOPOs). This should not take that long. I invite you to make your presentation.

Mr Allamby: I will ask my colleague, Dr David Russell, to do that.

Dr Russell: As members know, at our last appearance before the Committee, we were asked to come back on this provision, specifically on its application to children. We have gone away and considered it. Our starting position on the criminal sanction and what would flow from it is premised on international standards. We must draw the Committee's attention to the fact that the United Nations Committee on the Rights of the Child (CRC) has been clear that the age of criminal responsibility in all contracting states should be a minimum of 12 and that, ideally, the age should be raised to 14. On this basis, the serving of a VOPO on a child is problematic because of where the age of criminal responsibility sits at present in Northern Ireland.

The commission advises the Committee that when considering the application of this particular provision, and in order for it potentially to operate compatibly, the first point of principle should be considering the age of criminal responsibility in Northern Ireland in the context of the Bill so that anything in the justice system thereafter is compatible with binding human rights standards. If that was not the case, it is the commission's considered view that, as it stands, if applied to a child, a violent offender prevention order would be in breach of article 43 of the UNCRC. That is our basic position.

In addition, I draw your attention to qualifying offenders. Clause 53(3) enables an application to be made with regard to an offence that has taken place outside of the jurisdiction. Exactly the same principle would have to be applied to the application of the provision for it to be compatible with the convention and the rights of the child. So, if a child had been convicted in a state where the age of criminal responsibility was below the age of 12 for the base offence and, on the basis of that, an application was made for a VOPO, that, too, would engage the CRC. The fact that the initial offence was committed outside Northern Ireland does not obviate the responsibility of the Assembly in ensuring human rights compliance for the child in question.

Finally, if a decision was made to continue with the provision, and assuming that these issues were addressed in order to ensure compliance with the binding treaty obligation, we remind the Committee that the CRC is clear, even with regard to juvenile justice, that the best interests of the child, in this instance a child offender, has to be a primary consideration in addition to the consideration of the potential harm to others. I am happy to take questions.

The Chairperson (Mr Givan): There are concerns about compliance. The Bill has already been introduced to the Assembly. Where was the advice that the commission should have been giving to the Department? The Bill has started its journey. If the commission was there at the start of the process, surely this should have been detected and considered at that point.

Mr Allamby: In our initial analysis, we looked at this as a provision for adults rather than for children. We did not raise any legal issues in respect of adults. I think that it is probably a reasonable criticism to ask whether we should have envisaged this being an issue for children as well. I do not think that we sat down and thought about that. Our assumption was that the VOPOs were a provision for adults rather than for children. As I understand it, it was only when the Children's Law Centre raised the issue that it came to our attention. In an ideal world, we should have looked at this earlier, and I can only apologise. Clearly, we are not suggesting that VOPOs do not apply to adults. That is the issue that we had addressed initially, and we had not thought about how it applied to children and young people.

Dr Russell: To be clear, there are no grounds in human rights law as to why one could not apply to a child. The point is this: if it were to apply, it would have to do so in a compliant fashion.

Mr McGlone: Your paper states that the commission recommends that the Bill be amended to ensure:

> *"in the event of any application for a VOPO with regard to a child, the best interest of that child would be a primary consideration in addition to the consideration of potential harm to others."*

Can you explain that for me? If you, potentially, have a very violent person, how would the primary consideration be the child?

Dr Russell: It is "a primary consideration", not "the primary consideration".

Mr McGlone: Can you explain that to me? It states:

> *"in addition to the consideration of potential harm to others."*

If I was the person potentially at risk, I would hope that, instead of being an add-on, I would be a primary concern, too.

Dr Russell: That is the language of the treaty. The nature of children means that the rights and provisions afforded to them are very different from those afforded to adults, and they are particularly different with regard to how children should be treated when they engage the criminal justice system. As I said, it says "a primary consideration"; it does not say that it is the only consideration. There is a balance at play here. You have suggested a scenario. If you can think of a violent offence that could be committed by a child, a primary consideration might, depending on the circumstances, be to apply a VOPO. That would be in the child's best interests, as it would prevent them committing a criminal offence. The fact that it is a primary concern does not mean that the outcome is necessarily set in stone.

Mr McGlone: This would be applicable to 12- to 18-year-olds. That is the age range.

Dr Russell: In Northern Ireland, it would be applicable from the age of 10.

Mr McGlone: I understand that, so it would be applicable from the age of 10 to 18.

Dr Russell: Yes, and beyond for adults.

Mr McGlone: I have seen some 16-, 17- and 18-year-olds who could do a fair bit of damage.

Dr Russell: That is why I said that the international standard is that the age of criminal responsibility should be set at a minimum of 12 and in ideal circumstances 14. So, there is no concern about 16-year-olds, other than with regard to the fact that he or she would still be a child and their engagement in the criminal justice system should be different.

Mr McGlone: I appreciate that this would be in rare and exceptional circumstances. Do you reckon that the Bill should be amended to incorporate that?

Dr Russell: I raised the issue of the first point of principle, which is that the introduction of a VOPO, because it is part of the criminal justice system, raises an initial concern: anything in the criminal

justice system in Northern Ireland at present that would apply to a child above the age of criminal responsibility is in violation of the UNCRC. If the age of criminal responsibility were raised to 12, we would be having a different discussion.

Mr McGlone: Thank you very much for clarifying that.

The Chairperson (Mr Givan): There are no more questions. Thank you very much. I appreciate that this was a lengthy and lively session. I certainly appreciate your taking the time to indulge us.

Mr Allamby: Thank you, Chair. I have probably had more enjoyable afternoons, but it is important that all of this is aired.