THE CANADIAN BAR ASSOCIATION
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May 4, 2016

Via email: lcjc@sen.parl.gc.ca

The Honourable Bob Runciman
Chair
Standing Senate Committee on Legal and Constitutional Affairs
The Senate of Canada
Ottawa, Ontario
Canada, K1A 0A4

Dear Senator Runciman:

Re: Bill C-14 – Medical Assistance in Dying

The Canadian Bar Association's End of Life Working Group (the CBA Working Group) welcomes the opportunity to comment on Bill C-14, *An Act to amend the Criminal Code and to make related amendments to other Acts (medical assistance in dying).*

The CBA is a national association of 36,000 lawyers, Québec notaries, law teachers and students, with a mandate to promote improvements in the law and the administration of justice. The CBA Working Group, mandated to advise the CBA on end-of-life issues including physician-assisted dying, prepared this submission. The CBA Working Group comprises a cross-section of members drawn from diverse areas of expertise, including criminal justice, constitutional and human rights law, health law, wills, estates and trusts law, elder law, children's law, privacy and access to information law, and dispute resolution. The Working Group draws on the expertise of lawyers from all regions of Canada, including lawyers in private practice, the public sector and in-house counsel.

Criminal Code Amendments Should Align with *Carter* Decision

The CBA Working Group supports *Criminal Code* amendments to ensure a common understanding of the law in all provinces and territories. The CBA Working Group urges the government to ensure that the amendments proposed in the Bill align with the Supreme Court of Canada (SCC) decision in *Carter v. Canada*[1].

Eligibility for medical assistance in dying is set out in proposed subsection 241.2(2) of the *Criminal Code*. The heart of this section is a definition of "grievous and irremediable." The CBA Working Group does not believe that this definition is consistent with the criteria established by the SCC in *Carter*.

[1] 2015 SCC 5, [2015] 1 S.C.R. 331

The CBA Working Group believes that the SCC chose with care the terms "grievous" and "irremediable". We do not believe they should be conflated with "serious" and "incurable." Dictionary definitions of "grievous" introduce a subjective element of oppression or of bearing a burden, a nuance not captured by the term "serious." In the context of *Carter*, we believe the term "irremediable" is best understood subjectively, in the sense of a condition that cannot be resolved by treatments acceptable to an individual, rather than in the more objective sense of whether or not medical science has a "cure" for the condition. Both terms must be assessed in the context of the SCC's emphasis on the individual's response to their condition and their ability to make decisions concerning their bodily integrity and medical care.

The qualifications that an individual be "in an advanced state of irreversible decline in capability" and "that their natural death has become reasonably foreseeable" were not specified in the *Carter* decision. Their inclusion effectively narrows eligibility for medical assistance in dying to persons in the advanced stages of a terminal illness. The CBA Working Group has considered the explanation provided in *Legislative Background: Medical Assistance in Dying (Bill c-14)*. However, the CBA Working Group believes a contextual reading of the *Carter* decision must take into account:

- The SCC's repeated emphasis on the cruelty of denying medical self-determination to a person with a grievous and irremediable medical condition who "may be condemned to a life of severe and intolerable suffering" (para.1), particularly when the law would permit that person to request palliative sedation, the removal of life-sustaining medical equipment, and the right to refuse artificial nutrition and hydration (para.66).

- The facts of the case include not only Gloria Taylor, who was in the advanced stages of a terminal illness, but also Kay Carter, who was suffering intolerably from disease that was not *per se* terminal. The SCC referenced other witnesses, including those with motor neuron diseases, not all of which are fatal (para.14).

- There were numerous opportunities in the *Carter* judgment for the SCC to have introduced more restrictive criteria such as being at the end of life, and it chose not to do so. We note the SCC was aware of and did not reference the narrow criteria in Quebec's legislation, some of which appear in the proposed definition.

RECOMMENDATION

1. **The CBA Working Group recommends that proposed subsection 241.2(2) be removed from the Bill, and that proposed paragraph 241.2(1)(c) be amended to read:**

   They have a grievous or irremediable illness, disease or disability that causes enduring suffering that is intolerable to them.

Related sections should be amended accordingly.

Additional Protections Required When Providing Information about Medical Assistance in Dying

If medical assistance in dying is to be considered as part of a care continuum, professionals and persons close to an individual with a grievous and irremediable medical condition should be able to converse fully and frankly with them about their life course and planning without fear of criminal repercussion.

RECOMMENDATION

2. **The CBA Working Group recommends additional protections in section 241 for individuals – including health professionals, hospice and social workers, lawyers, family members, and others – who provide information about or in relation to medical assistance in dying even where not explicitly requested by that individual.**

Changes to Safeguards

The CBA Working Group in principle supports the requirement that a request be made in writing (or equivalent) and that there be an independent witness to attest to the requestor's signature. However, the language of proposed subsections 241.2(4) and (5) requires a witness who "understands the nature of the request for medical assistance in dying." This is an onerous and impractical requirement, with loss of privacy implications for the individual requesting medical aid in dying.

RECOMMENDATION

3. **The CBA Working Group recommends the phrase "understands the nature of the request for medical assistance in dying" be removed from both sections, with the effect that the individual is witness to the signature only, as is the case in other circumstances such as wills.**

Proposed subsection 241.2(7) imports the civil standard for medical negligence into the criminal law and incorporates by reference provincial laws, rules or standards that have not yet been written and that may differ by jurisdiction.

RECOMMENDATION

4. **The Working Group recommends that proposed subsection 241.2(7) be removed.**

The Working Group believes that the effect of proposed paragraph 241.2(3)(h) would be to require all individuals requesting medical assistance in dying to remain fully conscious until immediately before assistance is administered so as to be able to give express consent. This requirement is at odds with the recognition that eligible individuals are enduring intolerable suffering and are entitled to a range of care options, including sedation. In *HS (Re)*[2], the Alberta Court of Queen's Bench noted "the obligation placed on physicians to obtain genuine, ongoing, and informed consent to treatment." How that obligation is exercised should be left to health professionals acting in the normal course of their professional obligations and the individualized context of each patient.

We note parenthetically that the requirement does not address the situation of an individual who self-administers a prescribed substance or, alternatively, it would have the effect – contrary to the stated intention of the Bill – of requiring a health professional to be present in those circumstances.

[2] 2016 ABQB 121

RECOMMENDATION

5. **The CBA Working Group recommends that paragraph 241.2(3)(h)be removed from the Bill.**

Mature Minors, Mental Illness and Advance Requests

Bill C-14 does not extend eligibility for medical assistance in dying to mature minors or persons whose sole condition is mental illness. Nor does it permit advance requests. Rather, the government indicates in the preamble to the Bill that it will explore these issues and, in the *Backgrounder: Medical Assistance in Dying* which accompanied the Bill, clarified that it will appoint one or more independent bodies to further study them. Given the importance of these issues, the CBA Working Group recommends that Bill C-14 establish firm timelines for resolution of the exploration into these issues. To avoid unnecessary litigation, we recommend that this work be accomplished well in advance of the 5-year establishment of a Parliamentary review proposed in subsection 10(1) of the Bill.

We thank the Standing Senate Committee on Legal and Constitutional Affairs for the opportunity to provide comments on this important Bill.

Sincerely,

(original letter signed by Tina Head for Kimberly J. Jakeman)

Kimberly J. Jakeman
Chair, CBA End of Life Working Group