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May 2, 2016 – Via E-mail

To: Standing Committee on Justice and Human Rights JUST@parl.gc.ca

Submission Re: Bill C-14 and Medical Assistance in Dying (MAID)

> *…Dying is the final act in the drama of life. If, as I believe, dying is an integral part of living, then as a part of life it is entitled to the constitutional protection provided by s. 7 of the Charter... It follows that the right to die with dignity should be as well protected as is any other aspect of the right to life…*[1]
>
> *Justice Cory (dissenting) Rodriguez v British Columbia (Attorney General)*

Overview

Thank you for the opportunity to comment on Bill C-14[2]. I write on behalf of myself, my parents (long-time supporters of dying with dignity) and my daughter. I also write on behalf of the overwhelming majority of Canadians who have expressed their agreement with MAID.[3] I was a professional Social Worker, have my Master of Bioethics, my JD and am the President and Counsel of Shelley R. Birenbaum Professional Corporation, a law firm dedicated exclusively to the practice of health law in Ontario. I am a member and volunteer with Dying with Dignity Canada and a member of the Canadian Bar Association End of Life Working Group

I believe in democracy, autonomy and governance in accordance with the *Canadian Charter of Human Rights and Freedoms* (Charter). The Supreme Court of Canada decision in *Carter* v *Canada* (Carter)[4] was a carefully thought out and principled decision based upon a trial court decision that provided in-depth evidence. The unanimous decision was a victory for the Charter and for its recognition of the value that Canadians place upon autonomy in health care decisions and decisions dealing with their life.

Physician assisted dying is not a new topic of Government nor public debate. The topic was studied in the Report of the Law Reform Commission of Canada in 1983 and at least 14 bills have been introduced to decriminalize physician assisted dying since 1991.

The Liberal Party has made public statements about respect for the Charter and adopted a policy resolution supporting physician assisted dying.[5] I voted Liberal in the past election based exclusively on the professed Liberal commitment to social justice and respect for the Charter. Bill C-14 is deeply flawed in its narrowing of the Carter decision and its non-compliance with the Charter.

I am fully aware of the religious belief of Catholics, highly orthodox Jews and some other religions, that only God may take life. However, Canada is not a theocracy; it is a democracy. The Supreme Court of Canada clearly

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[1] *Rodriguez* v. *British Columbia* (Attorney General) [1993] 3 SCR 519
[2] Bill C-14, An Act to amend the Criminal Code and to make related amendments to other Acts (medical assistance in dying), First Reading April 14, 2016.
[3] Eight in 10 Canadians agree that individuals with a grievous and irremediable medical condition, including patients with dementia, should be permitted to consent to assisted death in advance. Ipsos Reid Poll 2016
[4] *Carter* v. *Canada* (Attorney General), [2015] 1 S.C.R. 2015.
[5] Policy Resolution 165, accessible at https://www.liberal.ca/policy-resolutions/165-death-dignity-legalizing-medicallyassisted-death/

provided that physicians who have religious or moral objections to physician assisted dying do not have to ***provide*** such services. Professional regulatory bodies and associations have already begun to articulate that those health care professionals must transfer care appropriately so that the professional obligation to provide patients with all possible options is complied with.

In my view the proposed Bill has significantly resiled from the Carter decision and many of its provisions may be found unconstitutional. It is deeply unfair to expect individuals who are grievously and irremediably ill to utilize their financial and emotional resources to challenge Bill C-14. I set out below specific recommendations for change to Bill C-14.

Recommendations for Changes to the Bill C-14

A. Carter is the <u>minimum</u> that should be in the law. Bill C-14 does not align with Carter, and significantly narrows those who are eligible for MAID. There is no need for a definition of "grievous and irremediable condition". These words were chosen with care by the Supreme Court and should not be conflated with "serious" and "incurable". "Grievous" appears in the Criminal Code and "irremediable" means, on a plain interpretation, "without remedy" (in a manner acceptable to the person). To require that an individual have an "advanced state of irreversible decline in capability" is not a requirement of Carter, nor is the requirement that "natural death has become reasonably foreseeable". This is to import into the law a requirement of a terminal condition, and a phrase that leaves physicians, nurse practitioners and other health professionals at professional risk, given its vagueness. Death is reasonably foreseeable for all of us, and certainly for individuals in their later years.

Recommendations:

1. **Delete Section 241.2 (2).**
2. **Amend S. 241.2 (1) (c) 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)**

B. Include Mature Minors and Advance Directives in Bill C-14 Bill C-14 does not extend eligibility for MAID to mature minors, nor does it permit advance requests. This is the situation notwithstanding that the Joint Senate Committee and The Federal Provincial Territorial Group made recommendations with respect to both areas. Instead, there is a vague commitment in the preamble of Bill C-14 (which is non-binding) to look to develop *non-legislative* measures for requests by mature minors, advance requests and requests where mental illness is to the sole underlying medical condition. These exclusions clearly have constitutional implications. Without advance consent, people with a diagnosis for dementia and other degenerative medical conditions will be faced with a cruel choice: take their own lives too early, or die a horrific death.

The exclusion of competent minors from access to MAID on the basis of the legal age of majority is arbitrary and will likely be subject to constitutional challenge on the basis of ss. 2(a), 7 and 15 of the *Canadian Charter of Rights and Freedoms* and s. 35 of the *Constitution Act, 1982*. Based on the decision in *AC v. Manitoba*[6], it would be difficult to justify why a competent minor who has a grievous and irremediable medical condition causing enduring suffering cannot gain access to MAID whereas an adult person with such a condition could.

[6] *AC v. Manitoba* 2009 SCC 30.

Recommendations:

3. **Advance directives should be permitted in Bill C-14, with further safeguards to be delineated in Bill C-14, or in provincial/territorial legislation/standards.**

4. **MAID should be extended to competent minors.**

5. **One year should be allowed for study of the issues with respect to competent minors (child impact assessment), with their inclusion in the legislation immediately after the one-year study.**

6. **In the interim a constitutional exemption process should be put into place immediately for mature minors similar to the exemption process in place now for competent adults.**

C. **Protection for Regulated Health Professionals, Family Members and Others** Under Bill C-14, all health professionals, family members and others are at risk of criminal prosecution if they discuss end of life choices with patients that include MAID. The one exemption in in s. 227 (2) is for a person "aiding a medical practitioner" or "nurse practitioner" **to provide** MAID. This is not sufficient to prevent health professionals and others from criminal liability for end of life discussions.

Recommendation:

7. **Add an additional section that exempts all persons and regulated health professionals from criminal liability when discussing end of life choices that include MAID.**

D. **Legislative Review** Bill C-14 (s10 (1)) contemplates *creation* of a committee in 5 years to review the provisions of the Act and propose any changes. This is far too long a period and there is no commitment for a date for reporting back.

Recommendation:

8. **There should be a report to Parliament much earlier (within 2 or 3 years of proclamation), with the establishment of a committee upon proclamation and a date specified for legislative amendments.**

E. **Requirement for Express Consent to be Given Immediately before Administering MAID** This requirement means that if a person that otherwise qualifies for MAID loses competency in the days before the administration of MAID (e.g. due to medication for pain, or due to an exacerbation of their illness), they will not be able to receive MAID. This seems particularly cruel.

Recommendation:

9. **Delete Section 241.2 (3) (h). It is inherent in the concept of consent that it may be withdrawn by the person. If desired, the legislation could explicitly state that consent may be withdrawn at any time.**

F. **Requirement for Professional Standard of Care – 241.2 (7).** This provision criminalizes medical negligence and provincial laws, rules and standards, many of which may not have been developed or differ among provinces/territories. This approach militates against a pan-Canadian approach to MAID and may result in jurisdiction shopping, as well as criminalization of provincial health laws.

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Recommendation:

10. **Subsection 241.2(7) be deleted from the Bill.**

I am out of Canada from May 12 until 24, but would be pleased to appear before the Committee, or to amplify on any matter related to Bill C-14 or MAID. My contact information is the bottom of this email.

Yours truly,

Shelley R. Birenbaum

c.c.
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