Ryerson University

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SUBMISSION TO THE STANDING COMMITTEE ON JUSTICE AND HUMAN RIGHTS FROM CATHERINE FRAZEE, OC, D.LITT., LLD. (HON.)

MONDAY, MAY 2, 2016

Honourable Committee Members,

I offer this submission in my capacity as Professor Emerita in Disability Studies at Ryerson University. My perspective on the issues before you is informed by years of study and teaching in ethics and disability studies, with particular attention to how cultural standards of what constitutes a good and worthy life shape social policy and law that marginalize, disadvantage and ultimately endanger disabled persons. This perspective is also informed by decades of social justice advocacy, by my term as Chief Commissioner of the Ontario Human Rights Commission, my service on the External Panel, and my contributions to the Vulnerable Persons Standard, a safeguards framework which I fully endorse and urge you to consider. My submission is informed by all of these professional and civic engagements, but it is also deeply infused by my embodied experience as a citizen who lives with a progressively degenerative neuro-muscular condition and who would be considered to be in an advanced state of irreversible decline, but who is privileged with the necessary conditions of respect and support that permit me to flourish.

1. THE CRIMINAL CODE MUST BE AMENDED IN ACCORDANCE WITH "A CAREFULLY DESIGNED AND MONITORED SYSTEM OF SAFEGUARDS".

I recognize that as parliamentarians you are under tremendous pressure of time and that if the government of Canada does not enact legislative amendments to the Criminal Code before the Court's June 6 deadline, we will have failed, utterly and inexcusably, to honour the Supreme Court's clear acknowledgment that "the risks associated with physician-assisted death can be limited through a carefully designed and monitored system of safeguards." The Court was clear in its admonishment that "we should not lightly assume that the regulatory regime will function defectively". The suggestion that parliamentarians might defeat this bill, leaving us with no regulatory regime whatsoever, flies in the face of the Court's confidence that Canada's "strict regulatory regime" would function as it should. In the most emphatic terms possible, I urge you to recognize, as expressed in the recent legal opinion of Professor Dianne Pothier, that "**it is not a responsible option for the Parliament of Canada to fail to act by June 6, 2016**."

2. THE ELIGIBILITY RESTRICTIONS OF BILL C-14 IN ITS PRESENT FORM MUST BE RETAINED.

I am deeply concerned about the uproar that has been generated in reaction to the definition of "grievous and irremediable condition" in Bill C-14. **I urge this Committee to leave section 241.2 (2) intact as it currently stands**, recognizing both that there are credible legal opinions affirming the constitutional validity of this approach, and further that compelling policy considerations require the critical delineation between medically hastened death and suicide prevention intervention that section 241.2 (2) provides. For example, as noted by the office of the Surgeon General for National Defense in its submission to the Joint Parliamentary Committee [JPC], persons experiencing such problems as post-traumatic stress disorder may consider or request assisted death "where there is otherwise a real possibility of a positive health outcome".

Limiting the provision of medical assistance in dying to persons who are on a clear trajectory toward death is entirely consistent with the broad sweep of public opinion about who would be eligible to receive an assisted death. Indeed, your own colleague and co-chair of the JPC, Robert Oliphant, worked to promote this understanding in a number of media interviews conducted following the release of the JPC Report. For example, in a Global News Interview on February 26, Mr. Oliphant clarified that life-ending interventions would be "for people in the final days of their lives"; in a CTV interview on February 25, he framed the issue as providing an option for people "at the end of their days". Limiting eligibility to persons in "an advanced state of irreversible decline in capability" whose "natural death has become reasonably foreseeable", is therefore constitutionally sound, consistent with a delicate meshing of competing social policy objectives, and likely to accord with public expectation across the continuum of the debate.

3. BILL C-14 REQUIRES AMENDMENT IN ACCORDANCE WITH THE UNIQUE REQUIREMENTS FOR VOLUNTARY AND INFORMED CONSENT TO A HASTENED DEATH.

Medically assisted death has been accepted by the Supreme Court of Canada as warranted ***for persons who suffer intolerably*** as a result of a grievous and irremediable condition. In order to consent to have one's life terminated, an autonomous and capable patient must therefore make a choice to die, in preference to any alternative options that might be available to alleviate an intolerable level of suffering. It is suffering that motivates a request to die, and responding to suffering that must shape our regulatory framework for medical assistance in dying.

Suffering, we know from extensive research in psychology and palliative medicine, takes many forms and may be responsive to a wide range of medical, social, psycho-social, technological and other interventions. This broad suite of possibilities to address the particular roots of a person's suffering must be made known to anyone who requests an assisted death, as an essential requirement of enabling their informed consent. **I would therefore urge this Committee to ensure that the complexities of consent in the context of assisted death are appropriately reflected in the articulation of physician responsibilities in section 241.2 (3) of Bill C-14**.

As I was able to articulate more fully in the context of my own submission to the Joint Parliamentary Committee, vulnerability is a universal human condition, experienced when persons are stripped by policy or circumstance of our otherwise "firm grip on the social determinants of health." The Court spoke definitively about the necessity to protect persons who are vulnerable from inducement to pursue an assisted death. This requires from us a more robust formulation of voluntariness than is adequately captured in the simple requirement to screen for "external pressure". Verifying the non-ambivalent nature of a request for assisted death demands explicit attention not only to questions of individual coercion, but also to the dynamics of vulnerability. **I would therefore urge this Committee's attention specifically to section 241.2 (1) (d)) of Bill C-14 and recommend amendment to explicitly acknowledge the inducements that arise when access to the social determinants of health is severely compromised**.

4. JUDICIAL MECHANISMS OF FORMAL AUTHORIZATIONFOR ASSISTED DEATH MUST REMAIN IN PLACE UNTIL A CAREFUL STUDY OF PRIOR REVIEW OPTIONS CAN BE UNDERTAKEN.

Canada is poised in a mere five weeks to embark upon a social enterprise without precedent in our nation's history and about which, now 15 months after the Court's landmark decision, there remains much fear and mistrust. Such circumstances warrant the highest standard of diligence.

A significant number of Canadian medical, faith and advocacy organizations urged in briefs submitted to the JPC that some form of expedited arms-length prior review be required to authorize Criminal Code exemptions for assisted death. In their submissions at trial, even the plaintiffs in Carter proposed a mechanism whereby physicians would submit reports for prior approval by an "expert panel" consisting of an ethicist, a lawyer and a doctor. In extending its deadline for the coming into force of the Carter decision, the Supreme Court put in place a system of prior review, noting that "***requiring judicial authorization during [the] interim period ensures compliance with the rule of law and provides an effective safeguard against potential risks to vulnerable people***."

The ideal relationship between physician and patient is one of fidelity and trust. Often, however, these relationships are complicated by asymmetrical relations of power, fundamental differences in how vulnerability is experienced and understood, and predispositions toward the psychological dynamics of transference and countertransference. That the vast majority of Canadian physicians manage these complex relationships with humility, sensitivity and skill is admirable. That some do not, accounts at least in part for the vulnerability that many Canadians are known to experience in their encounters with doctors.

The decision whether to administer a hastened death is not a purely clinical decision. It requires a physician's clinical judgment about such matters as prognosis, capacity and consent, but it also requires discernments of a legal nature concerning the weighing of evidence and the consistency with which terms and thresholds are interpreted. Because conflicting loyalties may compromise the neutrality with which these decisions must be made, and because the written articulation of explicitly reasoned judgment is a required skill set for judges and adjudicators, and because there is at present no Canadian roadmap for a safe and equitable regime of physician-assisted death, I extend my strongest urgings to this Committee, to ***hold in place the current arrangements for judicial authorization of medical assistance in dying, as currently required by order of the Supreme Court, until such time as careful thought and study can be given to whether some form of prior review and authorization is necessary or desirable for Canada in the long term***.

CONCLUSION

In setting aside the absolute ban on assisted death, the Court expressed its assurance that risks of harm to vulnerable Canadians could be limited by a system of robust safeguards. In good faith, Canada's disability rights, palliative care and faith and conscience-affiliated associations have worked to craft those safeguards that the Court contemplated. In the critical days ahead, I urge you to honour the Court's trust and to set in place the safeguards required to protect vulnerable Canadians from harm.