Barreau du Québec

BRIEF FROM THE BARREAU DU QUÉBEC

Bill C-14 — An Act to amend the *Criminal Code* and to make related amendments to other Acts (medical assistance in dying)

Submitted to the House of Commons Standing Committee on Justice and Human Rights

Ottawa

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Barreau du Québec

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Introduction

We have reviewed Bill C-14, An Act to amend the *Criminal Code* and to make related amendments to other Acts (medical assistance in dying), and wish to submit the following comments.

Given the short timeframe due to fast tracking of the bill and the format constraints imposed by the Standing Committee on Justice and Human Rights, we will focus only on recommending amendments to certain specific clauses of the bill.

Our comments must be viewed in light of validly enacted provincial legislation, *An Act Respecting End-of-Life Care*,[1] which came into force on December 10, 2015, and already regulates medical assistance in dying in Quebec. Our comments are therefore made in a context where there is co-existing provincial and federal legislation on medical assistance in dying, a unique situation in Canada.

New section 241 of the *Criminal Code*

Subsections (2) to (5) provide exemptions for medical practitioners, nurse practitioners, persons aiding these practitioners, pharmacists and persons aiding the patient from the offence of aiding a person to die by suicide.

We are concerned with the scope of the offence of "counselling a person to die by suicide." We believe that the bill should explicitly specify that a medical practitioner explaining all the care options available to a patient, including medical assistance in dying, does not constitute the offence of counselling a person to die by suicide.

It is desirable that medical practitioners have a frank relationship with their patients and that they be able to discuss all the care options available. Medical practitioners must have the assurance that they are not vulnerable to or at risk of criminal charges when they have a discussion with their patients. They will be able to adequately inform their patients only if the bill clearly sets out that this does not constitute a criminal offence.

New paragraph 241.1(b) of the *Criminal Code*

The bill provides that the definition of medical assistance in dying includes the situation of a medical practitioner prescribing or providing a substance that will cause the death of a person. That person must then self-administer this substance.

We note that this approach is difficult to square with the strict obligations placed on health professionals with regard to medical assistance in dying. What kind of control can there be over this substance? What happens if the patient does not take it or if it falls into the hands of someone else? Since the bill goes very far in terms of medical assistance in dying and the obligations placed on health professionals, it would be better if there were a link between this

[1] RSQ c S-32.0001 ("the Quebec legislation").

type of medical assistance in dying and the other sections of the bill pertaining to situations where health professionals are present and active. Beyond providing medication to the patient, it may be difficult, if not impossible, for medical practitioners to monitor and report on subsequent events, as required by law.

For example, in cases where the patient wishes to administer the medication at home, without the medical practitioner present, it would be impossible for the practitioner to certify that the patient did in fact die with medical assistance or otherwise. It is also possible that the patient decides to not administer the medication or even dies of another cause.

The Quebec legislation does not regulate this type of medical assistance in dying (assisted suicide). It would be worth considering rules to regulate this further, such as by requiring persons assisting the patient self-administering the medication to report it either to the medical practitioner who prescribed the medication or to a government authority.

Medical assistance in dying provided by a medical practitioner under such conditions could also put the medical practitioner in violation of their ethical requirements, including the obligation to attend to and not abandon the patient.

New subsections 241.2(2)(b) and (d) of the *Criminal Code*

To obtain medical assistance in dying, it must be demonstrated that the person is in an advanced state of irreversible decline in capability and that the person's natural death has become reasonably foreseeable, taking into account all of their medical circumstances, without a prognosis necessarily having been made as to the specific length of time that they have remaining.

These criteria are not in *Carter v. Canada (Attorney General)*.[2] The Supreme Court of Canada makes no mention of an advanced state of irreversible decline in capability or death being reasonably foreseeable. We wish to bring this point to Parliament's attention, since this opens up the possibility of challenges if the federal legislation does not provide for at least the scenarios presented in *Carter*: that medical assistance in dying must be available to "a competent adult … where (1) the person affected clearly consents to the termination of life; and (2) the person has a grievous and irremediable medical condition (including an illness, disease or disability) that causes enduring suffering that is intolerable to the individual in the circumstances of his or her condition."[3]

We hasten to point out that it is undesirable that persons who meet all the criteria set out in *Carter* be refused medical assistance in dying because of the restrictive criteria in the bill. These are individuals with intolerable suffering who will have to challenge the law in court. The restrictive conditions in the bill will result in patients having to cease eating in order to qualify for medical assistance in dying, as several cases in Quebec have shown. This is certainly not the interpretation to be given to the Supreme Court of Canada's decision regarding the scope of section 7 of the *Canadian Charter of Rights and Freedoms*.[4]

[2] 2015 SCC 5.
[3] Idem., para. 4.
[4] Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act* (U.K.), 1982, c. 11

The criterion of reasonably foreseeable death poses difficulties in interpretation, even with the other criteria. These difficulties may affect patients' ability to exercise their right to medical assistance in dying, since a vague criterion may lead to interpretations and applications that vary from one medical practitioner to another, depending on whether the practitioner takes a broad or restrictive interpretation. This means that the legal standard needs to be as precise as possible.

We firmly believe that the bill should be amended to reflect the criteria in *Carter*, thereby avoiding court challenges that would have to be brought by individuals who should not have to bear such a burden. We therefore recommend that section 241.2(2)(d) be withdrawn.

New subsection 241.2(5) of the *Criminal Code*

Generally, the safeguards in 241.2(3) appear adequate and are broadly consistent with those in the Quebec legislation. However, subsection (5), concerning the independence of the person who witnesses the patient sign the request for medical assistance in dying, appears to be unnecessarily stringent.

The witness simply attests that the patient signed the request. It is up to the medical practitioner to ensure that the patient is actually able to consent and that this consent is completely free of outside influence or pressure. The proposed rules in this case would be appropriate if they instead referred to an individual called upon to consent to an end-of-life decision for the patient. We recommend limiting the restrictions on witness eligibility to members of the medical team who will be administering medical assistance in dying.

New subsection 241.2(7) of the *Criminal Code*

Subsection 241.2 (7) stipulates that medical assistance in dying must be provided in accordance with any applicable provincial laws, rules or standards. In *Carter*, the Supreme Court of Canada ruled that "… aspects of physician-assisted dying may be the subject of valid legislation by both levels of government, depending on the circumstances and focus of the legislation …."[5]

To prevent problems in application regarding the obligations placed on health professionals, we believe that where a province has validly enacted medical assistance in dying legislation, in compliance with *Carter*, the health professional following the procedural requirements of this legislation should be deemed to have met the requirements of the federal legislation in subsections (3) and the following subsections of section 241.2 and thereby obtain the exemption.

This would make the job of health professionals easier, as they would not be subject to two sets of potentially contradictory legislation. As well, under this approach, in provinces with no medical assistance in dying legislation, the federal legislation would fully apply, thereby protecting the rights of all Canadians.

[5] *Carter v. Canada (Attorney General)*, supra, note 1, para. 53.

New section 241.3 of the *Criminal Code*

The bill creates new offences for cases where a health professional knowingly fails to comply with certain safeguards provided in the legislation. The maximum penalties are five years for an indictable offence and 18 months for a summary offence.

While we can appreciate that medical assistance in dying needs to be regulated to protect the vulnerable from the unscrupulous and that the offence provided requires proof of intent, we do not believe it is necessary to criminalize certain violations that are essentially administrative in nature and, *a fortiori*, impose harsh sentences such as those proposed in the bill.

Some of these offences are essentially administrative problems normally covered by provincial legislation regulating healthcare and medical practice. The legislation needs to be applicable and effective so as to provide a clear legislative framework for health professionals administering medical assistance in dying and to avoid legislative provisions that could lead them feeling reluctant to provide all available care to patients who wish to end their suffering.

New section 241.31 of the *Criminal Code*

The bill proposes a reporting system for medical practitioners and nurse practitioners who receive a request for medical assistance in dying, having them provide information required by regulations to a recipient designated by the federal Minister of Health or another recipient designated by regulations. This is to allow the Minister of Health to track medical assistance in dying in Canada.

To avoid an excessive administrative and reporting burden, the bill should allow the Minister to exempt health professionals in provinces with an existing satisfactory tracking mechanism from having to file information on medical assistance in dying as long as the federal government is satisfied with the province's established tracking mechanisms.

However, nothing prevents the federal government from requiring a province with an existing tracking mechanism to provide information pertaining to medical assistance in dying for national tracking purposes.

Conclusion

We hope that our comments will provide Parliament with food for thought to improve the bill.

We appreciate that it is the prerogative of the elected members to make the political choices they see fit in conformity with the Canadian constitution.