Brief Concerning Proposed Amendments to Bill C-14

Bill C-14 seeks to strike "the most appropriate balance between the autonomy of persons who seek medical assistance in dying, on the one hand, and the interests of vulnerable persons in need of protection and those of society, on the other".[1] It is contended that this is achievable by limiting access to medical assistance in dying to "competent adults whose natural deaths are reasonably foreseeable".[1] As a consequence, competent persons who have a "grievous and irremediable medical condition that causes them enduring and intolerable suffering"[1] and who are not "on a trajectory toward their natural death"[2] would not be eligible for access to a medically assisted death.

Has the "most appropriate balance" been struck? Not yet. First, "grievous and irremediable medical condition" is defined too narrowly without convincing justification in a way that does not offer any improvement over the eligibility criteria set out in *Carter* (2015). Second, by excluding entire classes of competent persons from access to medical assistance in dying, Bill C-14 runs the risk of failing to achieve its legislative objectives of recognizing autonomy and protecting the vulnerable, which would be unjust.

A. Grievous and irremediable medical condition - 241.2 (2)

- (a) "Incurable" does little to clarify the meaning of "grievous and irremediable". First, a medical condition may be incurable but be remediable with treatment that reduces or eliminates symptoms and/or prevents disease progression. It may also be curable or potentially curable but be irremediable if the needed treatment is not available or is not acceptable to the patient. Second, if a medical condition must be incurable, then the implication would be that a patient must attempt potentially curative treatment to establish incurability in his/her particular case. This would violate the well-established right of competent patients to refuse potentially life-saving or life-extending treatment. Finally, *Carter* did not require that the medical condition must be incurable for a patient to be eligible for medical assistance in dying.
- (b) "…decline in *capability*" is confusing. What type of capability is indicated here – physical, psychological, decisional? This is especially so given that 241.2 (1b) refers to a person being "capable of making decisions with respect to their health".
- (c) "…enduring physical or psychological suffering that is intolerable to them and that cannot be relieved *under conditions* that they consider acceptable" appears to be a reformulation of the *Carter* (2015) criteria. However, whereas *Carter* clarified that irremediable "does not require the patient to undertake *treatments that are not acceptable* to the individual", Bill C-14 refers vaguely and unhelpfully to "conditions" being unacceptable to the patient.
- (d) "*natural death* has become *reasonably foreseeable*" departs materially from *Carter,* which did not require a patient to be dying or approaching "natural death" in order to be eligible for medical assistance in dying. In clinical practice, there is often considerable uncertainty about prognosis, which renders 'reasonable foreseeability' another unhelpfully vague concept. Finally, the claim that "the individuals whose cases were considered by the Court" [2] would have met this criterion fails to be convincing.

Compared to *Carter,* this definition of "grievous and irremediable" is a significant narrowing of eligibility, which has the potential to create an effective barrier to access for a *competent person who is experiencing enduring and intolerable physical or psychological suffering but who is not "nearing the ends of their lives" [2] and whose medical condition is "not itself fatal".*

<u>PROPOSED AMENDMENT</u>:

Option 1 – Remove 241.2 (2a) and (2c); remove "in capability" from (2b); amend (2c) to read "intolerable to them in the circumstances of his or her condition"

Option 2 – Remove 241.2 (2) and amend 241.2 (1c) to read as per *Carter* "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."

B. Balancing autonomy and protection of the vulnerable – excluded classes of competent persons

The protection of vulnerable persons turns on safeguarding competence, voluntariness, and consent. Bill C-14 excludes requests for access to medical assistance in dying from mature minors, requests "where mental illness is the sole underlying medical condition", advance requests, and as noted (above*), those whose "natural deaths" are not "reasonably foreseeable" The drafters of Bill C-14 acknowledge that such exclusions may not be Charter-compliant and defend such exclusions on the grounds that they are necessary to protect vulnerable persons.[2] It is further proposed that these situations are complex and warrant additional study. Exclusion of competent persons on the presumption of vulnerability, however, does not serve the end of balancing autonomy and preventing errors and abuse, nor do arbitrary limits, such as age, as has been noted elsewhere.[3,4] Such exclusions may be just and justifiable to the extent that they are proportional to and necessary to achieve the objective of preventing harm to such persons (e.g., "negative perceptions of the quality of life of such persons",[2] "being induced, in moments of weakness, to end their lives"[1]). Failing this, these exclusions violate the autonomy rights of competent persons in these groups and unjustly force these individuals to remain in a state of enduring and intolerable suffering. Waiting until the fifth year following royal assent to address the results of additional study would not be reasonable or just.

PROPOSED AMENDMENTS:

Remove "at least 18 years of age" from 241.2 (1b) and amend to read simply "they are competent to make decisions with respect to their health"

Option 1 – Add a section or language to the Bill stipulating a set schedule for studying safeguards and amending the Bill in regards to medical assistance in dying mature minors, persons with primary psychiatric illness, and persons who have given advance consent.

Option 2 – Add a clause enabling amendment of the Bill as study results become available.

Respectfully submitted,

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1. Government of Canada, 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.
2. Minister of Justice and Attorney General of Canada. *Legislative Background: Medical Assistance in Dying* (Bill C-14), April 2016.
3. Provincial-Territorial Expert Advisory Group on Physician-Assisted Dying. *Final Report*, November 2015.
4. Special Committee on Physician-Assisted Dying, *Medical Assistance in Dying: A Patient –Centred Approach*, February 2016.