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SUBMISSION TO THE STANDING COMMITTEE ON FINANCE AND ECONOMIC AFFAIRS
Re: Bill 84 (*Medical Assistance in Dying Statute Law Amendment Act*)
and legal considerations in light of *Carter v. Canada*

March 28, 2017

Dear Honorable Members:

Thank you for the opportunity to provide this submission on behalf of the Christian Legal Fellowship (CLF) which represents some 700 legal professionals, and which intervened at all three levels of court in *Carter v. Canada*, including the Supreme Court of Canada.[1] We write to urge you to amend Bill 84 in order to:

1. protect all persons, including health care professionals, from being required or pressured to participate in medical assistance in dying ("MAID") contrary to their conscience and/or religious beliefs; and,
2. protect faith-based organizations - including hospitals, nursing homes, and hospices - from being forced to provide or refer patients for MAID.

"Effective Referrals" and Conscience Protection

At present, Bill 84 is silent on the issue of conscience protection. However, The College of Physicians and Surgeons of Ontario (CPSO) currently requires doctors who have a conscientious objection to participating in ending the life of a patient to provide an "effective referral".[2]

Many health care professionals consider referral of any kind, or allowing assisted death within a facility, as participation in assisted suicide or euthanasia. Forcing these health care professionals, or similarly minded health care communities, to participate in facilitating the assisted death of a patient undermines the very reason they went into health care in the first place and the reason certain health care institutions were created—namely, to help heal people or support them in the natural dying process. Excluding this entire class of individuals from entering or remaining in health care professions is simply bad policy.

Moreover, it is our position that such policy would violate the *Charter of Rights and Freedoms*. To require objecting medical professionals to provide effective referrals, or to take positive steps toward facilitating assisted death,[3] would violate their constitutional freedom of conscience and religion under section 2 of the *Charter*.[4] Requiring effective referrals will also result in objecting physicians being penalized or excluded from medical occupations on the basis of their religion, which is a form of discrimination under section 15 of the *Charter*[5] and s. 6 of the Ontario *Human Rights Code*.[6] Such rights violations are not justifiable in a free and democratic society.

Best Interests of Patients

Of course, the government has a responsibility to ensure, as a matter of public interest, that the people of Ontario have access to adequate numbers of qualified, skilled and competent regulated health professionals,[7] but there is no clear evidence to substantiate the notion that effective referrals for MAID are necessary to ensure access to such qualified, skilled and competent health professionals.[8] Conversely, as the Canadian Medial Association has recognized, it is in a patient's best interest and in the public interest for physicians to act as moral agents, and not as service providers devoid of moral judgement. [9] It is also in the public interest to allow a broad range of perspectives and beliefs for professionals and health care institutions, thereby enhancing freedom for patients to choose professionals and institutions that affirmatively practice according to principles that are central to patients' own moral and religious convictions, including those that unconditionally value human life. It is difficult to comprehend how it could possibly be in the "public interest" to expect patients to receive health care services from professionals or institutions that have been required to abandon their moral convictions in order to provide care.

Constitutional Framework

No constitutional right to physician-assisted suicide

Contrary to what some have asserted, there are no constitutional rights competing with health care professionals' freedom of religion and conscience to justify limiting the latter in this context. In *Carter v Canada*, the Supreme Court did not conclude that there is a *Charter* right to physician assisted suicide; it found only that the prohibition on assisted suicide as set out in the *Criminal Code* infringed the *Charter* right to life, liberty, and security of the person. It should come as no surprise that there is no *Charter* right to assisted death since there is no freestanding *Charter* right to health care either. As the Ontario Court of Appeal explained in the context of medical marijuana: "…given that marihuana can medically benefit some individuals, a blanket criminal prohibition on its use is unconstitutional. This court did not hold that serious illness gives rise to an automatic 'right to use marihuana'."[10] Decriminalizing assisted suicide in specific circumstances did not create an automatic "right to assisted suicide" just as decriminalizing marihuana in specific circumstances did not create an automatic "right to use marihuana" or decriminalizing abortion did not create an automatic "right to abortion".[11] However, even if assisted suicide were a "*Charter* right", it would be, as all *Charter* rights are, a right vis-à-vis the state, not individual health care professionals or institutions.[12]

Government may only impact conscience rights as minimally as possible

No matter how the government chooses to proceed, it must, under section 1 of the *Charter* and the *Oakes* test, choose the policy option which is least restrictive of *Charter* rights and freedoms. Effective referral is far from the least restrictive option available. Indeed, no foreign jurisdiction that permits medical aid in dying mandates referral. Neither do other provinces mandate effective referral to the extent currently required by the CPSO.[13] Alberta, for example, provides its own referral service to connect patients with willing euthanasia providers, an option that is also available here in Ontario.[14]

Professionals do not practice in a moral or ethical vacuum

A physician's ethical framework does, and should, inform the care they provide. There is a significant moral component to complex end-of-life care issues, the resolution of which often rightly lies within one's conscience. In such instances, the law requires that health care professionals be afforded the right to practice in accordance with their conscience, and that right must be robustly protected. Protecting conscience will be increasingly important in light of growing efforts to expand MAID's eligibility to include patients who are not terminally ill[15], as well as those who are incapacitated but who made requests by advance directives, those with mental illness, and children.[16]

Ontario prides itself as a province committed to inclusivity, diversity, and human rights. It should not stand as a global anomaly in failing to protect freedom of conscience, religion, and religious equality in this context. We urge the government of Ontario to enact conscience protection for health care professionals and institutions dedicated to healing and compassionate care, following the lead of every other jurisdiction in the world, all of which have found a way to provide access to MAID without infringing on fundamental rights and freedoms.

Respectfully submitted,

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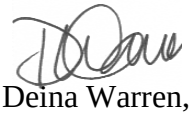

Deina Warren, LL.B., LL.M. - CLF Legal Counsel

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[1] 2015 SCC 5

[2] CPSO, Policy Statement #4-16, *Medical Assistance in Dying* (June 2016), online: http://www.cpso.on.ca/CPSO/media/documents/Policies/Policy-Items/medical-assistance-in-dying.pdf?ext=.pdf An effective referral means a "referral made in good faith to a non-objecting, available and accessible physician, other health-care professional, or agency".

[3] By, for example, finding and arranging for a third party to complete a patient MAID eligibility assessment

[4] Section 2 of the *Charter* guarantees freedom of conscience and religion as well as freedom of thought, belief, opinion and expression.

[5] Section 15 of the *Charter* guarantees the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on, among other grounds, religion.

[6] Section 6 of the *Code* protects equality in occupation based on a number of grounds or characteristics, including creed.

[7] *Regulated Health Professions Act*, 1991, SO 1991, c.18, Schedule 2, s.2.1

[8] As the Canadian Medical Association has recognized, this argument is simply "not empirically supported internationally, where no jurisdiction has a requirement for mandatory effective referral, and yet patient access does not seem to be a concern": Submission to the College of Physicians and Surgeons of Ontario (CPSO) re Consultation on CPSO Interim Guidance on Physician-Assisted Death (Jan 13, 2016), online: <http://policyconsult.cpso.on.ca/wp-content/uploads/2016/01/CMA-Submission-to-CPSO.pdf >.

[9] *Ibid.*

[10] *R. v. Mernagh*, 2013 ONCA 67, para 61

[11] *Carter*, para 132: "…we note - as did Beetz J. in addressing the topic of physician participation in abortion in *R. v. Morgentaler* - that a physician's decision to participate in assisted dying is a matter of conscience and, in some cases, of religious belief."

[12] *Mernagh*, para 147 (concurring reasons of Doherty, J.): a physician's refusal to provide the declarations necessary to access medical marihuana (which may be for any number of reasons including the doctor viewing it as "medically contraindicated") "is not attributable to the government or any form of governmental action" and any such refusals "are inherent" in the regime created by legislators.

[13] Quebec's *Act Respecting End-Of-Life Care*, S-32.001, provides that a physician who conscientiously objects to performing MAID shall refer the patient to an intermediate designated person who, in turn, is responsible to "take the necessary steps to find, as soon as possible, another physician willing to deal with the request." This provision is currently the subject of a legal challenge under both the Canadian *Charter* and the Quebec *Charter* on the basis that it violates freedom of religion and freedom of conscience (*D'Amico et Saba c Procureure général du Québec*). CLF is an intervener in that litigation.

[14] The Alberta government has established a "central care coordination service" which will connect patients with teams available to discuss all end of life options, including MAID, and who can also connect patients with palliative care providers. It can be accessed directly, and physicians need only provide the general health information number for Alberta (similar to Telehealth), which will then link patients to the care coordination service. See <http://www.albertahealthservices.ca/assets/info/hp/maid/if-hp-maid-coordination-service.pdf>.

[15] See the case of *Lamb v Canada* in British Columbia, which proposes to challenge the eligibility requirement of grievous and irremediable medical condition, *Criminal Code*, s.241.2(2) which requires the disease or disability be serious and incurable, that the patient is in an advanced state of irreversible decline in capability, that the physical or psychological suffering is intolerable, and that natural death is reasonably foreseeable.

[16] With Bill C-14, the Federal government committed to "explore other situations […] in which a person may seek access to medical assistance in dying, namely situations giving rise to requests by mature minors, advance requests and requests where mental illness is the sole underling medical condition".