Bill C-14 and its Deviation from Carter 2015

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On June 17, 2016, in response to *Carter 2015* and after a robust and public exchange between the House of Commons and the Senate, Parliament passed and proclaimed Bill C-14 (the Bill also received royal assent on that date, and is now effective law that amends the *Criminal Code*). Although the Bill adopts the criteria for access to MAID established in *Carter 2015*, the federal Liberal government added additional restrictive criteria that limits access to MAID to "those whose natural death has become reasonably foreseeable, taking into account all of their medical circumstances":

Eligibility for medical assistance in dying

241.2 (1) A person may receive medical assistance in dying only if they meet all of the following criteria:

(a) they are eligible – or, but for any applicable minimum period of residence or waiting period, would be eligible – for health services funded by a government in Canada;

(b) they are at least 18 years of age and capable of making decisions with respect to their health;

(c) they have a grievous and irremediable medical condition;

(d) they have made a voluntary request for medical assistance in dying that, in particular, was not made as a result of external pressure; and

(e) they give informed consent to receive medical assistance in dying.

Grievous and irremediable medical condition

(2) A person has a grievous and irremediable medical condition only if they meet all of the following criteria:

(a) they have a serious and incurable illness, disease or disability;

(b) they are in an advanced state of irreversible decline in capability;

(c) that illness, disease or disability or that state of decline causes them enduring physical or psychological suffering that is intolerable to them and that cannot be relieved under conditions that they consider acceptable; and

(d) their 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.

As noted above, the most significant departure from the criteria established in *Carter 2015* is the requirement, with respect to the meaning of "grievous and irremediable," that (a) the individual be in an "advance state of irreversible decline", and that (b) natural death has become "reasonably foreseeable", even in the absence of a medical prognosis. By implication, this excludes not only individuals with physical conditions that are not advanced or terminal, but also persons with capacity who suffer from serious and incurable mental illnesses or psychiatric conditions, even if they are grievous and irremediable and cause intolerable suffering to the individual.

The Senate had initially voted to amend Bill C-14 by deleting section 241.1(2) above in its entirety, to bring the Bill in-line with the criteria for MAID established in *Carter 2015*, but eventually capitulated to the House of Commons by approving the House version of the Bill with section 241.1(2) intact. In doing so, a majority of the Senate recognized or accepted that (a) it was "better to have a bill than no bill at all" (*i.e.*, to prevent a "patchwork approach to protection of the vulnerable"),[1] (b) the "Red Chamber" should accept the repeated vote of the elected House of Commons on its version of the Bill (*i.e.*, for which the federal Liberals will have to answer in the next election, not the appointed senators), and (c) excluded groups and individuals can challenge the constitutionality of Bill C-14 in court.[2]

Although Bill C-14 provides that, within 180 days of it becoming effective (*i.e.*, by no later than December 17, 2016), the Ministers of Justice and Health must initiate one or more independent reviews of issues relating to requests by mature minors for medical assistance in dying, to advance requests and to requests where mental illness is the sole underlying medical condition, there is no express requirement that the issue of "reasonably foreseeable" death be reviewed.

Advocates of broader access to MAID, and many lawyers and legal scholars, are concerned, nonetheless, that the law now excludes competent adults who are suffering from a medical condition that is not classified as terminal but nonetheless causes enduring suffering that is intolerable to the individual. Canadians who were otherwise and previously eligible to receive MAID under the criteria established in *Carter 2015* (including individuals who received MAID in Quebec or pursuant to judicial authorizations in other provinces before the law was passed). Members of this excluded class will now face access to care and justice issues because, absent any *pro bono* initiatives in the legal community, they will have to pay out of pocket to bring court applications for access to MAID on the basis that Bill C-14 is unconstitutional or, if not unconstitutional, that they should be granted a constitutional exemption from it. This will limit access to MAID within this excluded class to those who can afford to "pay for it", in a manner that is inconsistent with our universal public healthcare system.

Although the authors agree with the legal view that Bill C-14 is unconstitutional in this regard, until it is declared invalid by the courts in whole or in part, it is the prevailing "law of the land" with which health facilities and regulated health professionals must now comply. In order to comply with the Supreme Court's clear statement regarding patients' rights to autonomy and dignity regarding MAID, publicly funded healthcare facilities should

implement: (a) policies that ensure that patients are provided information about all options for care (*i.e.* MAID and/or palliative care) that may be available or appropriate to meet the patient's clinical needs, concerns or wishes;[3] (b) guidelines regarding access to MAID; and (c) if a faith-based institution (other than in Quebec) objects to providing MAID, protocols governing referrals to ensure that the patient can access MAID services. Similarly, regulated health professionals should promptly familiarize themselves with Bill C-14 and any corresponding guidance or policies of their health regulatory colleges and all health facilities where they provide services, including in particular existing policies regarding the "duty to provide information"[4] and any additional "duty to refer" for those who intend to conscientiously object to providing MAID directly.

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[1] Susana Mas, "Health minister warns of 'patchwork approach' without new doctor-assisted death law", *CBC News* (6 June 2016), online: *cbc.ca* http://www.cbc.ca/news/politics/philpott-assisted-dying-monday-1.3617856.

[2] Catharine Tunney, "Liberals' assisted-dying bill is now law after clearing final hurdles", *CBC News* (17 January 2016), online: *cbc.ca* http://www.cbc.ca/news/politics/assisted-dying-bill-senate-approval-1.3640195.

[3] Under the College of Physicians and Surgeons of Ontario's (CPSO) Policy Statement #2-15 on *Professional Obligations and Human Rights*: Physicians must provide information about all clinical options that may be available or appropriate to meet patients' clinical needs or concerns. Physicians must not withhold information about the existence of any procedure or treatment because it conflicts with their conscience or religious beliefs.

[4] *Ibid.*

Next chapter: "Constitutionality of Bill C-14 and Judicial Applications for Access to MAID"

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