April 22, 2016

Backgronder

Bill C-14: An Act to Amend the Criminal Code and to Make Related Amendments to Other Acts (Medical Assistance in Dying)

Context

On April 14, 2016, the federal government introduced Bill C-14: An Act to Amend the Criminal Code and to Make Related Amendments to Other Acts (Medical Assistance in Dying).

The proposed legislation was developed following the Supreme Court of Canada’s decision in Carter v. Canada (Attorney General), where the Court concluded that the absolute criminal prohibition on assisted death violated individuals’ rights (in certain circumstances) under the Canadian Charter of Rights and Freedoms. For the OHA’s backgrounder on the Carter decision click here; and for a Frequently Asked Questions resource, click here (OHA member login required).

The Court suspended the effect of its decision until June 6, 2016, to allow Parliament, provincial legislatures and regulatory bodies some time to respond to the ruling. During this interim period, recommendations for a legislative framework were put forward by the Provincial-Territorial Expert Advisory Group on Physician-Assisted Dying (“P/T EAG”); and the federal Special Joint Committee on Physician-Assisted Dying (“Special Joint Committee”). Additionally, in the absence of legislative direction, the College of Physicians and Surgeons of Ontario, the College of Nurses of Ontario and the Ontario College of Pharmacists provided interim guidance to their respective members on this issue.

The OHA has prepared this Backgrounder to provide members with an overview of the proposed legislation, and identify relevant considerations from a hospital perspective. For further information on Bill C-14, please refer to the government’s supporting materials on Bill C-14, including its Backgrounder on Medical Assistance in Dying; or the Department of Justice’s dedicated website for medical assistance in dying.

Key Highlights of the Proposed Legislation

Bill C-14 proposes to revise the Canadian Criminal Code to exempt specific health care practitioners from otherwise applicable criminal offences, specifically medical practitioners (physicians), nurse practitioners, and pharmacists, and those persons who help to provide medical assistance in dying.

The legislation would define “medical assistance in dying” to include the administration of life-ending medication by a medical practitioner or nurse practitioner; and individual self-administration of life-ending medication, where a medical practitioner or a nurse practitioner prescribes or provides the medication.

The proposed legislation also specifies the eligibility criteria and the safeguards that must be respected before medical assistance in dying may be provided to an individual.
LEGISLATIVE UPDATE

Legislative Proposals to Regulate Medical Assistance in Dying

A. **Criminal Exemptions for Medical Assistance in Dying**

Bill C-14 proposes to create exemptions from the *Criminal Code* offences of culpable homicide (causing the death of another), aiding suicide, and administering a noxious thing, for the purposes of allowing medical assistance in dying to be carried out for eligible individuals.

The proposed legislation defines “**medical assistance in dying**” as:

i. The administering by a medical practitioner or nurse practitioner of a substance to a person, at their request, that causes their death; or

ii. The prescribing or providing by a medical practitioner or nurse practitioner of a substance to a person, at their request, so that they may self-administer the substance and in doing so cause their own death.

The proposed *Criminal Code* exemptions would apply to:

- Medical practitioners, defined as a person who is entitled to practice medicine under the law of a province;
- Nurse practitioners, defined as a registered nurse, who, under the laws of a province, is entitled to practice as a nurse practitioner – or under an equivalent designation – and to autonomously make diagnoses, order and interpret diagnostic tests, prescribe substances and treat patients;
- Pharmacists, defined as a person who is entitled to practice pharmacy under the laws of a province;
- Persons who aid medical practitioners or nurse practitioners to provide medical assistance in dying (which is not necessarily limited to regulated health professionals); and
- Persons who aid another individual, at that individual’s explicit request, to self-administer a substance that has been prescribed for medical assistance in dying.

**Reasonable but Mistaken Beliefs**

The *Criminal Code* exemptions would apply even if the individual invoking the exemption has a “reasonable but mistaken belief about any fact that is an element of the exemption.” According to the government’s supporting materials on Bill C-14, “physicians and nurse practitioners who act in ‘good faith’ (i.e. with a reasonable but mistaken belief) would be protected from criminal liability. For example, if a physician honestly believed that a patient was 18 years old or that their state of decline was irreversible, and other reasonable practitioners would have formed the same belief, they would still be entitled to the medical assistance in dying exemption, even if they later learned that they were mistaken.”

**Additional Considerations:** Nurse practitioners, pharmacists and other health care professionals were not explicitly referenced in the *Carter* decision. The proposed use of the term “medical assistance in dying” (rather than “physician-assisted death”) is intended to clarify that health care practitioners other than physicians can provide assistance in dying under Bill C-14. It also aligns with recommendations provided by the P/T EAG and the Special Joint Committee regarding the need for an inter-professional basis to assisted dying processes.
B. Eligibility Criteria

In order for an individual to qualify for medical assistance in dying, all of the following criteria must be met:

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 (for example, as established under the Ontario Health Insurance Act);

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.

The term “grievous and irremediable medical condition” is further defined in the proposed legislation as requiring that:

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.

Additional Considerations: The proposed eligibility criteria would explicitly prohibit medical assistance in dying for mature minors (those under the age of 18), and by request through an advance care directive. These criteria are more restrictive than the recommendations provided by the P/T EAG and the Special Joint Committee.

The government’s supporting materials on Bill C-14 indicate that those with non-terminal conditions and those experiencing “psychological suffering” are not excluded from eligibility for medically-assisted death. However, an individual would be required to satisfy all of the enumerated eligibility criteria, including the requirement that natural death be “reasonably foreseeable.”

The Carter decision did not provide for a requirement that “natural death has become reasonably foreseeable.” The government’s supporting materials on Bill C-14 explain this requirement to mean that an individual must “be on a course toward the end of life. Death would have to be reasonably foreseeable in all of the circumstances of a person’s health, but there would not have to be a specific prognosis or prospected time period before death.”

In addition to ensuring that all of the eligibility criteria are met, medical practitioners and nurse practitioners who provide medical assistance in dying must also ensure compliance with a number of other safeguards measures, as outlined below.

C. Safeguard Measures

The proposed legislation aims to create “robust safeguards, reflecting the irrevocable nature of ending a life,” and as such, would require the following measures to be followed when medical assistance in dying is requested:
Requirements regarding the patient’s request

- The individual must make a written request, which may be signed and dated by a proxy if the individual is unable to write.
  - Note that the proxy would have to be at least 18 years of age and must understand the nature of the request for medical assistance in dying.
- The request must be signed and dated after the individual has been informed that their “natural death has become reasonably foreseeable, taking into account of all their medical circumstances.”
- The request must be signed and dated before two independent witnesses, who then must also sign and date the request.
- The individual must be informed that they have an opportunity to withdraw their request at any time.

Requirements regarding evaluation of the patient’s condition

- A medical practitioner or a nurse practitioner must provide a written opinion, confirming that the individual meets the eligibility criteria proposed under Part B, above.
- Another medical practitioner or nurse practitioner must provide a written opinion, confirming that the individual meets the eligibility criteria proposed under Part B, above.
- The medical practitioner(s) and/or nurse practitioner(s) providing these written opinions must be independent of each other.
- A period of at least 15 clear days must pass between the day on which the request is signed by the individual, and the day on which medical assistance in dying is provided — this timeframe may be shortened if both medical practitioner(s) and/or nurse practitioner(s) evaluating the patient agree that death or loss of capacity to provide consent is imminent.
- The individual must give express consent immediately before medical assistance in dying is provided.

Requirements regarding independence

The proposed legislation also outlines certain safeguard measures to ensure that requirements of independence are met:

The two witnesses who sign the request must be at least 18 years of age, and must not:
- Know or believe that they are a beneficiary under the will of the person making the request, or a recipient, in any other way, of a financial or other material benefit resulting from that person’s death;
- Be an owner or operator of any health care facility at which the person making the request is being treated or any facility in which that person resides;
- Be directly involved in providing health care services to the person making the request; or
- Directly provide personal care to the person making the request.

The two medical practitioner(s) and/or nurse practitioner(s) who evaluate the patient’s condition must not:
- Be in a business relationship with the other practitioner, a mentor to them or responsible for supervising their work;
- Know or believe that they are a beneficiary under the will of the person making the request, or a recipient, in any other way, of a financial or other material benefit resulting from that person’s death, other than standard compensation for their services relating to the request; or
• Know or believe that they are connected to the other practitioner or to the person making the request in any other way that would affect their objectivity.

Other safeguard measures

The proposed legislation stipulates that “medical assistance in dying must be provided with reasonable knowledge, care and skill, in accordance with any applicable provincial laws, rules or regulations.”

Additionally, Bill C-14 contemplates notification requirements for pharmacists dispensing substances for medical assistance in dying. Prior to a substance being dispensed, nurse practitioners or medical practitioners must inform the pharmacist of the purposes for which the substance is intended.

**Additional Considerations:** The proposed requirements for independence of witnesses and health care practitioners who evaluate the patient were not set out in the *Carter* decision. The government’s supporting materials on Bill C-14 indicate that the proposed measures for independence of witnesses “is a safeguard intended to ensure that requests for medical assistance in dying are truly voluntary, reflect the wishes of the patient, and are not made as a result of external pressure or coercion.” Similarly, the requirement for a second independent medical opinion is intended to corroborate the initial assessment; provide additional reassurance for the health practitioners involved; and ensure that appropriate “checks and balances are in place.”

**D. Monitoring and Reporting**

Bill C-14 sets out proposals regarding information that must be filed by medical practitioners, nurse practitioners and pharmacists who are involved in medical assistance in dying. The details of the information required would be developed under regulations at a future date.

The proposed legislation also provides for further regulation-making power regarding the use, protection and disclosure of information for the purpose of monitoring medical assistance in dying.

**Additional Considerations:** The government’s supporting materials on Bill C-14 indicate that “the government is proposing to develop a system to collect and analyze data, monitor trends and report on medical assistance in dying in Canada in order to ensure there is transparency and openness around its use. The government would work with provinces and territories to discuss criteria and protocols for collecting data so that reporting would be consistent across Canada. This system, and the obligations on providers to submit the necessary data, would come into force when the detailed regulatory measures are ready.”

**E. Penalties and Offences**

For medical practitioners and nurse practitioners, Bill C-14 proposes to introduce a new offence for failing to comply with the requirements regarding medical assistance in dying, with the maximum penalty being imprisonment for five years.

Additionally, the bill also proposes new offences for forging or destroying documents relating to medical assistance in dying (also punishable by imprisonment for up to five years); and for failing to comply with the regulations on provision of information (punishable by imprisonment for up to two years).
F. Non-Legislative Measures

The Preamble to the bill also proposes that the federal government would work on developing “non-legislative measures” that would:

- Support studies to explore the implications of medical assistance in dying being requested by mature minors; through advance requests; and where mental illness is the sole underlying condition;
- Support the improvement of “a full range of options for end of life care”; and
- Respect the “personal convictions of health care providers.”

Additional Considerations: The government’s supporting materials on Bill C-14 note that “the government is committed to supporting quality end-of-life services. To this end, the government will work to improve palliative and end-of-life care during discussions with provinces and territories on a new Health Accord.”

It also indicates the government is proposing to work with provincial and territorial counterparts to address the issue of access to medical assistance in dying. It aims to establish mechanisms to “connect patients with a physician or nurse practitioner willing to provide medical assistance in dying, and support the personal convictions of health care providers who chose not to participate. It would also respect the privacy of those who are willing to provide this assistance. This system could also offer other end-of-life care options to both patients and providers.”

G. Parliamentary Review and Other Related Amendments

Parliamentary Review

Bill C-14 provides for parliamentary review of its provisions five years from the date that the proposed legislation receives Royal Assent.

Other related amendments

The Bill would also enact a series of related amendments to other pieces of federal legislation, to ensure a Canadian Forces member or veteran who dies after receiving medical assistance in dying would not have their survivors’ entitlement to pensions or other benefits affected. It would also stipulate that if a federal inmate were to receive medical assistance in dying, the Correctional Service of Canada would not be required to conduct a separate investigation into such a death.

H. Medication Protocol and Drug Availability

The proposed legislation does not address the issue of medication protocols for assisted dying. However, the government’s supporting materials on Bill C-14 indicate that “decisions by physicians and nurse practitioners to use specific drugs for specific patients are considered within the practice of medicine and guided by clinical practice guidelines and protocols.” It also notes that “Health Canada, as the regulator of drug products, works with partners as appropriate to enable access for Canadians to safe and effective health products through scientific reviews.”

The Role of the Provincial Government

The government’s supporting materials on Bill C-14 note that “provinces and territories hold primary responsibility for delivering health services in Canada. They may choose to adopt additional laws and regulations around medical assistance in dying or set out more requirements for health professionals.”
The federal government will work with the provinces and territories to support a consistent approach to medical assistance in dying across Canada.”

Bill C-14 is silent as to the role of hospitals and other health care institutions in medical assistance in dying. The bill also does not consider the issue of whether faith-based health care institutions will be required to provide medical assistance in dying. These issues may be addressed at the provincial level.

In addition, a number of provincially-focused issues may require legislative clarification, including the role of regulatory bodies; billing under provincial health insurance processes; medical certification of death and the involvement of the Coroner; organ donation in the context of assisted death; and patient care pathways between the primary care, acute care and broader health system in delivery of medically assisted dying.

To date, the provincial government has not introduced legislation on medical aid in dying.

**Additional Information and Next Steps**

Amendments to Bill C-14 could be proposed at a number of points in the legislative process. At the time of writing, the bill passed first reading in the House of Commons, and will receive subsequent readings and be studied by a standing committee. The bill will also be further considered by the Senate. The final version of the bill will be voted on by the House of Commons, prior to receiving Royal Assent.

The *Criminal Code* prohibition on medical assistance in dying remains in effect until June 6, 2016, or until legislation is passed in Parliament and comes into force. If legislation is not passed by this date, the *Carter* decision takes effect. Assisted dying would be lawful where it is provided in accordance with the parameters established by the Court and provincial regulatory bodies.

If passed, Bill C-14 would come into force upon Royal Assent, except for the provisions regarding filing of information, which come into force on further government proclamation.

The OHA continues to monitor developments related to medically assisted dying, and will provide members with additional updates and further supports, as necessary.

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