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February 3, 2016

Via Mail & E-Mail: PDAM@parl.gc.ca

Ms Cynara Corbin
Special Joint Committee on Physician-Assisted Dying
Joint Clerk of the Committee
Sixth Floor, 131 Queen Street
Ottawa ON K1P 0A1

Ms Shaila Anwar
Joint Clerk of the Committee
40 Elgin Street
Chambers Building
The Senate of Canada
Ottawa ON K1A 0A4

Dear Ms Corbin and Ms Anwar:

Re: Special Joint Committee Consultations on Physician-Assisted Dying

The Canadian Medical Protective Association (“CMPA”) welcomes the opportunity to participate in the consultation process recently initiated by the Special Joint Committee on Physician-Assisted Dying. We thank the Committee for the invitation to make oral submissions and look forward to meeting with the Committee on February 4, 2016.

The CMPA is a not-for-profit mutual defence organization and is the principal provider of medical-legal assistance to Canadian physicians. The most obvious expression of the CMPA’s assistance to its members is the provision of legal representation in medical-legal matters related to the practice of medicine. It is equally significant that the CMPA provides broader advisory services to its members on a multitude of medical-legal issues, including issues related to end-of-life care. Consequently, the federal legislative response to *Carter v. Canada (Attorney General)* will have important implications for the CMPA’s more than 93,000 members and their patients.

The interaction between a physician and patient on end of life care, including palliative care and physician-assisted death, is inherently intimate. Members have already called the CMPA for guidance in interpreting the *Carter* decision and to find out what they can and should do for their patients who are seeking physician-assisted death. As a physician advisor, the CMPA sits at the intersection of law and medicine and will be asked to assist physicians in the many unique clinical contexts in which physician-assisted death may arise. The CMPA will be asked to guide physicians as they are called upon by patients in individual cases involving physician-assisted death in the context of end of life care. With that perspective, the CMPA and its members wish to see a legislative response to *Carter* that provides a consistent framework for

physicians to follow in the best interests of their patients.

The CMPA is pleased to provide the Joint Committee with our recommendations regarding the implementation of federal legislation to address physician-assisted dying. The CMPA submits a legislative response is required to amend the *Criminal Code* and establish a clear and consistent framework that **provides equal access to physician-assisted dying for patients and includes eligibility requirements and safeguards to ensure equal protection of the law for patients and their physicians**. This Committee can play a critical role in achieving each of these objectives and with respect, should do so.

Overview

The CMPA makes the following recommendations for consideration by the Committee:

- Federal legislation should be implemented to ensure consistent access to physician-assisted dying for all Canadian patients. If considered the most appropriate mechanism to address the issues of shared federal-provincial jurisdiction, the CMPA supports the inclusion of a provision allowing that federal legislation will not supplant provincial-territorial legislation that has been deemed substantially similar or effectively equivalent on the eligibility/safeguard elements of physician-assisted death.
- Eligibility criteria and safeguards should be defined in federal legislation in a clear and concise manner to promote equality of access and to protect patients, while minimizing the medical-legal risks for physicians.
- Federal legislation should support a patient's constitutional right to seek physician-assisted death while balancing the physician's right on moral or religious grounds not to be compelled to assist a patient to die
- In recognition of the unique role played by physicians for their patients, physicians who act in good faith in accordance with the requirements established by law for physician-assisted dying should benefit from legislated protection against criminal charges and civil liability.

Consistent Legislative and Regulatory Approach

Patients and their physicians will benefit from a uniform and consistent legislative and regulatory response to the Supreme Court of Canada's decision in *Carter*. Inconsistent eligibility criteria and safeguards across Canada will result in unequal access to physician-assisted dying for patients, thereby limiting their constitutional rights. Inconsistency is also likely to inhibit equal protection of the law, particularly for vulnerable patients. In the absence of a consistent legislated framework,

we remain concerned that physicians willing to participate in physician-assisted dying are at increased risk of medical-legal difficulty in the absence of a consistent framework.

At present (and until June 6, 2016), Canadians who wish to seek physician-assisted dying in accordance with the criteria set out in the *Carter* decision may apply to the court of their jurisdiction for an order allowing them to seek and receive a physician's assistance in dying. We anticipate the Courts may be challenged to issue consistent decisions, in the absence of a legislative framework that addresses the specific parameters of physician-assisted dying. We are aware that the Ontario Superior Court has published a practice advisory to guide applicants on the requirements for court ordered physician-assisted dying and we expect other courts will likely do the same. In the practice advisory, the Court has set out a detailed substantive and procedural framework for patients.

In the absence of legislation, the Court has sought to provide clarity on the eligibility requirements and safeguards. The CMPA submits that comprehensive federal legislation is necessary to facilitate a principles-based approach to physician-assisted dying that is consistent across Canada. In particular, federal legislation is required to make amendments to the *Criminal Code of Canada*. However, the CMPA also recognizes the shared federal-provincial jurisdiction over this matter. If considered the most appropriate mechanism, the CMPA supports the inclusion of a provision allowing that federal legislation will not supplant substantially similar or effectively equivalent legislation in the provincial/territorial jurisdiction. Such an approach is not without precedent in Canadian law.

In the absence of federal legislation, the existing patchwork of eligibility criteria and safeguards for physician-assisted dying is likely to continue. Québec's *An Act Respecting End of Life Care*, for example, requires that patients must be at the "end of life" to be eligible for medical aid in dying, and restricts the provision of medical aid in dying to situations where the physician administers the drug (*i.e.*, physicians cannot prescribe to patients to self-administer). The *Carter* decision does not limit physician-assisted dying to patients suffering from a terminal illness or who are at the end of life and does not limit the method of physician-assisted dying to the administration of the lethal substance by the physician.

The critical aspects of patient access to physician-assisted dying should be aligned based upon the fact that the principles in *Carter* are derived from constitutional rights guaranteed for all Canadians. It is our hope that efforts by the Special Joint Committee will result in a clear and consistent approach across Canada, and that there will be relative uniformity in the legislative and regulatory response to this issue. Parliament and the legislatures have an opportunity to address the existing legislative and social policy gap. In the absence of legislation, there is no clarity on how physician-assisted death should be delivered.

The CMPA applauds efforts by the medical regulatory authorities (Colleges) to address this challenging issue. However, the primary role of the Colleges is generally to create and enforce professional standards, not to address a legislative and social policy vacuum. Not all Colleges have yet implemented guidance for the profession, and the guidance that has been published is inconsistent.¹ For ease of reference, the divergent approaches taken by the Colleges on key aspects of physician-assisted dying regulation are summarized in the attached chart (Appendix “A”).

Eligibility Criteria and Safeguards

In the absence of a comprehensive legislated response, jurisdictions and organizations have considered the questions of eligibility and safeguards and have made important recommendations that should be considered.

The CMPA submits that federal legislation should carefully define eligibility criteria and outline safeguards. Clear delineation of eligibility and safeguards is essential for the protection of patients, including vulnerable individuals. The CMPA’s position is that at a minimum, the following issues **must** be addressed by federal legislation:

- The federal legislation should include amendments to the *Criminal Code* to confirm that physicians providing a patient with aid in dying are not in violation of the general prohibition on assisted suicide.
- The legislation must also address:
 - what constitutes an “adult” and whether that term includes “mature minors”
 - what form physician-assisted dying should take (voluntary euthanasia and/or assisted suicide)
 - what is meant by “grievous and irremediable medical condition”
 - whether physician-assisted death could be requested by way of advance medical directives
 - who makes the decision on patient eligibility
 - and what safeguards physicians must comply with before providing physician-assisted dying.

In this regard, the CMPA emphasizes efforts to provide legislated clarity and consistency in the law.

¹ To date, the Colleges of Physicians and Surgeons in British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, New Brunswick and Québec have approved their own guidance materials for their respective members. The Colleges of Physicians and Surgeons of Nova Scotia and Newfoundland and Labrador are also currently conducting consultations on draft guidelines. The government of the Northwest Territories is currently holding consultations on a legislative framework on physician-assisted death.

Although physicians' risk management practices already include, among other things, considerations related to informed consent, record-keeping, and assessment of capacity, the CMPA wishes to emphasize the need to adapt these safeguards to the context of physician-assisted dying. For example, legislation should address the need to ensure a patient consents free of undue influence and should contemplate that consent may change over time.

Age Requirement

At present, there are inconsistent interpretations of the Supreme Court's decision in *Carter* and proposals across the country suggest varying access to physician-assisted dying. Clarifying the eligibility requirements in federal legislation will specifically answer questions about patients' constitutional right to physician-assisted dying and help to address medical-legal risk for physicians.

The CMPA is particularly concerned with the disparate interpretations of the term "competent adult" used in the *Carter* decision and submits that a clear definition of the age requirement is essential to remove any uncertainty. Legislation should specify eligibility based on either age of majority or competence of a mature minor.

Other than Québec there has not yet been a comprehensive legislative response to defining a competent adult. As a result, several Colleges have taken different approaches to this issue in their interim guidance. Saskatchewan, Manitoba, and Nova Scotia have stated that the Supreme Court of Canada decision in *Carter* limits physician-assisted dying to individuals deemed to be adults under the province's age of majority legislation and excluding mature minors. Québec's legislation also restricts the provision of medical aid in dying to persons over the age of 18, which is the age of majority in Québec.

However, the College of Physicians and Surgeons of Alberta, in their *Advice to the Profession* on physician-assisted dying, suggests mature minors may be eligible for physician-assisted dying. The College of Physicians and Surgeons of New Brunswick states that physician-assisted death "could theoretically be available to any patient who can legally consent, which is the age of sixteen in New Brunswick." The Provincial-Territorial Expert Advisory Group on Physician-Assisted Dying recommends that the federal government make it clear in the legislation that eligibility for physician-assisted dying is to be based on competence rather than age.

Generally there are two approaches to this issue: one is age-based and the other is based on an assessment of competency. If the latter approach is adopted, it will be necessary to address how patient competence will be assessed in the context of physician-assisted dying. The test to determine whether a minor is competent is inherently subjective and may be particularly difficult

to implement in the context of physician-assisted dying. At this time it is preferable to set a clear requirement based on age.

Form of Physician-Assisted Dying: Administering/Prescribing

Clarity with respect to the process for administering physician-assisted dying is also required. Members of the CMPA have already enquired with the Association about accepted methods of providing physician-assisted dying if a patient obtains a case-specific exemption from a Court before the criminal prohibition on physician-assisted dying falls on June 6, 2016.

The Supreme Court did not expressly rule in *Carter* on the form physician-assisted dying should take. Under Québec's end-of-life legislation, which clearly sets out regulations and guidelines, medical aid in dying can only be administered by physicians; physicians are not permitted to prescribe the lethal medication to a patient to self-administer. In its document "Interim Guidance on Physician-Assisted Death", the College of Physicians and Surgeons of Ontario contemplates that patients may wish to self-administer the fatal dose of medication at home. Patients and physicians in other provinces and territories remain in a state of uncertainty. Other than in Québec, there is no comprehensive legislated direction on this issue. The CMPA's position is that the legislation should outline the acceptable methods of physician-assisted dying, thereby ensuring appropriate protection for patients.

Grievous and Irremediable Medical Condition

What constitutes a "grievous and irremediable" medical condition was not fully defined in *Carter*. The CMPA agrees with the concern raised by regulatory authorities to the External Panel on Options for Legislative Response to *Carter v Canada* that a rigid definition of these terms may not benefit patients and physicians, since it would remove the flexibility to take into account an individual patient's circumstances. That said, the development of some guiding principles on this issue would be beneficial to both the public and the medical community, to the extent that it will assist their understanding of these terms.

Advance Directives

The CMPA submits that legislation on physician-assisted dying should clearly state whether assisted dying may be requested by way of advance medical directives.

It is unclear from the decision in *Carter* whether the Supreme Court sought to exclude the possibility of requesting physician-assisted dying by way of advance medical directives. The Court merely states that the patient must be a "competent" adult to be eligible for physician-assisted

dying, but does not specify if the patient must be competent at the time the request is made, or at the time physician-assisted dying is provided.

To date and in the absence of legislated direction (with the exception of Québec), all regulatory authorities in Canada that have developed guidance on this issue propose that physician-assisted dying cannot be requested by way of advance medical directive. The Québec legislation expressly excludes the option of requesting medical aid in dying by way of advance medical directives.

That said, most provinces and territories have legislation governing the use of advance directives, which generally provide important information to physicians on patient's wishes, especially in the context of end-of-life care. To ensure a consistent approach and equal access to physician-assisted dying and equal protection of the law, the CMPA's position is that any comprehensive legislative response to *Carter* should carefully consider whether and when such directives must be respected.

Decision-Making Process

The CMPA is aware that organizations have made recommendations for the creation of federal boards or other bodies to act as decision makers in determining a patient's eligibility for physician-assisted death. The CMPA takes no position on who should make the eligibility decision. However, to the extent that physicians are involved in the decision making process, their role and obligations should be clearly delineated in federal legislation. The CMPA also supports a decision making process that will be easily accessible to patients, respects patient privacy, and will not impose undue administrative challenges for patients or their physicians.

Roles and Regulation of Healthcare Practitioners

Rights of Conscience

Effective and empathetic end of life care requires a strong bond of trust between a patient and his/her physician. In the context of physician-assisted dying and in support of this trust, the CMPA submits that the legislative response to *Carter* should address a physician's right on moral or religious grounds not to be compelled to assist a patient to die. The Supreme Court of Canada clearly stated in *Carter* that its ruling was not intended to compel physicians to provide assistance in dying. As such, we urge Parliament to ensure that physicians' freedom of conscience is protected when considering the legislation in response to *Carter*.

With a view to ensuring patient access to care, an appropriate approach to consider is the one adopted under Québec's *An Act Respecting End of Life Care*. In Québec, a physician who refuses a request for medical aid in dying for reasons of conscience, must notify the designated authority who will then take the necessary steps to find another physician willing to consider the request.

Discipline and Penalties

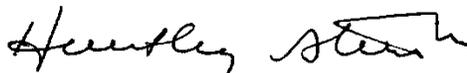
With a view to providing appropriate patient access, the CMPA submits that in order for physicians to provide the optimal support to patients faced with physician assisted dying, they need assurances that if they comply with the requirements established by law for physician-assisted dying and believe in good faith that their patient met the criteria, they should benefit from protection against criminal charges. The CMPA is aware that the American state of Vermont, in their end of life legislation, has adopted a provision to the effect that “[a] physician shall be immune from any civil or criminal liability or professional disciplinary action for actions performed in good faith compliance”.² To recognize the unique role being played by physicians for their patients, a similar provision should be considered for Canada.

The CMPA recognizes a role for the existing medical regulatory authorities (Colleges) in the development of more detailed policies to complement the legislative response, as already seen in Québec.

Conclusion

We trust that these comments will be of assistance to the Joint Committee and we look forward to continuing to participate in the development of a response to the decision in *Carter*. If the CMPA’s experience with medical-legal issues in the end-of-life context might be of further value to the Committee, we would be pleased to provide any other information or input as may be required.

Yours sincerely,



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HSS/lg

² *Patient Choice at End of Life*, Sec. 1, 18 VSA c 113, §5290.