The Association for Reformed Political Action (ARPA) Canada

Submission to:

The Legislative Assembly of Ontario
Standing Committee on Finance and Economic Affairs

Regarding:

Bill 84

"Medical Assistance in Dying Statute Law Amendment Act"

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About ARPA Canada

The Association for Reformed Political Action (ARPA) Canada is an organization that exists to educate and equip Christians for political engagement and to bring a Christian perspective to all levels and branches of government.

ARPA Canada is a respected voice in the ongoing public discussion surrounding end-of-life care. ARPA was an intervener before the Supreme Court of Canada in the *Carter* case which resulted in the striking down of the Criminal Code prohibitions on assisted suicide. ARPA also made legal and policy submissions to the following panels and committees:

1. The External Panel on Options for a Legislative Response to *Carter*,
2. The Special Joint Committee on Physician-Assisted Dying (Parliament of Canada),
3. The Provincial-Territorial Expert Advisory Group on Physician-Assisted Dying, and
4. The Standing Committee on Justice and Human Rights (Parliament of Canada).

Scrupulous Monitoring of "MAID" is Necessary

When the Supreme Court legalized assisted suicide in *Carter* (2015), it responded to concerns about its improper use by quoting the words of the trial judge, who said that the risks of legalized assisted suicide in Canada could be minimized (though not eliminated) through a **"carefully designed system that imposes strict limits that are scrupulously monitored and enforced."** Put another way, *only* through a carefully designed system that is "scrupulously monitored and enforced" can the inherent risks of a legalized assisted suicide regime be minimized. Failure to scrupulously monitor the performance of MAID arguably violates the *Charter* right to life (section 7), by robbing the severely sick or disabled of the equal benefit and protection of the law (section 15).

There is a very real risk that vulnerable people could be victimized by a system that permits deliberately ending the lives of severely sick or disabled. To avoid this risk, *scrupulous monitoring* is required. The Ontario government is right to require physicians to report each and every "medically assisted" death to the coroner and we commend this initiative. However, the reporting requirement needs to be strengthened significantly. The coroner should be able to determine from the content of the notice, at a minimum, some basic information about the circumstances and cause of the person's death.

While the *Criminal Code* now requires some paperwork (a signed second physician's opinion and a signed consent form) to be completed before "medical aid in dying" ("MAID") is performed, it does not require any reporting or monitoring. That is, the *Criminal Code* does not require that physicians report instances of MAID to anyone. Such a requirement is within the provincial government's authority to enact.

The Supreme Court in *Carter* contemplated that the legislative response to its ruling striking down the prohibition on assisted suicide may need to come from both Parliament and provincial legislatures (see para 126). Only the federal government can draw the line between culpable homicide or culpable assistance in suicide on one side and permissible MAID on the other. Provincial governments, however, have an important role in monitoring the provision of MAID by provincially licensed physicians and nurse practitioners, often in provincially licensed facilities, particularly where the criminal law is silent, as it is in this context.

Recommended Amendments to Bill 84

ARPA Canada's recommended amendments are modest. They do not require the coroner to investigate every death resulting from MAID. The first amendment simply requires that the MAID provider give copies of paperwork that is already required by the *Criminal Code* to the coroner. The second amendment would permit Ontarians to make access to information requests with respect to the provincial government's provision of MAID without special restrictions beyond the privacy and safety restrictions that are already present in Ontario's access to information legislation.

Amendment #1: Strengthen the reporting requirements of Bill 84. Require the physician or nurse practitioner who provided the medical assistance in dying to provide the Coroner with true copies of the following documents:

1. The signed statement of the medical practitioner or nurse practitioner who provided the medical assistance in dying stating:
    a. that the practitioner signing the statement provided the MAID,
    b. that the deceased patient died as a result of the provision of that MAID,
    c. the means used for MAID,
    d. that, in the practitioner's opinion, the deceased met all the criteria under subsection 241.2(1) of the *Criminal Code of Canada* at the time MAID was provided,
    e. that, in the practitioner's opinion, the safeguards of subsection 241.2(3) of the *Criminal Code* were fully complied with.
2. The written request of the patient for MAID, completed pursuant to and in compliance with subsection 241.2(3) of the *Criminal Code*.
3. The written opinion of another medical practitioner or nurse practitioner as required by subsection 241.2(3) of the *Criminal Code*.

This amendment to Bill 84 could be made as follows (next page):

1. The *Coroners Act* is amended by adding the following section:

Medical assistance in dying

10.1 (1) Where a person dies as a result of medical assistance in dying, the physician or nurse practitioner who provided the medical assistance in dying shall give notice of the death to a coroner in accordance with subsection (2) and, if the coroner is of the opinion that the death ought to be investigated, or if any information required pursuant to subsection (2) or (3) is not provided, the coroner shall investigate the circumstances of the death and if, as a result of the investigation, the coroner is of the opinion that an inquest ought to be held, the coroner shall hold an inquest upon the body.

Requirements re giving of notice

(2) The physician or nurse practitioner who provided the medical assistance in dying shall provide the coroner with true copies of the following documents:

(a) A signed statement of the medical practitioner or nurse practitioner who provided the medical assistance in dying, stating:

(i) that the reporting practitioner provided medical assistance in dying to the person whose death is being reported;

(ii) the full legal name and age of the person whose death is being reported;

(iii) the date and time that the person whose death is being reported died;

(iv) that the person whose death is being reported died as a result of the reporting practitioner's provision of medical assistance in dying;

(v) the means used for providing medical assistance in dying;

(vi) the underlying grievous and irremediable medical condition or conditions which the person whose death is being reported had at the time that medical assistance in dying was provided;

(vii) that, in the practitioner's opinion, the person whose death is being reported met all of the criteria under subsection 241.2(1) of the *Criminal Code* at the time medical assistance in dying was provided; and

(viii) that, in the practitioner's opinion, the safeguards of subsection 241.2(3) of the *Criminal Code* were fully complied with before medical assistance in dying was provided; and

(b) A certified copy of the written request for medical assistance in dying of the person whose death is being reported, completed pursuant to and in compliance with subsection 241.2(3) of the *Criminal Code*; and

(c) A certified copy of the written opinion of another medical practitioner or nurse practitioner, completed pursuant to and in compliance with subsection 241.2(3) of the *Criminal Code*.

Same

~~(2)~~(3) The physician or nurse practitioner who provided the medical assistance in dying shall further provide the coroner any information about the facts and circumstances relating to the death that the coroner considers necessary to form an opinion about whether the death ought to be investigated, and any other person who has knowledge of the death shall provide such information on the request of the coroner.

Non-application of clause 10 (1) (f)

~~(3)~~ (4) Clause 10 (1) (f) does not apply in respect of a deceased person who died as a result of medical assistance in dying.

Review

~~(4)~~ (5) The Minister shall, within two years after the *Medical Assistance in Dying Statute Law Amendment Act, 2016* receives Royal Assent, establish a process to review the provisions of this section.

Definitions

~~(5)~~ (6) In this section,

"medical assistance in dying" means medical assistance in dying within the meaning of section 241.1 of the *Criminal Code*(Canada); ("aide médicale à mourir")

"nurse practitioner" means a registered nurse who holds an extended certificate of registration under the *Nursing Act, 1991*; ("infirmière praticienne ou infirmier praticien")

"physician" means a member of the College of Physicians and Surgeons of Ontario. ("médecin")

Amendment #2. Remove sections 3 and 4 of the bill (which amend the *Freedom of Information and Protection of Privacy Act* and the *Municipal Freedom of Information and Protection of Privacy Act*, respectively).

Rationale for removal:

- These amendments to *FIPPA* and *MFIPPA* are unnecessary and reduce government transparency and accountability. Bill 84 would hinder third parties' ability to monitor the Ontario government's provision of medically assisted dying as a publicly funded health care service.
- Bill 84 limits freedom of expression, which the Supreme Court found includes a derivative right to freedom of information (see *Criminal Lawyers Association* (2010)).
- The *Personal Health Information Privacy Act* already protects "personal health information", which is very broad, as defined in s. 4 of *PHIPA* (see Appendix A). Personal health information is not subject to or accessible through FIPPA or MFIPPA
- As for identifying information about health care employees, it is already protected by existing provisions in *FIPPA* (s. 21) and *MFIPPA* (s. 14).
- As for information that relates to identifiable hospitals, which are subject to FIPPA, there are existing protections in FIPPA that permit refusal to disclose information where there is a reasonable expectation of harm. See particularly, s. 14(1)(e) and (i), and s. 20 of *FIPPA*, in Appendix B. (*MFIPPA* does not apply to hospitals, but has similar provisions: s. 8(1)(e) and (i) and s. 13.)
- Having access to hospital-specific data regarding the provision of "medical assistance in dying" or "MAID", which the above provisions of Bill 84 would preclude, is important. For example, such data may reveal that MAID is being used disproportionately in certain areas, which is important information for monitoring and improving public policy.
- No other medical service is excluded from access to information legislation, except abortion (the abortion exclusion is currently the subject of a *Charter* challenge).

The Information and Privacy Commissioner of Ontario recommends in its submission to this Committee that the definition of "identifying information" be amended so that only information about individuals, not facilities, would be excluded. ARPA Canada agrees that changing sections 3 and 4 of Bill 84 in this way would be a major improvement, although we believe that sections 3 and 4 of Bill 84 are simply unnecessary.

Appendix A – Section 4 of *PHIPA*

Personal health information

4. (1) In this Act,

"personal health information", subject to subsections (3) and (4), means identifying information about an individual in oral or recorded form, if the information,

(a) relates to the physical or mental health of the individual, including information that consists of the health history of the individual's family,

(b) relates to the providing of health care to the individual, including the identification of a person as a provider of health care to the individual,

(c) is a plan of service within the meaning of the *Home Care and Community Services Act, 1994* for the individual,

(d) relates to payments or eligibility for health care, or eligibility for coverage for health care, in respect of the individual,

(e) relates to the donation by the individual of any body part or bodily substance of the individual or is derived from the testing or examination of any such body part or bodily substance,

(f) is the individual's health number, or

(g) identifies an individual's substitute decision-maker. 2004, c. 3, Sched. A, s. 4 (1); 2007, c. 8, s. 224 (6); 2007, c. 10, Sched. H, s. 2.

Identifying information

(2) In this section,

"identifying information" means information that identifies an individual or for which it is reasonably foreseeable in the circumstances that it could be utilized, either alone or with other information, to identify an individual. 2004, c. 3, Sched. A, s. 4 (2).

Mixed records

(3) Personal health information includes identifying information that is not personal health information described in subsection (1) but that is contained in a record that contains personal health information described in that subsection. 2009, c. 33, Sched. 18, s. 25 (3).

Exception

(4) Personal health information does not include identifying information contained in a record that is in the custody or under the control of a health information custodian if,

(a) the identifying information contained in the record relates primarily to one or more employees or other agents of the custodian; and

(b) the record is maintained primarily for a purpose other than the provision of health care or assistance in providing health care to the employees or other agents.

Appendix B – "Health and Security" protections in *FIPPA*

Law enforcement

14. (1) A head may refuse to disclose a record where the disclosure could reasonably be expected to,

…

(e) endanger the life or physical safety of a law enforcement officer or any other person;

…

(i) endanger the security of a building or the security of a vehicle carrying items, or of a system or procedure established for the protection of items, for which protection is reasonably required;

…

(3) A head may refuse to confirm or deny the existence of a record to which subsection (1) or (2) apply.

Danger to safety or health

20. A head may refuse to disclose a record where the disclosure could reasonably be expected to seriously threaten the safety or health of an individual. R.S.O. 1990, c. F.31, s. 20; 2002, c. 18, Sched. K, s. 8.