Bill 84, Medical Assistance in Dying Statute Law Amendment Act, 2017

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Submitted to: Standing Committee on Finance and Economic Affairs

Submitted by: The Ontario Bar Association

ONTARIO BAR ASSOCIATION
A Branch of the Canadian Bar Association

L'ASSOCIATION DU BARREAU DE L'ONTARIO
Une division de l'Association du Barreau canadien

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Introduction

The Ontario Bar Association ("OBA") appreciates the opportunity to make this submission to the Standing Committee on Finance and Economic Affairs (the "Committee") in respect of Bill 84, *Medical Assistance in Dying Statute Law Amendment Act, 2017* (the "Bill"), which amends several acts including the *Coroners Act*, the *Excellent Care for All Act, 2010*, the *Freedom of Information and Protection of Privacy Act*, the *Municipal Freedom of Information and Protection of Privacy Act*, the *Vital Statistics Act*, and the *Workplace Safety and Insurance Act, 1997*.

The OBA

Founded in 1907, the OBA is the largest legal advocacy organization in the province, representing approximately 16,000 lawyers, judges, law professors and students. OBA members are on the frontlines of our justice system in no fewer than 40 different sectors and in every region of the province. In addition to providing legal education for its members, the OBA assists legislators with many policy initiatives each year - both in the interest of the profession and in the interest of the public.

This submission has been developed primarily by the OBA's Health Law, Criminal Law, and Privacy Law sections, whose members work in private practice, government agencies, regulatory bodies or in-house and provide legal advice to their clients on a diverse range of issues including health policy, duties and standards of care, criminal law, and complaints and discipline of health care professionals.

Comments

Our comments are limited to the impact of two acts affected by Bill 84: the *Excellent Care for All Act, 2010* and the *Coroners Act*.

Excellent Care for All Act, 2010 (the "ECAA")

The Bill should expand the scope of the immunity provided to include the institutions where MAID is provided.

Section 2 of the Bill amends the ECAA by adding section 13.8 as follows:

> 13.8 (1) No action or other proceeding for damages shall be instituted against a physician or nurse practitioner or any other person assisting him

> or her for any act done or omitted in good faith in the performance or intended performance of medical assistance in dying.
>
> Exception
>
> (2) Subsection (1) does not apply to an action or proceeding that is based upon the alleged negligence of a physician, nurse practitioner or other person.

In our view, the scope of the immunity provided under the ECAA in section 13.8 should be clarified to include the institutions where MAID is provided. Like the individuals to whom immunity is provided under the Bill, institutions may be still be directly liable (i.e. through "system failures") or vicariously liable for medical assistance in dying provided on site. It is reasonable to provide those institutions with immunity from actions or proceedings on the same basis as that provided to physicians or nurse practitioners.

The words "health care organization" and "health sector organization" are already defined under the ECAA and could be added here to provide appropriate protection to such institutions under the ECAA.

Coroners Act – Protection from Self Incrimination

The Bill should be amended to provide consistent protection from self-incrimination for individuals compelled to provide information to the Coroner by the *Coroners Act*.

Section 1 of Bill 84 amends the *Coroners Act* and requires that the:

> physician or nurse practitioner who provided the medical assistance in dying **shall provide** the coroner with 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. (emphasis added)

Such a person – a physician or nurse practitioner – may tend to criminate themselves in the answer or information provided.

By way of contrast, section 42 of the *Coroners Act* provides protection for witnesses, who are "deemed to have objected to answer any question asked" that may tend to criminate or tend to establish liability to civil proceedings. Section 42 deems that "no answer given by a witness at an inquest shall be used or be receivable in evidence

against the witness in any trial or other proceedings against him or her thereafter taking place, other than a prosecution for perjury in giving such evidence."

Similar protection should be afforded to physicians or nurse practitioners in the Coroner's pre-investigation and investigation phase of a death resulting from medical assistance in dying.

Alternatively, the definition of "information about the facts and circumstances", as set out in the Bill, could be defined to limit the disclosure. For instance, the limit could prohibit interviews of physicians, nurse practitioners or others, and limit the information available to the Coroner to documentary records that would ordinarily be produced by the person that provided medical assistance in dying.

We are aware that a statutory use immunity conferred by a provincial law would likely not bind a criminal court regarding the admissibility of the evidence. In *R. v. White*[1] the parties and the Court agreed that a use immunity conferred under the B.C. *Motor Vehicle Act* in relation to accident reports could not bind *Criminal Code* proceedings because that would be ultra vires the authority of the provincial government. As a result, the admissibility of the compelled statements would be a *Charter* issue decided under the section 7 right to silence. However, the inclusion of a use immunity provision would likely be a factor considered by a criminal court in determining the constitutional issue.[2]

Regardless, we submit that the Bill should confer consistent protection from self-incrimination for individuals compelled to provide information to the Coroner by the *Coroners Act*.

Conclusion

Once again, the OBA thanks the Committee for the opportunity to provide feedback on the Bill, and we commend the legislature for the attention that it has provided to the important considerations it sets out.

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[1] 1999 CanLII 689 (SCC) at para. 35.
[2] See for example para. 60 of *White* in which the SCC says that the use immunity provision in the BC *Motor Vehicle Act* shows that the intention behind the provision was to gather information for non-litigious purposes.