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Physician-Assisted Death: Legal expert says Parliament cannot choose access over constitutionally-protected rights of vulnerable persons

A just released Legal Opinion (see: <http://bit.ly/1Sjnw5w>) says that Parliament has a responsibility "to protect the constitutional rights of the vulnerable" in a system for physician-assisted death. Dianne Pothier, Professor Emeritus of the Schulich School of Law at Dalhousie University finds that the recommendations of the Provincial/Territorial Expert Advisory Group and the Parliamentary Joint Special Committee fail to account for the constitutional protections owed to vulnerable persons, under the Supreme Court of Canada's decision in Carter. While the Court imposed a responsibility to ensure equitable access to physician-assisted death, Professor Pothier states that constitutional protection for the vulnerable is a competing right and must also be protected: "With competing constitutional rights, it is not open to Parliament to pursue one to the exclusion of the other - that was ultimately the downfall of an absolute ban on physician-assisted death."

Balancing these rights means that while a total ban is not constitutional, nor is a wide-open system. The legal opinion examines whether four limits on the right to physician-assisted death, recommended in the Vulnerable Persons Standard (see: <http://www.vps-npv.ca>) can reasonably be defended under the *Charter of Rights and Freedoms* in order to ensure constitutional protection for vulnerable persons: restriction of eligibility to those with end-of-life conditions; mandatory vulnerability assessments including independent, but expeditious, prior review; exclusion of patients not able to consent at the time physician-assisted death would be administered, even if they had made an advance directive for this purpose; and, limiting availability to those age 18 and older. The legal opinion finds that all four are valid.

Catherine Frazee, former Chief Commissioner of the Ontario Human Rights Commission, and a former member of the Federal External Panel which examined options for a system for physician-assisted death, said: "This insightful and finely balanced opinion introduces a much needed, reasoned and illuminating legal analysis into the debate about Parliament's obligations to ensure robust safeguards for vulnerable persons. Some have said that Carter provides the 'floor' on which to design a regime for physician-assisted death. Professor Pothier has revealed the constitutional foundations on which this floor rests, and upon which appropriate safeguards must be constructed."

Derek Ross, Executive Director of the Christian Legal Fellowship, commented: "Professor Pothier's analysis provides much-needed clarification as to what *Carter* does - and perhaps more importantly, does not - require. *Carter* did not create a new free-standing constitutional right to "assisted death" without limitation based on one's age or the nature of one's illness. As Professor Pothier explains, the Supreme Court's clear statement that its declaration responds to the facts of Carter and not to other situations gives lawmakers far greater latitude to restrict assisted suicide and euthanasia, in order to protect the right to life of vulnerable persons, than the report of Parliament's Special Joint Committee on Physician-Assisted Dying may lead Parliamentarians to believe."

Commenting on the legal opinion, Robert Lattanzio, Executive Director of the ARCH Disability Law Centre stated: "Most recommendations have given short shrift to the concerns the disability community has raised about the need for a balanced system. We now have a compelling and reasoned legal argument that makes the constitutional imperative clear - concern for safeguards must amount to more than rhetoric. Legislative measures must provide meaningful protection against the risks vulnerable people will inevitably face in a system for physician-assisted death. That much we know from other jurisdictions."

"Thousands of people with disabilities and their families have felt from the outset of Carter case that our concerns about vulnerable Canadians weren't registering with the media or politicians," said Joy Bacon of the Canadian Association for Community Living. "So we worked with legal and health experts and many concerned civil society and faith-based organizations to draft the Vulnerable Persons Standard, with the Supreme Court's decision as our guide. It's very encouraging to see that one of Canada's leading constitutional experts affirms what we believed must be true in Canada - that our constitutionally protected core values and rights in this country impose on governments an undeniable obligation to make sure vulnerable persons are protected with real safeguards."

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The Vulnerable Persons Standard was developed by a group of more than forty advisors with expertise in medicine, ethics, law, public policy and needs of vulnerable persons. The Standard is a series of evidence-based safeguards that will help to ensure that Canadians requesting assistance from physicians to end their life can do so without jeopardizing the lives of vulnerable persons who may be subject to coercion and abuse.

For media availability, please contact:

Tara Brinston, National Coordinator, Vulnerable Persons Secretariat
tbrinston@vps-npv.ca | 1-855-207-7418 | vps-npv.ca