

I would like to thank Dying With Dignity Canada through their Executive Director, Wanda Morris, for their permission to reproduce their submission.

**François Lareau
3 July 2011**

APPENDIX "CODE-9"

Dying With Dignity

A Canadian Society Concerned With The Quality of Dying
Charitable Registration No. 062 1953-09-137
No d'enregistrement de notre Association de Bienfaisance

**Mourir dans la Dignité**

La Société Canadienne qui s'occupe de la Qualité de la Mort
Executive Director/Directeur Exécutif
Marilynne Seguin RN

SUBMISSION

TO

**THE HOUSE OF COMMONS
STANDING COMMITTEE ON JUSTICE AND
THE SOLICITOR GENERAL**

RESPECTING

**THE FRAMEWORK DOCUMENT ENTITLED
*TOWARD A NEW GENERAL PART OF
THE CRIMINAL CODE OF CANADA***

PRESENTED BY

DYING WITH DIGNITY**A CANADIAN SOCIETY CONCERNED WITH THE
QUALITY OF DYING**

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November, 1992

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1. INTRODUCTION

Dying with Dignity (“DWD”) was formed in 1980 as a society concerned with the quality of dying.

DWD attempts to address the serious problems experienced by those nearing the end of life.

DWD’s constituency is nationwide. DWD has over 7 000 members and responds to approximately 1 000 inquiries per month.

DWD affirms the right of each individual to choose their course of medical treatment. This includes the right to refuse medical treatment.

2. THE BASIC PRINCIPLE: HEALTH CARE MATTERS SHOULD NOT BE SUBJECT TO THE CRIMINAL CODE

DWD’s submission is that health care matters should not be and need not be part of The Criminal Code, provided such health care delivery is performed by licensed health care providers as regulated in their respective provinces.

DWD submits that this position is consistent with the proposed “Declaration of Principles”, namely:

- a) The criminal law should be used only in circumstances where other means of social control are inadequate or inappropriate;
- b) The criminal law should be used in a manner which interferes no more than necessary with individual rights and freedoms;
- c) The criminal law should set out clearly and understandably
 - (i) what conduct is declared criminal, and
 - (ii) what culpability is required for a finding of criminal liability.

3. ABSENCE OF FACTS SUPPORTING CRIMINALIZATION OF HEALTH CARE MATTERS

DWD is unaware of any extensive study respecting the continuing need for the inclusion of health care matters in The Criminal Code. Detailed research in this area is beyond the resources of DWD, but DWD recommends that officials of the Department of Justice assemble what statistical and other data is available to consider whether the inclusion of health care matters in The Criminal Code is in the public interest.

4. PROVINCIAL JURISDICTION – LEGISLATION

A number of provinces have enacted or have introduced legislation respecting health care directives.

Alberta

Advance Directives and Substitute Decision-Making In Personal Care, Report for Discussion No. 11, November 1991, by Alberta Law Reform Institute.

British Columbia

“Closer to Home” Summary of the Report of the British Columbia Royal Commission on Health Care and Costs — in the section titled “Strategies for Change” specific requests for change to the Criminal Code are addressed.

Manitoba

The Health Care Directives and Consequential Amendments Act. (Passed with a probable proclamation date of January 1993).

Nova Scotia

Medical Consent Act, Passed 1988

Ontario — Legislation

The Legislative Assembly of Ontario is considering legislation which would permit advanced medical directives and substitute decision-making and which would affirm the right of a patient to choose not to receive treatment. The legislation is not yet law.

Bill 74 — *The Advocacy Act*.

Bill 108 — *The Substitute Decisions Act, 1992*.

Bill 109 — *The Consent to Treatment Act, 1992*.

Bill 110 — An Act to amend certain Statutes of Ontario consequent upon the enactment of the *Advocacy Act, 1992*, the *Consent to Treatment Act, 1992* and the *Substitute Decisions Act, 1992*.

Ontario — Case Law

The Ontario Court of Appeal in the case of *Mallette vs. Shulman* has confirmed the right of a patient to refuse treatment even though such refusal might lead to the death of the patient.

Quebec — Legislation

The Mandat (passed 1990: legislates a Power of Attorney for property and personal health care decisions)

Quebec — Case Law

The Quebec Superior Court in the case of *Nancy B.* has confirmed her right to refuse treatment, even though her refusal might lead to her death.

Saskatchewan

Proposals for An Advance Health Care Directives Act by Law Reform Commission of Saskatchewan

PROVINCIAL JURISDICTION — REGULATION OF PROFESSION

Provincial statutes ensure that health care providers adhere to professional standards in implementing and giving effect to patient requests.

5. SPECIFIC ISSUES**(i) *Omissions (Section III (A)(iii)(b)) (Page 19)***

DWD submits that the omission to provide medical care where a decision to refuse medical care, and a decision to withdraw from medical care or treatment has been made, should not be subject to The Criminal Code.

We suggest this wording to deal with Omissions:

“A health care provider is not criminally responsible for any act done in accordance with the instructions given by a competent individuals or as the result of instructions contained in a individual’s advance health care directive (Living Will) or given by an individual’s personal attorney for health care.”

(ii) Medical Treatment Exception (Section III (A)(iii)(d)) (Page 25)

DWD submits that it is valuable to retain the principle that no one need provide medical treatment which is “therapeutically useless” or to which the patient does not consent.

The major difficulty is redefinition of the words “therapeutically useless”.

DWD submits that treatment which is therapeutically useless is treatment which prolongs the dying process or treatment which is given where there is no reasonable expectation that the physical or mental condition of a patient will improve.

DWD submits that a health care practitioner follows the instructions of a proxy decision maker or, follows the terms of an Advance Medical Directive, in the case of an unconscious or incompetent patient, be exempt from Criminal Code sanctions.

Clearly the Advance Medical Directive must comply with provincial legislation and the proxy decision maker must be qualified to act on the person’s behalf.

(iii) Consent to death — No Defence (Section III(A)(v)) (Your page 40)

DWD submits that where a patient has made a decision not to accept treatment or a decision to withdraw from medical care or treatment, that such decision is not a “consent to death”. Health care providers who act in accordance with those directions should not be subject to prosecution.

(iv) Aiding and Abetting (Section III(G)(xxxiv)(a)) (Page 121) and Counselling (Section III(G)(xxxiv)(c)) (Your page 127)

DWD submits that the activities of informing patients about the consequences of following or not following a course of treatment should not be subject to The Criminal Code.

DWD submits that advising the patient as to the consequences of following or not following a course of treatment, should not fail within the Criminal Code. Such advice simply provides the patient with the information necessary to make an informed decision.

DWD submits that health care providers who act in accordance with a patient’s directions to refuse or withdraw from medical care or treatment, where such refusal or withdrawal may result in the patient’s death, should not be subject to the Criminal Code.

6. CONCLUSION

DWD reiterates its position that health care matters should not be part of The Criminal Code.

DWD supports changes to The Criminal Code which would permit health care providers to give effect to the directions of patients including a patient's decision to refuse treatment, and a patient's decision to withdraw from treatment, without fear of prosecution.