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Date: 17 September 2020

FAO: Professor Nigel Mathers
Chair of the Board of Trustees

Professor Martin Marshall
Chair of RCGP Council

Royal College of General Practitioners

**URGENT - LEGAL LETTER - REQUEST FOR URGENT REVIEW OF THE
COUNCIL'S DECISION OF 21 FEBRUARY 2020 IN RESPECT OF THE RCGP'S
POSITION ON ASSISTED DYING**

Dear Sir/Madam

**Potential charity proceedings on behalf of Professor Sir Sam Everington
& Professor Aneez Esmail (Members of the Royal College of General
Practitioners) and Dignity and Choice in Dying Ltd and Good Law
Project Limited**

1. Introduction

- 1.1 We are instructed by Professor Sir Sam Everington & Professor Aneez Esmail (who will jointly be referred to as '**the applicants**'), in respect of proposed charity proceedings (as set out below) against the Royal College of General Practitioners (hereinafter '**the RCGP**'). We are also instructed by Dignity and Choice in Dying Ltd, known as Dignity in Dying, and Good Law Project Limited, who share the concerns of the applicants.
- 1.2 In summary, this matter regards the consultation and decision-making process in respect of the RCGP UK Council's decision of 21 February 2020 that the RCGP would maintain its position opposing a change in the law on assisted dying (hereinafter '**the consultation**' and '**the decision**').

- 1.3 The applicants consider that the consultation and the decision raise serious concerns about the RCGP's internal administration and domestic affairs, such that a challenge under section 115 of the Charities Act 2011 may be warranted. In particular, the applicants consider that the RCGP (and specifically its Council and/or Board of Trustees) have failed in their duties (as detailed below), including fiduciary duties under the Trustees Act 1952 and/or have failed to provide appropriate transparency in relation to the above.
- 1.4 The applicants' primary concern, as long-standing members of the RCGP, is that by continuing to support the current prohibition on assisted dying as a result of a flawed and unlawful decision making process, the College is failing in its obligations to properly represent the views of its members. This has the potential to mislead Parliamentarians and other stakeholders in regards to how RCGP members view the College's position on this issue.
- 1.5 Please treat this letter as a formal request for an immediate and thorough reconsideration of the position in light of the concerns raised. Our clients very much hope that pursuing charity proceedings will not be necessary and would therefore be open to meeting with the trustees and/or the Council to discuss their concerns in more detail, with a view to resolving these issues amicably. However, the applicants reserve the right to submit an application to bring charity proceedings against the RCGP in accordance with the Charities Act 2011 should it not provide possible otherwise to resolve this matter.
- 1.6 We would ask you to provide a copy of this letter to all of the Trustees and Council members, and would hope it might be possible to consider this matter at the Council meeting scheduled for 18 September 2020. We would be grateful for a response to this letter within 14 days.

2. Background

- 2.1 A detailed background history is provided in the paper in support of the decision of 21 February 2020 and we therefore do not set such a history here beyond noting key elements relevant to the concerns raised in this letter.
- 2.2 On 22 June 2019, the then Chair of the Council, Professor Helen Stokes-Lampard made the initial announcement. She said:

"It has been nearly six years since we asked our members as to whether we should support a change in the law on assisted dying - since then, it is possible that views within our membership have shifted. As such, RCGP Council has decided

that the time is right to conduct this consultation...".
(emphasis added)

- 2.3 The purpose of the consultation was repeated in the briefing document provided to RCGP members on 29 October 2019, alongside the consultation: *"...in June 2019 [Council] decided to consult its members again to assess whether their views have shifted."*
(emphasis added)

- 2.4 This briefing paper also stated that:

"The results will be independently collated and weighted by member career stage to assess whether the views expressed are representative of the whole membership. The weighted and unweighted results will be presented to the RCGP Council who will review the findings, reflect on the members' views on the issue and decide on what the College's position will be." (emphasis added)

- 2.5 Out of nearly 50,000 members who were contacted, 6,674 members participated, giving a response rate of 13.47%. We understand this was the College's largest consultation on an issue of public policy in terms of both response rate and volume of respondents.

- 2.6 The results for question one in the consultation concerning the position that should be adopted by the RCGP was as follows:

Statement	Unweighted %	No.
The RCGP should oppose a change in the law on assisted dying	47%	3144
The RCGP should support a change in the law on assisted dying, providing there is a regulatory framework and appropriate safeguarding processes in place	40%	2684
The RCGP should be neutral on the topic of the law on assisted dying	11%	701
I wish to abstain	2%	145

- 2.7 There was therefore a slight majority in favour of a change to the RCGP's position. However, despite the clearly stated intention at the outset of the process of comparing these results with the results from 2013, no attempt was made in the analysis of the results to

assess whether views had shifted since 2013 and it was ultimately claimed this was not possible because of different survey methodologies. Had such an analysis been conducted, it would have been clear that there was a significant shift in opinion since the previous consultation in 2013.

2.8 In particular, in 2013, twenty faculties and other devolved bodies reported a majority view in favour of maintaining the College's opposition to a change in the law. Based on the applicants' own analysis of the 2019 results this figure dropped to eleven. In 2013, 77% of those who responded individually to the College did so to express a view that the College should oppose a change in the law. This figure dropped to 47% in 2019.

2.9 Instead the basic statistics above were considered and discussed by the Assisted Dying Steering Group and the Ethics Committee and were shared with all Council members, College Faculty boards and devolved Councils without comparison. The outcome of the consultation and the wider issues were debated at a RCGP Council meeting on 21 February 2020; the minutes do not suggest there was discussion about how the results compared to 2013. Moreover, it is unclear if the weighted data was presented to all members of Council and a detailed breakdown of the results, including Faculty voting, has still not been published.

2.10 The Ethics Committee and steering group concluded the following:

"The results of the consultation indicate that there is no membership support for the College to change its current position on assisted dying. The highest proportion of respondents said that the College should continue to oppose a change in the law.

The results also show that there is no mandate for the College to adopt a neutral position on the issue as only 11% of members have supported this option. The difference between having no position versus neutrality is challenging to explain and implement in practice. The RCGP already has a position on assisted dying and Council chose to have a position on this matter both at the previous debate in 2014 and when the issue was discussed again at Council in June 2019." (emphasis added)

2.11 The Council then published its position on the RCGP website on the same day which read in part, as follows:

"RCGP Council agreed today that the survey results did not support a change in the College's existing position on assisted

*dying**...RCGP Council has decided that it will not review the College's position on this issue for at least five years unless there are significant developments on the issue."*

2.12 The weighted results were not published until March 2020, albeit a full breakdown is still to be provided. Having been given an opportunity to analyse both the weighted results and the RCGP Council's decision, the applicants then wrote to College Faculty Boards in a letter dated 11 June 2020, an example of which is enclosed for ease of reference. It is understood that that letter was brought to your attention, but the applicants never received a direct response from you or answers to the significant questions raised.

3. Our clients' concerns

3.1 Our clients' concerns are as follows:

- (a) The results of the consultation were misinterpreted and/or misstated;
- (b) there was no analysis of how the membership's position had shifted since 2013, despite this being the stated purpose of the exercise;
- (c) the decision adopted by the Council was irrational, failed to take into account relevant factors and took into account irrelevant factors;
- (d) as a result of the above, the Council and/or Board of Trustees' failure breached its fiduciary and other duties to its members and the charity; and
- (e) such matters are compounded by a significant lack of transparency regarding the decision-making process.

We expand on these concerns below.

3.2 As noted above, the conclusion of the Ethics Committee and Steering Group, seemingly accepted by the Council, was as follows:

"The results of the consultation indicate that there is no membership support for the College to change its current position on assisted dying."

Similar wording was used in the published statement on the RCGP's website, on 21 February 2020. This is a clear misinterpretation and/or misstatement of the actual survey results, which reflect significant support for a change of position.

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- 3.3 As has already been highlighted by the applicants in their letter of 11 June 2020; if the votes for those who abstained from answering the question are discounted, their analysis of the weighted data shows: 47.1% of respondents voted for the College to remain opposed; 42.1% voted for the College to change its position to one of support; and 10.6% voted to change its position to neutrality. This means that 52.7% of respondents voted for the College to change its current position in some form. This cannot be described as “*no membership support*”.
- 3.4 While it was later claimed that comparison between the 2013 and 2019 consultations was not possible, this was clearly not the view of Council when the survey was announced and when the briefing materials were being prepared. We can only assume that, at that time, and also in 2013, that it was accepted that the 2013 consultation results were robust enough to provide a comparison. It is unclear at what point this changed and how that decision was made.
- 3.5 Accordingly, it is also not clear why ‘neutrality’ was not properly considered by the Council. It has been defined in a briefing to members as signifying “*that the College would not take a position for or against any legislation on assisted dying in principle, but would continue to advise on clinical matters related to palliative care and any physician involvement in assisted dying should a change to the law be proposed.*” With such a polarised result on an important ethical issue, there was a fundamental error in treating ‘neutrality’ as a stand-alone third option as opposed to representing the middle ground between two competing, but polar opposite, views with similar levels of support. The results in this case clearly supported change in the College’s position and so neutrality is arguably the only logical way of reflecting that change.
- 3.6 This was the position taken by the Royal College of Physicians (“RCP”) in 2019. In that case, the polling of almost 7,000 members found that only 43% of the participants voted for the RCP to oppose any change in law, while 32% were in favour of the RCP supporting a change to the assisted dying. The RCP concluded that a failure to get a ‘supermajority’ of 60% either way meant that it needed to take a neutral stance on the issue as it was the only way to accurately demonstrate the shift in medical opinion on the matter. The RCP has noted on its website that ‘*Neutrality [is] defined as neither supporting nor opposing a change in the law, to try to represent the breadth of views within its membership.*’
- 3.7 While a legal challenge against the RCP commenced and was first rejected by the Charity Commission and then accepted by the High

Court in March 2019, it would appear it did not proceed any further and was no longer extant by the time of the RCGP Council meeting. In any event, the fact a particular position may be subject to legal challenge is not a relevant factor in decision-making: it is the case that any decision by a charity and public body could be subject to legal challenge is not made lawfully.

- 3.8 As a charity, the Board of Trustees has fiduciary duties to its members, as well as an obligation to uphold the constitution, its by-laws and its standing orders. The Council has similar duties. Such duties require the Council and the Board of Trustees to operate in the best interest of the charity and, in doing so, to represent all of its members on relevant matters as far as that is possible. They also require appropriate accountability and transparency on decision-making to its members so that its decision-making can be understood and challenged, particularly when important decisions are made that purport to represent the views of its memberships, but which do not involve direct consent or approval each of its members
- 3.9 However, as set out above, there was a failure to recognise that the opinions of the membership were almost evenly split, and that there was even a majority for a change of position, such that neutrality was the only rational position to adopt. The Council dismissed such an option for irrational reasons, while taking into account irrelevant factors and refusing to take into account relevant factors, including the significant shift in the views of the membership since 2013.
- 3.10 Such concerns are compounded by a lack of transparency, including regarding involvement in the decision-making of the Assisted Dying Steering Group, whose membership is unknown and whose involvement was only disclosed *ex post facto*.
- 3.11 As set out in the letter of 11 June 2020, the paper provided to Council members ahead of the February 21 meeting noted that the 2019 survey results were “*discussed and reflected upon at a combined meeting of the Assisted Dying Steering Group and the Ethics Committee*” and that it was concluded following these discussions “*that the recommendation to Council should therefore be to vote to retain the College’s existing position.*” No mention is made to an Assisted Dying Steering Group in any material that has been provided to RCGP members in regards to the consultation. The applicants still do not know the membership of this group, how those members were selected, the nature of its discussions and its precise role in the decision-making process. On such an important issue, evidenced by the fact this was the College’s largest consultation on an issue of public policy, transparency over the membership and role of such a group is crucial.

- 3.12 Similarly as noted above, the briefing paper that was given to members alongside the survey noted that the weighted and unweighted results would be presented to the RCGP Council when the final review was conducted. However, it is unclear if the weighted data was presented to all members of Council and a detailed breakdown of the results, including Faculty voting, has still not been published.

4. Alternative dispute resolution

- 4.1 As noted above, our clients very much wish to avoid the need for any formal applications or proceedings in respect of this matter. We would therefore invite the RCGP to acknowledge this formal correspondence and confirm its agreement to reviewing the matters raised in this correspondence and reconsidering the College's position in assisted dying.
- 4.2 Our clients would also be amenable to a roundtable meeting or mediation to discuss their concerns with a view to seeking appropriate resolution.

5. Conclusion

- 5.1 Due to the gravity of the issue at hand and the need for urgent consideration of this matter, we ask that this letter is shared with all Trustees and Council members, and hope that this letter can be discussed at the Council meeting on 18 September. We would, in any event seek a response within two weeks, that is, **by 1 October 2020**.
- 5.2 Unless the College agrees formally to review its decision in its entirety then please set out in your response the reasons the concerns set out above are rejected.
- 5.3 Please also include with your response relevant documents, including the following:
- (a) the minutes and all other documentation filed in relation to the 20 June 2020 members meeting;
 - (b) any minutes or documentation filed in relation to the Council meeting of 21 February 2020, and any previous Council meetings where plans for the consultation were discussed, that has not yet been made available to members;
 - (c) a list of all the members of the following committees:

- (i) the Ethics Committee, including members who attended the 21 February 2020 meeting or any prior meeting when the consultation was discussed; and
- (ii) the Assisted Dying Steering Group, including those members who attended the 21 February 2020 meeting or any prior meeting when the consultation was discussed.

5.4 Should we not receive a response within 14 days, or should that response be considered inadequate, then our clients reserve the right to seek the permission of the Charity Commission to initiate charity proceedings.

5.5 If you wish to discuss this matter further, please contact Jamie Potter or Christina Ashibogu using the information provided at the top of this letter.

5.6 We look forward to hearing from you.

Yours faithfully

Bindmans LLP

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