THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

November 4, 2020

Via email: JUST@parl.gc.ca

Iqra Khalid, M.P.
Chair, Committee on Justice and Human Rights
House of Commons
Ottawa, ON K1A 0A6

Dear Ms. Khalid,

Re: Bill C-7, Criminal Code amendments (medical assistance in dying)

The End of Life Working Group of the Canadian Bar Association (CBA Working Group) is pleased to comment on Bill C-7, *An Act to amend the Criminal Code (medical assistance in dying)*.

The Canadian Bar Association is a national association of 36,000 lawyers, Québec notaries, law teachers and students, with a mandate to promote improvements in the law and the administration of justice. The CBA Working Group comprises a cross-section of members drawn from diverse areas of expertise, including constitutional and human rights law, health law, wills, estates and trusts law, elder law, children's law, privacy and access to information law, and dispute resolution.

The CBA has demonstrated an abiding commitment to clarifying the law about end-of-life decision-making and stressing the importance of a pan-Canadian approach. The CBA has adopted resolutions supporting medical assistance in dying (MAiD) for persons with mental illnesses, mature minors and advance requests for MAiD.[1]

We participated in a ministerial roundtable on January 24, 2020 on the proposed legislative response to the Quebec Superior Court's decision in *Truchon v. Canada*[2] and prepared written submissions.[3]

While we applaud the government's efforts to harmonize and clarify the law, we have several concerns with Bill C-7.

1 See CBA Resolutions on Advance Requests, Psychiatric Conditions and Competent Minors

2 *Truchon v. Procureur général du Canada*, 2019 QCCS 3792 (*Truchon*).

3 See Feb 11, 2020 End of Life Working Group Submission

1. Preamble

The fifth paragraph of the preamble refers to a "human rights-based approach" to disability inclusion. This phrase is unclear and its intent should be clarified.

The sixth paragraph of the preamble refers to the "important public health issue that suicide represents". While we agree that suicide is an important public health issue, suicide is not MAiD, and there are important differences between the two. These differences were confirmed in *Truchon* and the Court held that physicians could distinguish between the two.[4]

2. Exclusion of Mental Illness [proposed section 241.2(2.1)]

Mental illness should not be excluded from the definition of "serious and incurable illness, disease or disability", especially given the full MAiD review planned for June 2020. The exclusion of mental illness appears to apply both when death is reasonably foreseeable and when death is not reasonably foreseeable.

This exclusion forecloses a thorough review of the issue and advances a conclusion that has not been debated or recommended. It was not mentioned in *Carter v. Canada*[5] nor *Truchon.* In *Truchon,* the Court stated that vulnerability must be assessed from an individual perspective through informed consent.[6] The general exclusion of all persons suffering from mental illness is likely to be constitutionally challenged.

We reiterate that Parliament must conduct a thorough review of this issue.

3. Delete Requirement for Practitioners to Agree (Serious Consideration of Reasonable and Available Means to Relieve the Person's Suffering) [proposed section 241.2(3.1) h)]

The last part of section 241.2(3.1) h) requires practitioners to agree with the person seeking MAiD that the person has given serious consideration to reasonable and available means to relieve their suffering.

The practitioner's role is to ensure informed consent, which includes discussion on treatment options. It is up to the individual to decide, once all information, risks, benefits and possible alternatives have been explained.

A consideration by the individual is a matter of personal autonomy. The practitioner should need to attest only that the person has received all the necessary information to have an informed consent. It is not relevant that the practitioner agrees or disagrees that the person seeking MAiD has given *serious consideration* to reasonable and available means.

We recommend removing this requirement in section 241.2(3.1) h).

4. Impediments to MAiD [proposed sections 241.2(3.1) (e) and (f))

We are concerned about the requirement that one of the two assessors must have expertise in the condition causing the person's suffering and that the two practitioners be independent.

---

4 *Truchon*, *supra* note 2, par. 466.

5 [2015] 1 SCR 331 (Carter)

6 *Ibid.*

Appointments with specialists can take months or years, and in many communities are not available. There is currently no requirement that individuals seek specialists when applying for MAiD. It is up to the practitioner to determine their own level of expertise when assessing and seeking informed consent.

While some situations could justify seeking the opinion of a practitioner with specific expertise, a blanket requirement could create a significant barrier to MAiD.

For patients not already in the care of specialists, there might be significant delays (presumably, beyond the 90-day requirement of section 241.2(3.1) i) to find a practitioner with expertise in the condition causing their suffering. As such, a blanket requirement for expertise could impede access to MAiD and deprive some individuals of the fundamental choice to request appropriate care and decide when they die, and by forcing them to continue their existence in suffering. This type of impact would be incompatible with *Carter*, as suggested in *Truchon* (par. 582 to 585).

In short, a blanket requirement for expertise may have a disproportionate impact on individuals living in areas where medical resources are limited. This would be incompatible with the principles of fundamental justice and may be unconstitutional.

5. Waiver of Final Consent [proposed section 241.2(3.2)]

It seems that the waiver of final consent to MAiD applies only when death is reasonably foreseeable.

In our view, the waiver of final consent should also apply when death is not reasonably foreseeable, as capacity may be lost in both situations. It is also unclear why the procedure is required to have been scheduled on a *specified day* for a waiver of final consent to apply.

6. Guidance on "natural death (not) reasonably foreseeable"

Bill C-7 proposes two different sets of safeguards for MAiD, the application of which depends on whether the person's natural death is reasonably foreseeable or not reasonably foreseeable. The criterion of "reasonably foreseeable death" has caused significant uncertainty and difficulty in practice and Bill C-7 does not give any guidance on how to apply it.

We recommend that guidance be given to avoid confusion on which safeguards apply and ensure appropriate access to MAiD.

7. Statistics

We agree that accurate statistics are important to understand and ensure access to MAiD. However, preliminary discussions on eligibility should not trigger reporting requirements, especially considering that these discussions include sensitive personal information. Statistics should only be required for formal MAiD requests.

Conclusion

Thank you for the opportunity to address these important matters and we reiterate our willingness to assist going forward.

(original letter signed by Marc-André O'Rourke for Kimberly Jakeman)

Kimberly Jakeman
Chair, CBA End of Life Working Group