CHRISTIAN LEGAL FELLOWSHIP

ALLIANCE DES CHRÉTIENS EN DROIT

Brief of the

Christian Legal Fellowship

to

The Standing Committee on Justice and Human Rights

regarding

Bill C-7, *An Act to amend the Criminal Code (medical assistance in dying)*

October 31, 2020

Executive Summary

Euthanasia is becoming a medical "solution" for existential/social suffering

- Of the 5,631 patients who received MAiD in Canada in 2019, the nature of their suffering was characterized as: "loss of dignity" (53.3%); "perceived burden on family, friends, or caregivers" (34.0%); "isolation or loneliness" (13.7%), "emotional distress/anxiety/fear/existential suffering" (4.7%)[1]
- In Quebec specifically, the presence of psychological suffering has contributed to 94% of MAiD cases, including: "loss of meaning in life, […] dependence on others, [and] the perception of being a burden on one's loved ones".[2]

Euthanasia is being provided where alternative supports are needed but not accessible

- According to reports, in 2019, at least 87 patients who died by MAiD required disability support services but did not receive them. An additional 1,996 patients died by MAiD after they had access to disability support services, but the adequacy of those supports is unknown.[3]
- In addition, at least 91 patients died by MAiD who needed, but did not access, palliative care.[4]

Safeguards are not always being followed

- According to the Chief Coroner of Ontario's review of 2,000 MAiD cases, **"**case reviews have demonstrated compliance concerns with both the Criminal Code and regulatory body policy expectations, some of which have recurred over time."[5]
- According to the Quebec end-of-life commission, at least 62 cases in Quebec from 2015-2018 did not fully comply with federal and/or provincial law.[6]

Contrary to implementing Truchon, Bill C-7 undermines the framework on which it rests

- The *Truchon* decision assumed the enforcement of **strict requirements that ensure the capacity and informed consent** of those requesting MAiD. Bill C-7 actually *removes* some of those very safeguards, including the requirement that "the patient remains competent...until the very end".[7]
- *Truchon* was also premised on the conclusion that "[m]edical assistance in dying as practised in Canada is a strict and rigorous process that, in itself, displays no obvious weaknesses".[8] The data above, some of which only became available after *Truchon*, suggests a different story.

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[1] Health Canada, "First Annual Report on Medical Assistance in Dying in Canada, 2019" (July 2020) online: <https://www.canada.ca/content/dam/hc-sc/documents/services/medical-assistance-dying-annual-report-2019/maid-annual-report-eng.pdf> at p 32 [2019 MAiD Annual Report]. More than one answer could be selected.
[2] *Truchon c Procureur général du Canada*, 2019 QCCS 3792 at para 210(e) [*Truchon*]. The majority of these cases reported the presence of both physical and psychological suffering.
[3] 2019 MAiD Annual Report at p 24.
[4] 2019 MAiD Annual Report at p 24-25. See calculations in Dr. Gallagher's analysis, *infra*.
[5] Dirk Huyer, "Medical Assistance in Dying Update", Office of the Chief Coroner (October 9, 2018) online: <https://www.mcscs.jus.gov.on.ca/english/Deathinvestigations/OfficeChiefCoroner/Publicationsandreports/MedicalAssistanceDyingUpdate.html >[2018 Chief Coroner of Ontario MAiD Update].
[6] See discussion below
[7] *Truchon* at para 273.
[8] *Truchon* at para 466.

Introduction

Granting requests for assistance in pre-emptively ending human lives[9] through the public healthcare system is an inherently social act with far-reaching consequences for Canadian individuals, institutions, and society. If enacted in its current form, Bill C-7 will fundamentally redefine medical assistance in dying and its role in Canadian society. This Bill prejudices marginalized patients to the incidental effects of a regime that endorses death as an appropriate response to non-life-threatening illness and disability. Furthermore, this Bill not only creates an unavoidable risk that some individuals could actually be euthanized against their true wishes, it *increases* that risk by removing key safeguards that ensure such requests are valid in the first place.

In short, the risks created by this Bill—risks that will have a devastating impact on marginalized Canadians—are grossly disproportionate to the benefits it attempts to confer on those seeking more expedient access to MAiD. Accordingly, CLF implores Parliament to preserve a more proportionate balance by confining MAiD to the end-of-life context and preserving procedural safeguards that offer meaningful protections for marginalized Canadians.

The need for a Supreme Court reference

In 2015, the Supreme Court in *Carter v Canada* ruled that a blanket prohibition on assisted suicide was an unjustifiable limitation on *Charter* rights, but only insofar as it deprived competent adults of a physician-assisted death, where such persons clearly consented to the termination of their lives and were suffering intolerably from a grievous and irremediable medical condition.[10]

The litigants in that case were competent adults seeking to hasten their death, and the Court crafted its ruling exclusively in response to their circumstances.[11] Indeed, the trial judge in *Carter* contemplated euthanasia only for patients who were "terminally ill and near death".[12] It was in this context that the Supreme Court analogized MAiD to palliative sedation, refusal of treatment, and other end-of-life decisions, stating: "the law has come to recognize that, in certain circumstances, an individual's choice about *the end of her life* is entitled to respect."[13] In *Carter*, the litigants proposed MAiD only as a means of *hastening* their natural deaths, not *initiating* the termination of an otherwise viable life. The Court deliberately made no pronouncement on other situations in which physician-assisted dying may be sought.[14]

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[9] We will employ the term adopted by Canadian legislation, "medical assistance in dying" (MAiD), to describe the intentional act of ending an individual's life or providing the means by which an individual may end his or her own life, at the request of the individual.
[10] *Carter v Canada (Attorney General)*, 2015 SCC 5, [2015] 1 SCR 331 at para 4 [*Carter* SCC].
[11] *Carter* SCC at paras 56 and 70. See also *Carter v Canada (Attorney General),* 2012 BCSC 886 at paras 16, 1279, and 1324 [*Carter* BCSC].
[12] *Carter* BCSC at para 1414(b); see also *Carter* SCC at para 12.
[13] *Carter* SCC at para 63 [emphasis added].
[14] *Carter* SCC at para 127.

Assisted suicide, subject to the narrow statutory exemption informed by *Carter*, is still a crime in Canada. Notwithstanding the Quebec court's opinion in *Truchon,* CLF's remains of the view that the *Charter* does not preclude Parliament from restricting MAiD to the end-of-life context in order to preserve the interests of marginalized persons and society, nor does it require Parliament to introduce a MAiD regime that would be among the most permissive of the already select few jurisdictions that permit euthanasia, physician-assisted suicide, or both. Although the Quebec Superior Court deemed the "reasonably foreseeable" death requirement unconstitutional, legal change of this magnitude should not rest on the reasons of a single judge, which have not yet been tested or reviewed by an appellate court.[15] Determining what the supreme law of Canada requires on this issue is worthy of a constitutional reference to the Supreme Court.[16]

Supporting marginalized Canadians

CLF wholeheartedly supports Bill C-7's clarification that mental illness is not, in itself, a basis for euthanasia eligibility. It is rightly excluded from the statutory definition of "grievous and irremediable condition". This adds much-needed clarity to the law, offering considerable protection for individuals who may already be vulnerable to suicide and could therefore be endangered by a more permissive MAiD regime. Expanding MAiD access to those struggling with mental health would also undermine ongoing efforts to promote suicide prevention and address suicide crises across the country, by suggesting that death is an appropriate response to suffering caused by depression and other mental illnesses.[17]

Bill C-7 makes it clear to the courts, the medical community, and the public that Parliament *does not* consider MAiD an appropriate response to suffering related to mental illness, nor does it consider MAiD an appropriate alternative to meaningful mental health supports. CLF strongly supports this position and recommends that any future amendments to Canada's MAiD regime preserve this provision in its current form.

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[15] For a critical analysis of the Quebec Superior Court's decision in *Truchon v Procureur general du Canada*, see Derek Ross, "What's the purpose of Canada's MAID law", Christian Legal Fellowship (October 10, 2019) online: https://www.christianlegalfellowship.org/blog/2019/10/10/whats-the-purpose-of-canadas-maid-law.

[16] For further analysis on the need for a constitutional reference, see Raj Anand et al, "Brief: Proposal to Clarify Legislative Objectives of Medical Assistance in Dying", Vulnerable Persons Standard, online: <https://static1.squarespace.com/static/56bb84cb01dbae77f988b71a/t/5f8f3b6a5a36714d62796f12/1603222379026/Supreme+Court+Reference+Brief+%2B+Appendix+A.pdf>.

[17] This is especially true in Indigenous communities grappling with suicide crises, many of which already lack meaningful mental health supports. As noted in 2018 by the Expert Panel Working Group of the Canadian Council of Academies: "The [Indigenous] Elders felt that allowing MAID for people with mental disorders could be damaging in communities experiencing youth suicide crises. Elders also shared experiences of systemic barriers that prevented them or their loved ones from accurate diagnoses and appropriate treatment. Without basic access to appropriate healthcare and social services in the community, the Elders expressed concern that MAID is a highly inappropriate care option." See The Expert Panel Working Group on MAID Where a Mental Disorder Is the Sole Underlying Medical Condition, "The State of Knowledge on Medical Assistance in Dying Where a Mental Disorder Is the Sole Underlying Medical Condition", the Canadian Council of Academies (2018) at p 29

Advance requests for MAiD should not be permitted in any circumstances

Bill C-7 proposes to remove, in certain cases, the statutory requirement that patients expressly consent to MAiD immediately prior to having their lives ended. Where applicable, advance requests for MAiD could be carried out even if the patient subsequently loses capacity. However, *Truchon* did not require the law to be changed in order to allow MAiD by advance request. In fact, the Québec Superior Court emphasized that **the question of advance requests was *not* at issue in the case before it and, therefore, would not be addressed in its judgment**.[18]

The issue of advance requests was carefully studied in 2018 by the Expert Panel Working Group of the Canadian Council of Academies, which was commissioned by the federal government to undertake an independent review of the matter. Their final report (the "AR Report") identified a number of concerns with allowing euthanasia for patients who have lost decision-making capacity, and it noted a lack of consensus amongst experts as to "which situations, if any, are suitable for allowing ARs [advance requests] for MAID."[19]

First, the Panel expressed concern over the dearth of data concerning advance requests for MAiD, from which the individual, institutional, and social impacts of this practice might be adequately understood. Very few jurisdictions permit MAiD, and only four of those regimes permit some form of advance request.[20] Only the Netherlands permits the practice for "conscious but incapacitated patients", as Bill C-7 contemplates permitting, and even there the practice is "contentious" and "still being debated".[21] The limited data is not only a hindrance to Parliament's ability to properly identify and weigh the risks and benefits of advance requests; it also reinforces the fact that, even among liberal democracies, acceptance of MAiD, especially by advance request, is extraordinary.

Expanding access to MAiD by permitting advance requests may also have broader unintended consequences for the law of consent. Insofar as MAiD is "an exemption to homicide or to assisted suicide in criminal law", an advance request for MAiD "taken as advance consent to being killed might appear incompatible with the concept of valid consent in criminal law".[22] Therefore, "allowing [advance requests] for MAID would require consideration of the limits of effective consent in Canadian law and amendment of the *Criminal Code*."[23]

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[18] *Truchon* at para 16.
[19] The Expert Panel Working Group on Advance Requests for MAID, "The State of Knowledge on Advance Requests for Medical Assistance in Dying", the Canadian Council of Academies (2018) at p 176 [AR Report], available online: <https://cca-reports.ca/wp-content/uploads/2019/02/The-State-of-Knowledge-on-Advance-Requests-for-Medical-Assistance-in-Dying.pdf>.
[19] AR Report at p 136. Among these four jurisdictions.
[20] AR Report at p 136. Among these four jurisdictions, "two (Belgium and Luxembourg) limit advance requests to cases of irreversible unconsciousness, and one (Colombia) allows them only in the context of imminent death."
[21] AR Report at p 134.
[22] AR Report at p 48.
[23] AR Report at p 48.

Permitting advance requests for death may undermine the principles justifying limits on an individual's right to consent to other forms of bodily harm. Parliament must consider the impact of this expansion on other circumstances in which Canadians may wish to consent in advance to bodily harm or the risk of unnatural death (e.g. sexual conduct, consensual fights, etc.).

The AR Report also raises concerns about introducing advance requests for MAiD amidst ongoing shortages and deficiencies in healthcare services. Many Canadians continue to face barriers to healthcare access, particularly long-term care and palliative care, and these barriers may influence an individual's decision to make an advance request for MAiD.[24] Marginalized groups, such as the impecunious and those without family or other community supports, may be disproportionately affected. Specifically, the Expert Panel found that:

> People with a prognosis that includes future loss of capacity anticipate vulnerability due to factors over which they do not have direct control, including societal stigma, caregiver stress, and availability of adequate home and residential care. These factors could influence deliberations about MAID and ARs for MAID. [25]

In the event of incapacity, some may perceive MAiD as preferable to the indignity and distress that can accompany inadequate palliative or long-term care. However, an advance request made on this basis does not derive from a genuine desire for MAiD, but rather to avoid the perceived indignity and distress one might experience in this vulnerable state. On this point, the Expert Panel concluded: "A key safeguard for ensuring that any MAID request (current or advance) is authentic is equal access to high-quality supportive care, so no one ever feels that MAID is the only way to address their suffering."[26]

Enacting Bill C-7 before high-quality long-term care and palliative care access is widely achieved would dramatically increase the risk of vulnerable patients choosing MAiD as a result of inadequate/inaccessible care. Additionally, Parliament must recognize that permitting advance requests for MAiD can adversely shift institutional and societal attitudes toward capacity loss, as well as perpetuate ableist stereotypes and biases. In particular, the Expert Panel found that:

> Allowing ARs for MAID might have a negative impact on the way society values people with capacity loss, increasing stigma and signalling that it is acceptable to consider a life with capacity loss as one not worth living. Moreover, some have expressed concern that allowing ARs for MAID would create a society in which MAID was an appropriate alternative to providing quality and

[24] Dr. Romayne Gallagher, "An unacceptable number of people who requested medical assistance in dying received little or not quality palliative care in the months before death", Policy Options (October 19, 20202), online: <https://policyoptions.irpp.org/magazines/october-2020/lack-of-palliative-care-is-a-failure-in-too-many-maid-requests/>.
[25] AR Report at pp 56-57.
[26] AR Report at p 159.

> accessible care to those with capacity loss, opening the door to cost of care, bed clearing, or other considerations to explicitly or subtly enter the treatment decision-making process.[27]

The AR Report makes it clear that this social and economic pressure could have troubling effects on institutional attitudes and practices:

> There is concern, however, that ARs for MAID […] could become a release valve for the societal failure to provide adequate support or care for those with neurocognitive declines and their families. The evidence collected also suggests a further concern that permitting ARs for MAID could devalue the lives of people with dementia or other neurocognitive deficits. That is, by giving someone access to MAID because they anticipate a decline in mental capacity, society tacitly approves of the notion that life with a decline in mental capacity is not worth living, contributing to the stigma associated with such a decline.[28]

Moreover, when it comes to the attitudes of individual patients, the Expert Panel identified that "permitting ARs for MAID might send a message to people with capacity-limiting conditions that their life will have limited value at a certain point, and that MAID would become a valued option at that time."[29]

Finally, the most concerning risk identified in the AR Report is the risk that some individuals may be euthanized against their wishes and that there are no safeguards capable of eliminating this risk entirely.[30] Every euthanasia regime risks unintentional deaths, no matter how many safeguards are in place,[31] but the risk is even greater if express and contemporaneous consent is not required.

The magnitude of this risk is well-supported by the available evidence. The federal government's recently released *First Annual Report on Medical Assistance in Dying in Canada* revealed that, out of the 7,336 written requests for MAiD that were reported in 2019, **263** were withdrawn by the patient, predominantly because they changed their mind. Of these 263 withdrawals, **20.2%** took place *immediately before the MAiD procedure was performed*.[32] Under Bill C-7, this final safeguard will no longer be available to incapacitated patients who made a prior request for MAiD and were deemed eligible at that time.

CLF is also concerned that Bill C-7 sets too high a threshold for expressing such a change of mind. While Bill C-7 requires that advance requests only be fulfilled if "the person does not demonstrate, by words, sounds or gestures, refusal to have the substance administered or resistance to its administration", this does not include "involuntary words, sounds or gestures made in response to

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[27] AR Report at p 147.
[28] AR Report at p 146.
[29] AR Report at p 165.
[30] AR Report at p 174.
[31] As the Québec Superior Court acknowledged in *Truchon* at para 623: **"Clearly, no system other than total and absolute prohibition will ever be able to prevent every error.**"
[32] 2019 MAiD Annual Report at pp 6, 36, 38.

contact". This raises concerns about how a medical practitioner is to distinguish between these two categories of communication, if it is even possible to make such a distinction in all cases.[33]

In *Carter*, the Supreme Court of Canada unequivocally stated—on three occasions—that MAiD should be performed only where a patient "**clearly consents** to the termination of life".[34] The inclusion of the words "**clearly**" (indicating a need for positive confirmation, without any doubt as to a person's wishes) and "**consents**" (present tense, in the "here and now") is significant and must be heeded.[35] Canada's *current* MAiD regime seeks to ensure this by requiring that eligible recipients of MAiD expressly reaffirm their consent when MAiD is about to be administered. Removing this requirement and permitting MAiD to be administered without a patient's explicit consent at the time of the procedure in certain circumstances necessarily introduces the risk that some patients will be euthanized against their wishes.

Ending a person's life, without absolute certainty of their consent at the moment of termination, should never be permitted by law. Accordingly, CLF strongly urges Parliament to remove the "final consent – waiver" provisions from Bill C-7 in their entirety.

Instant Access to Euthanasia?

Bill C-7 would remove the current requirement that eligible patients generally must wait at least 10 days between requesting MAiD and receiving it. This waiting period ensures some reflection on the part of the patient, in light of the permanence of the death they have requested. Without this provision, there is no mandatory period of reflection ensuring time for patients to consider other options or explore other treatments, such that someone could feasibly request and receive MAiD on the same day.

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[33]International experience demonstrates that some physicians have resorted to disturbing tactics in order to avoid the complexities of determining whether an incapacitated patient is resisting euthanasia: AR Report at p 74. This includes at least one recorded case where "the physician crossed a line by surreptitiously administering a sedative in the patient's coffee to calm her before the procedure and by continuing despite the patient's negative response during initiation of the infusion and administration of the euthanasic agent."

[34] *Carter* SCC at paras 4, 127, 147 [emphasis added].

[35] This language was cited by the unanimous British Columbia Court of Appeal in finding that an Alzheimer's patient should not be deprived of "nourishments and liquids", as directed in a prior request, because her present conduct indicated otherwise: "It should come as no surprise that a court of law will be assiduous in seeking to ascertain and give effect to the wishes of the patient in the 'here and now', even in the face of prior directives, whether clear or not. This is consistent with the principle of patient autonomy that is also reflected in the statutes referred to earlier (see especially s. 19.8 of the *HCCCFA Act*), and in many judicial decisions, including *Carter v. Canada (Attorney General)* 2015 SCC 5, where the Court emphasized that when assisted suicide is legalized, it must be conditional on the on the 'clear consent' of the patient. (Para. 127.)" *Bentley v Maplewood Seniors Care Society*, 2015 BCCA 91 at para 18. See further discussion in CLF's report, "Euthanasia and physician-assisted suicide in the case of mature minors, advance requests, and mental illness: legal, ethical, cultural, and clinical considerations" (submitted to the Canadian Council of Academies, 16 October 2017), online: <https://static1.squarespace.com/static/57503f9022482e2aa29ab3af/t/59d8151f90bade192aecd5eb/1507333409139/CCA+Call+for+Input+-+CLF+Background+Paper+-+OCT+6+2017.pdfl considerations>.

The seriousness of this amendment should be viewed in light of the data described above. What would the removal of this safeguard mean for the 263 patients referenced in the 2019 MAiD Annual Report and the 323 patients reported in Quebec since 2015[36]—and many others like them across Canada—who changed their mind *after* they made a written request for MAiD and sometimes *after* they were deemed eligible? If they could have requested and received MAiD the very same day, how might they have been able to reflect upon and pursue other options?

Bill C-7 would also remove the requirement that every request for MAiD be subject to independent verification by two witnesses. This change would eliminate a crucial opportunity to independently corroborate that a patient is not being coerced or pressured to seek MAiD. It is troubling to think that, if this change is made, the law would go to greater lengths to ensure the validity of a document disposing of an individual's property than it would with a direction to end one's life.[37] CLF strongly opposes Bill C-7's removal of both the mandatory 10-day reflection period and the independent verification of all MAiD requests by two witnesses. We recommend that these safeguards remain part of Canada's MAiD regime.

"Reinventing" MAiD

Perhaps the most drastic change proposed in Bill C-7 is the provision of MAiD to people who are not dying, by removing the requirement that a patient's natural death be "reasonably foreseeable". MAiD was initially presented as an exceptional mechanism to hasten an already-imminent death, with the goal of preventing suffering in end-of-life contexts and respecting autonomy in the final stages of the dying process. As Professor Catherine Frazee has observed, Bill C-7's proposed expansion fundamentally reinvents MAiD "so that it is no longer an alternative to a painful death, but for some, instead, an alternative to a painful life"; Bill C-7's resulting effect is to "embrace uncritically the notion that suffering associated with disability is a burden greater than death and that termination of such a life is a 'benefit' worthy of protection in law."[38]

In *R v Latimer,* the Supreme Court emphasized that "[k]illing a person — in order to relieve the suffering produced by a medically manageable physical or mental condition — **is not a proportionate response** to the harm represented by the non-life-threatening suffering resulting from that condition."[39] CLF is concerned that Bill C-7 effectively abandons this principle by accepting that terminating a life *is* an appropriate response to the non-life-threatening suffering

[36] This data is drawn from the annual reports of Quebec's commission on end-of-life care, detailed at https://www.christianlegalfellowship.org/maid

[37] The law requires two independent witnesses to the signing of a testator's will. See, for example, the *Succession Law Reform Act*, R.S.O. 1990, c. S.26, s. 4 (1)(b), which states that a will is not valid unless the "testator makes or acknowledges the signature in the presence of two or more attesting witnesses present at the same time." An exception is made for holograph wills, i.e. those made "wholly by [a testator's] own handwriting or signature" (s. 6).

[38] Catherine Frazee, "Remarks for End of Life, Equality & Disability: A National Forum on Medical Assistance in Dying", Council of Canadians with Disabilities and the Canadian Association for Community Living (January 31, 2020) online: <https://vimeo.com/388515714>.

[39] *R v Latimer*, 2001 SCC 1, [2001] 1 SCR 3 at para 41 (emphasis added).

produced by even a medically manageable condition, at least in certain contexts. This creates a risk of profound attitudinal harm against persons with disabilities by implicitly endorsing the view that disability related suffering in *life* is a fate worse that death. The law must protect patients not only from social pressure to choose death, but also from facing discrimination or prejudice in their decision to choose life.[40]

Lack of Compliance with Existing Safeguards

CLF is deeply concerned about ongoing reports of a lack of compliance with the *current* laws around MAiD. This has been identified in both Ontario and Québec, where a majority of MAiD procedures are performed. As of August 2018, the Office of the Chief Coroner of Ontario reported that, after reviewing 2,000 cases of MAiD administration, "some case reviews have demonstrated compliance concerns with both the Criminal Code and regulatory body policy expectations, some of which have recurred over time."[41] Similarly, reports out of Québec have confirmed that, every year, multiple cases of MAiD have involved non-compliance *Criminal Code* provisions and/or regulatory body requirements. Specifically, from July 2017 to March 2018, there were 19 cases of MAiD that did not comply with federal and provincial laws,[42] and, from April 2018 to March 2019, there were another 13 such cases.[43] Of the 1,374 cases that the Québec Commission on end-of-life care reviewed between December 10, 2015 and March 31, 2018, only 90% were verifiably conducted in accordance with the law, with at least 5% (62 cases) involving a violation of the law. Compliance with the law was impossible to verify in the other 5% (67 cases).[44]

Furthermore, the Office of the Correctional Investigator recently examined three known cases of MAiD in federal corrections and found that "each raises fundamental questions around consent, choice, and dignity."[45] Two of the cases involved "a series of errors, omissions, inaccuracies,

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[40] See Derek Ross, "The fundamental risk of expanding Medical Assistance in Dying", Policy Options (February 19, 2020) online: <https://policyoptions.irpp.org/magazines/february-2020/the-fundamental-risk-of-expanding-medical-assistance-in-dying/>. See also, "Lawyers' Joint Statement – An Open Letter to Parliament re: Bill C-7" signed by over 140 lawyers and law students, online: https://www.christianlegalfellowship.org/billc-7>

[41] 2018 Chief Coroner of Ontario MAiD Update.

[42] Commission sur les soins de fin de vie, "Rapport annuel d'activités: 1er juillet 2017 – 31 mars 2018", Gouvernement du Québec (2018) at p 15 [2017-2018 Québec MAiD Report].

[43] Commission sur les soins de fin de vie, "Le rapport annuel d'activités: 1er avril 2018 – 31 mars 2019", Gouvernement du Québec (October 2, 2019), 1003-20191002 (presented by Danielle McCann, Minister of Health and Social Services) at p 23.

[44] 2017-2018 Québec MAiD Report at p 23. Specific violations included: "The doctor who administered the [assisted death] did not carry out the interviews with the person to ensure the clarity of his request or to ensure the persistence of his sufferings and the consistency of its desire to obtain [MAiD] [9 cases]; The [assisted death] application was countersigned by a person who was not a health or social service professional [5 cases]; The person who obtained the [assisted death] did not have a serious and incurable [disease] [5 cases]; The person who obtained the [assisted death] was not at the end of his life [2 cases]; The doctor who administered the [assisted death] did not carry out the verifications provided for in section 29 of the Act [2 cases]" [unofficial translation].

[45] Ivan Zinger, "2019-2020 Annual Report: Office of the Correctional Investigator", The Correctional Investigator, Canada (October 27, 2020) at p 2 [2019-2020 Correctional Investigator Annual Report].

delays, and misapplications of law and policy."[46] This included one man who, after applying for full, day, and compassionate parole and being refused every time, ultimately "'chose' MAiD not because that was his 'wish,' but rather because every other option had been denied, extinguished or not even contemplated."[47]

The Correctional Investigator's review also revealed that "there is no legal or administrative mechanism for ensuring accountability or transparency for MAiD in federal corrections".[48] He has called for an independent investigation by an expert committee, as well as "an absolute moratorium on providing MAiD *inside* a federal penitentiary, regardless of circumstance."[49] CLF emphatically agrees with, and urges this Committee to incorporate, these recommendations in Bill C-7, especially given the disproportionate impact of the harms identified by the Correctional Investigator on members of marginalized communities who are over-represented in prison populations.

In the face of ongoing evidence that the current procedural safeguards are *not* being followed, it is alarming that the government is seeking to *remove* many of those safeguards, rather than strengthen and uphold them. Who is investigating these findings of non-compliance? And who is collecting and consolidating this data? The *Carter* decision was premised on the assumption that procedural safeguards would be "scrupulously monitored and enforced".[50] The federal government bears responsibility for reviewing reported cases of non-compliance and ensuring that data regarding non-compliance is gathered and used to inform future policy decisions.

For these reasons, CLF urges Parliament to establish an independent body with investigative powers to specifically review cases of non-compliance with the *Criminal Code* provisions relating to MAiD. This is especially necessary in light of the fact that family members have been denied standing in court to raise concerns about specific MAiD cases before the procedure is carried out on loved ones.[51] Creating an independent investigative body would be a positive step towards protecting marginalized patients by ensuring that the rigorous procedural safeguards—many of which were specifically referenced in *Carter*[52]—are fully and properly followed, as well as ensuring that there is accountability for legal violations when human life rests in the balance.

Conclusion

While the considerations that may drive a person to prefer death over suffering are intensely personal, MAiD itself is a social act with far-reaching consequences for marginalized Canadians,

[46] 2019-2020 Correctional Investigator Annual Report at p 2.
[47] 2019-2020 Correctional Investigator Annual Report at p 3.
[48] 2019-2020 Correctional Investigator Annual Report at p 3.
[49] 2019-2020 Correctional Investigator Annual Report at p 4.
[50] *Carter* BCSC at para 883; *Carter* SCC at paras 27, 105.
[51] *Sorenson v Swinemar*, 2020 NSCA 62; see especially paras 63-64, 100, and 152.
[52] *Carter* BCSC at paras 1238-1243, 1367; see also *Carter* SCC at paras 105, 117.

public institutions, and societal attitudes. Moreover, in light of the nation-wide reality of inadequate long-term care, mental health supports, and palliative care, there are still important ethical questions about whether an individual seeking MAiD in a context of systemic lack of support and healthcare can be said to have made a true "choice" at all.[53] Expanding access to MAiD is irresponsible without ensuring access to other meaningful healthcare options.

While some of the harmful consequences of permitting MAiD can be mitigated by strictly limiting it to the end-of-life context and by ensuring rigorous procedural safeguards throughout, there will always be unavoidable risks involved in providing MAiD. And yet, at a time when Canada has still to ensure ongoing access to adequate supports for those desiring to live despite suffering, Bill C-7 seeks to *remove* meaningful protections for patients. Not only would these changes place some of society's most vulnerable individuals at heightened risk, it would also transform Canada's MAiD regime into one of the most permissive in the world.

Any changes to Canada's MAiD regime must meaningfully respond to last year's End of Mission Statement of the United Nations Special Rapporteur on the rights of persons with disabilities, wherein Ms. Catalina Devandas-Aguilar communicated her serious concerns about "significant shortcomings" in the way all levels of Canadian government "respect, protect and fulfill the rights of persons with disabilities". Specifically, Ms. Devandas-Aguilar noted that there was a lack of protocol to "demonstrate that persons with disabilities have been provided with viable alternatives when eligible for assistive dying" and that she had received "worrisome claims about persons with disabilities in institutions being pressured to seek medical assistance in dying, and practitioners not formally reporting cases involving persons with disabilities."[54]

We are deeply concerned that, not only is there no protocol in place to ensure patients are *provided* viable alternatives, but, under Bill C-7, there is no requirement to even *discuss* alternatives with some patients before ending their lives. The provisions requiring physicians to inform patients of alternative options appear to apply only where death is not reasonably foreseeable. Respectfully, we submit that these provisions should apply to protect *all* patients.

We urge the government to prioritize addressing these concerns and ensure that Canadians receive medical assistance in *living* before considering amendments to expand, or remove safeguards around, access to medical assistance in dying.

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[53] Jonas-Sébastien Beaudry, "What's missing from the conversation about assisted death", Policy Options (October 16, 2019), online: <https://policyoptions.irpp.org/magazines/october-2019/whats-missing-from-the-conversation-about-assisted-death/>.

[54] Catalina Devandas-Aguilar, "End of Mission Statement by the United Nations Special Rapporteur on the rights of persons with disabilities, Ms. Catalina Devandas-Aguilar, on her visit to Canada", Office of the High Commissioner for Human Rights (April 12, 2019) online: <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24481&LangID=E>.

Appendix "A"
Summary of Recommendations

1. Refer to the Supreme Court of Canada, by way of constitutional reference, Bill C-14's existing protections limiting MAiD to cases where a patient's natural death is reasonably foreseeable.
2. Retain Bill C-7's exclusion of mental illness from the statutory definition of "grievous and irremediable condition".
3. Retain Bill C-14's mandatory 10-day waiting period requirement, as it currently stands, and the requirement for independent verification of all MAiD requests by two witnesses.
4. Remove Bill C-7's provisions waiving Bill C-14's important and necessary "final consent" requirements.
5. Remove Bill C-7's provision allowing a patient's healthcare or personal care provider to be an eligible witness to the patient's request for MAiD.
6. Respond to the UN Special Rapporteur's call to establish a protocol to "demonstrate that persons with disabilities have been provided with viable alternatives when eligible for assistive dying", and ensure that this is in place *before* considering expanding MAiD.
7. Investigate the "worrisome claims about persons with disabilities in institutions being pressured to seek medical assistance in dying, and practitioners not formally reporting cases involving persons with disabilities", which were identified in the UN Special Rapporteur's report, and establish an independent body, whose membership must include representatives of the disability community, to investigate such cases moving forward.
8. Extend to *all* patients the safeguards contained in s. 1(7) of Bill C-7, particularly those proposed in ss. 3(3.1)(g) and (h).
9. Add language to Bill C-7 that will ensure that all discussions surrounding MAiD are *patient*-led and not prematurely initiated by the physician, since any subtle pressures on patients to seek MAiD—especially from physicians, who are in positions of authority and respect—can work to undermine the principles of human dignity and patient autonomy.
10. Pursuant to the recommendations of the Office of the Correctional Investigator:
    a. Include a commitment to initiate an independent review by an expert committee "to deliberate on the ethical and practical matters of MAiD in all places of detention, with the aim of proposing changes to existing policy and legislation"
    b. Place "an absolute moratorium on providing MAiD inside a federal penitentiary, regardless of circumstance."

Appendix "B"

About Christian Legal Fellowship

Christian Legal Fellowship ("CLF") is a national charitable association of over 700 lawyers, law students, law professors, retired judges, and others, with members in eleven provinces and territories from more than 30 Christian denominations.

CLF is also a non-governmental organization in Special Consultative Status with the Economic and Social Council of the United Nations, and it has appeared before Parliamentary committees and made submissions before provincial governments, regulators and courts, including issues of euthanasia and end-of-life, conscience, religious freedom, human rights, and other issues affecting religious communities and their accommodation in a pluralistic society.

CLF has developed considerable expertise in the social and legal complexities surrounding the legalization of euthanasia and medical assistance in dying ("MAiD") in Canada. In 2012, CLF was recognized by the Quebec Superior Court as "possess[ing] an important degree of expertise in the areas of philosophy, morality, and ethics which areas could be useful for the defense considering the Plaintiff's request that article 241 (b) of the Criminal Code be declared unconstitutional." (*Leblanc v. Attorney General of Canada* et al at p. 45).

CLF was one of the few organizations to intervene in all levels of court in *Carter*, including the post-judgment motion for a further extension of time at the Supreme Court. CLF also intervened in both levels of court in *D'Amico c. Québec (Procureure générale)* concerning the constitutionality of Quebec's assisted suicide legislation, and in *Truchon c Procureur général du Canada*.

CLF participated, by invitation, in the consultations of the federal External Panel on Options for a Legislative Response to Carter v Canada and the Provincial/ Territorial Expert Advisory Group on Physician-Assisted Dying. CLF also participated in the consultations of the medical Colleges of Saskatchewan, Manitoba, Ontario, and New Brunswick on this issue. CLF filed detailed legal submissions to the Ontario and Alberta governments in response to their consultation on the issue of assisted suicide and euthanasia. CLF also made submissions to the Special Joint Parliamentary Committee on Physician-Assisted Dying, and to both the House of Commons and the Senate's Standing Committees on Bill C-14.