

November 12, 2020

Via email: JUST@parl.gc.ca

Mrs. Iqra Khalid
Committee Chair
Standing Committee on Justice and Human Rights
Sixth Floor, 131 Queen Street
House of Commons
Ottawa ON K1A 0A6

Dear Mrs. Khalid:

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

The Canadian Medical Protective Association (“CMPA”) welcomes the opportunity to provide comments on Bill C-7, *An Act to amend the Criminal Code (medical assistance in dying)*.

As you may know, the CMPA delivers efficient, high-quality physician-to-physician advice and assistance in medical-legal matters, including the provision of appropriate compensation to patients injured by negligent medical care. Our evidence-based products and services enhance the safety of medical care, reducing unnecessary harm and costs. As Canada’s largest physician organization and with the support of our over 100,000 physician members, the CMPA collaborates, advocates and effects positive change on important healthcare and medical-legal issues.

The CMPA’s Experience

Since the Supreme Court of Canada’s decision in *Carter*¹ and the introduction of Bill C-14 legalizing MAID in certain circumstances, the CMPA has received frequent and numerous calls from members with questions about MAID. As such, we are on the front lines in guiding physicians involved in providing MAID. Together with legal counsel, the CMPA has assisted with more than 1700 requests from physician members across Canada with MAID questions since the legislation came into force. The CMPA was a key resource consulted by physician MAID providers as standards of practice were being established and the community developed a degree of comfort with the new concepts.

The CMPA welcomes Parliament’s effort to propose legislation that attempts to balance the various views and concerns raised by different groups during the January 2020 consultations on a legislative response to the *Truchon* decision², and recognizes the challenge of that exercise. The CMPA cannot overstate the value of having operational clarity on eligibility and safeguard requirements. Uncertainty with respect to the interpretation of certain provisions of the legislation will be an obstacle to the establishment of the physician-patient relationship that is necessary to guide the patient through difficult end-of-life decisions, and may negatively affect access to MAID.

¹ *Carter v. Canada (Attorney General)*, 2015 SCC 5

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



Reasonably Foreseeable Death

The CMPA recommends that the interpretation of the concept that natural death be reasonably foreseeable under Bill C-7 be clarified to specify whether it is meant to have the same interpretation under Bill C-7 that it currently has under section 241.2(2)(d) of the *Criminal Code*.

Bill C-7 would amend section 241.2(3) of the *Criminal Code* to dictate the safeguards that must be met if the person meets all the eligibility requirements, and their natural death is reasonably foreseeable, taking into account all of their medical circumstances, without a prognosis necessarily having been made as to the specific length of time that they have remaining. The wording for what constitutes reasonably foreseeable death under Bill C-7 remains consistent with the current wording under section 241.2(2)(d) of the *Criminal Code*.

The Minister of Justice and Attorney General of Canada, Mr. David Lametti, stated in his speech in the House of Commons on February 26, 2020 that reasonable foreseeability of natural death “means that in light of all the person’s medical circumstances, his or her death is expected in a relatively short period of time. Natural death is not reasonably foreseeable just because an individual is diagnosed with a condition that will eventually cause death many years or decades into the future.” In that allocution, Mr. Lametti added that “the standard also has the advantage of using language that practitioners have become familiar with over the last four years.”³

In his October 9, 2020 speech before the House of Commons, Mr. Lametti stated that reasonably foreseeable death “does require a temporal link to death in the sense that the person is approaching the end of their life in the near term.”⁴

Significant weight will be given to Mr. Lametti’s words by MAID providers and assessors who may be uncertain, based on the above statements, whether the reasonably foreseeable death concept under Bill C-7 is meant to have the same meaning as under the current provision of the *Criminal Code*, or whether the concept is meant to have a narrower interpretation under Bill C-7.

MAID providers and assessors have now accumulated over four years experience in applying the concept of reasonably foreseeable death, and are relatively comfortable with that concept. Modifying its interpretation at this time may lead to confusion for healthcare providers. If it is the legislator’s intention to modify the meaning of reasonably foreseeable death, the legislator must provide formal and clear indication to that effect. Equally important, if the intention is for the interpretation of that concept to remain unchanged under Bill C-7, the legislator must also express this formally.

Regulatory Authority Guidance

The CMPA recommends that Parliament leave sufficient time between the adoption of Bill C-7 and its coming into force to allow regulatory authorities to update their MAID policies to provide guidance on the significant amendments to the current MAID framework. It will be important for physicians to have guidance on the application of some of the more challenging provisions in Bill C-7.

³ House of Commons Debates, Vol. 149, No. 024, 1st Session, 43rd Parliament (February 26, 2020), 1605.

⁴ House of Commons Debates, Vol. 150, No. 013, 2nd Session, 43rd Parliament (October 9, 2020), 1015.

For example, Bill C-7 proposes to add section 241.2(3.2) to the *Criminal Code* which would outline the criteria for waiving the requirement for consent to be given immediately before MAID is provided if specific conditions are met. What may be more challenging for physicians, is interpreting whether the patient who waived the final consent has subsequently demonstrated, by words, sounds or gestures, refusal to have MAID administered. There may be situations where family members may have different views on MAID, and may try to invoke the refusal provisions to allege a patient's advance consent was invalidated by subsequent actions. In that context, guidance from regulatory authorities on the application of the new provisions will be important.

Such guidance will also be important on issues surrounding how far in advance a patient could enter into an arrangement for MAID to be provided after they lose capacity to consent. While we understand that the waiver of the final consent is only available under section 241.2(3.2) to patients whose death is reasonably foreseeable and who meet all the eligibility criteria, there are scenarios where a patient could meet all the requirements to waive the final consent, but delay for an extended period of time the administration of MAID. This situation could create uncertainty as to the continued validity of the arrangement after a certain period of time has passed.

Conclusion

The CMPA encourages Parliament to be clear about the meaning of reasonably foreseeable death under Bill C-7 and to allow time for regulatory authorities to update their MAID policies to provide guidance on the significant changes Bill C-7 will bring to the MAID framework. Greater certainty about the application of the new MAID provisions will provide medical practitioners with the confidence to provide access to patients, without being unduly burdened by the possibility of criminal sanctions associated with misinterpreting the legislation.

CMPA's unique experience is such that it could be of great assistance to the Government in determining how proposed changes to the legislation could affect the delivery of MAID. We would be pleased to provide other information or input as may be required.

Yours sincerely,



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Chief Executive Officer

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Cc. Dr. Michael Cohen, President, Canadian Medical Protective Association