Brief to Standing Committee on Justice and Human Rights
Executive Summary: Commentary on Bill C-7
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Submitted by concerned citizens with medical legal expertise / and or experience with the MAID process

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Much of the bill is overly conservative and should go further:

- MAID should be available to all legally competent Canadians without differentiation as part of a continuum of health care choices, along with other treatment (or non-treatment) options. All health care choices should be given equal standing and every Canadian should have the right to choose what option or combination of options is right for them.

- While Bill C-7 makes a positive step forward in relation to consent waivers and elimination of the 'final consent' requirement, it does not go far enough. The 'two-track' discrimination between persons whose death is 'reasonably foreseeable' and those whose death is not, is highly susceptible to *Charter* challenge.
- If the 'final consent waiver' provisions are retained at all, they should be available to all persons, not just those whose death is reasonably foreseeable. As well, the 'death on a specified day' mechanism should be adjusted to provide for unforeseen contingencies arising after the arrangement has been settled and after the person seeking MAID has lost capacity to amend the arrangement.
- A fully-fledged 'advance request for MAID' provision should replace the limited steps in Bill C-7 so that all Canadians have practical and equitable access to MAID, both as death approaches, and as part of a planned approach to end-of-life questions generated even before death is reasonably foreseeable.
- The provisions relating to persons with difficulty communicating will produce unintended consequences for those who genuinely wish access to MAID.
- The requirement for various layers of expertise in ensuring a person's eligibility for MAID are internally illogical, unworkable and in large part unnecessary. If retained at all, they require substantial amendment.
- The provisions on communicating the availability of alternatives to MAID are too restrictive and should be rationalized.
- The requirement for certification of 'serious consideration' of such alternatives is unworkable for practitioners and essentially condescending to persons seeking MAID, and should be removed.

- The new 90 day waiting period for MAID access by persons whose death is not reasonably foreseeable is discriminatory and highly susceptible to *Charter* challenge. To the extent that the two-track process is retained, the 90-day period should be shortened substantially and made liable to such further shortening as the relevant practitioners may consider appropriate in their discretion.
- The provisions for advance consent to be invalidated in the event of words, sounds of gestures indicating refusal of MAID are too inflexible. They should be amended to add a 'try another day' provision so that a person does not have to lose the benefit of their advance consent for all time.
- Given the overlap between the Québec court decision and the 5-year review process already mandated, serious consideration should be given to including provisions now that will afford access to MAID to mentally ill persons and mature minors.

Brief to the Standing Committee on Justice and Human Rights

Commentary on Bill C-7

Bill C-7 is Too Narrow and Vulnerable to Charter Challenge

We are a group of concerned Canadian citizens who are supportive of medical aid in dying ("MAID"). We have had a variety of personal experiences with close friends and relatives who were grievously ill and dying; several of us have legal backgrounds, including in the medical-legal field.

We commend the Government of Canada's attempt to respond to issues of concern in the existing Bill C-14 particularly regarding the concept of "naturally foreseeable death" (as required by the Superior Court of Quebec in *Truchon v. Attorney General of Canada ("Truchon"))* and with respect to eligible persons who have lost the capacity to provide final consent before medical assistance in dying can be delivered. While aspects of Bill C-7 signal a move in the right direction, we feel strongly that much of the bill is overly conservative and should go much further.

The Government of Canada now has the perfect opportunity to create comprehensive, workable MAID legislation, and ensure that the MAID system does not discriminate among categories of Canadians wishing to avail themselves of it. The opportunity has been missed in Bill C-7 as it stands.

Bill C-7 is lacking in three major respects:

- first, it under-reaches in scope by failing to devise a comprehensive system allowing Canadians to create early stage, enforceable personal Advance Requests. Bill C-7 permits only certain classes of persons to enter into limited scope advance request "waiver arrangements", but fails to allow Canadians to define at an early stage (including pre-diagnosis) what circumstances for them amount to "intolerable suffering" should they ever develop a "grievous and irremediable condition".

- Secondly, the newly created "two-track" system and the express exclusion of persons with mental health issues create such significant inequities among classes of people that the bill is vulnerable to *Charter* challenge.

- Finally, Bill C-7 is procedurally complex and unworkable on a practical level, as detailed below.

Bill C-7 was initially drafted as the Government's response to the 2019 decision of the Quebec Supreme Court (*Truchon*); as such, the Bill has a specific focus addressing the particular issues raised in that case. However, because the unprecedented Covid-19 crisis largely paralyzed Parliament, Bill C-7 has not progressed past second reading so far. The result is that the legislative process for Bill C-7 is now overlapping with the s. 10 Bill C-14 mandated comprehensive five-year MAID review deadline, which review was supposed to begin in June 2020. We question the utility at this point of separating the two processes and fear that piecemeal drafting will result in inferior legislation that is vulnerable to Charter challenges.

This may be the last chance, for the foreseeable future, for the Government to create a robust and compassionate MAID system, one that respects Canadians' Charter right to equal access to MAID without discrimination, and, importantly, one that enables Canadians to create legally enforceable early stage (including "pre-diagnosis") Advance Requests for MAID. Now is the time for Canada to create a single piece of comprehensive legislation that affords Canadians real and workable MAID rights that are not merely consistent with but that closely adhere to the principles originally specified by the SCC in *Carter.* Canadian MAID legislation must reflect the fact that Canadians already have the right, by operation of the *Charter* and the unanimous SCC decision in *Carter*, to identify for themselves what constitutes "grievous and irremediable suffering that is intolerable to the individual".

What we need is for the legislation to successfully enable, promote and protect those rights. The further that the amended MAID legislation strays from the SCC's ruling, the more that all or part will be vulnerable to successful *Charter* challenges.

In preparing this commentary, we have had regard to the 2018 Council of Canadian Academies report, "*The State of Knowledge on Advance Requests for Medical Assistance in Dying.* Ottawa (ON): The Expert Panel Working Group on Advance Requests for MAID*, (*the 2018 CCA Report) which the Federal Government commissioned in 2016, following *Carter.*

A**nalysis and Recommendations:**

Our comments apply specifically to the proposed Bill C-7[1] as well as more generally to the upcoming (June 2020) five-year review (as noted above, the two intersecting processes should be dealt with at the same time). We acknowledge that some of our suggestions may raise issues of constitutional jurisdiction but the Government should take the lead in developing comprehensive enabling MAID legislation that can then be implemented as needed by the Provinces according to their health care structures.

MAID should be an option available to all Canadians as part of the continuum of health care choices to which every person is entitled, along with other treatment (or non-treatment) options. It is important that all health care choices be given equal standing and that Canadians have the right to choose what option or combination of options is right for them, recognizing that not everyone is interested in exhausting all available treatment procedures nor undergoing palliative care, particularly given the limitations of each. MAID should not be considered an option of last resort and should not be burdened with stigma any more than any other health care choice.

Our comments are divided into the following sections:

1. The Canadian MAID system needs to enable Canada-wide early-stage Advance Requests for MAID;
2. The proposed "two-track" process is unworkable and unconstitutional;
3. Several proposed "Safeguards" are redundant, procedurally complex, result in unequal treatment and/or create barriers to access MAID;
4. Specific Problems with proposed "Waiver Arrangements" as drafted;
5. Broader context considerations (mentally ill and mature minors).

1. The Canadian MAID system needs to enable Canada-wide early-stage Advance Requests for MAID

Discussion:

The inclusion in Bill C-7 of the "waiver arrangement" structure and the removal of the requirement for "final express consent" represents an important, positive and significant recognition that at least a form of "advance request" belongs in the Canadian MAID system. This inclusion signals that the Government acknowledges the need to address the terrible situation in which a person has expressed the desire for, has been assessed and approved for MAID but loses access to the delivery of MAID when

[1] For ease of reference throughout this commentary, we will refer to the existing statute (2016 *An Act to Amend the Criminal Code and to make related amendments to other Acts (medical assistance in dying)* as "Bill C-14" and we will refer to the February 2020 amendments ("*An Act to amend the Criminal Code (medical assistance in dying)*") as "Bill C-7". "Advance Directives" may be referred to as "AD" and "Advance Requests" as "AR"; Substitute Decision Maker may be referred to as "SDM".

they subsequently lose the capacity to provide a final express consent. However, the proposed limited advance request structure by way of "waiver arrangement" does not go far enough.

We submit that the proposed "waiver arrangement" provision of Bill C-7 is too limited in scope because it only applies to a person who has the type of "grievous and irremediable condition" that affords them the time to complete the mandatory "waiver arrangement". The way the proposed "waiver arrangement" provision is structured, a person would not be able to exercise their right to MAID if they were to suffer a sudden, unexpected catastrophic loss of the capacity (such as that which may result from a stroke, aneurysm, or accidental brain injury) to enter into a waiver arrangement. The waiver arrangement could even be problematic if a person has a rapidly progressing condition, like cancer, that results in the loss of capacity before they have time to complete the specified waiver arrangement. Even if they otherwise qualify for MAID, should a person lose the capacity to enter in the specified arrangement allowing them to waive the requirement for final express consent, they would not be able to have MAID administered even if they wanted to, and even if their natural death is reasonably foreseeable.

The waiver arrangement structure is also fundamentally inequitable as it only applies to people whose natural death is "reasonably foreseeable", but not to people whose death is not reasonably foreseeable. This means that people whose death is not reasonably foreseeable (like the applicants in *Truchon)* cannot access MAID if they become incapacitated and lose the ability to provide express consent. This is significantly unequal treatment compared to persons whose death is reasonably foreseeable who, by virtue of the new provision, would have the opportunity to waive the requirement for final express consent and who now could receive MAID if they lose capacity. Again, this inequity makes this provision highly vulnerable to a successful *Charter* challenge.

A much broader, comprehensive "Advance Request" approach is needed, affording all Canadians the opportunity to contemplate and express their end of life choices even before they become grievously ill, before their grievous condition takes a significant turn for the worse affecting their capacity, or before they suffer a sudden, unexpected, catastrophic loss of capacity. As noted in the 2018 CCA Report, the Canadian medical system already recognizes Advance Directives specifying the medical treatments that a person wants or rejects. A patient's right to refuse or withdraw treatment is well established in Canadian law, as is the right of patients to voluntarily cease eating and drinking, even if death is the inevitable result. Canadian law also recognizes the important role of Substitute Decision Makers in interpreting a person's medical (including end of life) wishes where such intentions are known. While we understand the difference between an Advance Directive (specifying the type of treatments a person might want) and an Advance Request for MAID, a robust MAID system must include a means for Canadians to create enforceable end of life choices, including the right to specify the circumstances under which they would want to access MAID and recognizing the important role for including SDMs in ensuring that a person's wishes are carried out, including having MAID.

Creation of a robust Canadian system of advance care planning is a timely consideration as we confront an unprecedented world-wide health crisis with Covid-19 in which the need and means for expressing end of life choices has become a prominent and important topic. In fact, medical professionals have been actively and publicly encouraging Canadians to have discussions with their families and health care providers as to whether they want to be put on ventilators (among other considerations) should they contract Covid-19, both to ensure that patient choice is respected, but also in order to assist medical professionals in allocating resources. It is essential that the Government learn from this terrible collective experience and that it take action to support Canadians in considering and formalizing their end of life choices, even at an early pre-diagnosis stage if a person so wishes. As noted above, enforceable Advance Requests would be important where there are personal sudden and unforeseeable catastrophic events, such as a debilitating stroke or a severe car accident, or suddenly progressing medical conditions like cancer, the unpredictability of which could make it impossible to enter into a "waiver arrangement" under the newly proposed Bill C-7 provisions.

Recommendation:

We recommend that a comprehensive legislative structure be established enabling adult Canadians at any stage of their lives to create enforceable Advance Requests for MAID together with Advance Directives expressing their end of life choices and appointing Substitute Decision Makers who would have authority to act when a person has lost capacity, including regarding the delivery of MAID where the person's desire for MAID is known. The legislation should make such AR and AD enforceable by requiring that medical practitioners give "presumptive value" to ARs and ADs in determining a person's end of life. Further, the legal effect of such ARs and ADs should survive a person's loss of capacity. The comprehensive advance request/ advance directive system could run parallel to a modified "waiver arrangement" similar to that contemplated by Bill C-7 where a person has not yet created a prior AR or an AD.

2. The proposed "Two Track" Process is Unworkable and Unconstitutional

Discussion:

As a general comment, we disagree entirely with the proposed "two-track process" that creates two categories of eligibility for MAID, each having different standards and conditions, one considerably more onerous than the other. This structure is unconstitutional as it purports to draw an arbitrary line between categories of people merely on the basis of death's predicted timing. Apart from rejecting the two-track process we are also troubled by the ambiguity of the language used, "natural death reasonably foreseeable and natural death not foreseeable". Our detailed analysis follows.

We are concerned by the language in the preamble to Bill C-7 that "Parliament considers it appropriate to permit **dying persons** who have been found eligible to receive medical assistance in dying." We assume that this terminology was used for economy of language and not in an attempt to change or restrict MAID eligibility only to a "dying persons" but we feel the wording, and the legislation relating to same, bears clarification.

Bill C-7 retains the concept of "natural death reasonably foreseeable" but treats it differently than in the previous Bill C-14. Bill C-7 does two things: first, it removes "naturally foreseeable death" as a threshold prerequisite criteria for assessing a person's **eligibility** for MAID as was the case under Bill C-14 ; secondly, Bill C-7 uses the concept as a means to **create two categories of persons** (those whose natural death is reasonably foreseeable and those whose natural death is not) in order to establish different processes and considerations for the **delivery** of MAID for each of the two tracks.

Bill C-7 does not define the meaning of "natural death reasonably foreseeable" or "natural death not reasonably foreseeable". We recognize that the former Bill C-14 likewise did not define the term, but some guidance as to its meaning was provided both in modifying words in the legislation itself, as described below; in statements by the then Attorney General (Wilson-Raybould) and in the Government of Canada "Glossary" published in 2016 shortly after Bill C-14 received Royal Assent. It has also been considered and interpreted by the courts.

Bill C-14 used the phrase "natural death has become reasonably foreseeable" as part of the criteria for determining whether a person had a "grievous and irremediable condition" (*Criminal Code* section 241.2(2)(d)) in order to determine a person's eligibility for MAID. Section 241.2(2) (d) went on to clarify that in making a determination of whether natural death was reasonably foreseeable (and, as such, whether a person was eligible for MAID), it was necessary to take "**into account all of their medical circumstances, without a prognosis necessarily having been made as to the specific length of time they have remaining".** This qualifying language has been preserved in Bill C-7, except its use has changed from being part of an eligibility consideration to becoming part of a "safeguard" provision (in

s. 241.2 (3)). Notably, the consideration as to specific length of time remaining is treated differently in the two newly created tracks, which we feel is problematic, as discussed below.

In June 2016, the Government of Canada released a Glossary of terms in conjunction with the enactment of Bill C-14. That glossary provided a lengthy definition of the words "reasonably foreseeable death" including an excerpt, as follows:

> "Natural death has become reasonably foreseeable" means that there is a real possibility of the patient's death within a period of time that is not too remote. In other words, the patient would need to experience a change in the state of their medical condition so that it has become fairly clear that they are on an irreversible path toward death, even if there is no clear or specific prognosis….Physicians and nurse practitioners have the necessary expertise to evaluate each person's unique circumstances and can effectively judge when a person is on a trajectory toward death. While medical professionals do not need to be able to clearly predict exactly how or when a person will die, the person's death would need to be foreseeable in the not too distant future."

The issue of whether a natural death was reasonably foreseeable was considered in the case of *A.B. v. Canada (2017 ONSC).* A.B. was a woman nearly 80 years of age who suffered from chronic debilitating osteoarthritis with unmanageable pain. Her assessing physicians could not agree if she qualified for MAID based on whether her natural death was reasonably foreseeable. The court looked at the legislation as well as the background context, and in particular, the court focused on the words of the then Attorney General when introducing the legislation, "To be clear, the bill does not require that people be dying from a fatal illness or disease or be terminally ill. Rather, it uses a more flexible wording; namely, that "their natural death has become reasonably foreseeable, taking into account all of their medical circumstances. This language was deliberately chosen to ensure that people who are on a trajectory toward death in a wide range of circumstances can choose a peaceful death instead of having to endure a long or painful one."

The court did not specifically rule on A.B.'s eligibility, but did land squarely on a determination that the legislation did not require that a person be dying from a terminal illness, disease or disability, that as a matter of statutory interpretation a person in A.B.'s condition fell within the meaning of the relevant section of Bill C-14, and, importantly, emphasized that medical professionals are the ones qualified and should be the ones to determine whether a natural death is or is not reasonably foreseeable.

The case of *Truchon v. Quebec (2019 QCCS)* provided the initial impetus for the Government to change the existing legislation's concept of reasonable foreseeability of death. One applicant had cerebral palsy and the other suffered from post-polio syndrome; both wanted to access MAID under Quebec and federal legislation and both were denied on the basis that they were not at the end of life (the Quebec standard) and that their deaths were not reasonably foreseeable (the federal standard). The Quebec court found both Acts unconstitutional: s.7 Charter rights were breached by prohibiting all non-dying persons from accessing MAID and possibly causing them to resort to death by other means, and s. 15 Charter rights were breached by the unequal treatment for those suffering from an illness but whose death was not reasonably foreseeable as compared to someone whose death was closer in time. Neither breach was saved by the Charter's notwithstanding clause (in the case of s. 7 the court found that a person's suffering outweighs the benefit to society, and in the case of s. 15, the court found that there was not only a minimal infringement of rights so the use of the *Charter* "notwithstanding" provision was not justified.)

The Quebec court gave the federal government a period of time to amend its MAID legislation to comply with the *Charter*. Our concern is this: the new structure proposed by Bill C-7, not only preserves but reinforces the two categories of persons (natural death foreseeable and not foreseeable) and establishes different standards and different processes applicable to each track. The new Bill C-7 two-track structure is vulnerable to s. 7 and s. 15 *Charter* challenges on much the same basis as the issues

adjudicated in *Truchon* and could even be argued to be worse than the previous standard as it intentionally distinguishes between classes of persons. It is important to note that the concept of "naturally foreseeable death" was the creation of Parliament and was not even considered in *Carter.* The Supreme Court in *Carter* set a broader standard for accessing MAID eligibility, not by assessing a person's proximity to death, but rather by determining if a person has a grievous and irremediable medical condition (including an illness, disease or disability) that is causing enduring suffering intolerable to the individual, in the circumstances of his or her condition. The broader SCC *Carter* standard should be used in Canada's MAID legislation, both in determining a person's eligibility for MAID and in setting the associated delivery process. Furthermore, moving away from a structure tied to proximity to death would enable the legislation to allow people to do early planning, and to create Advance Requests and Advance Directives, even at a pre-diagnosis stage.

We recognize that a pre-diagnosis Advance Request for MAID is a forward-looking approach requiring a person to consider what "would be" intolerable suffering to them at a future date, as opposed to a present determination of what is a currently intolerable condition for that person, but the underlying principles are consistent with the SCC ruling in *Carter.* There is significant individual, family and societal benefit in a legislative scheme that enables Canadians to engage in pre-planning for their end of life, well before a crisis-condition arises.

If the Government preserves the two-track concept of "naturally foreseeable death" and "natural death not reasonably foreseeable" we urge the Government to take steps to at least adhere more closely to the spirit of the SCC standard rather than straying further from it. This includes clarifying the meaning of "naturally foreseeable death" consistent with both the original legislative intent (as the former A.G. expressed) and subsequent court interpretation.

Recommendation:

We recommend that the Government eliminate the two-track process and remove the distinction between categories of persons based on proximity to death.

We recommend that the Bill be amended to contain specific wording clarifying that eligibility for MAID does not turn on a consideration of whether a person's death is imminent; that there need not be a specific prognosis regarding a person's expected remaining life span; and that the authority and responsibility for assessing eligibility is at the discretion of medical professionals, taking into consideration all of the relevant circumstances including the person's wishes as expressed in an Advance Request or as clearly expressed to an SDM, all points being consistent with the teachings of *Carter, A.B. and Truchon*.

If the Government does preserve the two-track concept, we recommend that steps be taken to adhere more closely to the spirit of the SCC standard in *Carter.*

3. **Several proposed "Safeguards" are redundant, procedurally complex, result in unequal treatment and/or create barriers to access MAID**

Measures that duplicate existing legal protections, are needlessly complex and/ or which result in unequal treatment become barriers to access instead of operating as "safeguards". Such barriers to access could have the effect of prejudicing vulnerable populations rather than being of benefit to them. Rural populations could be particularly vulnerable to being adversely affected by such purported "safeguards".

i) Section 241.2 (3)(g) Natural Death Foreseeable—Person with Difficulty Communicating

Discussion: This section relates to the means by which medical professionals should communicate with persons who have difficulty communicating and uses the phrase "take **all** necessary measures". We believe "all necessary measures" is too broad a standard that does not reflect differences in the availability of medical and other services, especially in rural areas. Importantly, it also entirely disregards the important role of a Substitute Decision Maker to aid in the communication of a patient's wishes, as well as the importance of considering a patient's Advance Care Plan.

Recommendation:

We recommend that this section be amended to replace "take all necessary measures" with "take all necessary measures **reasonable in the circumstances".**

We also recommend that this section include a provision for consultation with a Substitute Decision Maker, and that medical professionals should consider and give conclusive value to a patient's Advance Care Plan, if any.

ii) Section 241.2(3.1) Natural Death not Foreseeable- *Charter* Vulnerability

Discussion:

Our general comment (introduced above in the discussion of the meaning of "natural death foreseeable and not foreseeable"), is that the very creation of two categories of persons, each having different rights and obligations for accessing MAID, could be subject to a successful *Charter* challenge, on a very similar basis to the challenge that was successful in *Truchon.*

We recognize that the government has attempted to respond to the issues T*ruchon* presented by creating a system that at least provides some rather than no access to MAID for the second track of persons whose "natural death is not foreseeable". However, because the procedures and considerations are significantly more onerous or restrictive in the second track than in the first, this new provision as currently drafted risks exposure to s. 7 and s. 15 Charter challenges. Further, because the rights and restrictions of same are so very inequitable from one track to the other, the "natural death not foreseeable" structure would not be saved from the *Charter* challenge on the basis of a s.1 "notwithstanding clause".

Recommendation:

We recommend that in the event that the two-track system is retained (despite our recommendations to the contrary) the procedures and requirements for the second track be made significantly less onerous or restrictive, so that the rights and obligations of persons in both categories are more closely aligned.

iii) Section 241.2(3.1) (e) Natural Death not Foreseeable: Expertise Requirement

Section 241.2(3.1) (e) states that before a medical practitioner or nurse practitioner provides MAID they must:

(e) ensure that a written opinion confirming that the person meets all of the criteria set out in subsection (1) has been provided by

i) if they do not have the expertise in the condition causing the person's suffering, a medical practitioner or nurse practitioner with that expertise, or
ii) if they have that expertise, another medical practitioner or nurse practitioner.

The first issue is what the term "expertise" means in this context; does it mean a certified specialist or something less than that, and, if so, what? Take the example of the *Truchon* case: who would be considered to have expertise in cerebral palsy or post-polio syndrome? This requirement adds needless complexity that will inevitably cause additional interpretive (and practical) difficulties for medical practitioners. Further, even if the term 'expertise' can be somehow understood and agreed upon, this requirement could result in substantial delay in finding someone with the appropriate expertise, particularly in rural or remote areas.

This section is fundamentally unworkable as currently drafted because it contains inconsistencies: that is, if a person who is to deliver MAID does NOT have expertise in the condition, a written opinion that the patient meets the criteria must be written by someone who does have the expertise. BUT if the person who is to deliver MAID **does** have expertise in the condition, oddly enough **they** don't write the opinion themselves but rather they have to ensure that another medical practitioner or nurse practitioner provides the written opinion, and even more oddly, that second practitioner does **not** have to have such expertise in writing the opinion.

Moreover, Canadian medical and nursing professionals already have an obligation to consult with appropriate specialists when matters are beyond their own expertise. If Parliament is prepared to trust such professionals at all under the legislation, it should be prepared to trust them to consult as appropriate.

Recommendation:

We recommend that this section be deleted as it has inconsistencies and it presents needless practical complexities given that medical and nursing professionals already have an obligation to consult with appropriate specialists when matters are beyond their own expertise. In addition, it establishes a more onerous standard for the second track of persons than for the first track (where the assessment requirement is merely two independent practitioners) and, as such, this section becomes vulnerable to a *Charter* challenge.

If the "expertise" provision is preserved then it should be amended such that any medical practitioner providing MAID who has expertise in the relevant condition should be permitted to provide the written opinion. If the government has included this section with the belief that an extra step of 'expertise' is called for beyond the currently recognized professional standard then the written opinion should be given by a person having such expertise rather than someone without.

iv) Section 241.2(3.1) (g) Natural Death not Foreseeable - Offering Consultations

Recommendation:

We recommend that this section be amended in two respects: first, the wording should be changed from "ensure that the person has been informed of **the** means available to relieve their suffering" to "ensure that the person has been informed of the **reasonable and available** means available". The former term is too expansive without modifiers and is not consistent with the language in the subsequent subparagraph (h) which uses the "reasonable and available means" language.

We also recommend that the language be changed from "has been offered consultations with relevant professionals" to "has been offered the **opportunity for** consultations with relevant professionals". As currently drafted, it is arguable that in order to meet this condition the person would have had to have

actual consultations scheduled (which is impractical), rather than just being presented with the opportunity for same.

v) Section 241.2(3.1) (h) Natural Death not Foreseeable - Serious Consideration

Subsection (h) is unworkable and should be deleted. It is neither practical nor possible for a practitioner to be required to "agree with the person that the person has given serious consideration to [those] means" (to relieve suffering). It is an impossible standard to require of a practitioner as well as an improper precondition for a patient who may not want to give "serious consideration" to all reasonable and available means to relieve their suffering.

Recommendation:

We recommend that this section be amended to combine some of the provisions with subsection (g) such that the obligation becomes one of the practitioners advising of and discussing with the patient such "reasonable and available means to relieve suffering" (essentially a form of informed consent) but without the requirement that the practitioner inquire into the patient's state of mind as to whether he or she has "seriously considered" such means.

vi) Section 241.2(3.1) (i) Natural Death not Foreseeable - 90 Day Waiting Period

Recommendation:

We recommend that the 90-day waiting period be removed or substantially reduced. We are not aware of any medical or legal justification for such a long waiting period, in fact, the similar provision in the prior legislation was only 10 days, which period has now been removed entirely for persons falling within the first category of persons whose "natural death (is) reasonably foreseeable". To make such an extreme distinction between categories of patients is to attract the potential for a Charter challenge on the basis of s.15 inequality and s. 7 (security of the person).

We also recommend that if this subsection is preserved (even with a substantially shortened waiting period) the provision allowing practitioners the discretion to reduce the waiting period should be expanded. As currently drafted, the subsection allows two practitioners to reduce the 90-day waiting period but only if both are "of the opinion that the loss of the person's capacity to provide consent to receive medical assistance in dying is imminent." We recommend that the practitioners should be able to reduce the waiting period to whatever period they consider appropriate in the circumstances, including because of grievous and irremediable pain and suffering, not only because loss of capacity is imminent.

We also recommend that this section be clarified so that there is no question as to which practitioner has which obligation; as currently drafted this will be very difficult to determine in practice without guidance as to what was intended. In particular it is difficult in the current draft to clearly understand exactly who is the "first medical practitioner or nurse practitioner" who has the important discretion to reduce the waiting period.

vii) Section 241.2(3.1)(j) Natural Death not Foreseeable - Person with Difficulty Communicating

Recommendation:

We make the same recommendations as were outlined in section (i) above, relative to the same provision for persons with difficulty communicating whose natural death is foreseeable under Section 241.2(3)(g).

viii) Section 241.2(3.1)(k) Natural Death not Foreseeable - Express Consent Required

Recommendation:

If the two-track system is preserved we recommend that subsection (k) be amended such that the new "Final Consent- Waiver" provisions be extended to both tracks of patients.

4. Specific Problems with proposed "Waiver Arrangements "as drafted

i) Need for Equal Access to Waiver Arrangement Section 241.2 (3.2)

Discussion:

This topic was discussed in detail, above.

Recommendation:

We recommend that the new waiver arrangement provisions be made applicable to all Canadians without distinction as to imminence of death and that the two-track system be eliminated.

ii) Section 242.2(3.2) (a) (ii) Arrangement for Death on a Specified Day

Discussion:

This section establishes part of the process for creating a final consent waiver arrangement. It provides that a person may enter into an arrangement in writing with a medical practitioner to cause the person's death **on a specified day.** While we generally approve of the concept of the waiver arrangement, we are concerned that the requirement to name a specific day may be an emotionally difficult barrier for some patients.

We recognize that a later subsection (242.2 (3.2)(a)(iv)) states that death can occur on or before such specified date, however, our concern is that there is no express provision for amending the arrangement to a **later** date, or for renewing/ extending the arrangement if the specified date comes and the death does not occur for whatever reason. For example, what if a date of death is specified, the person loses capacity and cannot thereafter amend the arrangement, but for whatever reason the death cannot occur on or before the date specified (scheduling problems or an intervening event, like the Covid pandemic, etc). This could result in uncertainty for the practitioners and, tragically, could mean eligible persons could be denied the MAID they qualified for and wanted.

Recommendation:

We recommend that this requirement be changed to a defined event (like the loss of capacity) rather than tying it to a particular date in time. Alternatively, if the specified date structure is preserved, provision should be made to allow the death to occur at a later date if intervening events prevented the death on or before the specified date, and if the person at that point no longer has the capacity to enter into or amend the existing waiver arrangement.

iii) Section 3.4 - Advance Consent Invalidated

Discussion:

This section provides that an “advanced consent” in the form of a waiver arrangement can be forever invalidated if the person demonstrates words, sounds or gestures indicating refusal or resistance to the administration of MAID. We assume this section was meant to address the situation in which a person has lost the ability to communicate and/ or has lost capacity. We think this is too extreme a requirement and does not give practitioners and patients sufficient latitude to ensure that the patients’ original desire for MAID is preserved.

Recommendations:

We recommend that a “try another day” provision be added to this section, so that gestures of refusal or resistance on a single day are not enough to invalidate the advance consent for all time.

We further recommend that wording be added to this section, similar to the “inability to communicate” provisions in other parts of the statute; “if the person has difficulty communicating, take all necessary measures to provide a reliable means…” (etc).

We recommend that this section include a provision for consultation with a Substitute Decision Maker, and that medical professionals should consider and give conclusive value to a patient’s Advance Care Plan, if any.

5. Broader Context Considerations

Other Categories: Mental Illness and Mature Minors

Section 241.2 (2.1) of Bill C-7 specifically excludes mental illness from the definition of illness, disease or disability and, as such, persons with mental illness as the sole underlying medical condition are excluded from accessing MAID. We see this as a fundamental inequity that could be successfully challenged as an infringement of *Charter* rights. Now that the government is on the brink of its five-year review requirement, we recommend that persons with mental illness be considered in greater depth and be included in the comprehensive re-draft of the legislation.

Similarly, in the context of the broader five-year review, we recommend that the federal government develop a comprehensive system for allowing mature minors to access MAID. The Canadian medical system and associated case law has long recognized that mature minors are capable of making important medical decisions for themselves in appropriate circumstances; we see no reason for excluding this category of persons from MAID especially since it amounts to countenancing the suffering of people merely because they have yet to reach the age of majority.

All Canadians, regardless of age or mental capability are protected by *Charter* rights. To exclude these two groups amounts to the very kind of absolute prohibition to MAID which the SCC found breached the *Charter* in *Carter.*

Concerned citizens with medical legal expertise/ and or experience with the MAID process

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