

**Submission to the Standing Senate Committee on Legal and Constitutional Affairs on
Bill C-7: *An Act to amend the Criminal Code (medical assistance in dying)***

November 25, 2020

Introduction

The Evangelical Fellowship of Canada (EFC) is the national association of evangelical Christians in Canada. Established in 1964, the EFC provides a national forum for Canada's four million Evangelicals and a constructive voice for biblical principles in life and society.

The EFC appreciates the opportunity to participate in the Standing Senate Committee on Legal and Constitutional Affairs study on Bill C-7 and the watershed changes to the *Criminal Code* it proposes.

We remain firmly opposed to medically hastened death, but we offer recommendations to minimize the harm and risk to vulnerable Canadians. We believe that C-7's provisions will place more people at risk.

Our approach to the issue, and to Bill C-7 is based on the biblical principles of respect for human life and dignity, justice, and care for those who are vulnerable. We note that these principles are also reflected in Canadian law and public policy.

As the Supreme Court stated in the *Carter* decision, "The sanctity of life is one of our most fundamental societal values. Section 7 is rooted in a profound respect for the value of human life." (para. 63) The Court sought to achieve a delicate balance between the government's interest in promoting and protecting life, and individual autonomy. The Court concluded that limited exceptions to the blanket prohibition, while inherently risky for vulnerable persons, could be balanced with respect for life and not compromise it, with stringent safeguards in place, scrupulously monitored and enforced.

The proposed changes to the law are particularly troubling in light of the significant financial incentive for expanding MAID. The report of the Parliamentary Budget Officer on the cost of implementing Bill C-7, requested by a Senator, details the financial savings to the state in terms of health care costs.¹ At the same time, we have yet to make real progress in ensuring high quality palliative care is accessible to all Canadians.

¹ <https://www.pbo-dpb.gc.ca/en/blog/news/RP-2021-025-M--cost-estimate-bill-c-7-medical-assistance-in-dying--estimation-couts-projet-loi-c-7-aide-medicale-mourir>

Significant problems with the monitoring and reporting system for MAID have also been noted, as detailed by the Vulnerable Persons Standard report last month.² Very troubling developments are evident, as well, in the 2019-2020 annual report of Canada's correctional investigator Ivan Zinger, who is asking Canada for a moratorium on allowing medical assistance in dying (MAID) inside federal correctional institutions, no matter the circumstances.

Parliament's study of the current MAID regime is overdue. Legislation to expand the practice of MAID must not be passed before serious problems with the current regime are studied and addressed.

It is essential that the Committee carefully consider the impact of Bill C-7 and the concerns being raised by many Canadians, particularly Canadians with disabilities. This legislation is too important to be rushed. The Justice Minister can ask for another extension or the *Truchon* decision can take effect without Bill C-7 being passed.

Bill C-7 proposes fundamental changes in how we understand our societal duty of care and medicine. These are watershed changes to law, medicine and society that require a careful and thorough study. We urge the Committee to slow its process and take the time and care this issue warrants.

We recommend the following amendments:

- 1. Introduce an end of life requirement in the medical assistance in dying regime to replace 'reasonably foreseeable' death.**

Bill C-7's proposed removal of 'reasonably foreseeable' death is a foundational change. The carefully considered 2016 law (known as Bill C-14) was conceived as being for people who were suffering in the last stages of life. Bill C-14 sought, as laid out in the preamble, to "*...affirm the inherent and equal value of every person's life and to avoid encouraging negative perceptions of the quality of life of persons who are elderly, ill or disabled.*" This critical objective must not be set aside.

In the *Carter* decision, the Supreme Court expressly stated that their decision was intended to respond only to the factual circumstances before it. Ms. Taylor, as noted in the decision, described herself as dying and having a condition that was terminal.³ The *Carter* decision addressed an end of life context.

The rationale for passing Medical Assistance in Dying legislation in 2016 was to bring an earlier death for those who were suffering as they were dying. Bill C-7 would allow the lives of Canadians who are not dying to be ended. This is a watershed change.

² Failing People with Disabilities who Experience Systematic Suffering: Gaps in the Monitoring System for MAID, October 2020, <http://www.vps-npv.ca/news-and-resources>

³ Paragraph 12, *Carter v. Canada*, <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/14637/index.do>

We note that whether a patient's death is deemed to be foreseeable or not is left to the subjective determination of the doctor or nurse practitioner assessing the patient. The legislation offers no clear criteria or guidance for doctors in making such a determination. This gap seems particularly dangerous for people with disabilities, as research shows that doctors often consider disabled persons' quality of life to be significantly lower than disabled persons do themselves.⁴

Bill C-7 would make medically hastened death broadly available to people who are not dying. This change would mean that a person who is not dying but who has a chronic illness or disability could be eligible for hastened death ultimately *because* of their illness or disability. This would put persons living with disability outside of the protections offered to other Canadians, solely on the basis of disability.

People with disabilities already face significant difficulty obtaining the medical care and social supports they need. This inequity has only been heightened during the pandemic, as people with disabilities have seen how critical care triage protocols exclude them from critical care if resources are rationed. This change to the law will put their lives even more at risk.

Disability advocates have asked for this change **not** to be made. They express serious and legitimate concern that this change is discriminatory and will pressure people with disabilities to end their lives. It puts them at risk in a regime that accepts that certain lives can be ended, particularly in an overburdened medical system. We share these concerns.

As disability advocates say, "Nothing about us, without us." Every national disability organization opposes this change. We implore the Committee to hear what disability advocates are saying.

Advisors to the Vulnerable Persons Standard:

The system for monitoring medical assistance in dying (MAiD) in Canada is failing people with disabilities and not fulfilling Parliament's and the federal government's promise that the system would respect their equality rights.⁵

Professor Catherine Frazee:

To reinvent MAID so that it is no longer an alternative to a painful death, but for some, instead, an alternative to a painful life, is to embrace uncritically the notion that suffering associated with disability is a burden greater than death.⁶

Over seventy disability rights organizations and allies, including the Council of Canadians with Disabilities and Inclusion Canada:

Without the equalizing effect of the end-of-life criterion, which guarantees that the common thread between all persons who access an assisted death in Canada is that they

⁴ Carol J. Gill, "Health Professionals, Disability and Assisted Suicide: An Examination of Empirical Evidence and Reply to Batavia (2000)," *Psychology, Public Policy and Law*, 2000, v. 6, no. 2, 526-545.

⁵ Failing People with Disabilities who Experience Systematic Suffering: Gaps in the Monitoring System for MAID, October 2020, <http://www.vps-npv.ca/news-and-resources>

⁶ Remarks for End of Life, Equality and Disability: A National Forum on MAID, Jan. 30, 2020, <https://vimeo.com/388515714>

are all dying, persons with disabilities will be able to gain access ultimately because they have a disability. A worse stereotype couldn't be institutionalized in law – that disability-related suffering, largely caused by lack of support and inequality, justifies the termination of a person's life.⁷

This change was prompted by the decision of one judge in *Truchon* and the decision was not tested by higher courts. If there is concern about the constitutionality of an end of life criterion, it could be tested by asking the Supreme Court to review its constitutionality.

This is a matter of equal protection, otherwise the law distinguishes between those who have a disability or chronic illness and those who do not. This is discrimination on the basis of disability and violates the equality rights of Canadians with disabilities.

Removal of an end-of-life requirement for eligibility would send the message that a life with chronic illness or disability is not worth living. We must, as a nation, reject that notion unequivocally.

The government can and should reintroduce an alternative, unambiguous end of life criterion for medical assistance in dying.

2. Maintain Bill C-7's specific exclusion of mental illness and add provisions on concurrent mental illness

We support Bill C-7's specific exclusion of mental illness in s. 1 (2). We believe this specific provision both offers protection to Canadians with mental illness and supports a life-affirming approach.

We note, however, that there are situations where individuals who have a disability or chronic illness also have concurrent mental illness. Under the current legislation and the proposals set out in Bill C-7, there is no obligation to ascertain whether patients' request for death is due to treatable mental illness if they have an illness, disability or medical condition that otherwise makes them eligible.

Regrettably, social isolation, exclusion and stigma often come with disability and incurable illness. People may feel like a burden to family or caregivers and to the medical system. The strongest independent predictor of desire for hastened death in terminally ill patients is depression and hopelessness.⁸

⁷ <https://inclusioncanada.ca/2019/10/04/advocates-call-for-disability-rights-based-appeal-of-the-quebec-superior-courts-decision-in-truchon-gladu/>

⁸ <https://www.bcmj.org/articles/addressing-existential-suffering>

It is reasonable to expect that the impact of an offer or approval of MAID to a patient with concurrent mental illness would have the same effect as it would on a patient for whom mental illness is the sole underlying medical condition. As the CMHA position paper on MAID states, It is important to discuss the potentially negative impact of a psychiatrist's or medical practitioner's approval of MAiD for their patient. Presenting MAiD as a viable option may "reinforce loss of hope and demoralization" in struggling patients. It is argued that, "by answering a death request of a psychiatric patient positively, a central therapeutic element in the doctor-patient relationship, namely the instrument of hope, is removed."⁹

In any given year, 1 in 5 Canadians will experience a mental health problem or illness. Once depression is recognized, help can make a difference for 80% of those who are affected.¹⁰ However, many Canadians are not able to access mental health care and supports. Over 1.6 million Canadians report unmet mental health care needs each year.¹¹

We recommend a provision be added to require that those whose request for MAID may be related to a concurrent, underlying mental illness receive a mental health assessment, to help the patient, and the practitioner, better understand the factors underlying the desire for MAID and allow for a more informed decision about treatment.

3. Don't remove key safeguards for those whose death is reasonably foreseeable.

The safeguards in the current legislation need to be maintained and strengthened, not removed. In the *Carter* decision, the Supreme Court agreed with the trial judge's assessment:

My review of the evidence ... leads me to conclude that the risks inherent in permitting physician-assisted death can be identified and very substantially minimized through a carefully-designed system imposing stringent limits that are scrupulously monitored and enforced. (para. 105)

Rather than scrupulously monitoring and enforcing stringent limits in order to minimize the inherent risks, as the Court described, Bill C-7's removal of these key safeguards loosens these limits, significantly increasing the risk of wrongful death.

a. Amend Bill C-7 to maintain the 10-day reflection period between asking for and receiving hastened death.

The *Criminal Code* currently requires ten clear days as a reflection period between the time a request is made and hastened death is provided. There is already the ability for the reflection period to be waived if the medical practitioners believe that the person is likely to lose their capacity to consent or if their death seems imminent. This bill proposes to remove the reflection period altogether for individuals whose natural death is foreseeable.

⁹ <https://cmha.ca/wp-content/uploads/2017/09/CMHA-Position-Paper-on-Medical-Assistance-in-Dying-FINAL.pdf>

¹⁰ <https://cmha.ca/fast-facts-about-mental-illness>

¹¹ <https://cmha.ca/wp-content/uploads/2018/09/CMHA-Parity-Paper-Full-Report-EN.pdf>

This change could allow a person's life to be ended on the same day a request is made. The safeguard in the current legislation exists to ensure a person doesn't make a life-ending decision on a particularly difficult day, but rather gives careful consideration to the question of a hastened death. As we maintained when Bill C-14 was debated, we believe the 10-day period is already too short.

Removing the reflection period, therefore, seems both unnecessary given the exception allowed in the current law, and dangerous. This important safeguard should remain in place, especially given that 'foreseeable death' is a subjective term without a clearly defined timeframe. In fact, in the *Lamb* case, it was suggested that 'reasonably foreseeable' could be very widely interpreted by medical practitioners, to include people who may not die for years, if not decades. The exception currently in place allows this reflection period to be shortened only under exceptional circumstances.

As the evidence noted in the *Truchon* decision indicates, people do change their minds. Of 830 refused written requests for medical aid in dying, one in five (20%) of the refused requests were because the person changed his or her mind (para. 213-214). As well, the *First Annual Report on Medical Assistance in Dying 2019* indicates that 263 patients withdrew their request for MAID in one year. The report indicates over half (54%) changed their minds and 26% found palliative care measures were sufficient. Of all the patients who withdrew their request, 20% withdrew their request immediately before MAID.¹²

At the very least, the ten-day reflection period must be maintained in the law. Though we disagree with the existing exception to the ten-day reflection period which allows it to be waived under certain circumstances, if the exception is not well understood, it should be clarified, rather than simply removing this critical safeguard from the law for all patients.

b. Remove the waiver of final consent in Bill C-7, in order to maintain the safeguard that a person must be able to consent at the time of hastened death.

The requirement that a person be able to consent at the time of assisted death is a crucial safeguard to prevent wrongful death. Removal of this safeguard creates a significantly greater role for and responsibility by medical practitioners, requiring them to make decisions about patient communications that have subjective elements, such as determining whether the patient is communicating a refusal or making involuntary movements or gestures.

The Supreme Court in *Carter* said that assisted suicide must only take place when the patient "clearly consents to the termination of life." (para. 4, 127, 147) One key reason to require both a reflection period and consent at the time of death is that, as noted above, people do change their minds.

¹² Health Canada, *First Annual Report on Medical Assistance in Dying, 2019*, p. 38-39.
<https://www.canada.ca/en/health-canada/services/medical-assistance-dying-annual-report-2019.html>

Bill C-7 offers very few guidelines as to how a doctor or nurse practitioner and their patient would form and execute a 'waiver of final consent.' For example, there is no requirement for an independent witness to the written agreement or for confirmation of the assessment of the risk of capacity loss by another medical practitioner.

We firmly believe that the safeguard of being able to give final consent at the time of assisted death is crucial, and should remain in place.

If the government is determined to remove final consent in exceptional circumstances, it must not remove this safeguard for all patients. A tightly-worded exception that is subject to strict rules and clear guidelines, and applied only under specific, narrow circumstances would keep this protective measure of final consent in place for most patients. It is not a proportionate response to remove this key safeguard from all patients whose deaths are reasonably foreseeable, as a way to respond to exceptional circumstances.

c. Delete the provision that allows the number and independence of witnesses to be reduced.

Two independent witnesses to a person's request for MAID offer a higher standard of protection for vulnerable Canadians. It is standard procedure to require two witnesses to provide accountability and protection.

Under Bill C-7, the number of witnesses required to attest to a request for MAID would be reduced to one, and the witness could be the person's paid health care provider. One of the essential functions of independent witnesses is to ensure that a patient's decision for hastened death is a free, unforced decision, made without any sense of pressure. Reducing the number and independence of witnesses undermines this protection.

Further, allowing a single witness who is a paid health care provider of the patient in question compromises the need for a witness to be independent. This puts significantly increased responsibility upon a health care provider who otherwise has been tasked with a person's care. Disability advocates have also expressed concern that this would increase the potential for abuse of a person with disabilities by their paid health care provider.

d. Extend the new safeguards proposed for those whose death is not foreseeable to also protect those whose death is foreseeable.

Bill C-7 provides new and strengthened safeguards for individuals who are not dying, such as:

- One of the two doctors or nurse practitioners who provide a written opinion that the person meets all of the criteria must have expertise in the condition that is causing the person's suffering.
- The person must be informed of the means available to relieve their suffering (including, where appropriate, counselling services, mental health and disability support services, community services and palliative care) and be offered consultations with professionals who provide those services or care.

- The person must have discussed reasonable and available means to relieve their suffering with the medical or nurse practitioner who confirmed they are eligible, and they must agree that the person has given serious consideration to those means.

These safeguards should apply also to those whose death is reasonably foreseeable.

Bill C-7 says individuals who are not dying must be informed of options and treatments to relieve their suffering, but the reality is that access to palliative care, mental health care, and support and care for those living with disability are not readily or widely available.

Unlike other jurisdictions that have legalized hastened death, Canada is proposing only that patients must be informed of treatment or services to relieve suffering. Further, many of these forms of care and support are not adequately available across Canada or available in a timely way. It should be unthinkable that a patient would choose assisted death because the supports and care required to live are not readily available.

In the End of Mission Statement by the UN Special Rapporteur on the rights of persons with disabilities, at the end of her visit to Canada in April 2019, she states:

I am extremely concerned about the implementation of the legislation on medical assistance in dying from a disability perspective. I have been informed that there is no protocol in place to demonstrate that persons with disabilities have been provided with viable alternatives when eligible for assistive dying. I have further 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. **I urge the federal government to investigate these complaints and put into place adequate safeguards to ensure that persons with disabilities do not request assistive dying simply because of the absence of community-based alternatives and palliative care.** [emphasis added]¹³

We note also that Canada is acting to expand hastened death when it has not yet addressed the Special Rapporteur's concerns. It is acting to expand hastened death when the need for widely accessible, high quality palliative care for all Canadians has yet to be addressed.

It is unconscionable that we would make it easier to access hastened death in Canada than it is to receive quality palliative care, or than it is for individuals living with disability to access the medical and social supports they need to enjoy living on an equal basis with other Canadians.

Before expanding access to medically hastened death, the government should take steps in partnership with the provinces and territories to ensure Canadians have timely access to essential social and medical supports and services.

¹³ End of Mission Statement by the UN Special Rapporteur on the Rights of Persons with Disabilities on her visit to Canada, April 12, 2019, <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24481&LangID=E>

It should not be easier to obtain a hastened death in Canada than it is to obtain good quality palliative care, mental health care or other needed medical or social supports.

Whether or not Parliament decides to expand access, the proposed requirement for information to be provided and carefully considered should be extended to patients whose death is foreseeable. The requirement for patients whose death is foreseeable is currently much weaker. We believe all patients should have the benefit of extensive information about options and careful consideration with their medical practitioner. This is particularly important since it is possible for a person's natural death to be considered 'reasonably foreseeable' when it is still years away.

We urge the committee to extend these safeguards to all Canadians, whether their death is reasonably foreseeable or not.

4. Add specific conscience protection for health care workers and institutions

Conscience protection is a concern for many. Over 1,100 physicians, including Dr. Balfour Mount, the Canadian doctor who coined the phrase "palliative care," have signed a declaration stating that they do not want to end the lives of the patients under their care.¹⁴ Bill C-14 specifically referenced conscience protection, but it did not enact specific *Criminal Code* provisions to enforce this protection.

We have heard from health care workers that they are pressured to participate in medical assistance in dying against their deeply held beliefs. Palliative care doctors indicate they are increasingly under pressure to carry out MAID. As the Physicians' Alliance Against Euthanasia says, physicians increasingly feel pressured and bullied to participate in MAID:

The pressure has been intense for many physicians, especially amongst palliative specialists, some leaving even before this latest development. Descriptions were made of toxic practice environments and fear of discipline by medical regulators.¹⁵

As eligibility for MAID expands to allow ending the lives of patients no longer able to consent or of patients who have years still to live, there will be more doctors and nurse practitioners who feel they cannot end a patient's life in particular circumstances. This is in addition to those who feel they cannot participate in ending the life of any patient. This legislation will increase the number of doctors, nurse practitioners, paramedics and others involved in health care who have conscientious objections.

The *Charter* sets out fundamental freedoms, like that of conscience, which must be upheld and specifically protected in Canadian law and policy. There is currently a lack of protection that should be rectified in Bill C-7. This legislation must be amended to add specific *Criminal Code* offences related to coercion to participate in medical assistance in dying.¹⁶

¹⁴ <https://collectifmedecins.org/en/declaration/signatories/>

¹⁵ <https://collectifmedecins.org/en/press-release-2/>

¹⁶ See former Bill C-418 for a proposal of an offence related to coercion in medical assistance in dying, <https://www.parl.ca/DocumentViewer/en/42-1/bill/C-418/first-reading>

Conclusion

Bill C-7 has been presented as the government's response to last fall's lower court decision in *Truchon*. It is regrettable that the government did not appeal the decision and defend the legislation passed by Parliament, which took a narrower approach. There are significant and grave implications to expanding access to euthanasia to persons who aren't dying.

Further, Bill C-7 includes changes that are not addressed in the *Truchon* decision. If the government feels there is need for an expedited process in response to the decision, then those elements of the bill not addressed in *Truchon* should be removed so that they can be considered more carefully.

In fact, we believe that Parliament should re-assert and pass a different end-of-life requirement to replace "reasonably foreseeable." If there is concern that an end of life requirement in itself is unconstitutional, the government could ask for a Supreme Court reference on the matter.

We offer the following recommendations to minimize the harm and risk to vulnerable Canadians.

Summary of recommendations

- introduce an end of life requirement to replace 'reasonably foreseeable' death
- maintain the exclusion of mental illness, but require assessment for concurrent mental illness
- delete the provision that removes the 10-day reflection period (Bill C-7 s. 1 (5))
- delete the provision that creates a waiver of final consent (in Bill C-7 s. 1 (7))
- delete the provision that reduces the requirement from two independent witnesses to one witness who may be a paid caregiver (Bill C-7 s. 1 (4))
- extend the new safeguards proposed for those whose death is not foreseeable to also protect those whose death is foreseeable
- add specific conscience protection for health care workers and institutions in the *Criminal Code*

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