

Submission to the Department of Justice on the Consultations on Medical Assistance in Dying (MAiD): Eligibility Criteria and Request Process January 27, 2020

Thank you for the opportunity to provide input on the *Consultations on Medical Assistance in Dying: Eligibility Criteria and Request Process*. The Centre for Addiction and Mental Health (CAMH) is Canada's largest mental health teaching hospital and one of the world's leading research centres in its field. CAMH uses its expertise in clinical care, research, education and system building to improve the lives of people impacted by mental illness. The topic of Medical Assistance in Dying (MAiD) and its availability to people with mental illness as their only medical condition is a difficult one for CAMH and the broader mental health community. As evidenced in the Council of Canadian Academies (CCA) report on *The State of Knowledge on Medical Assistance in Dying Where Mental Disorder is the Sole Underlying Medical Condition*, there is little consensus on the topic and that is likely to remain the case for the foreseeable future.

Background and context

In October 2017, CAMH published our [Policy Advice on Medical Assistance in Dying and Mental Illness](#). This paper continues to represent CAMH's thoughts on the topic and our reservations about expanding access to MAiD for people whose only medical condition is mental illness and who are not nearing natural death. At the time this paper was written, it was a theoretical discussion as reasonable foreseeability of natural death was an eligibility criterion in federal MAiD legislation. The recent decision by the Superior Court of Quebec (*Truchon v. Attorney General of Canada*) that it is unconstitutional to limit access to MAiD to people nearing the end of life and the Government of Canada's decision to accept that ruling and commit to changing the federal MAiD legislation by March 11, 2020, now makes MAiD for people with non-terminal illnesses, including people with mental illness as their only medical condition, an imminent reality.

Extending MAiD to people with non-terminal illnesses signals a significant and fundamental shift in Canada's approach to assisted dying. For some, the difference between providing MAiD to people with terminal illness versus non-terminal illness is the difference between hastening death and causing death. CAMH is pleased that the government appears to recognize the significance of extending MAiD to people with non-terminal cases as their consultations and survey questions suggest that they are considering a revision and tightening of existing safeguards. Given the government's decision to extend MAiD to people with non-terminal illnesses, CAMH agrees that amending safeguards is the best approach for establishing access to MAiD for this population. Later in this submission we recommend that the government implement additional safeguards that would apply to all cases of non-terminal MAiD, including people with mental illness as their only medical condition.

CAMH remains concerned, however, that even with additional safeguards, some people with mental illness will still be able to obtain MAiD in circumstances that are not contemplated by the legislative process (i.e. situations where a person is 'tired of living'). This concern is rooted in the additional complexities inherent in mental illness and mental health treatment.¹ With that in mind, CAMH proposes an additional safeguard that we believe must be addressed before people with mental illness as their only medical condition can access MAiD. Once the requirements of this safeguard are met, people with mental illness as their only medical condition can access

¹ CAMH, 2017; CCA, 2018

MAiD under the same circumstances as those with non-terminal physical illnesses –by meeting all of the criteria outlined in the legislation (including the additional safeguards proposed in this submission).

Recommendations

Given the concerns and considerations just described, CAMH makes the following recommendations to the federal government as they move to amend MAiD legislation by removing the reasonable foreseeability of natural death criteria and extend MAiD to people with non-terminal illnesses.

Recommendation #1: The federal government temporarily prohibit MAiD for people with mental illness as their only medical condition until mental health experts develop standards of care that determine when a person’s mental illness has become irremediable.

With the removal of reasonable foreseeability of natural death from the criteria of a ‘grievous and irremediable’ medical condition, people wishing to access MAiD will have to meet the three remaining criteria (assuming the government does not amend these criteria):

- They have a serious and incurable illness, disease or disability
- They are in an advanced state of irreversible decline in capability
- They experience enduring physical or psychological suffering that is intolerable and cannot be relieved under conditions that the person finds acceptable.

In regards to the third criterion, CAMH recognizes that the grievousness of an illness is subjective and there is no doubt that some people with mental illness experience intolerable psychological and sometimes physical suffering due to their symptoms. The irremediableness (i.e. incurability and irreversibility) of an illness, however, is an objective determination that should be based on the best medical evidence available. CAMH’s concern is that there are currently no established standards of care that set a threshold for when a mental illness should be considered irremediable.² There is simply not enough evidence in the mental health field at this time to predict the trajectory of any one person’s mental illness and to ascertain whether an individual has an irremediable mental illness. This means that the ‘grievous and irremediable’ criteria will be open to interpretation by each MAiD assessor and any determination that a person has an irremediable mental illness will be inherently subjective. This could put people with mental illness at risk of accessing MAiD in circumstances not contemplated by the legislative provisions.

For this reason, CAMH is proposing a temporary hold on MAiD requests for people with mental illness as their only medical condition until standards of care are developed that establish a threshold for when a mental illness should be considered irremediable for the purposes of MAiD. To develop the standards of care, the federal government should appoint an expert working group who will produce these standards within a reasonable timeframe of the current amendment(s) to MAiD legislation coming into effect. The expert working group should develop standards of care in consultation with a broad range of other experts in the mental health field, including people with lived experience of mental illness and family members. The content of the standards should be determined by mental health experts, but some items for consideration may include a minimum period of time that a person has had a mental illness and/or a requirement that a person has participated in a certain number or types of treatments before they will be considered eligible for MAiD.³ The introduction of the standards of care should be accompanied by training for MAiD assessors.

² As cited in CAMH, 2017

³ CCA, 2018

Recommendation #2: The federal government require additional legislative safeguards for all cases of non-terminal MAiD. The following safeguards should be required:

- **Additional assessment(s)**
- **A two-track process**
- **Eligibility assessments conducted by specialists**
- **A vulnerability assessment**
- **Review by roundtable or committee**
- **Extended waiting period**
- **Extensive data collection**

Once standards of care that establish a threshold for when a mental illness should be considered irremediable have been developed, then people with mental illness as their only medical condition can access MAiD the same way as others with non-terminal illnesses. CAMH believes that additional safeguards are required for all cases of non-terminal illness due to the fundamental difference between providing MAiD to a person nearing natural death and providing MAiD to a person not nearing natural death. The recognition of this fundamental difference is evident in other assisted suicide schemes. Belgium, for example, requires additional assessments in cases where death is not imminent.⁴ The additional safeguards recommended by CAMH are drawn from the CCA report.⁵

An additional assessment(s) by a specialist in the illness for which a person is requesting MAiD should be required in non-terminal cases to confirm the person's diagnosis and prognosis. This is particularly important in cases where mental illness is the only medical condition as a lack of equitable mental health care in Canada means that some individuals may not have had access to a specialist before requesting MAiD. In cases of MAiD where mental illness is the only medical condition, an individual would be required to receive a psychiatric assessment by a psychiatrist. This assessment would also include a capacity assessment completed by the assessing psychiatrist or through referral to an expert in capacity assessment. Determining capacity in people with less-acute mental illnesses can be extremely complex and contrary to the *Truchon* decision, distinguishing between a patient who is suicidal and one who is rationally requesting MAiD due to their mental illness is an extremely difficult task. Hence the requirement for a capacity assessment in such cases. Once an additional assessment is made in non-terminal cases and the information passed on to MAiD assessors to begin their eligibility assessments, the specialist should initiate a two-track process. This would involve the simultaneous exploration of other treatment or management options with the person requesting MAiD. In cases of people with mental illness as their only medical condition, the psychiatrist would explore recovery-oriented options with the individual.⁶

The next safeguard for people with non-terminal illnesses would require that the two independent eligibility assessments that are currently required under the legislation be conducted by medical practitioners who are specialists in the illness for which a person is requesting MAiD (as opposed to any two medical practitioners or nurse practitioners currently required under the legislation). In cases of MAiD for mental illness as the only medical condition, eligibility assessments should be conducted by psychiatrists who are trained in the application of the standards of care.

⁴ Ibid

⁵ Ibid

⁶ Ibid

A vulnerability assessment should also be required in all cases of MAiD for non-terminal illness to assess psychosocial factors that may contribute to the persons suffering.⁷ Grief, loneliness and stigma, as well as poor social determinants of health can impact a person's suffering and ability to cope⁸ and it is often these psychosocial dimensions of suffering that motivate people to request assisted dying.⁹ People with mental illness and others with long-term, non-terminal illnesses are particularly vulnerable to isolation and lack of social support and it is imperative that they receive a vulnerability assessment to ensure that these modifiable psychosocial factors are not driving their request for MAiD. Such assessments should be conducted by a multi-disciplinary team and include consultation with other healthcare providers and family members to better understand the scope of the person's suffering. The vulnerability assessment along with the additional assessment(s) and eligibility assessments should be brought to a roundtable or committee for review and final determination on whether an individual with a non-terminal illness is eligible for MAiD. CAMH believes this extra step is necessary to ensure all factors are thoroughly considered in cases where the person requesting MAiD is not nearing natural death. The roundtable or committee should be comprised of specialists in the illness for which a person is requesting MAiD

An additional safeguard that should be required for people with non-terminal illnesses is an extended waiting period. Currently, there is a minimum 10 day period between when a person requests MAiD and when MAiD is provided. In situations where a person is nearing natural death and may lose capacity imminently, a short waiting period is necessary. In non-terminal cases, time becomes less of a concern and an extended waiting period between the request and provision of MAiD will allow for additional treatment and management options to be considered through the two-track process as well as any psychosocial factors uncovered in the vulnerability assessment to be addressed.

Finally, given the fundamental difference between MAiD for terminal versus non-terminal illnesses, CAMH recommends that additional data be collected on non-terminal requests and approvals for MAiD. The additional data should include information on the length of time the person has had their illness, number/type of treatment and management options tried, as well as the social determinants of health and psychosocial factors.

The government's decision to extend MAiD to people with non-terminal illnesses – and particularly to those with mental illness as their only medical condition – is a complex moral and ethical decision. While CAMH continues to have reservations about this decision, we accept that it is the way forward. CAMH believes that the two recommendations contained in this submission will balance the challenge of respecting the capable wishes of a person with an irremediable mental illness requesting MAiD and protecting those who are vulnerable.

Thank you again for the opportunity to provide input on the *Consultations on Medical Assistance in Dying: Eligibility Criteria and Request Process*. Representatives from CAMH would be happy to meet to discuss our recommendations in more detail.

For more information on this submission, please contact:

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⁷ VPS, 2017

⁸ CAMH, 2017

⁹ As cited in CAMH, 2017

References

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