



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

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Why Bill C-7's mental illness exclusion cause will not accomplish what it sets out to do

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In February 2020, the federal government introduced a bill in response to the Québec Superior Court decision in the *Truchon-Gladu* case (*Truchon v. Canada (Attorney General)*, [2019] QCCS 3792). This bill (C-7) proposed amendments to the original 2016 law decriminalizing medical assistance in dying (MAID). Parliament was prorogued in August 2020 and the proposed amendments were re-introduced in October 2020 (again labelled C-7). Among the modifications it contains is an exclusion clause for mental illness¹:

‘Exclusion (2.1) For the purposes of paragraph (2)(a), a mental illness is not considered to be an illness, disease or disability’.

(Paragraph (2)(a) refers to the first of (soon to be) three defining aspects of a ‘grievous and irremediable medical condition’ namely that it must be a serious and incurable illness, disease or disability.)

The federal government’s stated rationale for this clause is that there is no consensus regarding the issue of whether persons whose mental illness is their sole underlying medical condition (MI-SUMC) should be permitted to access MAID and if so, whether eligibility in light of the existing criteria can be assessed (Canadian Broadcasting Corporation 2020). By excluding MAID MI-SUMC, the government mistakenly assumes the clinical community will be able sidestep hard cases leaving only those where there is already consensus that we should proceed and consensus on how to proceed. However, this is not true. Reflection on real cases of MAID for persons with comorbid physical and psychiatric conditions or conditions with both physical and psychiatric components reveals that the concerns raised about eligibility and about assessing eligibility for persons with MI-SUMC are already present in cases in which people have been able to access MAID.

Over 13,000 people in Canada have accessed MAID since it was legalized. While data are available about the primary diagnoses of those who have received MAID, data is not available about their co-existing medical problems, including psychiatric problems. However, given the prevalence of mental disorders within the population as a whole (all disorder 12 month prevalence equals approximately 20%), a significant percentage of those who have received assisted dying are likely also to have had mental disorders.

The sub-population of persons with coexisting physical and psychiatric problems requesting MAID is a diverse group including those for whom:

- the mental disorder plays a relatively minor role in motivating the request,
- the mental disorder plays a substantial or principal role in motivating the request,
- the very combination of their physical and psychiatric circumstances motivates the request, and

¹ Conventional psychiatric language uses the expression ‘mental disorder’ whereas the bill refers to ‘mental illness.’ It is not clear to which conditions this expression refers as this is not defined in the bill. When speaking about the bill, I will use the expression mental illness. Otherwise, I will use the expression mental disorder.

- the psychiatric and physical components of the person's condition are intertwined such that they are best thought of as a mixed condition rather than a two co-existing conditions and it is this condition motivates the request.

Table 1 below summarizes the concerns that have been raised about permitting MAID in cases of MD-SUMC. Table 2 provides examples of real (fictionalized to prevent identification) cases involving mental disorders for which MAID was requested and provided in Canada under the current law.

Table 2 illustrates that the concerns about lack of consensus used to justify excluding MAID MI-SUMC are also present in cases that have not been excluded to date and will not be excluded by C-7. Given that these patients accessed MAID during a time when their natural deaths were considered reasonably foreseeable, we can anticipate that once this is not required, there will even more cases that raise the same issues as MI-SUMC.

From these two tables, one can draw the conclusion that Bill C-7's proposed mental illness exclusion will not accomplish what it sets out to do that is, it will not succeed in sidestepping difficult cases where there is lack of consensus on whether MAID MI-SUMC should be permitted and if so, how to assess eligibility.

Table 1: MAID eligibility criteria and concerns raised about applying these criteria in cases where a mental disorder is the sole underlying medical condition (Council of Canadian Academies, 2018)

Section 241.2.1 A person may receive medical assistance in dying only if they meet all of the following criteria:	Concerns raised about applying the MAID eligibility criterion to MD-SUMC
241.2(a) they are eligible — or, but for any applicable minimum period of residence or waiting period, would be eligible — for health services funded by a government in Canada;	
241.2(b) they are at least 18 years of age and capable of making decisions with respect to their health;	<p>It can be very difficult to assess capacity about an irreversible decision in which there may be a great deal of uncertainty about potential future benefits and potential risks of continuing to live.</p> <p>Assessors can disagree amongst themselves whether the person is capable.</p>
241.2 1(c) they have a grievous and irremediable medical condition;	It is impossible to predict irremediability of mental disorders or there are no standards by which to do so.
241.2(d) they have made a voluntary request for medical assistance in dying that, in particular, was not made as a result of external pressure ;	<p>A person’s request may not be voluntary and free of external pressure if she is acting under the pressure of socioeconomic vulnerabilities that are associated with mental illness.</p> <p>For some conditions, suicidal thinking is a symptom of the condition such that when the person is successfully treated, she is no longer suicidal. It can be difficult or impossible to distinguish between someone who requests MAID because they have made a voluntary request versus someone who is expressing suicidal thoughts brought about by the condition. A person who requests MAID because she is acting on the suicidal thoughts caused by her condition is not making a voluntary request.</p>

241.2 1(e) they give informed consent to receive medical assistance in dying after having been informed of the means that are available to relieve their suffering , including palliative care.	State of the art interventions for persons with difficult to treat psychiatric conditions are not easily accessible to many patients and there are no mechanisms in place to ensure that people have access.
Section 241.2(2) A person has a grievous and irremediable medical condition only if they meet all of the following criteria:	Concerns raised about applying the MAID eligibility criterion to MD-SUMC
241.2 2(a) they have a serious and incurable illness, disease or disability;	It is impossible to determine if a mental disorder is incurable or there are no standards by which to do so.
241.2 2(b) they are in an advanced state of irreversible decline in capability	It is impossible to know if a person's decline is irreversible or there are no standards by which to do so.
241.2 2(c) that illness, disease or disability or that state of decline causes them enduring physical or psychological suffering that is intolerable to them and cannot be relieved under conditions that they consider acceptable	<p>A person's perceived suffering may be due to social factors such as social exclusion, poverty that are associated with having a mental disorder. It is argued that it would be inappropriate to address this type of suffering by providing MAID to an individual when it is society that ought to change.</p> <p>A person's judgment about the acceptability of treatments may be clouded by features of the mental disorder (e.g. unwarranted pessimism about the future) that are ignored within the legal conception (cognitive) of capacity. Therefore, a person may be capable of consenting on legal criteria for capacity, but these criteria do not take into consideration the ways in which mental disorder can otherwise affect decision-making.</p>

Table 2: Real cases of people with mental disorders who have received MAID in Canada under the existing criteria

Cases of comorbid physical and psychiatric conditions OR conditions with both physical and psychiatric components	Problems raised regarding application of the eligibility criteria
<p>Comorbid mental and physical conditions where the mental disorder is the primary motivation for MAID</p> <p>55 year old woman with schizophrenia and newly diagnosed gastric cancer. Numerous previous suicide attempts. She refuses treatment for cancer and asks for MAID to end her lifelong suffering due to her mental disorder.</p>	<ul style="list-style-type: none"> • Is the person's request for MAID (and refusal of treatment for cancer) really an expression of suicidal ideas related to the mental disorder? • Are specialized treatment options for the mental disorder available? • Is the acceptability of the treatment options affected by symptoms of schizophrenia?
<p>Mixed condition with physical and psychiatric components is the motivation for MAID</p> <p>68 year old with severe fibromyalgia, bed-ridden and fully dependent on others for activities of daily living. She believes her condition is associated with Lyme disease. She is in a financially precarious situation. She wants MAID because there is no way to cure her condition.</p>	<ul style="list-style-type: none"> • Does this person's health beliefs compromise her capacity to consent to MAID? • Is the voluntariness of the request compromised by financial insecurity? • Are specialized treatment options for the illness available? • Is the condition incurable? • Is the decline brought about by the condition irreversible? • Is the intolerability of the person's suffering due to financial precariousness? • Is the acceptability of the means to relieve suffering affected by her beliefs that Lyme disease is the cause of her condition?

<p>Combination of physical and mental conditions is the motivation for MAID</p> <p>65 year old man with a personality disorder diagnosed at age 25. He developed Crohn's disease at age 35 and suffers from chronic pain and malnourishment. He asks for MAID because of his mental suffering and bodily pain.</p>	<ul style="list-style-type: none"> • Is his capacity to consent affected by his malnourished state? • Are specialized treatment options for the mental disorder and his pain condition available? • Is either condition or the combination of conditions incurable? • Is the decline brought about by the combination of conditions irreversible? • Is the acceptability of the means to relieve suffering affected by symptoms of the personality disorder?
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