

---

**CHRISTIAN  
LEGAL  
FELLOWSHIP**

---



---

**ALLIANCE DES  
CHRÉTIENS  
EN DROIT**

---

Brief of the

**Christian Legal Fellowship (CLF)**

submitted to

**The Special Joint Committee on Medical Assistance in Dying**

regarding

**Follow-up on Recommendation 13 of the Second Report of the  
Special Joint Committee on Medical Assistance in Dying**

**November 16, 2023**

This brief highlights a number of human rights and constitutional considerations to assist this Committee in its examination of MAID in cases where mental disorder is the sole underlying medical condition (MAID MD-SUMC). A more detailed analysis, along with supporting references, is set out in CLF's previously submitted background paper.<sup>1</sup>

## I. The Supreme Court has not mandated Parliament to introduce MAID MD-SUMC

It is important to clarify that, as a number of legal scholars have explained in detail, no court has specifically directed Parliament to introduce MAID MD-SUMC.<sup>2</sup> In *Carter*, the Supreme Court stated that “euthanasia for minors or persons with psychiatric disorders” would “not fall within the parameters suggested in these reasons”.<sup>3</sup>

Some have argued that courts will find it unconstitutional for Parliament to exclude patients with a psychiatric condition from Canada's MAID regime. However, the law does not do this: no person who is otherwise eligible is automatically excluded simply because they have a psychiatric condition.

What is really at issue is whether a mental disorder itself should form the *sole basis for eligibility* for MAID. This fundamentally different legal question has not been adjudicated. Parliamentarians should be aware of a number of compelling equality considerations which weigh *against* expanding MAID for mental illness.

## II. Legal distinctions are not necessarily discriminatory

A key principle under s. 15 of the Charter is that “not every distinction is discriminatory.”<sup>4</sup> The legal question is not whether distinctions *exist*, but whether “the lines drawn are generally appropriate, having regard to the circumstances of the persons impacted and the objects of the scheme.”<sup>5</sup>

Restricting eligibility for MAID for certain conditions is not necessarily *discriminatory*. For example, Parliament may be justified in determining that mental disorders should not give rise to eligibility for MAID if they can not be confidently determined to be irremediable (a key parameter for eligibility established in *Carter*). The lack of medical consensus on the irremediability of mental disorders was recently emphasized by a Quebec Select Committee, leading it to recommend “that

<sup>1</sup> Available at <<http://www.christianlegalfellowship.org/amadsubmissions>>.

<sup>2</sup> See Mary J Shariff, Derek Ross, and Trudo Lemmens, “Mental Illness, Health Care, and Assisted Death: Examining Parameters for Expanding or Restricting MAID under Canada's Charter and Federal System” (Manitoba Law Journal, forthcoming):

<[https://www.robsoncrim.com/files/ugd/bab59a\\_5cc28534439743b595ffa8c71f120f9c.pdf](https://www.robsoncrim.com/files/ugd/bab59a_5cc28534439743b595ffa8c71f120f9c.pdf)>; Trudo Lemmens, “Parliament is not forced by the courts to legalize MAID for mental illness : Law Professors' Letter to Cabinet” University of Toronto Faculty of Law Blog:

<<https://www.law.utoronto.ca/blog/faculty/letter-federal-cabinet-about-governments-legal-claims-related-maid-mental-illness>>.

<sup>3</sup> Para. 111. While the Alberta Court of Appeal in *EF* did not interpret this as excluding a psychiatric condition from the scope of *Carter's* declaration, that case did not involve an interpretation of the Charter. See Shariff et al., *ibid.*, for further discussion.

<sup>4</sup> *R v Kapp*, 2008 SCC 41 at para 28.

<sup>5</sup> *Withler v Canada*, 2011 SCC 12 at para 67.

access to medical aid in dying not be extended to persons whose only medical condition is a mental disorder” – that recommendation was adopted by the National Assembly and is now reflected in Quebec’s *Act respecting end of life care* (s. 26).<sup>6</sup>

### III. Expanding MAID for mental disorders may perpetuate *inequality*

To constitute a breach of s. 15’s equality guarantee, a law must not only create a *disproportionate impact* based on a protected ground, it must also *impose burdens* or *deny benefits* “in a manner that *has the effect of reinforcing, perpetuating, or exacerbating a disadvantage*”.<sup>7</sup>

It has been observed that MAID does not represent a *benefit* of the law’s equal protection against the termination of human life, but rather an *exception to* that benefit.<sup>8</sup> Expanding MAID, then, actually *removes* more people from the benefit of law’s general protection. Expanding MAID can also *perpetuate disadvantage* insofar as it institutionalizes ableist presumptions about the value of life with a mental illness,<sup>9</sup> as well as by “portray[ing] death as preferable to a disabled life”, rather than responding to “underlying inequalities”.<sup>10</sup>

CLF shares these concerns, particularly in the context of Canadians receiving MAID in connection with suffering associated with systemic ableism and marginalization, which, scholars have warned, could be exacerbated by expanding MAID.<sup>11</sup>

Introducing MAID MD-SUMC—especially where mental health supports are often inaccessible—thus risks *perpetuating* harm for many individuals, not alleviating it. These risks may be heightened further for members of marginalized groups who are disproportionately impacted by mental disorders, as further discussed in CLF’s background paper.

### IV. Parliament must balance and consider the rights of *everyone*

Finally, even if the *Charter* rights of those seeking MAID expansion are limited by legislative safeguards which restrict eligibility, those limitations may be justifiable under s. 1 of the *Charter*, in light of competing interests and rights. The Supreme Court has acknowledged that “[c]omplex regulatory regimes are better created by Parliament than by the courts”, and a “high degree of deference” will be shown to Parliament in this regard.<sup>12</sup>

---

<sup>6</sup> *Report of the Select Committee on the Evolution of the Act respecting end-of-life care*, Assemblée Nationale du Québec (December 2021) at 51, 57.

<sup>7</sup> *R v Sharma*, 2022 SCC 39 at para 31.

<sup>8</sup> MAID is permitted as a specific *exception* to culpable homicide and aiding suicide offences: *Criminal Code*, ss 227(1),(4), 241(2)-(5.1).

<sup>9</sup> See e.g., André Schutten, “Lethal discrimination: a case against legalizing assisted suicide in Canada” (2015) 73 SCLR (2nd Series).

<sup>10</sup> Isabel Grant and Elizabeth Sheehy, “Focus on dignified lives, not facilitated deaths”, LexisNexis: The Lawyers’ Daily (24 March 2021).

<sup>11</sup> See e.g. Archibald Kaiser, Isabel Grant, Trudo Lemmens, and Elizabeth Sheehy, “MAID bill is an affront to equality”, *Toronto Star* (11 March 2021).

<sup>12</sup> *Carter v Canada (Attorney General)*, 2015 SCC 5 at paras 98, 125.

**RECOMMENDATION**

For these and other reasons examined in our background paper, CLF urges Parliament to reverse the proposed expansion of MAID MD-SUMC, and instead prioritize mental health supports that offer all Canadians the ability to *live* with dignity.