



THE CANADIAN
BAR ASSOCIATION
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October 31, 2023

Via email: lcjc@sen.parl.gc.ca

Senator Brent Cotter
Chair, Standing Senate Committee on Legal and Constitutional Affairs
Senate of Canada
Ottawa, ON K1A 0A4

Dear Senator Cotter:

Re: Bill S-248, Advance Requests for Medical Assistance in Dying

The End of Life Working Group of the Canadian Bar Association (CBA Working Group) is pleased to comment on Bill S-248, *An Act to amend the Criminal Code (medical assistance in dying)* and its proposed approach for advance requests for medical assistance in dying (MAiD).

The Canadian Bar Association is a national association of 37,000 lawyers, Québec notaries, law teachers and students, with a mandate to promote improvements in the law and the administration of justice. The CBA Working Group comprises a cross-section of members drawn from diverse areas of expertise, including constitutional and human rights law, criminal justice, health law, wills, estates and trusts law, elder law, child and youth law, privacy and access to information law, and dispute resolution.

The CBA Working Group has demonstrated an abiding commitment to clarifying the law about end-of-life decision-making and stressing the importance of a pan-Canadian approach. The CBA has adopted a resolution supporting advance requests for MAiD, with appropriate safeguards.

Our May 2023 submission to the Special Joint Committee on Medical Assistance in Dying addressed, among other matters, a suggested framework for advance requests.¹

We believe that advance requests respect the fundamental *Charter* principles of security of the person and the sanctity of personal autonomy. Advance requests allow an individual to access MAiD later (in accordance with their prior capable wishes) and addresses existing concerns that the risk of future incapacity may make MAiD inaccessible, resulting in people accessing MAiD earlier than they might want. In other words, if a person must have capacity at the time of requesting MAiD, that person must access MAiD while still capable even if the person is not yet ready to die. If they wait and risk incapacity, they will not be able to access MAiD at all (unless there is a framework for advance requests).

¹ [CBA Submission to Joint Committee on Medical Assistance in Dying \(May 2023\)](#)

Comments on Bill S-248

The CBA Working Group believes that Bill S-248 is a strong and thoughtful approach to introducing advance requests. We specifically agree with the following provisions in the Bill:

- Advance requests be permitted only after diagnosis of a grievous and irremediable condition (to ensure a fully informed consent)
- There must be a written Declaration for the advance request (Declaration)
- Triggering Conditions for MAiD must be clear in the Declaration
- Advance requests be revocable by words, gestures or otherwise, indicating that MAiD is no longer desired (whether the person is capable or incapable)
- All other qualifying conditions for MAiD must be satisfied

We also support the waiver of final consent in Bill S-248 for individuals whose death is not reasonably foreseeable and who have met the qualifying conditions for MAiD should they lose capacity.

However, we are concerned that a registry and time limit for the Declaration might make the process difficult to access and keep current.

To ensure effective implementation of the changes, we recommend that the legislative framework also address all necessary conditions, including the requisite elements of the documentation and the protections and release of liability for all parties acting in good faith pursuant to an advance request. We suggest adding the following:

1. The Declaration should be a prescribed form and its contents listed in the *Criminal Code*. The contents would include:
 - (i) appointment of a MAiD Agent (as described in our May 2023 submission to the Special Joint Committee);
 - (ii) clear delineation of the circumstances constituting intolerable suffering for the applicant (Triggering Conditions); and
 - (iii) signature of both the applicant and the witnesses in accordance with specific execution requirements contemplated by Bill S-248.
2. The Declaration should be revocable by using a prescribed form (Revocation). The requirements for a Revocation should be included in the *Criminal Code* and specify that a lower level of capacity is required to *revoke* an advance request than the level of capacity required to *make* an advance request.
3. A MAiD Agent be named to initiate an assessment of whether the applicant's Triggering Conditions for an advance request have been met. Restrictions should be imposed on who can act as a MAiD Agent (e.g., minimum age, prohibition for paid caregivers or other persons providing health care services to the applicant).

4. *Criminal Code* prohibitions on administering MAiD to an individual who demonstrates refusal or resistance by words, sounds or gestures be applied to advance requests, despite a determination that the Triggering Conditions have been satisfied.
5. Rights of review be addressed for the MAiD Agent, and others, to determine, among other items, and where necessary, whether:
 - (i) Triggering Conditions have been satisfied;
 - (ii) circumstances dictate that the MAiD Agent is required to initiate the assessments for MAiD; and
 - (iii) Applicant has demonstrated refusal or resistance by words, sounds or gestures.
6. A default authority (such as a legislative appointee or government body) be empowered to act as a decision-maker of last resort to give effect to an advance request if a MAiD Agent is unable or unwilling to act.

We appreciate the opportunity to share our views and we would be pleased to offer further assistance as needed, including by appearing before your Committee.

Yours truly,

(original letter signed by Marc-André O'Rourke for Shelley Birenbaum)

Shelley Birenbaum
Chair, End of Life Working Group