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Accommodate Conscientious Physicians for the Sake of Ontario Patients

A submission from the Association for Reformed Political Action (ARPA) Canada

to

The College of Physicians and Surgeons of Ontario

regarding

the Medical Assistance in Dying (MAiD) policy

April 8, 2021

ARPA Canada appreciates the opportunity to participate in the Preliminary Consultation on the CPSO's Medical Assistance in Dying (hereafter "MAiD") policy. The current CPSO policy clearly identifies the steps a physician must take when a patient requests MAiD and explains in detail how a physician should respond to such a request. ARPA Canada is concerned about certain parts of the existing policy and the guidance it gives to healthcare professionals regarding existing MAiD legislation.

Our main concern with the CPSO's MAiD policy is the lack of accommodation for healthcare professionals who are conscientious objectors (for professional, moral, or other reasons) to providing or participating in MAiD. While the CPSO recognizes the right of physicians to limit the health services they provide for reasons of conscience or religion, the policy still requires physicians to provide an effective referral for MAiD. The lack of protection for freedom of conscience causes a problem for both physicians and patients within Ontario's health care system. Below we lay out the reasons for this concern and offer means for improving the policy.

MAiD is Unique as Legally Non-Culpable Homicide

Before the Supreme Court of Canada struck down the prohibition on assisted suicide, the practice of what is now called "Medical Assistance in Dying" was a criminal offence (i.e. culpable homicide) punishable as first or second degree murder, with penalties of imprisonment for life for those found guilty.[1] The change in the law occasioned by Parliament's response to the Supreme Court decision allowed for particular medical professionals to terminate the lives of their patients in exceptional circumstances without criminal sanction (through Bill C-14 in 2016 and again in Bill C-7 in 2021).

[1] In the 2015 *Carter v. Canada (Attorney General)* decision, the Supreme Court of Canada struck down the absolute prohibition on assisted suicide in s. 241 of the *Criminal Code* and on consenting to homicide in s. 14.

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However, MAiD remains homicide in the *Criminal Code.*[2] The legal question in every situation where MAiD is administered is whether the homicide is culpable or not culpable (see s. 222(1)-(5)). Regardless of whether it is culpable, participating in homicide is a grave action of the highest moral weight and no government in Canada has ever *compelled* homicide. Think, for example, of conscientious objectors to war, where good governments make accommodations for pacifists who cannot fight with deadly force against an enemy. MAiD is completely unlike other medical procedures because it is homicide. The CPSO must understand, appreciate, and grapple with this fact and move forward accordingly.

Understanding Physician Conscience Rights

The concern for many physicians is that the requirement of an effective referral forces them to participate in or facilitate a service they object to for professional or moral reasons. Freedom of conscience and religion are protected by section 2(a) of the *Charter of Rights and Freedoms,* subject only to reasonable limits that are demonstrably justified in a *free* and democratic society (emphasis added, see section 1 of the *Charter*).

Canadian philosophers Jocelyn Maclure and Charles Taylor suggest that there are two premises which relate to the obligation for reasonable accommodation. First, there are times where rules are unintentionally discriminatory to certain religious groups, and these groups must be accommodated accordingly. Second, conscientious and religious convictions "form a particular type of subjective preference that calls for special legal protection."[3] Conscientious objections of medical professionals are more than simply a choice or preference that can be changed at will. Rather, religious beliefs must be distinguished from personal preferences or opinions because they are a fundamental part of a person's identity. Violating the fundamental beliefs that an individual holds, including compelling them to act contrary to their conscience, causes moral harm to that person because it harms their integrity.[4] These beliefs shape how a person sees the world and provide a framework for all of their actions.[5] One's conscience shows them what their duties are under the moral framework that they follow. Religion and conscience are a key component of human flourishing because they shape all the other aspects of life and well-being.[6]

Coercing someone to perform acts contrary to their beliefs prohibits them from acting with honesty and integrity. For example, if an atheist is compelled to perform a religious act that he cannot do in good conscience, then he is being denied the ability to practice according to his beliefs about the world around him.[7] The CPSO requirement for an effective referral causes harm to physicians who believe that participating in ending a person's life through MAiD is wrong.

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[2] Criminal Code of Canada, section 222(1) states, "A person commits homicide when, directly or indirectly, by any means, he causes the death of a human being."
[3] Jocelyn Maclure and Charles Taylor, *Secularism and Freedom of Conscience* (Cambridge, MA: Harvard University Press, 2011), 73.
[4] Ibid, 77.
[5] Richard Moon, *Freedom of Conscience and Religion* (Toronto, ON: Irwin Law, 2014), 20.
[6] Robert P. George, *Conscience and Its Enemies* (Wilmington, DE: ISI Books, 2016), 116, 117.
[7] Ibid., 129.

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Freedom of conscience must include freedom from being compelled to act on something a person considers evil. This freedom exists to preserve integrity and personal autonomy, and is of fundamental importance to an individual who holds to particular beliefs. An example of this is when pacifists refuse to participate in military service due to their beliefs. With respect to individual consciences, the last time conscription was imposed in Canada, there was an exemption given to those with conscientious objections on religious grounds.[8] Although government actors determine the *legality* of an action or practice, individuals must be permitted to hold to their beliefs regarding the *ethical nature* of that action, especially if they are being asked to do something which they cannot do in good conscience.[9]

Ethical Decision-Making

Physicians are given the duty to provide the best possible medical advice to their patients and to promote the health and well-being of their patients. Doctors must always consider the best interests of the patient when providing medical services and may refuse to participate in a service if, in their professional opinion, a particular procedure is not in the best interest of the patient. In *Flora v. Ontario Health Insurance Plan,* the Ontario Court of Appeal affirmed that ethical considerations are essential in medical decision-making.[10]

The existing CPSO policy on MAiD improperly separates conscientious reasons from clinical reasons in medical decision-making, where it states in Policy #11 b. that "physicians who decline to provide MAiD due to a *conscientious objection* must communicate their objection to the patient directly and with sensitivity, informing the patient that the objection is due to *personal and not clinical reasons* (emphasis added)." Medical and ethical decisions are informed by one's moral framework. This is part of a physician's holistic approach to healthcare, as they provide medical opinions about what is best for the patient based on professional experience and ethical considerations.

In cases other than MAiD, patients may disagree with their doctor's opinion regarding the best course of action. Such disagreement is no basis for disciplinary action against the doctor. A clear example of this is circumcision of male infants. Some parents, for religious or health reasons, choose to have their male infants circumcised. Different doctors disagree regarding the health consequences of such a procedure. Although circumcision is legal, a doctor can refuse to provide the service to a patient based on what he or she thinks is in the best interest of the patient, and is not required to give the patient a referral to a different doctor.[11] In cases where MAiD is requested, however, the CPSO policy requires physicians to provide an effective referral regardless of their concern for the patients' best interests. In these circumstances, doctors are treated like vending machines, expected to fill patients' orders on demand. This policy disrespects Ontario physicians by attacking their professional and personal integrity.

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[8] Moon, 194.

[9] *Christian Medical and Dental Society of Canada v. College of Physicians and Surgeons of Ontario,* 2019 ONCA 393. Factum of the Interveners, The Evangelical Fellowship of Canada, the Assembly of Catholic Bishops of Ontario, and Christian Legal Fellowship, para. 16.

[10] *Flora v. Ontario Health Insurance Plan,* 2008 ONCA 538, para. 75.

[11] A counter argument might be that, in circumcision, a guardian and not the actual patient (the infant) is requesting the service. However, this misses the point of the comparison: in some situations doctors can refuse to participate in a legal procedure that is medically consented to by the one who has capacity for that consent.

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Inadequate Accommodation Negatively Impacts Patient Access to Care

The effective referral requirement also negatively impacts patients. Failing to respect medical professionals' conscientious beliefs may deter persons with strong consciences from entering or remaining in medicine, particularly within certain specialties. In 2015, the ratio of physicians in Ontario averaged 231 physicians per 100,000 population. Canada's ratio of physicians to population ranked 29th out of 33 high-income countries. The low ratio results in longer wait times for patients and difficulty in finding family doctors.[12] Pushing conscientious objectors out of the medical profession will likely cause Ontarians from various religious backgrounds and traditions to be underrepresented in Ontario's healthcare system and will further reduce options for Ontarians seeking medical care.

To accommodate conscience claims is not to give preferential treatment. As discussed above, religious and conscientious convictions are not simply a choice, but core to a person's integrity and identity. In that light, government entities have a duty to protect equal opportunity for persons of various religious backgrounds and varying belief systems to enter the medical system and cannot let factors such as religion to "diminish a person's opportunities to flourish."[13] The requirement for physicians to provide an effective referral essentially closes the door to equal opportunity in a chosen career.[14]

Patients Benefit from a Diverse Healthcare System

Patients need access to a strong and diverse healthcare system. Different medical professionals will have varying professional opinions about what is good for their patients in particular situations, and how they can best pursue patient health. Ontario's healthcare system needs this diversity of ideas and worldviews in order to truly thrive. In the same way that Ontario allows for diversity in language and ethnicity for physicians, the system should include religious diversity to reflect patient diversity. This allows patients to choose professionals who practice with integrity according to principles similar to the patient's own convictions. Part of the CPSO's role in that regard is to eliminate barriers to equitable access to the profession and to respect a diversity of ethical perspectives and religious minorities to further the public good.[15]

A patient goes to their doctor for professional advice. That professional advice is based on the physician's education, experience, and best judgment, all of which are grounded in their moral and professional convictions. Penalizing (and potentially eliminating) physicians with conscientious objections to MAiD also eliminates the possibility of many patients receiving appropriate care through a diverse healthcare system. Patients may want the security of knowing their doctor will never recommend MAiD. Others may desire a doctor with a moral code that does allow for MAiD. And still others may prefer a doctor who will provide an honest, ethical opinion, whether or not they agree with that opinion. A single approach to new and controversial medical and ethical issues can cause specific groups of people to feel isolated, marginalized, and suspicious of the system which is supposed to help

[12] Steven Globerman, Bacchus Barua, and Sazid Hasan, "The Supply of Physicians in Canada: Projections and Assessment," (The Fraser Institute, 2018), accessed April 6, 2021, at page i.
[13] Maclure and Taylor, 71.
[14] Ibid., 25.
[15] Factum of the Interveners, The Evangelical Fellowship of Canada, et al., *supra* note 8, at paras. 18-21.

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them navigate difficult medical choices. In the *Carter* decision, the trial court recognized that "thoughtful and well-motivated people can and have come to different conclusions about whether physician-assisted death can be ethically justifiable."[16] This is true of both physicians and patients.

Health care professionals should be able to provide their best medical advice to their patients and to refuse services they believe are not in the best interest of their patients. Conscientious objections by physicians and patient access to care are not mutually exclusive. Ultimately, the decision on which course of treatment to take lies with the competent patient, and if they do not agree with the medical advice given, the patient has the right to find another doctor who can provide a second opinion. A physician can inform their patient about the services available but should not be required to facilitate or coordinate the treatment. This accommodation would more appropriately balance conscientious objections with patient access to care.

A Stronger Healthcare System: Ensuring Proper Dialogue and Safeguards around MAiD

Ontario needs a medical system that allows doctors to act with integrity. Where doctors are free to think and act for themselves, there is more likely to be testing of ideas and challenging of assumptions within the medical profession, and that is a good thing for patients.[17]

Removing the effective referral requirement for MAiD and encouraging open dialogue in physician-patient relationships will strengthen the healthcare system and benefit both physicians and patients. ARPA Canada believes it is critical for physicians to respect the dignity of their patients and communicate any objections or concerns with sensitivity. This is not an "either/or" proposition. Respecting the dignity of patients and their access to care can be done while increasing accommodation for physicians with conscientious objections to certain medical procedures.

Furthermore, to protect vulnerable patients, the CPSO MAiD policy should clarify that a physician can only share information regarding MAiD if a patient asks for it. The change in the criminal law does not compel in any way the proactive recommendation of MAiD; indeed, proactively recommending MAiD may yet be a criminal offence.[18] A physician must not proactively suggest or recommend MAiD. Patients should never be induced toward MAiD. If a patient asks about MAiD, what follows should be an open and honest discussion about the treatment options available to them. Both pieces of federal legislation regarding MAiD, Bill C-14 (2016) and Bill C-7 (2021), state that a goal of the legislation is to protect vulnerable people from being 'induced' to end their lives.

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[16] *Carter v. Canada (Attorney General),* 2012 BCSC 886, para. 343.

[17] There is also the "macro" point about the medicine and society: What if we're wrong? What if promoting MAiD has terrible, unintended consequences and future generations view it as such (as most of the world still does through criminal sanction)? The long history of medicine is full of examples of the dangers and damage of forced conformity to "accepted medicine." The scientific method must always be open to dissent.

[18] Section 241 (1) of the Criminal Code (the section immediately preceding the MAiD provisions) states: "Everyone is guilty of an indictable offence and liable to imprisonment for a term of not more than 14 years who, whether suicide ensues or not, (a) counsels a person to die by suicide or abets a person in dying by suicide…" It is clear from the exception to section 241(1)(b) (found in 241(2)) that MAiD is a type of suicide under the Criminal Code.

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Ms. Catalina Devandas-Aguilar, the UN Special Rapporteur on the Rights of Persons with Disabilities, following a visit to Canada, stated: "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."[19] In the same way this applies to people with disabilities, it would apply to others who are now eligible for MAiD, including those who would qualify under recent federal government changes to MAiD legislation.

Vulnerable Ontarians may face many inducements towards MAiD. They may feel that they are a burden to their family and society. They may feel a deep sense of fear, helplessness, or despair. If a doctor brings up MAiD with such a patient, it may be taken as a signal that the physician thinks the patient's life is no longer worth living. When a patient does initiate a request for MAiD, the physician should facilitate a discussion about all end-of-life care options, including alternatives to MAiD.

In addition, when MAiD is administered to a patient, there should be honesty and accuracy in reporting on the death certificate. Health Canada guidelines regarding the Medical Certificate of Death require that the immediate cause of death be recorded as "the toxicity of the drugs administered for the purposes of a medically-assisted death."[20] The underlying cause would be listed as the disease or condition that led to the request for MAiD. In accordance with these guidelines, the CPSO should follow federal guidelines and allow for complete honesty and transparency in filling out a death certificate for a patient who has accessed MAiD. Although the details of MAiD deaths are supplied to the Office of the Coroner, including details of MAiD on a death certificate will also help ensure accuracy in vital statistics records in Ontario. Physicians who do not include MAiD information in a death certificate are withholding significant information about the cause of death, namely that it was administered by the physician. This is all the more significant in light of the seriousness of homicide, as discussed above (see discussion at footnote 2 above). Finally, transparency on the death certificate would ensure honesty for others who access the death certificate, such as family members, or other loved ones. Doctors must not be permitted to prevent others from know the details regarding the cause of death.

Summary and Recommendations

Under the current CPSO policy, physician conscience rights are not adequately protected, and physician-patient dialogue is hindered, thus reducing quality of care for patients. Removing the effective referral mandate will strengthen the healthcare system and increase diversity and access to care. Physicians who will not violate their conscience are not seeking to impose their views on others or obstruct patient access to care. Rather, they are seeking a means to continue their work with integrity.

[19] "End of Mission Statement by the United Nations Special Rapporteur on the rights of persons with disabilities, Ms. Catalina Devandas-Aguilar, on her visit to Canada." (United Nations Human Rights Office of the High Commissioner, April 12, 2019), accessed March 31, 2021.
[20] "Guidelines for Death Certificates." (Government of Canada, April 26, 2017), accessed April 8, 2021.

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ARPA Canada recommends that the CPSO MAiD policy be amended in the following ways:

1. Policy #7 currently states: "Physicians **must** be satisfied that the patient's decision has been made freely, without undue influence from family members, healthcare providers, or others, and that they have made the request themselves, thoughtfully, and in a free and informed manner." To provide further clarity, the following should be added:
   "Healthcare professionals must not suggest or recommend MAiD to a patient unless the patient inquires or requests more information. Medical providers must not in any way pressure a patient to consider MAiD."

2. Policy #11, b. currently states that physicians "must communicate their objection to the patient directly and with sensitivity, informing the patient that the objection is due to personal and not clinical reasons." This statement should be replaced with:
   "must communicate their objection to the patient directly and with sensitivity, and engage in discussion about options for social or medical supports, palliative care and/or end-of-life care."

3. Policy #11, e. requires an effective referral for MAiD, stating that physicians "must not abandon the patient and must provide the patient with an effective referral." This should be replaced by the following:
   "must not abandon the patient and must continue to support the patient in ways that are consistent with the physician's professional integrity."
   I. "Physicians must provide accurate information about legal options for the patient if requested."

4. Policy #20 states that "Physicians who decline to provide MAiD must document that an effective referral was made, the date it was made, and the physician, practitioner, and/or agency to which the referral was made." This policy should be removed.

5. Policy #22, b. currently states: "When completing the death certificate physicians must not make any reference to MAiD or the drugs administered on the death certificate." To ensure greater transparency and accuracy in reporting measures, this should be amended to state:
   "When completing the death certificate physicians must reference when MAiD was initially requested, confirm that consent to MAiD was given immediately before the administration of MAiD, the name of the witness present, and the type and amount of pharmaceuticals administered during the procedure."

6. The Process Map and the Advice to the Profession should be altered accordingly.

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ARPA Canada is grateful for the opportunity to submit our recommendations on the Medical Assistance in Dying policy, and we would welcome the opportunity to discuss this further.

On behalf of ARPA Canada,

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The mission of ARPA Canada is to educate, equip, and encourage Reformed Christians to political engagement and to shine the light of God's Word to Canada's municipal, provincial, and federal governments. As part of its mission, ARPA Canada works to promote awareness and engagement within communities across Canada on issues like this one. ARPA Canada makes regular presentations to, and prepares written submissions and publications for, all levels of government on a broad spectrum of different issues.