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2022

### Recommendations on Mature Minors

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#### Recommended Citation

Invited Written Submission from Constance MacIntosh to the Special Joint Committee on Medical Assistance in Dying (9 May 2022), online (pdf): Parliament of Canada < [parl.ca/Committees/en/AMAD/StudyActivity?studyActivityId=11625215](http://parl.ca/Committees/en/AMAD/StudyActivity?studyActivityId=11625215) > [[perma.cc/4N8Y-FM7K](https://perma.cc/4N8Y-FM7K)].

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May 9, 2022

To: Special Joint Committee on Medical Assistance in Dying,  
Statutory Review of the Provisions of the Criminal Code Relating to Medical  
Assistance in Dying and their Application

From: Constance MacIntosh, Full Professor, Schulich School of Law, Dalhousie University,  
Nova Scotia

**Recommendation:** The Committee should remove the requirement from the Criminal Code that candidates for Medical Assistance in Dying (MAID) be at least 18 years old.

This is for the following reasons, elaborated upon below.

1. The MAID regime should always turn on the actual capacity of any person requesting MAID
2. The MAID regime's approach to consent and capacity should be consistent with Canadian law on health care decision-making by minors
3. The MAID regime will likely be found unconstitutional if it maintains an age-based bar
4. The vulnerability of youth may require a different approach but does not justify an age-based bar
5. Removing the age bar is consistent with the recommendations of expert panels.

1. **The MAID regime should always turn on the actual capacity of any person requesting MAID.** The existing MAID regime rests on the actual decisional capacity of individuals over the age of 18. This criteria implies that, for persons over 18, decisional capacity cannot be assumed. However, there is no justification for automatically assuming a person who is under 18 years of age presumptively lacks capacity, a fact which is recognized in how decisional capacity for health care decisions for minors is approached in Canadian law.
2. **The MAID regime's approach to consent and capacity should be consistent with Canadian law on health care decision-making by minors.** Canadian law, both under statute and the common law, recognizes that being under the age of majority is not an absolute bar to a minor making their own decisions about medical procedures, including decisions such as withdrawing or withholding life sustaining treatment. In some provinces such as Manitoba, the age to consent to medical procedures is 16,

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and a regime has been established for when the minor is between the ages of 12 to 16, to determine what weight to place on the minor's views. In most provinces, minors who understand the nature and consequences of the specific decision in front of them (i.e., mature minors) have the authority to make decisions about their health care (even where the consequence will or may be death).

3. **The MAID regime will likely be found unconstitutional if it maintains an age-based bar.** As I have detailed in a peer-reviewed publication,<sup>1</sup> Supreme Court of Canada jurisprudence on mature minors has made it clear that section 7 of the Canadian Charter of Rights and Freedoms rejects arbitrary age limits being used as a substitute for assessing medical decisional capacity. In the germinal Canadian decision on mature minors and medical decision-making, *AC v Manitoba*, Justice Abella wrote that “[a] rigid statutory distinction that completely ignored the actual decision-making capabilities of children under a certain age would fail to reflect the realities of childhood and child development”, and so would be arbitrary.<sup>2</sup> In *AC* the legal regime for taking the views of youth into account in medical decision-making was found to be consistent with the Charter, because it relied on *actual capacity*, not age, as being the core determinant for assessing whether a minor could make their own treatment decisions.
4. **The vulnerability of youth may require a different approach but does not justify an age-based bar.** This fact is reflected in Canadian provincial/territorial law and the common law, which, as noted above, turn on capacity and are often coupled with additional safeguards such as a role for the treating physician. In jurisdictions where minors are not barred from accessing MAID, there have been a variety of approaches developed. These include requiring that the minor's consent be coupled with parental consent, including a health treatment team in the decision-making process, and in-depth consultation processes and special review boards. The question of vulnerabilities and safeguards was an important aspect of the *Carter* decision. Important to this brief, the Supreme Court of Canada relied upon the

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<sup>1</sup> Constance MacIntosh, “Carter, Medical Aid in Dying, and Mature Minors” (2016) 10:1 McGill JL and Health S1. [https://digitalcommons.schulichlaw.dal.ca/scholarly\\_works/691/](https://digitalcommons.schulichlaw.dal.ca/scholarly_works/691/)

<sup>2</sup> *AC v Manitoba (Director of Child and Family Services)* 2009 SCC 30 at para 116

mature minor decision, AC, when it found that safeguards could be designed and implemented. They wrote:

As the trial judge noted, the individual assessment of vulnerability (whatever its source) is implicitly condoned for life-and-death decision making in Canada. ...In AC [the case involving whether a mature minor could consent to withdrawing life-sustaining treatment] Abella J adverted to the potential vulnerability of adolescents who are faced with life-and-death decisions about medical treatment...Yet, this Court implicitly accepted the viability of an individual assessment of decisional-capacity in the context of that case. We accept the trial judge's conclusion that it is possible for physicians, with due care and attention to the seriousness of the decision involved, to adequately assess decisional capacity. (at para 116)

In short, it was the court's confidence that assessments can be made of youths' decisional capacity in life and death decisions that gave the court confidence that assessments can be made of adult capacity to consent to MAID.

**5. Removing the age bar is consistent with the recommendations of expert panels.**

All expert panels with a mandate to make recommendations have endorsed a capacity-based approach to MAID, and rejected an age-based bar. These include the 2010 Expert Panel of the Royal Society of Canada recommended MAID legislation reflect the law on mature minors for making decisions about medical procedures. Quebec's 2013 *Commission des droits de la personne et des droits de la jeunesse* found an age bar would violate Quebec's Charter and recommended rules in line with provincial laws for mature minors. The 2015 Provincial-Territorial Expert Advisory Group on Physician-Assisted Dying recommending avoiding an age-based criteria and instead focus on competence.

Sincerely



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