

Legislative Background

**Bill C-7: Government of Canada's Legislative Response
to the Superior Court of Québec *Truchon* Decision**

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Introduction

The purpose of this document is to provide a technical overview of the Government of Canada's legislative response to the Superior Court of Québec *Truchon*¹ decision on medical assistance in dying (MAID). MAID was decriminalized in 2016 following the Supreme Court of Canada's decision in *Carter*² through former Bill C-14, *An Act to amend the Criminal Code and to make related amendments to other Acts (medical assistance in dying)*, which came into force on June 17, 2016 (S.C. 2016, c.3). Canada's *Criminal Code* now exempts physicians and nurse practitioners who provide, or help to provide, MAID from otherwise applicable criminal offences (the offences of culpable homicide and aiding suicide) and provides eligibility criteria and procedural safeguards that must be followed for MAID to be provided lawfully.

As per section 241.1 of the *Criminal Code*, "MAID" is an umbrella term which includes:

- the administration by a medical practitioner or nurse practitioner of medication that will cause a person's death at their request; and
- the prescription or provision by a medical practitioner or nurse practitioner of medication that a person can self-administer to cause their own death.

As a matter of criminal law, the federal MAID regime in the *Criminal Code* applies across the country. Provinces and territories also have jurisdiction over aspects of MAID, such as its implementation through healthcare systems, the regulation and oversight of health professionals, and the prosecution of *Criminal Code* offences. Provinces and territories can introduce legislation and policies related to health care, so long as they do not permit what the *Criminal Code* prohibits. To date, only Québec has adopted comprehensive MAID legislation.³

Evolution of MAID in Canada

The MAID legislation (former Bill C-14) created an end of life MAID regime. Its core policy objective was to give Canadians who were suffering intolerably in the dying process the choice to have a medically assisted death.

The MAID legislation also required the Government of Canada to initiate independent reviews on three issues: requests for MAID by mature minors, advance requests, and requests for people where a mental illness is the sole underlying medical condition. The Council of Canadian Academies (CCA) was selected to undertake these reviews, which were tabled in Parliament in December 2018. The reports and a summary are available on the [CCA's website](#).

The legislation also required the Minister of Health to make regulations to establish a federal monitoring regime to collect data relating to MAID in Canada in order to provide insight into how the legislation is working and promote transparency and public accountability, taking into consideration the very serious and irreversible nature of ending life. The *Regulations for the Monitoring of MAID* came into force in November 2018 and set out the framework for mandatory reporting for physicians and nurse practitioners who receive written requests for MAID, and for pharmacists who dispense drugs for MAID. The First Annual Report on Medical Assistance in Dying in Canada, prepared using the federal monitoring regime data, was released on July 24, 2020 and covers the 2019 calendar year. It is available on [Health Canada's website](#).

¹ *Truchon v Canada (AG)*, 2019 QCCS 3792.

² *Carter v Canada*, 2015 SCC 5.

³ *Act Respecting End-of-Life Care*, chapter S-32.0001.

Prior to releasing the first annual report, Health Canada published four interim reports based on voluntary data submitted by provinces and territories.

According to the First Annual Report on MAID in Canada, in 2019, there were 5,631 cases of MAID reported in Canada, accounting for 2.0% of all deaths. In other jurisdictions where MAID is permitted, assisted deaths account for between 0.3% (in US states where patients must be at the end of life and only self-administration is permitted) and 4.6% (in Belgium, the Netherlands and Luxembourg - the “Benelux” countries - where eligibility is based on suffering rather than proximity to death and clinician administered MAID is permitted) of all deaths. When all data sources are considered, the total number of medically assisted deaths reported in Canada since the enactment of federal legislation in 2016 is 13,946. The First Annual Report on MAID in Canada includes more detailed information on requests for MAID than the previous four interim reports, and includes data on access to and receipt of palliative care and disability support services among persons who received MAID.

The MAID legislation also required that a parliamentary review of the law and the state of palliative care be initiated five years after the law came into effect. This review will provide the opportunity to hear from Canadians about how MAID is working, to consider the CCA reports on requests for MAID by mature minors, advance requests, and requests for people where a mental illness is the sole underlying medical condition, and to see if any changes should be made. It was expected that this review would start in the summer of 2020. However, the COVID-19 pandemic disrupted parliamentary activities and has delayed this review.

Finally, since the enactment of the MAID legislation, litigation challenging the MAID regime has been initiated in British Columbia, Ontario, Quebec and Saskatchewan. The British Columbia (*Lamb*) and Quebec (*Truchon*) cases challenged the MAID law on the basis that its eligibility criteria violated the *Canadian Charter of Rights and Freedoms* (the “*Charter*”) because they were too restrictive. The Ontario (*Foley*) and Saskatchewan (*Katzenback*) litigations also allege that the MAID law violates the *Charter*, but on the basis that its safeguards are insufficient to protect Canadians, who are offered MAID instead of adequate support services and assistance in life.

Truchon v. Attorney General of Canada

On September 11 2019, the Superior Court of Québec, in its *Truchon v Canada (AG)* decision, declared unconstitutional the “reasonable foreseeability of natural death” eligibility criterion contained in the federal MAID legislation, and the “end of life” eligibility criterion contained in Quebec’s *Act Respecting End-of-Life Care*. The Court ruled that the RFND criterion violates section 7 of the *Charter*, which protects against deprivations of life, liberty and security of the person, and section 15 of the *Charter*, which guarantees the right to the equal protection and equal benefit of the law without discrimination. The ruling, which only applies in Quebec, was not appealed by the Attorney General of Canada or the Attorney General of Quebec. The Court suspended the declaration of invalidity for a period of 6 months, until March 11, 2020, and granted a constitutional exemption to the plaintiffs during the suspension period. On March 2, 2020, the Court granted the Attorney General of Canada’s request that the suspension of the declaration of invalidity be extended for four months, until July 11, 2020, and subsequently granted a further extension to December 18, 2020, as disruptions to the parliamentary process due to the COVID-19 pandemic made it impossible to meet the previous deadline.

Part I – Bill C-7: Government of Canada’s Legislative Response to *Truchon*

Bill C-7 is the Government of Canada’s legislative response to the *Truchon* decision. It is identical to former Bill C-7, which was introduced on February 24, 2020 and died on the Order Paper when Parliament was prorogued in August 2020. The development of the Bill was informed by the evidence submitted before the Court in *Truchon*, as well as by available Canadian and international research, social science evidence and reports, such as the December 2018 reports of the Council of Canadian Academies.⁴ It was also informed by the experience of existing international MAID regimes⁵ (see Annex A), by the Canadian experience over the past four years and, most recently, by the Government of Canada’s consultations on MAID that took place early this year.

During the month of January 2020 and early February 2020, the Government of Canada engaged the Canadian public, as well as provinces and territories, Indigenous groups, health care providers, experts and key stakeholders to receive their feedback on expanding Canada’s MAID legislation in response to the *Truchon* decision:

- Over 300,000 Canadians participated in the online public consultations between January 13 and 27, 2020.
- Minister of Justice and Attorney General of Canada, David Lametti, Minister of Health, Patty Hajdu, and Minister of Employment, Workforce Development and Disability Inclusion, Carla Qualtrough, met with experts, health care providers, health professional associations and regulatory bodies, representatives of persons living with disabilities, Indigenous organizations and other key stakeholders (over 125 participants in total) to consult them directly on revising Canada’s federal MAID legislation.⁶

⁴ Council of Canadian Academies, “The State of Knowledge on Medical Assistance in Dying for Mature Minors” (2018), online (pdf): <<https://cca-reports.ca/wp-content/uploads/2018/12/The-State-of-Knowledge-on-Medical-Assistance-in-Dying-for-Mature-Minors.pdf>>;

Council of Canadian Academies, “The State of Knowledge on Medical Assistance in Dying Where a Mental Disorder Is the Sole Underlying Medical Condition” (2018), online (pdf): <<https://cca-reports.ca/wp-content/uploads/2018/12/The-State-of-Knowledge-on-Medical-Assistance-in-Dying-Where-a-Mental-Disorder-is-the-Sole-Underlying-Medical-Condition.pdf>>;

Council of Canadian Academies, “The State of Knowledge on Advance Requests for Medical Assistance in Dying” (2018), online (pdf): <<https://cca-reports.ca/wp-content/uploads/2019/02/The-State-of-Knowledge-on-Advance-Requests-for-Medical-Assistance-in-Dying.pdf>>;

Council of Canadian Academies, *The State of Knowledge on Medical Assistance in Dying for Mature Minors; The State of Knowledge on Advance Requests for Medical Assistance in Dying; and The State of Knowledge on Medical Assistance in Dying Where a Mental Disorder is the Sole Underlying Medical Condition*, December 13, 2018, online: <<https://cca-reports.ca/medical-assistance-in-dying/>>.

⁵ In addition to Canada, there are 16 jurisdictions with explicit legal rules for the provision of MAID: 9 US states (California, Colorado, District of Columbia, Hawaii, Maine, New Jersey, Oregon, Vermont, Washington), the states of Victoria and Western Australia (adopted on December 10, 2019, not in force yet) in Australia, New Zealand (would come into force after a referendum in 2020), Colombia and the “Benelux” countries (Belgium, the Netherlands and Luxembourg).

⁶ Ministers Lametti, Hajdu and Qualtrough held 10 roundtables in Halifax, Montreal, Toronto, Vancouver, Calgary, Winnipeg, Ottawa, and Québec City. Attendance at these roundtables was by invitation only. Participants were also given the opportunity to provide additional written comments.

- Ministers and senior officials also sought input from their provincial and territorial counterparts on responding to the *Truchon* ruling.

The proposed legislative reforms are tailored to respond to the *Truchon* ruling within the court-imposed deadline and to address other MAID-related issues on which there is strong support. Other broader and more complex issues, such as MAID for persons suffering solely from a mental illness and advance requests following the diagnosis of a capacity-limiting medical condition, will be examined as part of the parliamentary review of the federal MAID provisions and the state of palliative care in Canada.

To support the implementation of the proposed legislative reforms, the Minister of Health would also work with the provinces and territories, health system partners, including MAID providers and care coordination networks, and health practice regulatory and oversight bodies to help develop, monitor and report on MAID practice guidelines, training, retrospective review processes and results.

Legislative Objectives

The preamble of the proposed legislation outlines the Bill's main objective, which is to balance several interests and societal values, including respecting the autonomy of persons who are eligible to receive MAID, the equality rights protected by the *Charter*, the need to protect vulnerable persons from being induced to end their lives, and the recognition of suicide as a significant public health issue. It also outlines a series of affirmations and principles upon which the proposed *Truchon* response is founded, including the appropriateness of no longer restricting eligibility for MAID to persons whose natural death is reasonably foreseeable, the affirmation of the inherent and equal value of every person's life, the recognition of Canada's obligations as a State Party to the United Nations Convention on the Rights of Persons with Disabilities, and the need for additional consultation and study of MAID for certain types of situations that present more complexity and risk, such as advance requests for MAID and mental illness as the sole underlying medical condition.

Overview of Proposed Legislative Reforms

In summary, the Bill proposes the following *Criminal Code* amendments to the MAID regime:

- **Eligibility criteria:** repeal the “reasonably foreseeable natural death” criterion and exclude cases where mental illness is the sole underlying medical condition;
- **Safeguards:** create two sets of safeguards – one set of eased safeguards for people whose natural death is reasonably foreseeable, and a second set of new and clarified safeguards for people whose natural death is not reasonably foreseeable;
- **Advance consent:** permit the administration of MAID on the basis of advance consent (in other words, the requirement for final consent at the time of the MAID procedure would be waived by operation of law) for persons whose natural death is reasonably foreseeable and who have been assessed and approved for MAID, if they lose capacity to consent before their preferred date for MAID and have a written arrangement with a practitioner; permit advance consent to the administration of MAID by a practitioner in cases of failed self-administration;
- **Monitoring regime:** enhance the reporting requirements based on experiences with the federal MAID monitoring regime to date.

The following sections will explain each proposed amendment in more detail.

Part II – Eligibility Criteria for MAID

Current Eligibility Criteria

Under the current *Criminal Code* eligibility criteria, persons who seek to obtain medical assistance in dying must satisfy all of the following eligibility criteria (subsections 241.2(1) and (2) of the *Criminal Code*):

- be 18 years of age or older;
- be capable of making decisions with respect to their health;
- be eligible for health services funded by the federal government, or a province or territory (or during the minimum period of residence or waiting period for eligibility);
- make a voluntary request for MAID that is not the result of external pressure;
- give informed consent after having been informed of the means that are available to relieve their suffering, including palliative care;
- have a “grievous and irremediable medical condition”, which is defined as:
 - having a serious and incurable illness, disease or disability;
 - being in an advanced state of irreversible decline in capability;
 - experiencing enduring physical or psychological suffering that is intolerable to them and cannot be relieved under conditions that they consider acceptable; and
 - their natural death has become reasonably foreseeable, taking into account all of their medical circumstances, without a prognosis necessarily having been made as to the specific length of time that they have remaining.

Proposed Amendments to Eligibility Criteria

Removal of RFND

The Bill proposes to make two amendments to the current MAID eligibility criteria. First, it would remove the “reasonable foreseeability of natural death” (RFND) criterion from the list of eligibility criteria in response to the *Truchon* decision, which declared that criterion unconstitutional. The legal effect of removing RFND would be that both persons whose natural death is reasonably foreseeable and persons whose natural death is not reasonably foreseeable could be found eligible for MAID if they meet all other eligibility criteria.

Exclusion of Mental Illness as the Sole Underlying Medical Condition

The Bill also proposes to provide that a “mental illness” is not considered to be an “illness, disease or disability” for the purpose of the MAID eligibility criteria. The legal effect of this amendment would be to preclude individuals suffering solely from a mental illness from accessing MAID.

The Government of Canada asked the Council of Canadian Academies (CCA) in 2016 to conduct an independent study on MAID in such cases. Following a comprehensive study of this matter, experts in this field could not come to a consensus on this very complicated issue (CCA report released in December 2018). On the contrary, the experts who prepared the CCA report were deeply divided on many fundamental issues implicated by this question. In addition, many participants in the roundtables held in January and February 2020 emphasized the increased complexities and risks of MAID for mental illnesses, including the fact that:

- clinicians disagree on if/when a mental illness can be considered “irremediable”;

- capacity assessments are more difficult to conduct, given that symptoms of mental illnesses can affect a person’s ability to understand and/or appreciate the nature and consequences of treatment decisions;
- the trajectory of mental illnesses is generally harder to predict than those of physical diseases; and
- a desire to die is a symptom of some mental illnesses.

These concerns have also been noted by many mental health organizations, such as the Mental Health Commission of Canada, the Centre for Addiction and Mental Health, the Canadian Mental Health Association, and the Canadian Psychiatric Association.

Despite the absence of a single clear definition of mental illness, in the context of Canadian discussions on MAID, this term has come to be understood as generally referring to those conditions which are primarily within the domain of psychiatry, and which raise specific types of concerns as set out above, when it comes to eligibility for MAID. In the context of the federal MAID legislation, the term “mental illness” would not include neurocognitive or neurodevelopmental disorders, or other conditions that may affect cognitive abilities, such as dementias, autism spectrum disorders or intellectual disabilities, which may be treated by specialties other than psychiatry (such as neurology for neurodegenerative or neurodevelopmental conditions) or specialties outside of medicine (such as education specialists for intellectual disabilities) and do not raise the specific concerns outlined above.

Moreover, although persons suffering solely from a mental illness would not be eligible for MAID, persons suffering from both a grievous and irremediable physical medical condition and a mental illness would not be excluded from the regime (e.g., someone suffering from clinical depression who also has a spinal cord injury).

The Government of Canada recognizes that the suffering associated with mental illness can be just as intolerable as that arising from other types of medical conditions, and that stigmatizing assumptions that mental illness deprives people of decision-making capacity must be avoided. However, the Government believes that the unique considerations for MAID in this kind of situation require further discussion and public debate. The issue of MAID for persons whose sole underlying medical condition is a mental illness will therefore be part of the parliamentary review. The Government of Quebec also announced that access to MAID for such cases would be suspended and that a broad consultation process would be conducted on this issue.

Revised Eligibility Criteria

As a result of these two proposed amendments, the MAID eligibility criterion which requires a person to have a “grievous and irremediable medical condition” would be defined in the following way (amended subsection 241.2(2) of the *Criminal Code*):

- having a serious and incurable illness, disease or disability (to the exclusion of a mental illness—new subsection 241.2(2.1) of the *Criminal Code*);
- being in an advanced state of irreversible decline in capability; and
- experiencing enduring physical or psychological suffering that is intolerable to them and that cannot be relieved under conditions that they consider acceptable.

Part III – Safeguards for MAID

Current Safeguards

Under the current *Criminal Code* provisions, before a physician or nurse practitioner can provide MAID to a person, the following safeguards must be met (subsection 241.2(3) of the *Criminal Code*):

- **Witness requirement:** Patient must make a written request that must be witnessed and signed by two independent witnesses;
- **Two assessments:** Two independent practitioners must confirm all eligibility criteria;
- **Possibility to withdraw consent:** Person must be informed that they can withdraw request at any time, by any means;
- **Reflection period:** Mandatory 10-day reflection period after the written request is signed, unless death or loss of capacity is imminent;
- **Final consent:** Immediately before MAID is provided, the person must be given opportunity to withdraw their consent, and must confirm consent to receive MAID.

The proposed *Criminal Code* amendments would create two different sets of safeguards depending on whether the person’s natural death is reasonably foreseeable or not. Specifically, the Bill proposes to use the “reasonably foreseeable natural death” (RFND) standard to determine which set of safeguards apply to someone seeking access to MAID. It would also determine whether a person who has been found eligible for MAID can consent in advance to receiving it even if they have lost decision-making capacity by the date of the procedure (“advance consent arrangement” – see Part IV below). The RFND criterion would no longer apply as an eligibility criterion that could have the effect of excluding a person from accessing MAID.

The Meaning of RFND

RFND is assessed on a case-by-case basis, in relation to the specific person who is seeking MAID, and must consider the whole of their individual and unique medical circumstances. RFND is not limited to those who have an illness that is known to cause death, but can result from a combination of multiple factors relevant to a person’s overall medical circumstances.

RFND requires a temporal, but flexible, connection between the person’s overall medical circumstances and their anticipated death. Individuals may decline toward death along trajectories of greater or lesser predictability. As such, RFND is not defined by a maximum or minimum prognosis, but it does require a temporal link to death in the sense that the person is approaching the end of their life in the near term.

Anticipating how long a person has to live is difficult, and clinical estimation of life expectancy becomes even more difficult the further away death is expected. Many people who have received MAID under the current eligibility criteria requiring RFND were expected to die within a few weeks or months. A person’s death may also be foreseeable in the temporal sense over longer periods, depending on the particular circumstances under consideration. However, having an illness that will cause death several years in the future would not normally meet the condition of RFND.

RFND allows for clinical judgement while maintaining a temporal link to end of life. It remains a useful and meaningful term in the context of MAID.

Proposed Amendments to Safeguards – Two Sets of Safeguards

The first set of safeguards would continue to be tailored to persons whose natural death is reasonably foreseeable, where risks are reduced and where the potential sources of suffering are most likely linked to the dying process itself. The second set of safeguards would be tailored to persons whose deaths are not reasonably foreseeable, and would therefore reflect the more serious consequences of error in these cases (e.g., providing MAID to a person who could have grown more comfortable with their medical situation, or found a treatment which alleviates their suffering). The Bill proposes additional safeguards to address elevated risks associated with the diverse sources of suffering and vulnerability that could lead a person whose death is not reasonably foreseeable to seek access to MAID, such as loneliness or isolation, lack of adequate supports and hopelessness. Such sources of suffering and vulnerability may be remediable to different degrees.

Proposed Amendments to Safeguards for Persons whose Natural Death is Reasonably Foreseeable

In the cases of persons whose natural death is reasonably foreseeable, it is proposed that some of the existing safeguards be eased. Proposed amendments would require that MAID requests be witnessed by one independent witness instead of two, and would allow individuals who provide either health or personal care as their profession or occupation, and who are paid to provide such care to the person requesting MAID, to act as independent witnesses. It is also proposed to repeal the 10-day mandatory reflection period.

Witness Requirement

The two proposed changes to the witness requirement aim to respond to concerns raised by health professionals and other stakeholders at the MAID roundtables to the effect that finding two independent witnesses is a challenge for many and, thus, poses an access barrier. The first change would facilitate access to MAID by requiring only one independent witness instead of two. Having only one independent witness would be an adequate safeguard given that the witness is only attesting to the signing and dating of the MAID request and plays no role with respect to the assessment of eligibility or application of other safeguards.

The second change would allow individuals who are paid to provide health and personal care as their profession or occupation to act as independent witnesses, which is currently not allowed. These individuals are likely to be among the limited number of personal contacts persons residing in a care institution may have. Persons who are being paid to provide personal or health care, and who have chosen the provision of care as their profession or occupation, can reasonably be expected to witness a MAID request with integrity and objectivity, and be guided by the interests of the person making the request, rather than by personal, emotional or other self-interested reasons.

These individuals would still be excluded from acting as a witness if they are a beneficiary of the person's will or if they would receive a financial benefit from the person's death (under paragraph 241.2(5)(a)). For greater certainty, any medical provider who is involved in the assessment of the person for MAID eligibility or in providing MAID to the person would still be excluded from being able to act as an independent witness.

10-day Reflection Period

During the roundtable discussions held to inform the government's response to *Truchon*, there was overwhelming support to remove the 10-day reflection period. Health care providers and other experts indicated that in their experience, patients who request MAID do so after careful consideration, often over a long period of time. In their view, the 10-day waiting period often resulted in prolonging patient suffering because individuals would refuse medications in order to retain capacity to consent to MAID (this concern is also addressed by the proposed change to allow for the waiver of the requirement for final consent – see Part IV on Advance Consent). The proposed removal of the 10-day reflection period would be limited to persons whose natural death is reasonably foreseeable.

The complete set of safeguards that would apply to a person whose natural death is reasonably foreseeable is set out at **Annex B**.

New and Clarified Safeguards for Persons whose Natural Death is Not Reasonably Foreseeable

In the cases of persons whose natural death is not reasonably foreseeable, safeguards would be based on the current ones, with certain changes, additions and clarifications. The requirements in respect of independent witnesses to the written request for MAID would be eased (as described above) and the following new and clarified safeguards, designed to support fully informed decision-making by persons seeking MAID whose death is not reasonably foreseeable, would apply.

Mandatory 90-day assessment period (New)

The first new safeguard for persons whose natural death is not reasonably foreseeable would require that a minimum of 90 days be taken for the assessments of the person's eligibility. This assessment period could be shortened if the assessing practitioners agree that loss of capacity is imminent, but only if they are able to complete their assessments in a shorter period of time.

This proposed safeguard would aim to respond to the additional challenges and concerns that may arise in the context of MAID assessments for persons whose natural death is not reasonably foreseeable, including whether the suffering is caused by factors other than the medical condition, and whether there are ways of addressing the suffering other than MAID. The requirement for a minimum of 90 days for such assessments would seek to ensure that enough time is devoted to exploring all the relevant aspects of the person's situation, including whether there are treatments or services that could help reduce the person's suffering, such as counselling services, mental health and disability support services, community services and palliative care.

Second Assessment by Practitioner with Expertise (New)

The second new safeguard would require that one of the two mandatory eligibility assessments be conducted by a practitioner with expertise in the condition that is causing the person's suffering. Involving an assessor with expertise in the medical source of the person's suffering would help to ensure that all treatment options have been identified and explored, while at the same time avoiding the need for specialist involvement, which could pose a barrier in remote and rural areas where specialists may be in short supply.

Information on Available Supports (Clarification of Informed Consent)

A third change would be a clarification of informed consent that would expressly require that the person be informed of available counselling services, mental health and disability support

services, community services and palliative care, as appropriate to the individual's situation, and be offered consultation with relevant professionals. Most practitioners explore appropriate supports and available treatments in discussions with their patients as part of good medical practice, so this proposed safeguard would reinforce the importance of these discussions. It would also support the final new requirement (see immediately below).

Serious Consideration of Reasonable Means to Alleviate Suffering (Clarification of Informed Consent)

The final change would be a clarification of informed consent that would require the person and the practitioners to agree that reasonable means to alleviate the person's suffering have been discussed and seriously considered before MAID could be provided. This safeguard would require the practitioner to explore reasonable treatment options with the patient and be satisfied that the person has fully explored and weighed the risks and benefits of available treatment options. At the same time, patients would not be required to undertake treatments that may be unacceptable to them.

The complete set of safeguards that would apply to a person whose natural death is not reasonably foreseeable is set out at **Annex B**.

Part IV – Advance Consent for MAID

Advance Consent – Persons whose Natural Death is Reasonably Foreseeable

The proposed legislation would also amend the *Criminal Code* MAID provisions to allow people whose natural death is reasonably foreseeable to retain their ability to receive MAID if they should happen to lose the capacity to consent to it after they have been approved, but before it is provided. At present, this is not permitted, as one of the safeguards in the *Criminal Code* requires the person to confirm their consent immediately before they receive MAID (paragraph 241.2(3)(h)).

More specifically, the proposed amendments would allow for the waiver of the requirement for final consent for MAID through an “advance consent arrangement”, if the following conditions are met (proposed subsection 241.2(3.2) of the *Criminal Code*):

- The person's natural death is reasonably foreseeable;
- The person has been assessed and approved for MAID in accordance with all applicable safeguards;
- They have indicated their preferred date to receive MAID;
- They have been informed by their practitioner that they are at risk of losing the capacity to consent to MAID before their preferred date; and
- The person has a written arrangement with their practitioner in which the person gives consent in advance to receive MAID on their preferred date if they no longer have the capacity to consent on that date (which has the effect of waiving the requirement for final consent), and the practitioner agrees to provide MAID on that date if the person has in fact lost the capacity to consent at that time (they may also agree that the practitioner will provide MAID earlier than the preferred date, upon loss of capacity, if so desired).

This proposal would respond to circumstances like that of Audrey Parker who was suffering from terminal cancer and was approved to receive MAID but, because she was at risk of losing

capacity before her preferred date to receive it, decided to schedule her MAID procedure earlier than she wanted.

The proposed amendments would not enable waiver of final consent for those whose deaths are not reasonably foreseeable.

Patient Resistance

Practitioners would not be allowed to provide MAID through advance consent in cases where the person demonstrates, by words, sounds or gestures, refusal or resistance to the administration of the substance to cause their death (proposed subsection 241.2(3.4) of the *Criminal Code*). A demonstration of resistance would make the advance consent arrangement invalid going forward. If the person regained capacity at a later date, they could consent to MAID being provided at that time (as long as they continue to meet all eligibility criteria) or could draft a new advance consent arrangement with their practitioner. The law would also make clear that involuntary bodily actions, such as twitching or physical recoiling from contact or insertion of needles, for instance, do not equate to resistance or refusal.

This prohibition would respond to ethical concerns raised by medical practitioners and experts with regard to ending the life of someone who is not capable of withdrawing their consent or confirming it (despite having consented to MAID at an earlier time), and who is actively resisting the MAID procedure.

Meaning of Advance Consent

The proposed measures are being referred to as permitting MAID by “advance consent” because they would involve situations where, in the present, a person’s request for MAID has been assessed and approved, but the person risks losing capacity before the MAID procedure takes place. Therefore, the person would be providing “advance consent” for the MAID procedure as a replacement for the “final consent” that is otherwise required by the law immediately before MAID is provided.

By contrast, the term “advance request” better describes situations where a person is not seeking access to MAID in the present, but outlines the circumstances under which they would want to receive MAID at some point in the future, if certain circumstances arise after they lose their decision-making capacity. In these circumstances, unlike the “advance consent” measures proposed in Bill C-7, the person would not have made request for MAID or been found eligible for MAID at the time when they prepare the document setting out their future wishes. This is appropriately called an “advance request” for MAID since the request would be prepared long in advance of when MAID would actually be desired and provided. Issues relating to advance requests for MAID will be examined during the parliamentary review.

Advance Consent – Failed Self-Administration

The proposed legislation would also enable a person who chooses to self-administer MAID (as opposed to the practitioner administering the substance that ends their life) to create a back-up plan, in the unlikely event that complications arise from the self-administration, leaving them without the capacity to give consent to their practitioner to administer the substance to complete the process. In this case, the provision of MAID by the practitioner would complete the peaceful dying process that the person had chosen and started themselves.

Part V – Monitoring Regime

Proposed Data Collection Enhancements

The proposed legislation would also authorize the Minister of Health to develop additional regulations to enhance the current federal monitoring regime. This authority and the future regulations would reflect changes in the legislative regime and Canada’s experience in implementing MAID since 2016.

Specifically, it is proposed to collect certain information from practitioners who assess MAID eligibility (without yet having received a written request), from other health sector personnel who have the responsibility to conduct preliminary assessments of MAID requests for care-coordination purposes, as well as from pharmacy technicians who may provide MAID substances to medical practitioners.

Since the implementation of the federal MAID monitoring regime in 2018, it has become clear that capturing information based solely on the “written requests” for MAID, as currently set out in the law, has resulted in an incomplete picture on who is requesting MAID across the country. Various provincial and territorial MAID coordination systems have been set up to triage the intake of MAID requests, which means that some requests do not meet the written request requirement of the current legislation and are thus not reported.

The proposed modifications would address these gaps in the law, and provide a fuller understanding of the MAID landscape in Canada. Amending the federal MAID regime to include these new requirements would provide for data collection that more clearly aligns with the original intent of the 2016 MAID law, that is, to collect information on all requests for, and cases of, MAID.

Part VI – Coming into Force

The proposed legislation would come into force on the day of Royal Assent. A proposed transitional provision would ensure that, once the proposed *Criminal Code* amendments are in force, persons who have already signed their MAID requests under the current regime are not required to undergo any additional safeguards. At the same time, those whose deaths are reasonably foreseeable would be able to benefit from the removal of the minimum 10-day reflection period, and the ability to consider an advance consent arrangement, if that would be appropriate to their circumstances.

Annex A – International MAID Regimes

In addition to Canada, there are 16 jurisdictions with precise legal rules for the provision of MAID: 9 US states (California, Colorado, District of Columbia, Hawaii, Maine, New Jersey, Oregon, Vermont, Washington), the states of Victoria and Western Victoria (adopted on December 10, 2019, not yet in force) in Australia, New Zealand (would come into force after a referendum in 2020), Colombia and the “Benelux” countries (Belgium, the Netherlands and Luxembourg). As outlined in the chart below, foreign laws take differing approaches with respect to eligibility for MAID. Thirteen of them are considered “end of life” regimes, which means that they limit eligibility to circumstances where a person is at the end of life, while three jurisdictions (the “Benelux” countries) have enacted broader MAID regimes, where persons who are not nearing the end of life, including those with a physical disability or mental illness, can be found eligible for MAID if their suffering is unbearable and cannot be relieved.

Belgium, though not an “end of life” regime, does require different safeguards to be applied to persons who are not expected to die in the short term (“*à brève échéance*”), and so does treat patients dying in the short term differently from all other patients requesting MAID, insofar as the mandatory safeguards are concerned (specifically, Belgium requires a mandatory reflection period of 1 month and a mandatory third opinion from a psychiatrist or a specialist in the person’s medical condition only in the case of persons not dying in the near future).

Foreign laws also take different approaches with respect to advance requests for MAID (whether a person can receive MAID after they have lost the ability to consent to die, based on a request made while they were competent). Only four jurisdictions allow some kind of advance request. Belgium and Luxembourg limit such requests to circumstances where a person is irreversibly unconscious, Colombia limits them to circumstances where death is imminent (for both conscious and unconscious persons), while the Netherlands allow them for persons over 16 years of age who are still conscious, but have lost decision making capacity.

Key Features of Foreign MAID Regimes

	Eligibility for persons not nearing end of life (includes physical disability and mental illnesses)	Advance Requests	
		Person has lost capacity but is conscious	Person is irreversibly unconscious
<i>Canada</i>	No	No	No
<i>United States</i> (California, Colorado, District of Columbia, Hawaii, Maine, New Jersey, Oregon, Vermont, Washington)	No	No	No
<i>Australia</i> (Victoria, Western Australia)	No	No	No
<i>New Zealand</i> (would come into effect after referendum)	No	No	No
<i>Colombia</i>	No	Yes (death must be imminent)	Yes (death must be imminent)
<i>Belgium</i>	Yes	No	Yes
<i>Netherlands</i>	Yes	Yes	No
<i>Luxembourg</i>	Yes	No	Yes

Annex B – List of Amended Safeguards

First Set of Safeguards: Natural Death is Reasonably Foreseeable

As a result of these proposed *Criminal Code* amendments, the following set of safeguards would apply to persons whose natural death is reasonably foreseeable (amended subsection 241.2(3) of the *Criminal Code*):

- Patient must make a written request that is witnessed and signed by **one** independent witness (**eased safeguard**);
 - Individuals who are paid to provide either health or personal care as their profession or occupation can be an independent witness (**eased safeguard**);
- Two independent practitioners must confirm all eligibility criteria;
- Person must be informed that they can withdraw request at any time, by any means;
- Immediately before MAID is provided, person must be given opportunity to withdraw consent, and must confirm consent to receive MAID (**unless they have an “advance consent arrangement”, see Part IV**).

Second Set of Safeguards: Natural Death is Not Reasonably Foreseeable

As a result of these proposed *Criminal Code* amendments, the following set of safeguards would apply to persons whose natural death is not reasonably foreseeable (proposed subsection 241.2(3.1) of the *Criminal Code*):

- Patient must make a written request that is witnessed and signed by **one** independent witness (**eased safeguard**);
 - A paid professional personal or health care worker can be an independent witness (**eased safeguard**);
- Two independent practitioners must confirm all eligibility criteria are met;
 - One of the two practitioners assessing eligibility must have expertise in the condition that causes the person’s suffering (**new safeguard**);
- Minimum period of **90 days** for assessment of the MAID request, which can be shortened if loss of capacity is imminent and assessments are complete (**new safeguard**);
- Person must be informed of counselling, mental health supports, disability supports, community services and palliative care, and be offered consultation with relevant professionals, as available and applicable (**clarification of informed consent**);
- Practitioners agree with the person that they have discussed and appropriately considered reasonable means of alleviating their suffering (**clarification of informed consent**);
- Immediately before MAID is provided, person must be given opportunity to withdraw consent, and must confirm consent to receive MAID.