

CRIMINAL CODE

BILL TO AMEND—SECOND READING—DEBATE CONTINUED

On the Order:

Resuming debate on the motion of the Honourable Senator Wallin, seconded by the Honourable Senator Tannas, for the second reading of Bill S-248, An Act to amend the Criminal Code (medical assistance in dying).

Hon. Pamela Wallin: Thank you very much, Your Honour, for this opportunity to conclude my thoughts on Bill S-248.

Throughout our lives, we deal with death in many forms — the death of a relationship or a career, the death of a loved one, even a beloved pet and, of course, we will face our own death as well. Death and dying are a part of life. We are — for better or worse — the only species actually aware of the inevitability of death. That motivates us, helps us find purpose and may also frighten us; either way, it makes moments meaningful and precious.

We live in a time where we can reasonably foresee death. We can diagnose terminal illness or spot signs of physical and cognitive decline scientifically and with great accuracy. While more people may be living longer, what becomes more important is: Are we actually living a good life? In the pursuit of longevity, we must always consider quality of life.

I have come to my views watching both of my parents die in two very different but equally tragic ways — my father to painful cancers, my mother to Alzheimer's. Their suffering was unnecessary and preventable. These encounters with death can help ready us for an end to our own life. We all want to be spared pain and indignity, but we need choices.

I believe it is our right, and perhaps even our responsibility, to make our own end-of-life decisions. Every single day, Canadians with an incurable or irreversible medical condition suffer needlessly in hospital beds and care homes. They suffer, sometimes with loved ones close at hand, but too often alone or in fear or — the worst of all fates — without knowing who they are or once were.

For many Canadians, the right to choose medical assistance in dying has been a blessing. I have seen it first-hand. The ability to choose is empowering. MAID affords a person not just relief from pain and suffering, but a sense of control and predictability, a chance to plan and a chance to say goodbye.

For those recently diagnosed with an incurable illness, death is a ruthless dictator. Research shows that over 20% have prolonged and intense feelings of fear of dying a painful death. We are able, so why would we not offer some certainty at the end when so much of life has become uncertain? That's what this bill is about: peace of mind and a dignified departure.

Bill S-248 gives Canadians, once they have been diagnosed with a "grievous and irremediable medical condition," the ability to make an advance request for MAID, before they lose the capacity to give final consent. It's a common sense answer to a gap in the current law, and it's something an overwhelming majority of Canadians want. It will allow those diagnosed with dementia or Alzheimer's the freedom from this possible Catch-22: You can't ask in advance of a diagnosis, and once diagnosed it's too late to ask for some time in the future.

This bill will allow a person to apply long before they actually wish to die and long before they have lost capacity to ask for MAID. This offers peace of mind and a better quality of life for the time they have left with much less stress and anxiety as they live out their final days.

In 2019, a survey by *The Canadian Press* found that over 86% of Canadians agree that people with a serious, degenerative and incurable disease should be able to request and obtain medical assistance in dying, and 74% said MAID should be accessible to all people with incurable diseases, even if their death is not imminent. Just last year an Ipsos poll conducted by Dying with Dignity found that Canadians feel the same way about advance requests: 83% of Canadians support them for those with a grievous and irremediable condition.

This is a powerful insight into the minds of Canadians, their values, their empathy and concern for their fellow citizens, not just their loved ones. It is all clear. Even with so much public support, we still, sadly, have that unfair gap in our current MAID laws, and it is our responsibility as lawmakers to right this inequity.

I won't review the entire history of MAID, but, as you will remember, in 2016 the government introduced Bill C-14, in response to the Supreme Court *Carter* decision, which afforded individuals the right to make their own end-of-life decisions. In the bill, a series of safeguards were put in place to guard against fears of a slippery slope of access. But the government decided that access for mature minors or those with mental disorders as an underlying sole condition and the right to an advance request were all to be excluded from the final draft of the bill. The government said it wanted more time to figure out how the public and the medical world would deal with the ethical complexity.

Of course, all agreed that an assisted death ought not replace essential support and services for the under-represented, the unwilling or those who could have been treated or cared for but were failed by an unjust or overburdened system. This applies to anyone, for that matter. MAID is always a matter of choice. MAID is not an alternative to poverty or treatment or support or family. It should and must always be a choice. And I believe, as it stands, our MAID regime is moving toward the right balance between access and safeguards. We know a little more with MAID having now been available for more than six years.

The third annual report on MAID, which was released in July, indicated that in 2021, 80% of all MAID recipients first had access to and received palliative care, a number that has remained constant since 2019.

• (1950)

Of the MAID recipients who did not receive palliative care, 88% had access to those services but chose not to avail themselves of that option.

So the typical MAID recipient, then, is a cancer patient in their seventies who died in their home after receiving palliative care in advance of MAID. We must continue to work to ensure equal access as well, so those in rural or underserved areas are not denied access.

There have been some suggestions — undocumented — of people being offered MAID as a first resort rather than a last. Any evidence of any such cases should be investigated, of course, but it does not mean the entire system should be replaced.

There are safeguards in MAID law to make sure that those requesting MAID must state, literally in the moment before their medically assisted death, that they are certain. It ensures the patient, their doctor, family and loved ones would all be absolutely certain that a MAID recipient had made the choice. It also ensures that medical practitioners administering MAID are legally protected.

But colleagues, instead of making things easier, some safeguards have actually created more ambiguity. In a case where people have been deemed eligible for a medically assisted death — say, they had an advanced form of cancer that might physically prevent them from uttering that final verbal consent, or they feared that they might fall unconscious from their illness — then their only option would be to end their life prematurely — sooner than necessary — because they would have to end their lives while fully competent and verbal. It was a legal trap that needlessly creates more suffering.

That is exactly what happened to Audrey Parker, a 57-year-old Nova Scotia woman with stage 4 breast cancer, who had to end her life two months before Christmas, due only to a poorly conceived “safeguard” in the law.

Countless others likely had to make a similar decision — we have heard many of those stories — before the law was finally changed in March of 2021 thanks to the tireless advocacy of Audrey’s family and friends.

It was an important change and it has paved the way for this bill. Because, as I noted, some people who are eligible for MAID are at risk of losing capacity before their chosen date. And now, thanks to “Audrey’s Amendment,” in a way we now have a very

limited version of advance requests in the current law. Limited because it is only for those who have already been assessed and approved for MAID, and only when you’re right at the end, and when a doctor agrees that you might be robbed of that ability to say “yes” or nod your head as final consent in your last moments.

Colleagues, this was the context in which I introduced an amendment last year to Bill C-7 to fully allow for advance requests. My hope was to extend the right to an advance request to those whose death was not imminent but who would inevitably lose their right to consent. This is, of course, the case for those with dementia or Alzheimer’s, which is why the right to make their views known in advance is so key.

I wish to thank so many of you for helping me pass that amendment here in this chamber. It was a powerful moment. Sadly, though, it was later rejected by the government of the day. I genuinely do not understand why the government said “no” to the wishes of this chamber and to the stated wishes of so many Canadians. Instead, the issue was handed over to a special joint parliamentary committee for more study.

As we see so often, the people — Canadians — are more compassionate and open-minded than the government, as was the Supreme Court of Canada, who led the way.

We also see provinces moving forward on this. The Quebec National Assembly Select Committee on Dying with Dignity recommended an advance directive for medical aid in dying in 2012. The *Provincial-Territorial Expert Advisory Group on Physician-Assisted Dying: Final Report* sought clarity from the government to include advance requests in any upcoming legislation.

Even the Council of Canadian Academies’ reports on advance requests, mature minors and mental disorders — though prohibited from making any actual recommendations — proposed possible levels of accessibility for legislators to consider when amending future legislation.

And remember that our first Special Joint Committee on Physician-Assisted Dying, leading up to Bill C-14, stated, in its seventh recommendation:

That the permission to use advance requests for medical assistance in dying be allowed any time after one is diagnosed with a condition that is reasonably likely to cause loss of competence or after a diagnosis of a grievous or irremediable condition but before the suffering becomes intolerable.

All those hearings, expert testimonies and recommendations — a decade of work. Colleagues, that is why I introduced my amendment to Bill C-7 and why I believe it passed here in this chamber.

Not everyone will choose this option for themselves, but they believe others should have the choice. Yet, somehow it still wasn’t enough, and still the people of Canada continue to seek the right to advance requests in 2022.

So that is exactly what this bill now aims to do. There are signs that the political climate is changing. Earlier this year, in Quebec, an all-party committee put forward 11 recommendations, 10 of which propose a workable model for advance requests. That provided significant direction on the scope of this bill and was also the inspiration for the Quebec government's Bill 38, in limbo at this moment due to the recent election.

It was a reasoned bill and set out what I believe to be an appropriate level of safeguards. I urge colleagues to look at the bill to see what a provincial framework for advance requests would look like.

But there are concerns that, if passed, any provincial advance request regime will still be vulnerable — as would the medical practitioners — if the federal law does not change. So even if Bill 38 is passed, Quebec doctors could go to jail for honouring an advance request, even if it's legally permitted in their province but not by Ottawa.

The Supreme Court of Canada has already given the federal government all the room it needs to allow the right to an advance request, so these delays are unjust.

I believe this bill is a remedy. It amends the federal Criminal Code to allow for advance requests. It is not overly prescriptive in its approach, as that is actually the purview of the provinces.

You see, our MAID laws exist as an amendment to the Criminal Code, essentially as an exclusion, and all health-related issues are regulated by the provinces per the Constitution. So this bill merely excludes an advance request — or the use of an advance request — from being considered a criminal act.

The legislation is quite simple. It amends subsection 241.2(3.1), (3.2) and (3.4) of the Criminal Code relating to a medically assisted death. This section is the final consent waiver safeguard, which can now be waived thanks to subsection (3.21) or, as I described earlier, "Audrey's Amendment."

The bill also adds another section — (3.22) — which allows a person and their doctor to prepare a written set of specified conditions and state that when these medically assessed behaviours or conditions are present, that would help define the time when the person would want MAID to be performed. It is the crux of this bill.

Of course, they would have to have been diagnosed with a serious or incurable illness, disease or disability to be eligible for MAID in the future. Spelling out the conditions would exist on paper, even before they are assessed and approved for MAID.

Section (3.22)(a) states that a person may be able to make a declaration in writing that a medical practitioner or nurse practitioner can perform MAID without final consent as long as the conditions of suffering are clearly identified in the advance request, and that those conditions can be easily observed by the medical or nurse practitioner.

• (2000)

This is an important distinction from what we currently have in the law. Subsection 3.21, the so-called "Audrey's Amendment," allows final consent to be waived if there was agreement between a MAID recipient and their doctor to have MAID performed on a specific day, and if that person's suffering and physical state have prevented them from being able to make that final verbal confirmation.

Subsection 3.22 affords the same right to Canadians diagnosed with a serious and incurable illness, disease or disability, and who don't yet have a date set for a medically assisted death but have established a clear set of criteria for when they want their suffering to end.

Paragraph 3.22(b) of the bill requires an advance request to be no more than five years old. This means it would need to be updated regularly to make sure it remains a person's wish and intent and that is what they really want when they have lost control of their circumstances.

That timeline was decided after consultations with various stakeholders and groups such as the Alzheimer Society of Canada and the Canadian Association of MAiD Assessors and Providers, known as CAMAP.

But if the Social Affairs Committee of this place were to advise that a three-year update is appropriate, I would absolutely concur. Whatever gives the most people the most peace of mind is what we should do.

Paragraph 3.22(c) in the bill requires an advance request to include the consent to have MAID performed by the person requesting it, and paragraph (d) requires two independent witnesses to be present during the signing of the advance request.

We should all be discussing end-of-life choices with family, friends, doctors and even lawyers long before the end is nigh. We should all have advance care planning documents and directives, and they are readily available online. They should be updated regularly so that your records and your intentions, over time, are clear. Clarity and understanding are key to having your wishes honoured.

I believe the scope of this bill finds the right balance. It requires an advance request to be regularly updated. It also requires someone seeking an advance request to discuss that request with their doctor and others — many others — in detail, to ensure they understand what they are doing and agree on what criteria they and their doctor believe to be appropriate.

And you would have to be approved for MAID. It will not circumvent the parameters already established in our current laws, or the scope recommended by any of our federal reports. It will not compel anyone to choose MAID, nor can it be used as a coercive tactic. It simply gives Canadians the assurance that, in the event their disease, illness or disability worsens to the point where they can no longer consent to MAID, their wishes will be respected.

Of course, the bill will benefit from study by our Social Affairs Committee. Health Canada and the provinces need to create regulatory frameworks to allow for advance requests, and no doubt they would benefit from our advice here.

There is also the issue of how an advance request would be stored. Will an online registry be needed or be created? What happens if someone travels between provinces? What if they wish to change the set of specified conditions or opt out of the advance request entirely?

I personally believe that anyone should have the right to an advance request in a living will. No one who loses capacity unexpectedly — through accident or stroke, for example — should be forced to live the rest of their life incapacitated until their death. That is why we have “do not resuscitate” laws. I see an advance request as exercising that same right. Our well-stated, well-documented decisions on our own lives should be respected even after losing our conscious ability to confirm that decision in the moment.

But these are all important and very complicated issues that I know our committee would study and consider. Again, if our MAID laws were not tied to the Criminal Code, then we could simply address many of these issues and concerns legislatively. But, sadly, that is not the case.

Finally, colleagues, allow me one last comment on why this bill is before the Senate now rather than after the Special Joint Committee on Medical Assistance in Dying has finished its final report.

As I noted earlier, the committee is spending valuable time relitigating the concept of MAID. We have, indeed, heard from many witnesses representing the full spectrum of views on this issue, and I do hope this eventually leads to the crafting of actual recommendations that would be specific and useful for future legislation. But I think Senate committees are better able to report on matters in a timely way, and time is of the essence.

The government’s action or inaction is often frustrating for the thousands of Canadians awaiting decisions. Their lives and their deaths are too often trapped in our legislative limbo.

In *The Meditations*, Marcus Aurelius wrote:

... every day more of our life is used up and less and less of it is left, but this too: if we live longer, can we be sure our mind will still be up to understanding the world

So we need to hurry.

Not just because we move daily closer to death but also because our understanding—our grasp of the world—may be gone before we get there.

Colleagues, we do need to hurry. This bill will help those whose grasp of the world is fading. This bill is needed and wanted by so many.

Thank you for listening and know that I am grateful for your support if you can offer it. Thank you.

Hon. Denise Batters: Senator Wallin, I have a few questions about witnesses, how they’re defined in your bill and how that’s characterized. How is the term “independent witness” defined in your bill? I know under your bill, the patient’s declaration must be:

... witnessed by two independent witnesses to confirm that it was made voluntarily and not as a result of external pressure and each witness signed and dated it . . .

I have a further question about that, but could you answer about “independent witnesses” first, please? Thank you.

Senator Wallin: This is a concept that already exists in other parts of law, but “independent witnesses” would be best characterized as those that the client, the patient and the person who is requesting MAID, in consultation with medical professionals over time, has suggested would be independent and would not have a vested interest in the outcome or the decision of the patient.

Senator Batters: Is there a definition that already exists under Bill C-7 or Bill C-14 or something that it’s referring to or is this an extra definition? That’s what I’m wondering about. Maybe you can find that out and let me know if you’re not sure, because there could be a few different definitions. It might be that that person is not entitled to benefit under the estate, or it also might be someone who is not related to that person. I’m wondering about that because it’s an important definition.

I’m also wondering if it would be correct that under your bill it would be the “medical practitioner” who certifies that under subparagraph 3.22(e)(iii), “each witness is an independent witness as described in subsection (5).”

What I’m wondering there is: How would a medical practitioner be able to determine that? By the way, it’s important to recall that such a medical practitioner under the medical assistance in dying laws could be a doctor or a nurse practitioner. I’m wondering how a medical practitioner would have that level of knowledge. Thank you.

Senator Wallin: I have discussed this whole issue at length with the Canadian Association of MAiD Assessors and Providers. These are doctors. They are often family doctors. So these are people who have known the patient over years and over time.

I just had this discussion with someone last week. The importance of us all filling out these forms and making wishes clear over time and with a variety of people helps ensure that kind of independence. It may be that you have some of your family members involved. You may have friends or outsiders. You might go to a lawyer. You might go to a separate doctor from your own family doctor. There are many options.

• (2010)

If you make those comments, thoughts and beliefs known to your friends, family and, more importantly, written down, then you have that guarantee or backup. The medical professionals who are engaged in the medical assistance in dying, or MAID,

area very much want this to happen. They are seeking provincial rules — that's part of what they negotiate and deal with — to clarify this.

You will find in any of the forms that you are asked to fill out — of course, you can have variations on that, if there's something that gives you, specifically, more comfort — that there are lots of ways to make this clear.

I'm a woman who doesn't have children or a husband, so I would obviously have to go beyond the parameters of immediate family — perhaps a more distant relative, a niece or nephew. But I would have made this action very clear early in the process. That is why I keep suggesting and almost begging that I wish we would do this not only for ourselves to ensure that our own requests and wishes are respected, but that we do this for the sake of those who love us and want to make sure that these really are our wishes and that it's carried out.

It does mean responsibility for us earlier in life. I know when you're 29, nobody thinks about this. But for most of us in here, it's well-timed for us to be thinking about these issues. It's clarity for yourself as well. If you go through this process of filling out these forms and going through the exercises that are required, it really makes you examine your own feelings. It makes sure that there is a definition there. There's a certainty there. There's a commitment there.

If you ask others to participate in that process with you, be they a lawyer, family or friends, then you actually are getting that sense of security from them and for them that they are willing to bear witness to this.

It's an obligation. It's a heavy obligation. We have to take it most seriously. The sooner we start that process, the better. That's where we would get to those definitions because it would be a group of people who would be engaged in this process over time.

[*Translation*]

Hon. Marie-Françoise Mégie: Will Senator Wallin take a question?

Senator Wallin: Yes.

Senator Mégie: Senator Wallin, during my medical career, I worked with people with serious and incurable medical conditions, including people with neurocognitive disorders.

We are using the advance medical directives system. If Bill S-248 is passed, what will the interdependencies be between advance requests for medical assistance in dying and the provincial advance medical directives system?

[*English*]

Senator Wallin: You've raised a series of questions there because, of course, the Criminal Code is the federal purview and all matters health are the provincial purview.

This is why groups have been working on this issue for more than 10 years to try to find frameworks that reflect the needs and desires of a particular province or territory — because views will

be different across this country — and that we find a federal framework that will accept that and has enough flexibility in it so that if one province is different from another, it can be in the embrace of the MAID laws — a new, revised set of MAID laws.

Advanced medical directives or care directives — when you go into a hospital and you're about to have surgery, they may ask you if you want to sign a do not resuscitate order. That's the individual that's there. But I think it all starts to form part of your views and your history. If you have that — if you have engaged in this process of preparing for end-of-life decisions — then that is going to be further reassurance to people that your views have been similar, not just in the short-term but over the long-term.

I would see it as part of a larger piece where your beliefs and feelings have been monitored over time. If they are the same, if there's a consistency or if there's a change, all that can be assessed by the medical professionals at the end of the day.

Hon. Ratna Omidvar: Will Senator Wallin take another question?

Senator Wallin: I will.

Senator Omidvar: Thank you very much, Senator Wallin.

I want to commend you for your ongoing and consistent advocacy for advanced requests. Your comments brought back a rush of memories going back to 2016-17 when we debated and studied Bill C-14. There was a lot of emotion. There was also a lot of substance.

This issue of advanced request, I want to ask you, is it unique or new in Canada? There are other jurisdictions — most famously, the Netherlands, but also Belgium and Switzerland — that have physician-assisted dying laws.

Is there anything that you can share with us from your study of this issue from other jurisdictions and what can we learn? Have they had some experience here that could inform us?

Senator Wallin: From most of the things that I have studied in other countries, my understanding is they have a very different view of it. It's a decision that you make, and that's it.

In countries like Switzerland, they've even allowed for — I hate to use the phrase — medical tourism, where people can go and seek an end to their life if they're suffering and, for some reason, do not qualify in this country.

Ours is complicated. There's no question. But I think that's a good thing. What we are doing is really dealing with the nitty-gritty of this. This is not a decision that anybody takes lightly. It's not anything that a medical practitioner wants to take lightly.

Because ours is still in the Criminal Code, it makes it doubly more complicated because we're asking people to engage as individuals or as medical practitioners in something that we're still saying might be against the law. It's really important that we narrow this down.

[Senator Wallin]

This comes home with the benefit, as I mentioned several times, of “Audrey’s Amendment” because it moved us in that direction, which is that this woman knew that she would lose her ability to give that final consent in the final moments because of the nature of her illness and so she took her own life early.

Honestly, I get calls from people every week documenting cases of friends who have made that choice because they didn’t quite qualify. They were afraid that if they waited for the moment when they would qualify, they wouldn’t be able to consent. We have that Catch-22 there for a lot of people.

We owe it to everybody to find clarity. Because we’ve come this far and because we are doing this in such a deliberate way, we don’t have a lot of international precedent. Our own provinces are wrestling with it. Quebec is doing some of the heavy lifting on this. It seems we always wait until there’s a court decision. We’re forced in one direction and then we run around and try to figure it out.

• (2020)

What I think we need to be doing — and this is what the committee and other groups are involved in — is to be proactive. We need to try to lay out the parameters, to give people assurance, peace of mind and confidence that we’re not doing this without serious understanding and study and putting the rules, protections and safeguards in place. That’s really what we have to do. We need to do that here, in the other place and in the courts. The medical providers have to engage in that, and they are, but we need to find some way to bring it all together. I’m hoping this will be a starting point for that discussion.

Hon. Mary Jane McCallum: I can understand why people may want to request assisted dying, but I don’t think that any of us in this chamber can say that it will not be used as a coercive tactic. I have had calls from elders and disability communities. One elder in particular told me that, when he went to his medical doctor, he was offered it. He didn’t request it, nor did he want it. Now he’s afraid. He’s an Indigenous elder.

When you look at the vulnerable populations, we can say it’s coercive. When we look at the issue of forced sterilization that’s occurring with Indigenous women today, there is no choice. There’s no option for them: It has been taken away from them.

What safeguards will be put in place for Aboriginal people and the disability community — that is, those who are looked upon as subordinate by many people in Canada? What safeguards will be put in place for them?

Senator Wallin: The safeguards are the same as for any Canadian — they exist in law. We are trying to put safeguards on this specific issue of advance requests that are more relevant to that particular issue. We already have the waivers of final consent and the right to do this. The laws apply to everybody.

I mentioned this in my remarks, but I think it’s important to say this: We don’t have documented cases of people who have been forced to undergo MAID. It’s almost inconceivable that a medical practitioner would engage in that without being

challenged by the family and by their own medical establishment. They have very strict rules surrounding what doctors can’t do, and medical malpractice is something they’re most aware of.

If there were any such cases, they should, of course, be taken to the authorities. They should be examined. There should be action taken, if need be. But, as we’ve been hearing through witnesses and testimony, there is no evidence on that one. Thank you.

(On motion of Senator Seidman, debate adjourned.)

[*Translation*]

CRIMINAL CODE JUDGES ACT

BILL TO AMEND—SECOND READING—DEBATE ADJOURNED

Hon. Pierre J. Dalphond moved second reading of Bill C-233, An Act to amend the Criminal Code and the Judges Act (violence against an intimate partner).

He said: Honourable senators, today, I have the honour to commence second reading of Bill C-233, An Act to amend the Criminal Code and the Judges Act (violence against an intimate partner).

This bill was introduced in the House of Commons on February 7, 2022, by Anju Dhillon, the member for Dorval—Lachine—LaSalle and a family and criminal lawyer, in cooperation with Pam Damoff, the member for Oakville—North—Burlington and Parliamentary Secretary to the Minister of Public Safety, and with Ya’ara Saks, the member for York Centre and Parliamentary Secretary to the Minister of Families, Children and Social Development.

It was changed slightly by the Standing Committee on the Status of Women and then unanimously passed by 326 MPs on June 1. Unfortunately, this bill arrived in the Senate when we were working exclusively on government bills.

Although it consists of only four provisions, including one on the coming into force of the act, Bill C-233 proposes two measures that should help reduce incidents of violence, including femicide, against women who want to end a toxic relationship.

[*English*]

First, Bill C-233 proposes to amend the Criminal Code where an accused is charged with an offence against an intimate partner. Before making a release order, this change would require a justice to consider whether it is desirable — regarding the safety and security of any person — to include that the accused wear an electronic monitoring device as a condition of the bail order.

Second, Bill C-233 proposes to amend the Judges Act to signal to the Canadian Judicial Council the importance of continuing education seminars for judges on matters related to intimate partner violence and coercive control in intimate partner and family relationships.