Alberta Health Services

Frequently Asked Questions for Physicians/Nurse Practitioners

After March 17, 2021

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1. What is the current status of the laws related to medical assistance in dying?

On September 11, 2019, the Superior Court of Quebec found the "reasonable foreseeability of natural death" eligibility criterion regarding medical assistance in dying (MAID) in the Criminal Code to be unconstitutional (*Truchon v Attorney General of Canada*). The ruling also suspended the declaration of invalidity to allow the federal government the opportunity to amend the medical assistance in dying law (the "MAID law").

The proposed changes to the MAID law have been contemplated in Bill C-7 and have been debated in the House of Commons and the Senate over the past year. On March 17, 2021, the Government of Canada made changes to the Criminal Code in relation to MAID. The revised law mainly modifies MAID eligibility criteria and safeguards in response to the *Truchon* decision. Information on the specific changes that came into effect when the new legislation was passed is available on: https://www.canada.ca/en/health-canada/services/medical-assistance-dying.html

2. What are the Legislative changes to MAID in Bill C7?

The most significant change is that a person's natural death NO LONGER has to be reasonably foreseeable for them to be eligible for MAID. For patient's whose natural death is reasonably foreseeable, they no longer are required to wait the 10 day reflection period.

Persons' whose sole medical condition is a mental illness are explicitly excluded from being eligible for MAID; however, the Federal Government will be completing further consultation with respect to this provision to be concluded by March 17, 2023. There is no indication as to whether a change will be made over this time.

All other previous eligibility criteria, including the 3 other sub-criteria for a *Grievous and irremediable medical condition*, remain in effect.

The other key change is that once a person is deemed eligible based on the new criteria, they will now be placed on either a "fast track" if their death is reasonably foreseeable or, if not, on a "slow track". The procedural safeguards have been modified for each of these "tracks".

A full summary of the legislative changes and how they impact assessment of MAID eligibility criteria and safeguards can be found at [*Link to Legislative Changes Summary Document]* .For further information refer to questions 7,8 and 9 below.

3. How will these changes affect my MAID assessment?

How the new legislation applies to a patient will depend on whether the patient is already engaged in the MAID process, meaning if the patient's Record of Request (ROR) was submitted prior to vs. after March 17, 2021. Details on each are provided in the following sections.

For a step by step summary please refer to the *MAID Process Interim Flowchart* (Hyperlink to document)

4. For Patient's with Record of Requests dated PRIOR to March 17, 2021?

For those patients with an ROR submitted prior to March 17, 2021, the assessment and provision process will mostly continue as before, with two new changes. These patients will continue to be assessed under the old legislation, meaning that their natural death is required to be reasonably foreseeable. If they wish to be assessed under the new legislation, they will need to complete a new ROR and have two new assessments regardless of how far they had proceeded with their previous assessment process.

First, patients who submitted their ROR prior to March 17, 2021 are no longer required to wait the 10 day reflection period as this requirement has been removed from the legislation.

Second, some of these patients may be eligible to waive the requirement of final consent immediately prior to the MAID provision. This will be subject to the conditions outlined in the *Waiver of Final Consent* pursuant to Bill C7. One of these conditions is that the patient and providing practitioner enter into a written agreement specifying an agreed upon date on which the patient will receive MAID as well as the patient giving consent to still receive MAID on or before that date should they lose capacity to consent to MAID prior to that date. The full details regarding the waiving of final consent process are listed on the *Waiver of Final Consent* (hyperlink here).

5. For Patients with Record of Requests received ON or AFTER March 17, 2021?

Any patient who completes a ROR on or after March 17, 2021 must be assessed under the new legislation.

The key differences in doing assessments for NEW MAID REQUESTS are:

(i) They no longer need a reasonably foreseeable natural death to be eligible for MAID

(ii) Their requests only require ONE Witness. The witness can be someone who directly provides health services or personal care to the patient (except for MAID assessors/provider involved in patient's case)

NOTE: If a Mental Illness is their sole underlying medical condition then they continue to NOT be eligible for MAID at this time.

If the patient is deemed eligible for MAID under the new criteria than an additional new step is required to:

(i) Determine if their natural death is reasonably foreseeable (RFND) or NOT.

Please note: This step is not required to determine MAID eligibility but rather to determine which Procedural Safeguards "track" will apply to the patient

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6. For Patients that are found to be ELIGIBLE and have a RFND are there any changes to their processes?

YES. The two changes which now apply (and did not before) to this category of patients are:

(i) The 10 day reflection period from time the ROR was signed to the date of the MAID provision has been removed

(ii) These patients may be eligible for a Final Consent Waiver (Hyperlink to document) option. There are strict criteria for this option to apply. (see next section)

7. What is the Waiver of Final Consent?

It is a written agreement between the patient and providing practitioner which, under specific circumstances, allows the patient to still receive MAID should they lose their capacity to consent prior to the previously agreed upon MAID provision date.

The required criteria for this to be valid are:

a. Before losing capacity to consent to receiving MAID, the Patient's:
    i. natural death is reasonably foreseeable
    ii. meets all of the eligibility criteria and related safeguards for MAID
    iii. entered into a written arrangement with the providing practitioner who would administer a substance to cause their death on a specified day
    iv. has been informed by the providing practitioner that they are at risk of losing their capacity to consent to receive MAID
    v. in the written arrangement they consented to receive MAID on or before the day specified in the arrangement if they lost their capacity to consent prior to that day
b. The Patient has lost the capacity to consent to receiving MAID
c. The Patient does not demonstrate, by words, sounds, or gestures, refusal to have the substance administered or resistance to its administration
d. The substance is administered to the person in accordance with the terms of the arrangement

Note: The Waiver of Final Consent is never available when the patient's natural death is not reasonably foreseeable.

8. Where do I document the Waiver of Final Consent?

The final consent waiver written agreement must be documented using the *AHS Waiver of Final Consent for MAID* form [hyperlink to form]. A list of all legislatively required safeguards that both patient and the providing practitioner must agree to are included on this form. The form also includes a section to add additional terms both Patient and providing practitioner may wish to include as part of their agreement.

Further details regarding the *Waiver of Final Consent* as well instructions on how to complete the consent form are included with the document.

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9. Are there any conditions which would invalidate the Waiver of Final Consent?

YES. Once a person demonstrates, by words, sounds or gestures, refusal to have the substance [to cause death] administered or resistance to its administration, MAID can no longer be provided to them on the basis of the consent given by the agreement. NOTE: involuntary words, sounds or gestures made in response to contact do not constitute a demonstration of refusal or resistance

Furthermore, the Waiver of Final Consent does not impose any legal duty on the Practitioner to provide MAID.

10. For NEW Patients that are found to be ELIGIBLE and DO NOT HAVE A RFND what additional requirements do I have to follow?

Four NEW Safeguards have been added for patients who now qualify for MAID but whose natural death IS NOT reasonably foreseeable. These are:

1. At least one of the assessors must have *expertise* in the condition causing the patient's suffering. If neither do, then they must consult a MD or NP that does have that expertise and share that consultant's findings with the other assessor(s). (Refer to Question #12 for further details on what qualifies as expertise)

2. The Patient must have *been informed* of means available to relieve their suffering AND *offered consultations* with relevant professional who provide those services

3. Both Assessors must have *had discussions with the patient about the reasonable and available means to relieve the Patient's suffering AND they both* agree with the Patient that the Patient *has given serious consideration* to the relevant and available means to relieve their suffering

4. Ensure there are at least 90 days from the start of the 1st assessment to the date of MAID provision. If both assessments have been completed and both assessors are of the opinion that the Patient is at imminent risk of losing their capacity to provide consent to MAID, any shorter period of time the first assessor considers appropriate in the circumstances.

11. What is the meaning of RFND (Reasonably Foreseeable Natural Death)?

The legislation does not define RFND. RFND is assessed on a case-by-case basis, in relation to the specific context of the 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 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 is expected assessors/providers will continue to use the same clinical reasoning to determine if a patient has a RFND as they did prior to Bill C7.

12. What constitutes *expertise* in the condition that is causing the individual's suffering?

One DOES NOT need to have specialization or certification in order to be considered as having expertise for this purpose. Expertise could be obtained, for example, through special training or previous experience with patient(s) with a similar condition.

The requirement is for expertise in the condition causing suffering, not just in the condition that is the serious and incurable illness, disease or disability, unless this is what is causing the greatest suffering. The assessor needs to assess the greatest source of suffering to determine what expertise is required.

The practitioner with expertise is providing knowledge on the individual's medical condition and options to relive suffering so that the MAID assessor can complete a fully informed assessment of the individual but not necessarily assessing for MAID unless they are acting as an assessor who also has pre-existing expertise in the condition.

For further details on this please refer to *Guidance on determining Expertise in the condition that is causing suffering. (link)*

13. What does it mean a patient has "been informed" and "seriously considered all reasonable and available means to relieve their suffering"?

The MAID assessors are both required for ensuring the patient has been *made aware* of available treatment/support services that might relieve their suffering, have *provided a description* of the treatment/support services and their potential impact and given the *opportunity to speak with relevant professionals* who provide these treatment/support services. While this does not require the patient to actually have tried those treatments or support services it does require that both assessors have discussed this with the patient and agree the patient has given serious consideration to the available means.

In fulfilling these requirements, a MAID assessor will benefit from the consultation with the expert in situations where they do not have expertise in the condition that is causing the person's suffering.

The legislation does not specify a timeline within which the referral must take place. However, if a Patient is interested in being referred to those other options but it is taking a significant time, great care should be taken in assessing how this delay may be impacting the voluntariness and informed consent of the Patient in their ultimate decision on whether to proceed with MAID or not.

14. When does the 90 day minimum assessment period begin?

The assessment period begins on the day on which the first assessment begins, from the point of view of the MAID assessor's understanding they have begun to assess a request for MAID. (NOTE: It does NOT begin from the date of the ROR).

The first day could be based, for example, on the MAID assessor reviewing the person's file, meeting the person, or engaging in any other reflection or consideration of information that forms part of a MAID assessment. The identified date needs to be documented and communicated on the Combined Assessor/Provider Form.

15. How do the new MAID Reporting Requirements affect me?

Bill C7 includes a number of amendments to what additional data will be required to be reported to Health Canada. These regulations are not expected to come into force until early 2023. Until then some new data will be collected on a voluntary basis. The Federal government is conducting consultations with the various jurisdictions to determine exactly what this will look like.

At this time, all currently required reporting information from practitioners has been updated on the latest MAID assessor and provider forms on the AHS MAID website. As these requirements change, all affected practitioners will be informed of the relevant changes including changes to affected forms.