SCL SOCIETY OF CONSERVATIVE LAWYERS

Assisted Dying for Terminally Ill Adults Bill [HL]

[AS INTRODUCED]

A

BILL

TO

Allow adults who are terminally ill, subject to safeguards, to be assisted to end their own life; and for connected purposes.

BE IT ENACTED by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

1 Assisted dying

(1) Subject to the consent of the High Court (Family Division) ...

LEGISLATION ON ASSISTED DYING: A SLIPPERY SLOPE?

Lord Sandhurst KC and Shannon Hale

About the authors

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London, September 2024

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The views expressed in this paper are those of the authors alone, who take sole responsibility for all errors and omissions.

INTRODUCTION

The legalisation of assisted dying in England & Wales is now on Parliament's agenda. On 26 July Lord Falconer of Thoroton introduced in the House of Lords the Assisted Dying for Terminally Ill Adults Bill.[1] Some say the term is a euphemism for assisted suicide. We think it does not help discussion of this difficult topic to debate semantics.

Its enactment is not a foregone conclusion. Wes Streeting, the new Secretary of State for Health and Social Care, has said that he feels "conflicted" about the issue[2] and is "uncharacteristically undecided" about it.[3] He is not alone.

Concerns that safeguards will be ineffective or abandoned outright are causing some previous supporters of legalising assisted dying to review their position. Canadian academic, Ashley Frawley, for example, points to the Canadian experience of safeguards being "watered down or removed over time" and "alarming examples" of abuse or safeguards failing to protect the vulnerable, as evidence that safeguards are inadequate and societal inequalities will lead to unjust deaths.[4]

Legalising assisted dying is a first step towards the expansion of more permissive laws. Consider Canada. Canada's Medical Aid in Dying (MAiD) law has expanded significantly since its introduction in 2016. Originally, only adults with a "grievous and irremediable medical condition" where death was "reasonably foreseeable" were eligible for MAiD. However, it is no longer a requirement for death to be "reasonably foreseeable".

- An adult experiencing "unbearable suffering" can now qualify for MAiD.
- Those with a mental illness alone will be eligible from March 2027.[5]

The speed and scale of change, as well as legitimate concerns over adequate safeguards, are prompting former supporters of assisted dying to change their minds.[6]

There are well established concerns over the legalisation of assisted dying. These concerns include:

- An assisted dying law will lead to a "normalisation" and thus an over-wide liberalisation of the practice over time.[7]
- To legalise assisted dying sends a "social signal" of approval, which opponents fear "would in time lead to pressure on those who might not otherwise have contemplated ending their lives, to hasten their own demise – so as 'not to be a burden' on others."[8]

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1 A Bill to allow adults who are terminally ill, subject to safeguards, to be assisted to end their own life; and for connected purposes (2024) Parliament: House of Lords, HL Bill 7 https://bills.parliament.uk/bills/3741

2 Wes Streeting MP, Tweet dated 30 March 2024: https://x.com/wesstreeting/status/1774187232888316382

3 Aine Fox, "Streeting: Time for assisted dying debate has come, as Bill introduced in Lords", *Independent* (26 July 2024) www.independent.co.uk/news/uk/esther-rantzen-bill-wes-streeting-health-secretary-commons-b2586369.html

4 Ashley Frawley, "Assisted dying: why Scotland must say no", *The Herald* (26 March 2024) www.heraldscotland.com/politics/viewpoint/24208859.assisted-dying-scotland-must-say-no

5 "Medical assistance in dying: Legislation in Canada", Government of Canada (18 July 2024) www.canada.ca/en/health-canada/services/health-services-benefits/medical-assistance-dying/legislation-canada.html

6 Sonia Sodha, "When the right to die becomes the duty to die, who will step in to save those most at risk?", *The Guardian* (7 April 2024) www.theguardian.com/commentisfree/2024/apr/07/conflicted-legalising-assisted-dying-sonia-sodha?CMP=Share_iOSApp_Other

7 "Assisted Dying / Assisted Suicide", House of Commons Health and Social Care Committee, Second Report of Session 2023–24 at para 130, https://publications.parliament.uk/pa/cm5804/cmselect/cmhealth/321/report.html

8 Matthew Parris, "Euthanasia is coming – like it or not", *The Spectator* (31 March 2024) www.spectator.co.uk/article/matthew-parris-assisted-dying-lives/; Matthew Parris, "We can't afford a taboo on assisted dying", *The Times* (29 March 2024) www.thetimes.com/article/we-cant-afford-a-taboo-on-assisted-dying-n6p8bfg9k

- Even if laws initially restrict assisted dying to those with six months left to live, over time there will be calls to expand the law to include people who are not terminally ill or suffer from mental illness or even children.[9] As Sonia Sodha cautioned in a recent article, "once you cautiously nudge the door on assisted suicide, it is very difficult to stop it swinging wide open."[10]

Finally, it is not clear whether it is intended by the Bill's proposers that assisted dying be offered on the NHS. Importantly, the NHS is under huge strain, the temptation to take short cuts with palliative care or to accede too readily to requests will have to be avoided. We suggest that may be difficult.

The introduction of Lord Falconer's Bill in the House of Lords has made assisted dying a live issue for this Parliament. We consider that Parliamentarians must resist any proposal to introduce assisted dying, not least because of the practical challenges it presents as well as the real risks that such a law will normalise the practice over time and lead to its expansion at the expense of the most vulnerable.

Clause 1 of Lord Falconer's Bill proposes that:

(1) Subject to the consent of the High Court (Family Division) pursuant to subsection (2), a person who is terminally ill may request and lawfully be provided with assistance to end their own life.

(2) Subsection (1) applies only if the High Court (Family Division), by order, 5 confirms that it is satisfied that the person—

(a) has a voluntary, clear, settled and informed wish to end their own life,

(b) has made a declaration to that effect in accordance with section 3, and

(c) on the day the declaration is made—

(i) is aged 18 or over,

(ii) has capacity to make the decision to end their own life, and

(iii) has been ordinarily resident in England and Wales for not less than one year.

This presupposes judicial oversight which goes beyond rubber stamping. It raises important practical questions – will the Official Solicitor be involved? Who will pay? Will there be legal aid? How much court time will be occupied? We examine these proposals in more detail below.

In Canada in 2022[11], there were 13,241 MAiD provisions reported accounting for 4.1% of all deaths in Canada. Canada's population is about 58% of the UK's. The UK equivalent would be well over 20,000 such deaths a year. Is it really to be suggested that the UK courts could handle such through put?

Further, as Health Canada reports,[12] "the total number of medically assisted deaths reported in Canada since the introduction of federal MAiD legislation in 2016 is 44,958" and "the number of cases of MAiD in 2022 represents a growth rate of 31.2% over 2021".[13] The Canadian example shows that a steady growth in assisted dying cases can follow a change in the law.

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9 Ashley Frawley [see reference 4], also House of Commons Report [see reference 7] at 36–37.

10 Sonia Sodha [see reference 6]

11 Health Canada, "Fourth Annual Report on Medical Assistance in Dying in Canada 2022" www.canada.ca/content/dam/hc-sc/documents/services/medical-assistance-dying/annual-report-2022/annual-report-2022.pdf

12 Health Canada [see reference 11] at 12.

13 Health Canada [see reference 11] at 20.

WHAT IS THE LAW?

The Suicide Act 1961 decriminalised suicide and attempted suicide in England and Wales, so that someone who commits suicide or survives a suicide attempt will not face criminal charges. But the Act makes it a criminal offence for someone to perform an act "capable of encouraging or assisting the suicide or attempted suicide of another person" and if that act "was intended to encourage or assist suicide or an attempt at suicide."[14] It is these cases that are subject to legal challenge.

It is not illegal for UK citizens to commit assisted suicide abroad. However, a family member or another individual accompanying that person may face criminal investigation and prosecution upon their return to the UK.[15]

The Director of Public Prosecutions (DPP) must consent to prosecutions being brought against third parties who assist another to commit suicide. Charges may be brought provided both the evidential stage and the public interest stage are met (i.e., the case must satisfy the Full Code Test). If the evidential stage is not met, a case cannot proceed to the public interest stage regardless of the circumstances. Guidance from the Crown Prosecution Service (CPS) clarifies that it is not an offence to explain the law on assisted suicide.[16]

The evidential stage of the Full Code Test considers whether there is "sufficient evidence to justify a prosecution" – namely, whether the prosecution can prove that the elements of the criminal offence are met.[17] The CPS must prove two elements:

- "The suspect did an act capable of encouraging or assisting the suicide or attempted suicide of another person; and
- The suspect's act was intended to encourage or assist suicide or an attempt at suicide."[18]

Two caveats are important here. Firstly, the CPS guidance clarifies that the suspect "does not have to know or even be able to identify" the person who commits or attempts to commit suicide, and that that person "need not be a specific person." Secondly, someone may commit this offence "even where a suicide or an attempt at suicide does not take place."[19]

Whether charges are brought depends on the factual circumstances of each case. Charges may be brought in a variety of circumstances, including websites that promote suicide if the intention is for one or more readers to commit or attempt to commit suicide, someone who unknowingly provides non-lethal drugs which are believed to be lethal, or where a third party puts pressure on or threatens an individual to commit suicide.[20] The prosecution must also prove that the third party "intended to assist the victim to commit suicide and that the suspect knew that those acts were capable of assisting the victim to commit suicide."[21] A prosecution does not automatically follow where the evidential test is met.[22]

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14 Suicide Act 1961, s 2

15 House of Commons Report [see reference 7] at paras 16–26

16 "Suicide: Policy for Prosecutors in Respect of Cases of Encouraging or Assisting Suicide", Crown Prosecution Service, Legal Guidance, Violent Crime (February 2010, updated October 2014) at paras 13, 35 www.cps.gov.uk/legal-guidance/suicide-policy-prosecutors-respect-cases-encouraging-or-assisting-suicide

17 CPS Guidance [see reference 16] at para 37

18 CPS Guidance [see reference 16] at para 17

19 CPS Guidance [see reference 16] at para 18

20 CPS Guidance [see reference 16] at paras 20, 23, 24

21 CPS Guidance [see reference 16] at para 29

22 See *R (on the application of Purdy) v Director of Public Prosecutions* [2009] UKHL 45 at para 44

Provided the evidentiary stage is met, the DPP will then consider whether it is in the public interest to prosecute. Deciding whether it is in the public interest to prosecute is not a simple arithmetical exercise. A decision cannot be made on the basis of whether there are more factors for or against. Sometimes, one factor may be sufficient to decide if the public interest test is met. The CPS Guidance is clear that "each public interest factor [must be considered] in the circumstances of each case" and an "overall assessment" determines if the test is met.[23]

The updated CPS Guidance identifies several factors making prosecution more or less likely. In total, there are thirteen factors that favour prosecution, including:

The victim:

- was a minor, lacked mental capacity to make an informed decision,
- had not "reached a voluntary, clear, settled and informed decision that they wished for their life to end", or
- had not "clearly and unequivocally communicated" that decision, and the victim could not physically end his or her own life.

Additional factors include, the suspect:

- was not "wholly motivated by compassion", or
- "pressured, coerced or controlled the victim to make the decision",
- had "a history of violence or abuse against the victim", or
- was acting in the capacity of a doctor, nurse, or healthcare professional, or
- influenced the victim's decision "not to seek medical treatment, palliative care and/or independent professional advice".[24]

In cases where the following factors are present, a prosecution is less likely:

- "The victim had reached a voluntary, clear, settled and informed decision that they wished for their life to end. They must have the freedom and capacity to make such a decision. This decision must have been made sufficiently close in time to their death and independently reached by the victim and not influenced by pressure, control or coercion by the suspect or anyone else. This requires thorough scrutiny and critical examination of the suspect's account, on its own and when placed in the context of the evidence as a whole. Prosecutors should consider what access the victim had to health care professionals including discussions about treatment and support options;
- The suspect was motivated by compassion alone and only in circumstances where the preceding factor is present;
- The victim was physically unable to undertake the act to end their own life;
- The actions of the suspect may be characterised as reluctant, in the face of significant emotional pressure due to the victim's wish for their life to end. Prosecutors should consider whether this is capable of independent verification by others;
- The suspect made a genuine attempt to take their own life at the same time;
- The suspect reported the death to the police and fully assisted them in their enquiries into the circumstances and their part in it."[25]

These factors are not exhaustive, and each case must be considered on its merits. The CPS updated its guidance following the decision in *R (on the application of Purdy) v Director of Public Prosecutions* [2009] UKHL 45, in which the Appellate Committee of the House of Lords required the DPP to clarify which factors militated for and against prosecution. It is important to note

23 CPS Guidance [see reference 16] at para 39

24 "CPS publishes updated homicide prosecution guidance", Crown Prosecution Service, News, Violent crime (5 October 2023) www.cps.gov.uk/cps/news/cps-publishes-updated-homicide-prosecution-guidance

25 Updated CPS Guidance [see reference 24]

that *Purdy* did not decriminalise the offence of encouraging or assisting suicide, nor, the DPP has made clear, should the CPS guidance be construed as granting immunity from prosecution to those who assist another person in committing suicide.[26]

When the current Prime Minister was the DPP, his view was that prosecutions were unlikely in cases where people were "'motivated by compassion who helped a relative or close friend' with a 'clear, settled and informed' wish to die."[27]

WHAT IS BEING PROPOSED?

Lord Falconer's recently introduced assisted dying bill would make it legal for a terminally ill person to receive assistance to end their own life, provided the High Court (Family Division) confirms the person is an adult who has made a "voluntary, clear, settled and informed" decision to end his or her life and has the capacity to take that decision.[28] The bill defines a terminally ill person as someone who has received a terminal medical diagnosis and be "reasonably expected to die within six months."[29]

The bill contains various safeguards. Someone solely with a mental illness or a disability does not meet the threshold of being terminally ill.[30] Two qualified registered medical practitioners (the attending doctor who will assist the terminally ill individual in ending his or her life and an independent doctor) must each independently examine the person and be satisfied that he or she is:

- "terminally ill,
- has the capacity to make the decision to end their own life, and
- has a clear and settled intention to end their own life which has been reached voluntarily, on an informed basis and without undue influence, coercion or duress."[31]

The attending doctor and independent doctor can establish whether a terminally ill individual has "a clear and settled intention to end their own life if they are satisfied, on the basis of in-depth discussions with the person, that the person is acting on their own free will, without undue influence, coercion or duress."[32] They must also be assured that the individual "has been fully informed of the palliative, hospice and other care" available to them.[33] A terminally ill individual may revoke the decision to end his or her life at any time, and not necessarily in writing.[34]

Additional safeguards for health professionals are in place. While a health professional may prepare the drugs or assist a person with their self-administration, the bill requires that "the decision to self-administer the medicine and the final act of doing so must be taken by the person for whom the medicine has been prescribed." In other words, a health professional cannot administer the drugs to end the patient's life.[35] The bill also states that anyone with a conscientious objection has no duty "to participate in anything authorised by this Act."[36]

26 "Suicide: Policy for Prosecutors in Respect of Cases of Encouraging or Assisting Suicide", Crown Prosecution Service, Legal Guidance, Violent Crime (February 2010, updated October 2014) at paras 1–8 www.cps.gov.uk/legal-guidance/suicide-policy-prosecutors-respect-cases-encouraging-or-assisting-suicide

27 House of Commons Report [see reference 7] at para 28

28 Assisted Dying Bill, s 1 [see reference 1]

29 Assisted Dying Bill, s 2(1) [see reference 1]

30 Assisted Dying Bill, s 2(3) [see reference 1]

31 Assisted Dying Bill, s 3(4) [see reference 1]

32 Assisted Dying Bill, s 3(5) [see reference 1]

33 Assisted Dying Bill, s 3(6) [see reference 1]

34 Assisted Dying Bill, s 3(9 [see reference 1])

35 Assisted Dying Bill, ss 4(4), 4(5) [see reference 1]

ASSISTED DYING LAWS IN OTHER JURISDICTIONS – CORE ELEMENTS

Assisted dying is legal in a minority of jurisdictions around the world. Notably, Montana legislators are working to reverse a court ruling that created a defence for doctors who assisted with a person's suicide by making it a criminal offence to do so.[37]

Some jurisdictions in the United States, Australia, and New Zealand have restricted assisted dying to those with an established terminal diagnosis.

Australia: Assisted dying is legal in all of the Australian states, with legislation active since 2019 in Victoria, 2021 in Western Australia, 2022 in Tasmania, and 2023 in New South Wales, South Australia, and Queensland. The Northern Territory enacted assisted dying legislation in 1995 but the Federal Parliament overturned the law in 1997 and it ceased to be in effect. Legislation is being considered for the Australian Capital Territory but no law is yet in effect. Those with a terminal illness are eligible for assisted dying, but the law does not extend to those with mental illness or a disability or to minors. The law permits self-administration or physician assisted administration of a drug to end one's life.[38]

The United States: Only 10 of the 50 of American states have legalised assisted dying: Oregon (1997), Washington (2008), Vermont (2013), California and Colorado (2016), the District of Columbia (2017), Maine, Hawaii and New Jersey (2019), New Mexico (2021). The law requires those with a terminal diagnosis to self-administer a drug to end their life. With two exceptions, the state laws require the individual to also be a resident of that state.[39]

In other jurisdictions, assisted dying is available to those with a terminal illness or on the basis of intolerable suffering: Switzerland, Luxembourg, Belgium, Netherlands, Austria, Spain, Portugal, and Canada. Some jurisdictions have gone further to expand the law to include mental illness.

Canada: Medical Aid in Dying (MAiD) became legal in Canada in 2016. MAiD is available to those with a terminal diagnosis or unbearable suffering. Parliament has approved expanding the law to include those with a mental illness, however this change will go into effect in 2027. Currently, the law does not apply to children but there have been attempts to change this restriction. The law permits self-administration or physician assisted administration of a drug to end an individual's life. The law only applies to those who are eligible for government-funded health services.[40]

Belgium: Assisted dying has been legal in Belgium since 2002. It is available to those with an established terminal diagnosis, unbearable suffering, or a mental illness. Children are also eligible. The law permits self-administration or physician administration of a drug to end an individual's life.[41]

The Netherlands: The Netherlands also legalised assisted dying in 2002. Like Belgium, it is available to those with an established terminal diagnosis, unbearable suffering, or a mental illness. Children are also eligible. An individual can end his or her life through self-administration or physician administration of a drug.[42]

Switzerland: Switzerland legalised assisted dying in 1942. Those with an established terminal diagnosis, unbearable suffering, or mental illness are eligible, including children. The law only permits the self-administration of a drug to end one's life.[43]

36 Assisted Dying Bill, s 5 [see reference 1]

37 House of Commons Report [see reference 7] at p 25, Figure 2

38 House of Commons Report [see reference 7] at pp 27–29

39 House of Commons Report [see reference 7] at pp 26, 28, 34

40 House of Commons Report [see reference 7] at p 36

41 House of Commons Repor [see reference 7]t at p 37

42 House of Commons Report [see reference 7] at p 37

43 House of Commons Report [see reference 7] at p 37

CORE CONCERNS

Assisted dying has been the topic of much recent debate in Parliament. Lord Falconer's recently introduced assisted dying bill resembles a previous Private Members' bill sponsored by Baroness Meacher in 2021, with a few minor changes.[44] The House of Commons last voted on assisted dying in 2015, where the proposal was "overwhelmingly rejected" with 329 MPs voting against it and only 117 MPs voting for it.[45]

The reasons for legalising assisted dying have not changed over the last decade, but our understanding of the societal effects caused by the legalisation of assisted dying has changed in significant ways. One need only look to other jurisdictions like Canada or, closer to home, Belgium, the Netherlands, or Switzerland to see that the concerns with opening the door to assisted dying are not unfounded.

Drawing on the experience of other jurisdictions, our core concerns with Lord Falconer's bill – and indeed any legislative proposal to decriminalise assisted suicide – are the following:

- Opening the door to assisted dying creates slippery slope towards ever expansive laws as the practice is normalised over time.
- Safeguards can – and do – change or weaken over time. For instance, time limits are subject to change – six months could become one year, or death may not be reasonably foreseeable.
- There are insufficient checks on the medical practitioners, including their motivation and predispositions, who are performing assessments and providing assistance under the legislation.
- A margin of error exists for both health professionals and judges. They can and do get it wrong.
- A court order burdens judicial resources and is an impractical requirement given time constraints on judges and their lack of expertise. Although this requirement is an important safeguard, it could give rise to practical difficulties leading to undesirable changes in the law (e.g., doctors – who are often overworked and short of time – signing off on declarations).

THE CANADIAN EXPERIENCE – A SLIPPERY SLOPE TOWARDS NORMALISATION

Canada is an example of how quickly assisted dying laws can expand and safeguards can become relaxed. Assisted dying was meant to be regulated by "stringent and well-enforced safeguards."[46] When legislation was first introduced in Parliament, the then Minister of Justice and Attorney General acknowledged the importance of protecting the vulnerable and affirmed that it was not the government's intention to "promote premature death as a solution to all medical suffering."[47] Nevertheless, Health Canada wildly underestimated the uptake of MAiD deaths. It forecasted that MAiD deaths would stabilise at 4% of all deaths by 2033, yet Canada reached the 4% threshold "in 2022, eleven years ahead of what Health Canada predicted only months earlier, and

44 A Bill to enable adults who are terminally ill to be provided at their request with specified assistance to end their own life; and for connected purposes (2021) Parliament: House of Lords, HL Bill 13 https://bills.parliament.uk/bills/2875

45 Rowena Mason, "Assisted dying bill overwhelmingly rejected by MPs", *The Guardian* (12 September 2015) www.theguardian.com/society/2015/sep/11/mps-begin-debate-assisted-dying-bill

46 *Carter v Canada (Attorney General)*, 2015 SCC 5, [2015] 1 SCR 331 at para 29, citing *Carter v Canada (Attorney General)*, 2012 BCSC 886 at para 1243

47 Alexander Raikin, "From Exceptional to Routine: The Rise of Euthanasia in Canada", Cardus (7 August 2024) at p 8, citing Canada, *House of Commons Debates*, April 22, 2016, 42nd Parliament, 1st Session, vol 148 (045) www.cardus.ca/research/health/reports/from-exceptional-to-routine

double its prediction just four years earlier."[48] A practice intended to be rare has become routine.[49]

Parliament first enacted MAiD (medical assistance in dying) in 2016. At that time, only those with a "grievous and irremediable medical condition" and a reasonably foreseeable natural death were eligible. Only those who met the four-part criteria were eligible:

- A "serious and incurable illness, disease or disability";
- An "advanced state of irreversible decline in capability";
- The underlying illness "causes them enduring physical or psychological suffering that is intolerable to them and that cannot be relieved under conditions that they consider acceptable"; and
- Their natural death was reasonably foreseeably, "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."[50]

Under the 2016 law, only adults with capacity to make health-related decisions were eligible to make a request, the request had to be made voluntarily and without external pressure, and a requestor needed to give informed consent having been made aware of other options to relieve suffering including palliative care.[51]

The 2016 law contained important safeguards, all of which have been relaxed in recent years:

- There was a 10-day waiting period between the date of the request and the date on which MAiD was administered.
- Medical professionals had to confirm consent immediately prior to providing MAiD.[52]
- An individual's request for MAiD needed to be made in writing before two independent witnesses, all of whom had to sign and date the request.
- Certain individuals could not be independent witnesses, including beneficiaries of the individual's will, the owners or operators of the healthcare facility where the individual received treatment or resided, or someone who directly provided healthcare services or personal care to the individual making the request.[53]

These safeguards provided a degree of comfort that vulnerable people would not be exploited and MAiD would not be abused. The Preamble echoed this view, stating that "robust safeguards, reflecting the irrevocable nature of ending a life, are essential to prevent errors and abuse in the provision of medical assistance in dying."[54] Yet, just five years later in 2021 Parliament amended the law and relaxed these very measures.

The 2021 law made a series of changes, which weakened safeguards and created different pathways and safeguards according to whether or not death is reasonably foreseeable.[55]

The most notable changes are these:

- Eligibility is no longer limited to only those whose natural death is reasonably foreseeable.[56]

48 Alexander Raikin [see reference 47] at p 4, 6, 14; See also Government of Canada, "Regulations Amending the Regulations," (2022), 2567

49 Alexander Raikin [see reference 47] at p 14, citing J Serebrin, "Quebecers No Longer Seeing Doctor-Assisted Deaths as Exceptional, Says Oversight Body," CBC News (15 August 2023) www.cbc.ca/news/canada/montreal/quebecers-maid-no-longer-last-resort-oversight-body-1.6936530

50 Government of Canada, "An Act to amend the Criminal Code and to make related amendments to other Acts (medical assistance in dying) SC 2016, c 3", s 241.2(2) https://laws-lois.justice.gc.ca/PDF/2016_3.pdf

51 Government of Canada [see reference 50] s 241.2(1)

52 Government of Canada [see reference 50] s 241.2(3)(g),(h)

53 Government of Canada [see reference 50], s 241.2(3)(b),(c), s 241.2(5)

54 Government of Canada [see reference 50] Preamble

55 Government of Canada, "Canada's New Medical Assistance in Dying Law" (accessed 24 August 2024) www.justice.gc.ca/eng/cj-jp/ad-am/docs/MAID_Infographic_EN.pdf

56 Government of Canada, "An Act to amend the Criminal Code (medical assistance in dying) SC 2021, c2", s1(3)

- Where natural death is reasonably foreseeable and an individual is at risk of losing capacity, an individual may waive final consent and they need not be offered an opportunity to withdraw consent before MAiD is administered, unless the individual shows signs of resistance or refusal to MAiD being administered.[57]
- A request for MAiD now needs to be witnessed by only one independent witness, and this can now be someone who is paid to provide health-care or personal care to the individual making the request (as long as the paid practitioner is not the same person administering MAiD or confirming eligibility for MAiD).[58]
- Where natural death is not reasonably foreseeable, safeguards similar to those in the 2016 law apply and there must be "90 clear days" between the first assessment of eligibility and the administration of MAiD, unless the individual is about to lose capacity to consent in which case a shorter period applies.[59]
- The 2021 law removed the 10-day waiting period.[60]
- Mental illness alone is not a basis for eligibility.[61]

Subsequent amendments to the law mean that people with mental illness as a sole underlying medical condition will be eligible for MAiD in 2027.[62]

Canada offers a cautionary tale. One area of concern is the number of and speed at which MAiD requests receive approval. The courts were of the view that MAiD deaths would be rare because the evidence showed that only 10% of assisted dying requests in Oregon were successful. But the Canadian data shows the inverse. The number of unsuccessful requests represent a small percentage of total requests and this number has declined each year.

In 2019, 8% of MAiD requests were unsuccessful and this number has fallen each year to now 3.5% of all requests in 2022. In 2022, over 81% of MAiD requests resulted in MAiD deaths.[63]

Of equal concern is the speed at which doctors approve MAiD requests. In theory, clinicians are meant to explore other options, including palliative care, with patients, all of which takes time and further consultations. In practice, it only takes about 11 days between the date of the request and the date of a MAiD death, even with the elimination of the 10-day waiting period. This rate is markedly higher than Oregon where the median time is 34 days.[64]

The number of MAiD deaths have outpaced projections. Since the introduction of MAiD in 2016, the number of MAiD deaths has increased each year and there was an "average growth rate of 31.1% from 2019 to 2022."[65]

As shown in Figure 1, there were 1,018 MAiD deaths in 2016 and by 2022 this number had increased thirteenfold to 13,241[66]. MAiD deaths where natural death was not reasonably

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https://laws-lois.justice.gc.ca/PDF/2021_2.pdf

57 Government of Canada [see reference 56] s 1(3.2)

58 Government of Canada [see reference 56] ss 1(2.1)(e),(e.1), (5.1)

59 Government of Canada [see reference 56] s 1(3.1)

60 See Criminal Code, RSC 1985, c C-46, ss 241.1, 241.2

61 Government of Canada [see reference 56] c 2, s 1(2.1)

62 Original plans would have introduced this change in 2023, but this measure has been delayed twice to 2024 and 2027. See An Act to amend the Criminal Code (medical assistance in dying) SC 2023, c 1, s 1; An Act to amend the Criminal Code (medical assistance in dying) SC 2024, c 1, s 1

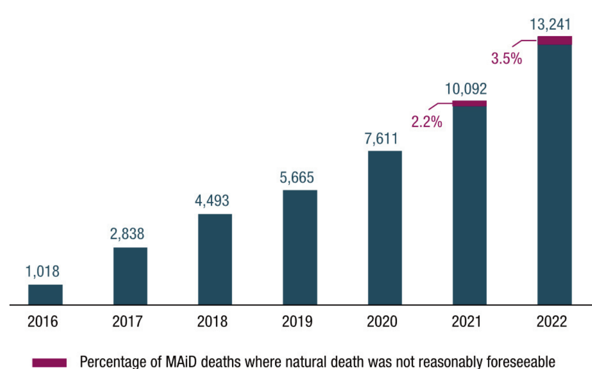
63 Alexander Raikin [see reference 47] at p 11

64 Alexander Raikin [see reference 47] at p 12–13

65 Health Canada, "Fourth Annual Report on Medical Assistance in Dying in Canada, 2022" (Published October 2023) at p 20 www.canada.ca/content/dam/hc-sc/documents/services/medical-assistance-dying/annual-report-2022/annual-report-2022.pdf

66 Alexander Raikin [see reference 47] at p 4

Figure 1: Canada: MAiD deaths, 2016–2022



foreseeable have also increased since legalisation in 2021.[67]

It is important to understand that Canada only went to change the law because the supreme court ruled that a prohibition on assisted dying was contrary to the Canadian Charter of Rights and Freedoms. In a span of six years, MAiD deaths have become the fifth leading cause of death in Canada: in 2019, MAiD deaths accounted for 2% of all deaths in Canada. Health Canada reports that by 2022 this number had increased to 4.1%.[68]

Compared to other jurisdictions where assisted dying is legal, MAiD deaths have risen at a rapid growth rate in Canada placing it on near equal footing with assisted dying deaths in the Netherlands.[69]

The Netherlands shows how the legalisation of assisted dying leads to its normalisation over time. Initially, only adults with a terminal illness and unbearable suffering were eligible. In the span of 20 years, assisted dying is now available to those suffering from mental illness, children over the age of 12, and disabled infants. Efforts are underway to make assisted dying available for children between the ages of 1 and 12 and for the elderly who are not ill but feel that they have reached the completion of their lives.[70] The recent high-profile case of 29-year-old Zoraya ter Beek highlighted the growth in assisted dying deaths in the case of mental illness, with only two cases in 2010 growing to 138 (or 1.5% of euthanasia deaths) in 2023.[71] Unsurprisingly, as safeguards are relaxed and assisted dying laws are expanded, the practice becomes increasingly normalised.

At Second Reading of her assisted dying bill in 2021, Baroness Meacher dissuaded the House of Lords from heeding the slippery slope argument on the grounds that assisted dying laws in other jurisdictions – apart from Canada – "have always been broadly based."[72] With respect, as the evidence demonstrates in the Netherlands, Canada, and elsewhere, this is simply not the case.

The assisted dying laws in Canada were not meant to be expanded over time. The 2016 law was "quite narrowly targeted to comply with the Supreme Court's judgment in *Carter*, focusing on reasonable foreseeability of death."[73] Yet, two years after Parliament legalised assisted dying on these narrow grounds, "a Canadian court struck down the law as unconstitutional" on the basis that it was "discriminatory to only allow the terminally ill to die through assisted suicide."[74]

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67 Health Canada [see reference 65] at p 20

68 Health Canada [see reference 65] at p 21

69 Alexander Raikin [see reference 47] at p 15

70 Yuan Yi Zhu, "Against assisted suicide: How long before the right to die becomes a duty to die?" *The Critic* (19 April 2023) https://thecritic.co.uk/against-assisted-suicide

71 Harriet Sherwood, "Dutch woman, 29, granted euthanasia approval on grounds of mental suffering" *The Guardian* (16 May 2024) https://www.theguardian.com/society/article/2024/may/16/dutch-woman-euthanasia-approval-grounds-of-mental-suffering

72 UK Parliament, Hansard, Assisted Dying Bill (HL), Vol 815: debated (22 October 2021), Second Reading at 10.09am (Baroness Meacher) https://hansard.parliament.uk/Lords/2021-10-22/debates/11143CAF-BC66-4C60-B782-38B5D9F42810/AssistedDyingBill(HL) [Second Reading House of Lords Debate]

73 Joint Committee on Human Rights, "Oral evidence: Human rights and assisted dying" HC 1195 (24 May 2023) per Richard Ekins KC at p 9 https://committees.parliament.uk/oralevidence/13221/pdf [Joint Committee on Human Rights]

74 Yuan Yi Zhu [see reference 70]

As Richard Ekins KC testified before the Joint Committee on Human Rights, "this is not a stable state of affairs" and it is evident that the "hope that one can limit the practice to a narrow set of persons for whom there are compelling considerations is ungrounded."[75] Once assisted dying becomes legal, even on the narrowest grounds, it is only a matter of time before judicial or political decisions lead to an expansion of the law.

Canada underscores how legalising assisted dying – even on the narrowest grounds with the strictest safeguards – leads to a normalisation of the practice over a short period of time. MAiD is available to individuals who suffer from chronic diseases, like diabetes and arthritis or even anorexia.[76]

The law has expanded so much that now Canadians are applying for MAiD due to a lack of adequate financial resources or stable housing, rather than a desire to end their lives. While someone cannot qualify for MAiD solely due to poverty or lack of housing, the expansion of the law to include intolerable suffering where death is not naturally foreseeable and, by 2027, mental illness, would give people in difficult circumstances an avenue to end their lives.[77]

Recent polling shows that one third of Canadians think those suffering from homelessness or poverty should be eligible for MAiD.[78]

The change in public perception and legal norms proves the point Richard Ekins KC made to the Joint Committee on Human Rights:

> "If one's concern is that we are crossing a major moral and legal threshold by allowing intentional killing and assistance of intentional killing, the fact that people get quite keen on this and expand the range of it, as they have in the Netherlands and Belgium, is not a reason to think there is no problem because people are perfectly happy. *It might be there is a problem precisely because they are getting used to this more expansive jurisdiction or practice*" [emphasis added].[79]

Changing the law will radically reorient social perceptions towards death. As Lord Herbert of South Downs argued during Second Reading of Baroness Meacher's assisted dying bill, legalising assisted dying would mean that "Life, in some circumstances, is no longer to be protected by an inviolate principle, but rather by administrative safeguards and time limits."[80] This would mark a significant shift in the law leaving the door open to watered down safeguards in the future.

Even if the UK introduces narrowly drafted legislation, it will only be a matter of time before safeguards are weakened. The proposed six-month time limit could easily be expanded to one year or broadened to death being reasonably foreseeable or even, like Canada, to when death is not reasonably foreseeable.

Parliament must resist the temptation to "legislate for best-case scenarios."[81] There will always be a margin of human error involved. Doctors do not always get it right, and sometimes act for improper motives. When the NHS is already under considerable pressure, assisted dying could create a perverse incentive for doctors to "encourage patients to take their lives to ease pressures on the NHS."[82]

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75 Joint Committee on Human Rights [see reference 73] at p 9

76 Madeleine Grant, "Comment: Assisted suicide and the NHS are a truly toxic mix" *The Telegraph* (21 August 2024) /www.telegraph.co.uk/news/2024/08/21/assisted-suicide-and-the-nhs-are-a-truly-toxic-mix

77 Hannah Alberga, "Ontario woman enduring effects of long COVID begins process for medically assisted death" CTV News (12 July 2022) https://toronto.ctvnews.ca/ontario-woman-enduring-effects-of-long-covid-begins-process-for-medically-assisted-death-1.5976944

78 Tristin Hopper, "One third of Canadians fine with prescribing assisted suicide for homelessness" *National Post* (16 May 2023) https://nationalpost.com/news/canada/canada-maid-assisted-suicide-homeless

79 Joint Committee on Human Rights [see reference 73] at p 9

80 Second Reading House of Lords Debate at 3.33pm (Lord Herbert of South Downs)

81 Madeleine Grant [see reference 76]

82 Madeleine Grant [see reference 76]

Similarly, it is impractical and undesirable for judges to monitor and enforce safeguards if the numbers become anywhere near proportionate to those in Canada. Judicial oversight raises issues involving judicial resources, the type of evidence before the court, whether counsel is available, and funding questions.[83]

UK LAW DOES NOT BREACH THE EUROPEAN CONVENTION ON HUMAN RIGHTS (ECHR)

Existing UK law does not breach Article 2 or any other article right under the European Convention on Human Rights (ECHR).[84] The right to life does not include the right to die,[85] and it remains open to States to continue to ban assisted dying and prosecute those who assist their own nationals in ending their lives abroad.[86]

Recent jurisprudence from the European Court of Human Rights confirms that although there is a trend "emerging towards decriminalisation of medically assisted suicide", "the majority of member States continue to prohibit and prosecute assistance in suicide" and that there is "no basis for concluding that the member States are thereby advised, let alone required, to provide access to [physician-assisted dying]."[87]

Regardless of political pressure, Parliament retains the discretion to maintain a blanket ban on assisted dying if such a ban ensures the protection of the vulnerable. In *Pretty v the United Kingdom*, the European Court of Human Rights ("the Court") concluded that the UK's blanket ban on assisted suicide was not incompatible with the ECHR. In the Court's view, the law was designed to protect the weak and vulnerable who were incapable of making informed decisions to end their lives. The Court found that "Clear risks of abuse do exist, notwithstanding arguments as to the possibility of safeguards and protective procedures," and so it was for "States to assess the risk and the likely incidence of abuse if the general prohibition on assisted suicides were relaxed or if exceptions were to be created."[88]

States have a margin of appreciation in balancing the competing interests engaged in end-of-life questions. In *Karsai v Hungary*, the Court affirmed that the "margin varies in accordance with the nature of the issues and the importance of the interests at stake." In cases where member States have not reached consensus on either point, "particularly where the case raises sensitive moral or ethical issues, the margin will be wider."[89]

While there is a wide margin of appreciation for assisted dying bans or laws, the margin of appreciation remains subject to the Court's review.[90] That being said, the Court held that a criminal ban on assisted dying is lawful where it pursues legitimate aims, including: "protecting the lives of vulnerable individuals at risk of abuse, maintaining the medical profession's ethical integrity and also protecting the morals of society with regard to the meaning and value of human life."[91]

83 Second Reading House of Lords Debate at 3.43pm (Lord Sandhurst)

84 Joint Committee on Human Rights [see reference 73] at p 8. Moreover, a ban on assisted dying does not engage Article 3 of the ECHR because "the state is not forcing a person to undergo torture or inhuman or degrading treatment" even if someone is undergoing terrible suffering (Joint Committee at p 14).

85 *Pretty v the United Kingdom* (no. 2346/02, ECHR 2002-III) at para 39

86 Gregor Puppinck, "ECHR: No Right to Assisted Suicide" European Centre for Law & Justice (July 2024) https://eclj.org/euthanasia/echr/echr-confirms-no-right-to-assisted-suicide—promotes-palliative-care

87 *Karsai v Hungary* [2024] ECHR 516 at para 143 [Karsai]

88 *Pretty* at para 74

89 *Karsai* at para 139

90 *Karsai* at paras 144, 167

Notably, in *Karsai*, the Court recognised palliative care as "essential to ensuring a dignified end of life."[92] The Court also concluded that "it is part of the human condition that medical science will probably never be fully capable of eliminating all aspects of the suffering of individuals who are terminally ill."[93] Nevertheless, the Court emphasised that the "heightened state of vulnerability warrants a fundamentally humane approach by the authorities to the management of these situations, an approach which must necessarily include palliative care that is guided by compassion and high medical standards."[94]

Is it not the case then that Parliament should be primarily concerned with the provision of high-quality palliative care accessible to all rather than watering down protections for the most vulnerable in the name of mercy?

CONCLUSION

The Health Secretary has said that palliative care in the UK is not yet at a sufficient level where people would be free to make "a real choice" between end-of-life care and the alternative.[95] The real focus of Parliamentarians should be on improving the quality of palliative care provision across the country.

We believe that the UK's existing law is the gold standard – the norm that best protects the most vulnerable and guards against undesirable social behaviour. The experiments in other countries are exceptions to the rule. Hard cases make bad law. Once the law is changed, society in this country will move to accept a new norm. There will be no going back. There will be subtle societal pressure on the elderly, the gravely ill and serious disabled to end their lives in this way. Do we really want that?

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91 *Karsai* at para 137

92 *Karsai* at para 154

93 *Karsai* at para 158

94 *Karsai* at para 158

95 Henry Bodkin, "State of end-of-life care in Britain means we are not ready for assisted dying, Streeting suggests" *The Telegraph* (7 September 2024) www.telegraph.co.uk/politics/2024/09/07/end-of-life-care-assisted-dying-health-secretary-streeting

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