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Long-Term Care Facilities Should Prepare for Federal Efforts

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Long-Term Care Facilities Should Prepare for Federal Efforts

Nikhil Pandeya, Alec Mazurek

The most recent [Throne speech](#) has been the subject of criticism from several provincial premiers for what they believe to be an overstep into areas of provincial jurisdiction. While healthcare does fall into the provinces' scope of powers, the federal government's legislative plans appear to be within their purview. Provincial premiers are naturally diligent in ensuring that federal legislation does not overstep its jurisdiction, but their recent reactions do not appear grounded in a legitimate fear of overreach. Provinces and care facilities should prepare for the introduction of new federal measures that will respond to growing concerns regarding long-term care in Canada.

The Speech from the Throne was delivered on September 23 by Governor General Julie Payette. The government's [plans](#) covered areas such as childcare, pandemic relief, and the future of long-term care in Canada following serious [concerns](#) brought to light by the COVID-19 pandemic. Immediately following the speech came a flurry of criticism from the provinces. Quebec Premier François Legault [expressed](#) his disappointment with the speech and, alongside Ontario Premier Doug Ford and Alberta Premier Jason Kenney, raised concerns about an "attack" on the provincial jurisdiction over healthcare, arguing that simply more federal funding would be sufficient.

The premiers have been historically resistant to any legislation that could potentially intrude on their jurisdiction. There has been vehement opposition from the premiers towards several pieces of federal legislation, including the [Employment Insurance Act](#) and more recently the [federal carbon tax](#).

Trudeau has previously acknowledged these jurisdictional concerns. In a [statement](#) back in June, he clarified his respect for matters of provincial jurisdiction, but noted that he was increasingly concerned after watching how facilities "have failed" patients. Following the recent Throne speech, Trudeau [defended](#) his plans from criticism of interference in matters of provincial jurisdiction, citing the federal government's role in protecting the safety of Canadian citizens and the need to intervene in matters that are extraordinary. In emergencies, he noted, a "blank cheque" would not suffice.

The federal government has a few emergency mechanisms at its disposal. Section 91 of the *Constitution Act, 1867* gives the federal government the power to temporarily "make Law for the Peace, Order, and good Government of Canada" including in areas of provincial jurisdiction, often referred to as the POGG power. Recently, much discussion has been centered around whether or not Trudeau will invoke POGG in order to intervene in the long-term care crisis. The POGG clause can only be invoked under certain [circumstances](#) and does not apply to all emergency situations. Section 92 of the *Constitution Act, 1867* provides that healthcare falls under the jurisdiction of the provinces. So, it is unlikely that the POGG clause could be invoked by the federal government if they were to introduce permanent legislation. In this case, there appear to be theatrics in the responses by the premiers to the Throne speech.

What the federal government plans to do instead is enact criminal legislation. Canadian criminal law falls within the legislative powers of the federal government. The Throne speech highlighted

the government's [plan](#) to amend the Criminal Code to introduce new penalties for neglect of seniors in care facilities – a move which has already received [support](#) from nurses. With this plan, Trudeau appears to be interested in simply addressing the serious deficiencies in long-term care provision that led to alarming [reports](#) during the first wave of the COVID-19 pandemic. Long-term care facilities that have not been negligent might not be greatly affected.

It is important to first recognize that the Throne speech is an [outline](#) of a government's legislative agenda. This is by no means a piece of legislation itself. In this case, the response by the premiers, to be in opposition without the contents of legislation presented before Parliament might be presumptuous. This response might be more reasonable after the federal government had announced a legislative proposal, as in the case of the carbon tax. The federal government has simply announced plans to amend the Criminal Code to include a harsher punishment for negligence in long-term care facilities. This demonstrates a short-sighted response by the premiers, since this kind of amendment presents no breach of jurisdiction between the provincial and the federal governments.

The premiers have a responsibility to protect their respective jurisdictions, but their response to the Throne speech showed a short-sightedness of the challenges that a global pandemic presents to all levels of government. The federal government in the speech remunerated its commitment towards [financially supporting](#) the provinces, which is exactly what was requested by the premiers. It should not be shocking to the premiers that the federal government, faced with an unprecedented health and economic challenge, ought to look at ways of mitigating its impact by using all tools at its disposal. The Speech outlined just that: that the government is prepared to face the economic and health crises that this pandemic has induced in cooperation with the provinces.

Long-term care facilities should prepare for the introduction of new criminal legislation that could impact their operations. What remains up in the air is how long it will be before these measures are introduced through the new hybrid Parliament – a mode of operation that has presented additional [difficulties](#) to lawmakers. In any case, the state of long-term care across Canada, brought to light by the COVID-19 pandemic, has been widely condemned, and these facilities and the provincial governments should prepare for new criminal measures to be implemented.