

# WRONGFUL DEATHS BY ASSISTED SUICIDE OR EUTHANASIA

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## LACKING CAPACITY

### Are persons lacking decision making capacity at risk of wrongful death by assisted suicide?

- A recent landmark study shows that the majority of persons diagnosed with a terminal illness and with less than 6 months to live lack full decision making capacity;
- Regimes that permit assisted suicide with no requirement for a doctor to be present when the lethal substance is ingested only require assessment of decision making capacity at the time of the request – not at the time it is ingested.

### Decision making capacity and terminal illness

In a [landmark study](#) of decision making capacity of persons with terminal cancer and a prognosis of less than six months to live – that is a cohort that would be eligible for assisted suicide under the schemes in Oregon and other US States as well as in Victoria, Australia – 90% were found to be impaired in regard to at least one of the four elements of decision making – Choice (15% impaired), Understanding (44%), Appreciation (49%) and Reasoning (85%).<sup>1</sup>

Under Victoria's *Voluntary Assisted Dying Act 2017*, for example, "a person is presumed to have decision-making capacity unless there is evidence to the contrary" (Section 4(2)).

This study suggests that, at least in the case of persons with cancer and a prognosis of less than six months to live, it would be more prudent to start from the presumption that they are likely to have impaired decision making capacity unless it is demonstrated to the contrary.

The study also found a significant discrepancy between physician assessments of decision making capacity compared to the actual decision making capacity as tested on the MacCAT-T scales.

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<sup>1</sup> Elissa Kolva et al., "Assessing the decision making capacity of terminally ill patients with cancer", *American Journal of Geriatric Psychiatry*, 2018 May; 26(5): 523-531, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6345171/pdf/nihms937741.pdf>

Physicians assessed as “unimpaired” 64% of those who, according to the MacCAT-T assessment had impaired Reasoning; 70% who had impaired Appreciation; 61% who had impaired Understanding and 100% of those who had impaired Choice.

This lack of ability of physicians who are actually caring for terminally ill cancer patients with a prognosis of less than six months to live to accurately assess their patients’ decision making capacity is likely to be exceeded in flawed assessments of decision making capacity by other doctors – who do not necessarily have an established relationship with the person – making an assessment of decision making capacity in relation to a request for assisted suicide.

Schemes like those in Oregon and Victoria provide for assessing doctors to refer to a specialist for an assessment of decision making capacity but this is **purely optional** on the part of those doctors. In Oregon in [2018](#) only 3 out of 168 people (1.78%) who died by assisted suicide under the Oregon law were referred by the prescribing doctor to a psychiatrist or psychologist for consultation on whether or not the person was not “capable” due to “impaired judgement”.<sup>2</sup>

### **Loss of decision making capacity between assessment at time of request and time of ingestion**

Oregon and Washington report data on the length of time between a person requesting a lethal substance for the purpose of assisted suicide and actually ingesting the substance.

In Oregon in 2018 one person ingested lethal medication 807 days (2 years 2 ½ months) after the initial request for the lethal prescription was made. The longest duration between initial request and ingestion recorded is 1009 days (that is 2 years and 9 months).<sup>3</sup> In Washington the data shows that in each year between 5% and 17% of those who die after requesting a lethal dose do so more than 25 weeks later with one person in 2012 dying nearly 3 years (150 weeks) later, one person in 2015 dying nearly

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<sup>2</sup> Oregon Public Health Division, *Oregon Death With Dignity Act: 2018 Data Summary, Table 1*, p.11, <https://www.oregon.gov/oha/PH/PROVIDERPARTNERRESOURCES/EVALUATIONRESEARCH/DEATHWITHDIGNITYACT/Documents/year21.pdf>

<sup>3</sup> Oregon Public Health Division, *Oregon Death With Dignity Act: 2018 Data Summary, Table 1*, p.13, <https://www.oregon.gov/oha/PH/PROVIDERPARTNERRESOURCES/EVALUATIONRESEARCH/DEATHWITHDIGNITYACT/Documents/year21.pdf>

two years later (95 weeks) and one person in 2016 dying more than two years (112 weeks) later.<sup>4</sup>

Clearly in these cases there is a real possibility that, even if a person was correctly assessed as having decision making capacity at the time of the request they may well have since become impaired in their decision making capacity before actually ingesting the lethal substance.

Under their schemes (and under similar schemes in other US States as well as Victoria, Australia) the only assessment of decision making capacity is carried out at the time of the request. There is no assessment of decision making capacity at the time the lethal substance is actually ingested.

This obviously creates the opportunity for [subtle or overt coercion](#), or for deceptive administration of the lethal substance by a family member or carer.<sup>5</sup> However, it also makes it possible for the person to voluntarily ingest the lethal substance but without a full appreciation or understanding of what they are doing and without making a reasoned decision to do so.

### **No scheme can avoid wrongful deaths due to lack of capacity**

Given that, even if doctors assessing decision making capacity improved their skills beyond the present very poor level, there will still be persons who are mistakenly assessed as having decision making capacity who actually are impaired in their ability to understand, appreciate or make a reasoned decision about assisted suicide or euthanasia, there will inevitable be wrongful deaths from lack of capacity.

Additionally, in those jurisdictions which allow persons requesting a lethal substance for assisted suicide to be prescribed and supplied with the lethal substance for later ingestion there is a very real possibility that some of these people will have impaired decision making capacity by the time (perhaps weeks, months or even years later) when they actually ingest it. These too will die a wrongful death.

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<sup>4</sup> Washington State Department of Health, *Death with Dignity Act Reports, 2009-2017* available at: <http://www.doh.wa.gov/YouandYourFamily/IllnessandDisease/DeathwithDignityAct/DeathwithDignityData>

<sup>5</sup> [https://www.australiancarealliance.org.au/bullying\\_or\\_coercion](https://www.australiancarealliance.org.au/bullying_or_coercion)