

Eligible conditions

Joint Select Committee recommendations:

7.89 Voluntary Assisted Dying Legislation Framework

Eligible conditions

The legislation is intended to provide assisted dying for those for whom death is a reasonably foreseeable outcome as a result of an eligible condition.

An eligible condition is an advanced and progressive:

- a) terminal illness or disease;
 - b) chronic illness or disease; or
 - c) neurodegenerative illness or disease,
- where death is a reasonably foreseeable outcome of the condition.

The person's suffering

The person's suffering must not be temporary nor able to be treated or remedied in a manner acceptable to the person. The suffering:

- a) must be related to an eligible condition;
- b) must be grievous and irremediable;
- c) cannot be alleviated in a manner acceptable to the person; and,
- d) must be subjectively assessed – that is, from the person's point of view.

Joint Select Committee commentary:

7.43 [...] A time until expected death may unfairly exclude those people who would otherwise qualify for voluntary assisted dying.

Eligible condition

Medical and health practitioners commonly use the word 'terminal' to describe a situation when an illness or disease is expected to lead to a foreseeable or imminent death. For people in the general community the word 'terminal' may bring to mind a specific interpretation such as a person with cancer who is very close to death. This difference in interpretation of the word 'terminal' means that the specific inclusion of chronic illness or disease and neurodegenerative diseases in the eligibility criteria helps to make it clear that people with these illnesses and diseases may also be eligible for voluntary assisted dying. The use of the phrase 'advanced and progressive' indicates that the medical illness or disease is very serious and on a deteriorating trajectory.

A person with a disability or mental health condition would not be discriminated against in access to voluntary assisted dying but must meet all the eligibility criteria. Having a disability or mental health condition in itself would not be considered to meet the eligibility requirements. This is consistent with the position of both the Joint Select Committee and the Victorian legislation³⁶.

³⁶ Voluntary Assisted Dying Act 2017 (Victoria).

The Joint Select Committee's recommendation would mean that a person with grievous, unbearable and incessant suffering which is irremediable, but who does not have an eligible condition would not have access to voluntary assisted dying. That is the case in most other jurisdictions where there is some form of voluntary assisted dying legislation, although not in the Netherlands, where it is sufficient that a person's suffering is unbearable, with no prospect of recovery (refer Appendix 2).

Time until death

Around the world there are varying approaches to the expected time to death. Some jurisdictions are specific in restricting eligibility to those expected to die within the next six months³⁷ (Victoria increases this to 12 months in the case of a neurodegenerative condition³⁸). Canada is an example of a jurisdiction that does not have a prescribed time requirement but requires that "natural death has become reasonably foreseeable" in relation to the eligible medical condition³⁹. Other jurisdictions have no time-bound requirement at all⁴⁰.

The underlying reasons for a jurisdiction including a timeframe until death in the eligibility criteria must be known, otherwise the requirement may be misunderstood. For example, United States jurisdictions require that the terminal condition is expected to "produce death within six months"⁴¹ – it is reported from doctors in Oregon that this is not a medical judgement but based on funding access to hospice benefits at that point⁴².

Recommendation 22 of the Joint Select Committee is that the legislation requires that death be reasonably foreseeable as a consequence of the eligible condition. This reflects their position that a terminal diagnosis should be sufficient cause, as well as ensuring that conditions in which protracted suffering is experienced over many months or years prior to an inevitable death are eligible for voluntary assisted dying⁴³. The Joint Select Committee also observed that, in general, proponents of assisted dying were not in favour of time frames "as they were viewed as arbitrary and clinically problematic"⁴⁴.

There have been recent reports of implementation and interpretation issues in Canada relating to the use of the term 'reasonably foreseeable' which have led to some provinces revising advice on the term to include a person-centred element⁴⁵. The Council on the College of Physicians and Surgeons of Nova Scotia (Canada) guides understanding of the Canadian eligibility element re '*the patient's natural death has become reasonably foreseeable*' by referencing a Supreme Court ruling in its interpretation:

37 Voluntary Assisted Dying Act 2017 (Victoria) and those states in the US that have legislated for assisted dying (California, Colorado, Oregon, Vermont and Washington).

38 Voluntary Assisted Dying Act 2017 (Victoria).

39 Medical Assistance in Dying Act, Bill C-14 (Canada).

40 Act on Euthanasia (Belgium); Termination of Life on Request and Assisted Suicide Act (Netherlands); Right to die with Dignity (Luxembourg).

41 Death with Dignity Act (Oregon).

42 "Inquiry into end of life choices – final report", Legislative Council Legal and Social Issues Committee, Parliament of Victoria, (June 2016).

43 7.43 and 7.44, "My Life, My Choice" report of the Joint Select Committee on End of Life Choices, Parliament of Western Australia (August 2018).

44 6.76, "My Life, My Choice" report of the Joint Select Committee on End of Life Choices, Parliament of Western Australia (August 2018).

45 Downie, C & Scallion, K 2018, 'Foreseeably unclear: The meaning of the 'reasonably foreseeable' criterion for access to medical assistance in dying in Canada', Forthcoming, *Dalhousie Law Journal*.

“natural death need not be imminent and that what is a reasonably foreseeable death is a person-specific medical question to be made without necessarily making, but not necessarily precluding, a prognosis of the remaining lifespan.

In formulating an opinion, the physician need not opine about the specific length of time that the person requesting medical assistance in dying has remaining in his or her lifetime.

(AB v. Canada 2017 ONSC 3759, para 79-80)

Therefore, natural death will be reasonably foreseeable if a medical or nurse practitioner is of the opinion that a patient’s natural death will be sufficiently soon or that the patient’s cause of natural death has become predictable.”⁴⁶

In keeping with a person-centred approach, the phrase ‘where death is a reasonably foreseeable outcome for this person’ may aid recognition that the terminal nature of an illness or disease can be influenced by the person’s individual context and not only related to the condition.

Suffering

Suffering is an intensely personal experience and can take a variety of forms (physical, emotional, social or spiritual).

Although central to understanding the circumstances in which one might seek voluntary assisted dying, the fundamental principle remains the autonomy of the person who is approaching end of life and the person’s right to choose the manner and timing of death. Not all jurisdictions include suffering as a component of eligibility (e.g. the USA states that have legislated for assisted dying). Jurisdictions that include suffering as a component of eligibility typically require the suffering to be very serious – described as ‘intolerable’ (Canada), ‘constant and unbearable’ (Belgium) or ‘lasting and unbearable’ (the Netherlands)⁴⁷.

The use of an adjective such as ‘grievous’ (or a more common term such as ‘very severe’) risks imparting a judgement on the suffering of the person and implies that the person needs to prove the severity of their suffering.

In Victoria and Canada, the eligibility criteria include that the eligible condition is causing suffering that cannot be relieved in a manner acceptable to the person⁴⁸. This position was also taken by the Joint Select Committee.

The Joint Select Committee further recommended that suffering be subjectively assessed – that is, from the person’s point of view. This is consistent with a person-centred approach to voluntary assisted dying.

⁴⁶ College of Physicians & Surgeons of Nova Scotia 2018, ‘Professional standard regarding medical assistance in dying’.

⁴⁷ Refer Appendix 2.

⁴⁸ Voluntary Assisted Dying Act 2017 (Victoria) and Medical Assistance in Dying Act, Bill C-14 (Canada).

Questions to consider:

- If voluntary assisted dying only applies to an illness or disease that is terminal, is specification of a timeframe either desirable or necessary?
- Would a timeframe help or hinder access to voluntary assisted dying?
From the perspective of the person? Or medical practitioner?
- If a timeframe is to be specified should it be defined as:
 - reasonably foreseeable outcome of the eligible condition?
 - reasonably foreseeable outcome for this person?
 - 6 months? (with 12 months for neurodegenerative disorders)
 - 12 months?
 - other?
- Must a person's suffering be 'grievous and irremediable' to be eligible?
- Must the person's suffering be related to the eligible condition?

Appendix 2: Voluntary Assisted Dying in other jurisdictions

Disclaimer: Every reasonable effort has been made to ensure that the information in this Appendix is complete and accurate. However the information relied upon from other jurisdictions is subject to change and interpretation, and the content of this appendix is for comparative purposes only.

Voluntary assisted dying in other jurisdictions ⁶⁶							
Victoria	Canada	Oregon	Washington State	Vermont	California ⁶⁷	Belgium	Netherlands
Eligibility							
At least 18 years of age, resident in Victoria for at least 12 months (must be Australian citizen or permanent resident) and has decision-making capacity. Has advanced disease that is expected to cause death within six months (or within 12 months for neurodegenerative diseases). Disease is causing suffering that cannot be alleviated in a manner that is tolerable for the person. Cannot qualify solely because of mental illness or disability.	At least 18 years of age and capable of making decisions and with a grievous and irremediable medical condition. Condition is serious and incurable illness, disease or disability; in an advanced state of irreversible decline; causing enduring suffering that is intolerable. Natural death has become reasonably foreseeable.	Adult resident suffering from a terminal disease as determined by physician. Disease will produce death within six months. Cannot qualify solely because of age or disability.	Competent adult resident determined by physician to be suffering from a terminal disease which will produce death within six months. Person does not qualify solely because of age or disability.	Capable resident at least 18 years of age, suffering from a terminal condition, which means incurable and irreversible disease that would result in death within six months.	Resident 18 years of age or older with terminal disease which will result in death within six months and with capacity. Person does not qualify solely because of age or disability.	Limited to those in medically futile condition with constant and unbearable suffering that cannot be alleviated. Not limited to people at the end of their life. Emancipated minors may access.	Must be lasting and unbearable suffering (in view of physician). No reference to condition. Not limited to people at the end of their life. The Act applies for patients aged 12 and over (with certain requirements for parental involvement).

⁶⁶ Adapted from Ministerial Advisory Panel on Voluntary Assisted Dying Final Report, Department of Health and Human Services, State of Victoria (July 2017).

⁶⁷ Voluntary assisted dying has also been legislated for in the US states of Hawaii, Colorado and District of Columbia. The statutes in these states are very similar to those US states listed in the table.

Voluntary assisted dying in other jurisdictions

Victoria	Canada	Oregon	Washington State	Vermont	California	Belgium	Netherlands
Request							
<p>Patient must make a first verbal request, followed by a written request, witnessed by two independent individuals, and a final verbal request. The final request must be made at least nine days after the first request. The final request may not be made on the same day as the second independent assessment.</p> <p>Waiting period can be reduced if death is likely to occur before expiry of the waiting period.</p>	<p>Request is written and witnessed by two individuals. 10 days between written request and the day on which medical assistance in dying is provided. Supports those with communication difficulties.</p> <p>Waiting periods can be reduced if death or loss of capacity is imminent.</p>	<p>Request is written and witnessed by two independent individuals. Requests repeated with 15 days waiting period between two oral requests.</p>	<p>Request written and witnessed by two independent individuals. Second oral request reiterated at least 15 days after initial oral request.</p> <p>Prescription at least 48 hours after written request.</p>	<p>Written request in presence of two independent witnesses. Requests repeated with 15 days waiting period between two oral requests.</p> <p>Prescription at least 48 hours after whichever event occurred last.</p>	<p>Two oral requests 15 days apart and a written request, witnessed by two individuals.</p>	<p>Request must be voluntary, well-considered and repeated. Request in writing. May be included in an advance directive. No specified waiting periods but the doctor and person need to have had several conversations over a reasonable period of time.</p>	<p>Request must be voluntary and well-considered. No written request required.</p>

Voluntary assisted dying in other jurisdictions							
Victoria	Canada	Oregon	Washington State	Vermont	California	Belgium	Netherlands
Assessment							
Both the coordinating practitioner and consulting practitioner independently assess eligibility, that the request is voluntary and inform the person. Referral for specialist assessment if doubt about decision-making capacity.	Assessment undertaken by medical or nurse practitioner, who must also ensure another independent practitioner has given written confirmation of person meeting criteria.	Attending physician assesses eligibility and informs patient. Consulting physician confirms and verifies. Counselling referral if suffering from psychiatric or psychological disorder or depression causing impaired judgement.	Attending physician assesses eligibility and informs patient. Refers to consulting physician for confirmation of diagnosis and verification that patient is competent and acting voluntarily. Counselling referral if suffering from psychiatric or psychological disorder or depression causing impaired judgement.	Physician assesses eligibility and informs patient. Refers patient to second physician for medical confirmation. Verifies judgement not impaired or referred for evaluation.	Attending physician assesses eligibility and informs patient. Refers if indication of mental disorder. Consulting physician conducts second assessment, and referral if required.	Assessment is undertaken by one physician, who consults an independent physician about the disorder. If the person is not expected to die in the near future, a psychiatrist or specialist in the disorder must conduct a second assessment and confirm the suffering cannot be alleviated.	Assessment undertaken by one physician who has consulted with one other independent physician who has seen the person and given written opinion.
Practitioner							
Participation is voluntary. Protection if participating in good faith.	No one is compelled to provide or assist in dying. Protection for those who participate.	Protection if participating in good faith compliance. No health care provider may be under a duty to participate.	Only willing health care providers shall participate. Protection if participating in good faith.	Physician or other person not under any duty to participate. Physician not subject to liability if complies with requirements.	Participation is voluntary. Protection if participating in good faith.	No physician compelled to participate.	Act is ground for exemption from criminal liability for physician who observes requirements.

Voluntary assisted dying in other jurisdictions							
Victoria	Canada	Oregon	Washington State	Vermont	California	Belgium	Netherlands
Medication Management							
Prescription requires authorisation permit by Department of Health and Human Services. Any medication not used must be returned to dispensing pharmacist by contact person.	Medical practitioner informs dispensing pharmacist of purpose of medication. Silent about unused medication.	Dispensing record filed with authority. Silent about unused medication.	Any medication not used must be disposed of by lawful means.	Department of Health shall adopt rules for safe disposal of unused medications.	Unused medication personally delivered to facility or disposed of by lawful means.	Legislation is silent on medication management.	Legislation is silent on medication management.
Medication Administration							
If the person cannot self-administer, the coordinating practitioner may administer with a witness present and additional certification.	Medication may be self-administered or administered by medical or nurse practitioner.	Medication must be self-administered. No option for physician administration of medication.	Medication must be self-administered. No option for physician administration of medication.	Medication must be self-administered. No option for physician administration of medication.	Medication must be self-administered. Requires form 48 hours before self-administration. No option for physician administration of medication.	Legislation provides for physician administration (viz “physician who performs euthanasia”) though the oversight agency has accepted cases of assisted suicide as falling under the law. ⁶⁸	Physician may administer or assist in self-administration.

⁶⁸ Analysis of the Seventh Report of the Federal Commission for Euthanasia control and evaluation to the Legislative Chambers (for the years 2014 and 2015), Institut Européen de Bioéthique.

Voluntary assisted dying in other jurisdictions							
Victoria	Canada	Oregon	Washington State	Vermont	California	Belgium	Netherlands
Mandatory reporting							
Mandatory reporting to review board within seven days of completion of first assessment, completion of second assessment, completion of certification for authorisation and administration by medical practitioner.	Minister for Health makes regulations for provision and collection of information.	Request form is included in legislation. Details of request and assessment only filed in patient's medical record. Health care provider files copy of dispensing record with authority. Authority conducts annual review of a sample of records.	Administratively required documentation and a copy of dispensing record filed with Department of Health. Department conducts annual review of all records.	Physician to file a report with Department of Health documenting completion of all the requirements.	Request form is included in legislation. Physician documents information in individual's medical record. Dispensing record filed with Department. Department conducts annual review of a sample of records.	Oversight body sets out a registration form that must be filled in by physician whenever lethal dose of medication is administered. Must be submitted within four days of administration.	Physician notifies municipal autopsist via form and provides report on observance of due care requirements.
Oversight							
Voluntary Assisted Dying Review Board has multiple functions relating to reporting, monitoring, referral of issues, continuous improvement, analysis, research and provision of information and advice.	Minister for Health to make regulations for the collection of information for monitoring. Provides for five year review of legislation.	The law requires the Public Health Division of the Oregon Health Authority (OHA) to monitor compliance with the law and issue an annual report.	Department of Health annually reviews all records maintained. Department adopts rules to facilitate collection of information regarding compliance. Department must publish annual report.	Department of Health shall adopt rules to facilitate collection of information regarding compliance. Department generates a biennial statistical report.	Department of Public Health collects and reviews a sample of records. Department publishes a statistical report every year.	Establishes a Commission that reviews reporting forms to determine if there has been compliance. Commission comprised of 16 members: 8 doctors, 4 lawyers and 4 others. Publishes two-year reports.	Establishes Regional Review Committees who determine if physician has acted in accordance with the requirements of due care. Committees issue annual report. Made up of a physician, a lawyer and an ethicist.