

Written evidence submitted by Rebecca Hampton Flory (ADY0112)

I wish to address the following question with evidence

What can be learnt from the evidence in countries where assisted dying/assisted suicide is legal?

I propose, from evidence obtained from Oregon USA and the Netherlands, that there be a need for an **ante review committee** to ensure that all procedural safeguards have been met prior to the dispensation of life-ending medication for the benefit of both the patient and physician alike.

1. Executive Summary

- 1.1 The current *ex-poste* review procedure in the Netherlands is thorough, transparent and accountable in comparison to the Oregon model.
- 1.2 The mechanics of the Netherlands model review procedure would be transferrable to the current medico-legal situation in England and Wales, with the added inclusion of *ante* review committees to ensure compliancy with the legal safeguards.
- 1.3 Physicians currently practicing in Oregon and the Netherlands have positively considered establishing *ante* review committees to review each case on an individual basis and consider this would benefit both patient and physician alike.¹
- 1.4 Given the finality of the request, it would be a reasonable and logistically attainable goal to establish *ante* review committees to ensure all procedural checks are legitimate in the eyes of the law.

2. Background/Issue

- 2.1 The practices in Oregon and the Netherlands differ significantly when ensuring that the legal requirements of their respective laws have been met; Oregon physicians are only required to submit a simple form *ex-post* to ensure compliance by the consulting and attending physicians.

¹ Rebecca Hampton-Flory 'A Socio-Legal Analysis of Assisted Dying: A Comparative Analysis and Empirical Evaluation of the Laws, Policies and Practices in Oregon and the Netherlands' (provisional thesis title).

This process has been criticised for its tick-box style approach with little scope to detail potential indicators that may suggest coercion or abuse.²

- 2.2 Conversely, the Netherlands review every case of euthanasia and assisted suicide *ex-post* through the submission of a model form to one of five Regional Euthanasia Review Committees (RTE) who undertake the process of ensuring that the due care criteria has been met.³ They do not however focus on whether euthanasia and/or assisted suicide should have been performed.⁴
- 2.3 In addition to the submission of the model forms, the RTE may request further information or attendance by the requesting physician to clear any ambiguity in the process.⁵ If the committee find that the due care criteria has not been met, they refer the case to the Director of Public Prosecutions for further investigation.⁶
- 2.4 Between January 2015 – November 2022 the RTE published 58 cases that had not met the due care criteria, many of which detail violations of the safeguards *prior* to the administration of euthanatics.⁷ These concerns could effectively be negated by *ante* review committees as well as *ex-post* checks to ensure that the safeguards have been met and subsequent monitoring and evaluation is undertaken respectively.⁸
- 2.5 *Ante* review committees would also serve to relieve physicians of subsequent fears or burdens associated with the process⁹ by determining the final decision on whether to permit the issuance of a prescription.

² M Okninski, 'A Comparative Analysis of Voluntariness Safeguards and Review Procedure under Oregon and Netherlands Physician Assisted Dying Laws' (2018) 41 Dalhousie Law Journal 121.

³ Regional Euthanasia Review Committees *Euthanasia Code 2018* (Rotterdam, April 2018).

⁴ D Miller, S Kim, 'Euthanasia and Physician-Assisted Suicide not Meeting the Due Care Criteria in the Netherlands: A Qualitative Review of Review Committee Judgements' (2017) 7 British Medical Journal Open <<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5665211/pdf/bmjopen-2017-017628.pdf>> accessed 25 October 2021.

⁵ Regional Euthanasia Review Committees *Euthanasia Code 2018* (Rotterdam, April 2018).

⁶ Regional Euthanasia Review Committees *Euthanasia Code 2018* (Rotterdam, April 2018).

⁷ 38 of the 58 cases involved either uncertainty in the determination of unbearable suffering, hopelessness, or reasonable alternatives, or issues with the consultation process as opposed to being carried out with medical due care. These failures in applying the legal safeguards could be mitigated by way of an *ante* review committee.

⁸ See also the proposal of palliative care consultation in F Miller, H Brody, T Quill, 'Can Physician-Assisted Suicide be Regulated Effectively' (1996) 24 Journal of Law, Medicine & Ethics 225.

⁹ B Kelly and Others, "An Indelible Mark" the Response to Participation in Euthanasia and Physician-Assisted Suicide Among Doctors" A Review of Research Findings' (2019) 18 (1) Palliative and Supportive Care 82.

- 2.6 Baroness Meacher has proposed that an *ante* approach be taken, with all declarations of procedural checks undertaken by the attending and independent physician to be submitted to the High Court so that consent may be granted for assistance.¹⁰
- 2.7 *Ante* approaches to legal issues have been proposed in the literature before; in 2012 Brownsword, Lewis and Richardson submitted a proposal to the Commission on Assisted Dying suggesting that prospective legal immunity be allowed for persons who intended to assist those who commit suicide (England and Wales).¹¹ They proposed a regime that, subject to contemporaneous assessment from an adjudicative panel, persons wanting to assist suicide would not be prosecuted in accordance with section 2 (1) of the Suicide Act 1961.¹² This approach would achieve two objectives; **it would create legal certainty for the person assisting and would allow contemporaneous assessment of the person requiring assistance to identify any vulnerabilities.**¹³

3. Evidence

- 3.1 The submitter has acquired and analysed data collected in March 2020 that asked physicians in Oregon and the Netherlands “Do you believe that establishing a review committee to perform procedural checks in alignment with the legal safeguards required by law *prior* to issuing a lethal prescription (accessing euthanasia and/or assisted suicide) would benefit both patient and physician?”
- 3.2 **67% of respondents strongly agreed/agreed that ante review committees should be established;** 19% were undecided and the remainder disagreed/strongly disagreed. Fragmented to geographical location **this figure was highest in Portland, Oregon where 78% of respondents strongly agreed/agreed on the establishment of ante review committees.** Qualitative responses in the Netherlands alluded to the impression that ante review committees were

¹⁰ Assisted Dying Bill HL (2021-22) 13. Previous Bills submitted by Rob Marris and Lord Haywood have also sought consent from the High Court.

¹¹ R Brownsword, P Lewis, G Richardson, ‘Prospective Legal Immunity and Assistance with Dying: Submission to the Commission on Assisted Dying’ (2012) 23 Kings Law Journal 181. Also proposed, e.g. in Victoria in Australia by the Legal and Social Affairs Committee of the Legislative Chamber (Upper Chamber of the Victoria Parliament) in 2016, see. Sec 8.9 at <https://www.parliament.vic.gov.au/file_uploads/LSIC_pF3XBb2L.pdf> accessed October 2021.

¹² R Brownsword, P Lewis, G Richardson, ‘Prospective Legal Immunity and Assistance with Dying: Submission to the Commission on Assisted Dying’ (2012) 23 Kings Law Journal 181.

¹³ R Brownsword, P Lewis, G Richardson, ‘Prospective Legal Immunity and Assistance with Dying: Submission to the Commission on Assisted Dying’ (2012) Kings Law Journal 181; see also K Yeung, ‘Regulating Assisted Dying’ (2012) 23 Kings Law Journal 163.

already in situ as all cases of euthanasia and assisted suicide are reviewed.¹⁴ Portland, Oregon were generally in favour¹⁵ and state-wide Oregon mentioned that it would ultimately depend on the type of procedural checks.¹⁶

- 3.3 Further analysis revealed a correlation between age and ante review committees with **all females aged between 41-50 in the Netherlands cohort agreeing that ante review committees should be established**; in Portland **all physicians with 41+ years' experience agreed with the establishment of ante review committees** and **89% of physicians who disagreed with aid-in-dying only being available to the terminally ill agreed with the establishment of ante review committees**. In the Netherlands **70% of women physicians agreed with the establishment of ante review committees**.

4. Solution

- 4.1 That the current proposal includes the establishment of an *ante* review committee comprising of relevant professionals – a physician, ethicist and lawyer¹⁷ (psychiatric input and palliative care input would also be of benefit in this approach)^{18 19} – to review each case individually from a legal and medical viewpoint. The resultant decision if found in accordance with the safeguards, would provide the requesting physician with a licence to issue the prescription under the provisions set out in the proposed Assisted Dying Bill.
- 4.2 Compared to the process proposed by Baroness Meacher that consent be granted by the High Court, **the *ante* review committee approach would take a step down from the daunting process of a High Court declaration by ensuring all safeguards are adhered to with a panel of specialists performing substantive and procedural checks prior to the issuance of a prescription.**

¹⁴ Responses included “All are reviewed in the Netherlands.”; “Common practice in the Netherlands.”; “Is this not the current way we do things in the Netherlands?”; “I believe we already have it SCEN”

¹⁵ Responses included “I agree with this as long as the review committee is balanced, not politized and timely.”; “Physicians are humans and some checks and balances are necessary.”; “As physicians, we should do no harm. We often work collaboratively. In ensuring sound decision making, working with at least one other provider may be reasonable should a physician’s judgement be in error.”

¹⁶ Responses included “It would depend on what procedural checks are being done.”; “Regulations can be burdensome and time-challenged. Would depend on the process.”

¹⁷ This statement is based on the Netherlands Regional Euthanasia Review Committees structure. See <<https://english.euthanasiecommissie.nl/the-committees/the-committees>> accessed October 2021.

¹⁸ See for example M Hotopf, W Lee, A Price, ‘Assisted Suicide: Why Psychiatrists Should Engage in the Debate’ (2011) 198 *The British Journal of Psychiatry* 83; S Anfang ‘One Psychiatrist’s Perspective on Physician-Assisted Death’ (2021) 49 (1) *The Journal of American Academy of Psychiatry and the Law* 9.

¹⁹ See for example F Miller, H Brody, T Quill, ‘Can Physician-Assisted Suicide be Regulated Effectively’ (1996) 24 *Journal of Law, Medicine and Ethics* 225.

- 4.3 The ante review committee would comprise of experienced professionals with an interest in end-of-life care, however it does not necessarily follow that they would be approving of every case in every instance. The committee would be balanced and have the necessary knowledge and expertise to navigate the review procedure to ensure adherence to the statutory safeguards.
- 4.4 Finally, further to the points set out above, it follows that if assisted dying is to be medicalised then the appropriate regulatory body should be that of the medical profession itself. The medical profession strives on accountability and given irrevocable nature of the final act it seems not only practical but sensible for assisted dying to be regulated by the profession who are required to undertake the practice.

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