What kind of prospective scrutiny of euthanasia do we need?

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Conflicts of interest

No conflicts to disclose

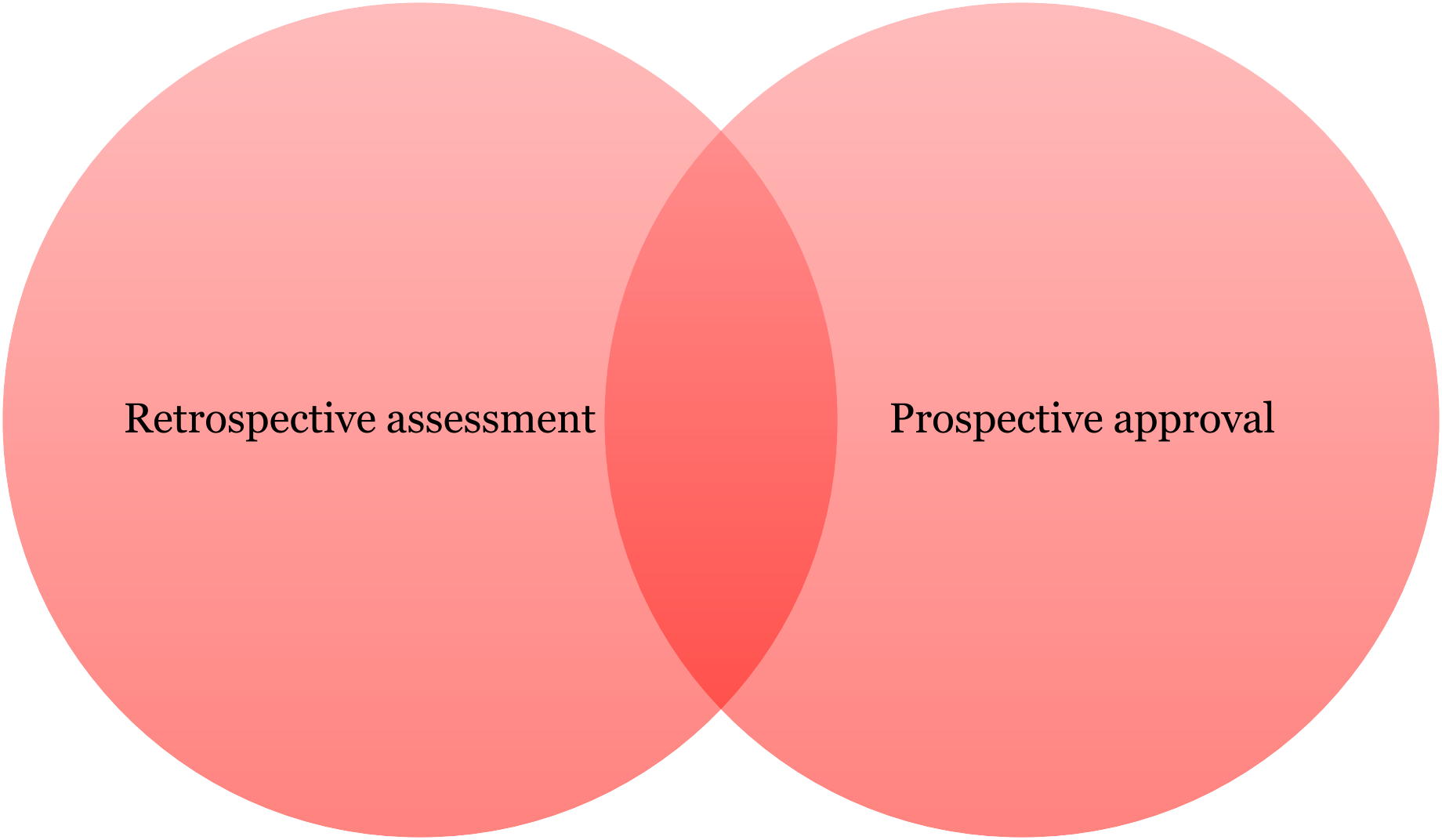
Disclosures

- I was a law clerk to Iacobucci J. when the Supreme Court of Canada heard and decided *Rodriguez*
- I was an expert witness for the plaintiffs in *Carter* on the legal regulation of assisted dying in permissive jurisdictions and its effectiveness

"a regulatory regime's legitimacy depends upon whether it achieves its stated goals effectively (with a minimum of administrative costs), and whether, in both its design and implementation, it conforms with principles of good governance such as transparency, accountability, due process, and the requirements of substantive fairness (including proportionality, consistency and equality of treatment)."

Yeung, K. (2012). Regulating Assisted Dying. *King's Law Journal*, 23(2), 163-179.

Review and scrutiny



The intersection

- widespread agreement that reporting obligation with retrospective assessment necessary for legitimate regulatory regime
  - retrospective assessment will decide whether criteria met, and (if needed) whether terms of any prospective approval were satisfied
- less agreement on extent of prospective approval needed

Plan

- extent of adoption
- calls for adoption
  - two recent examples
    - Canada
    - England & Wales
- patients close to the end of life

Extent of adoption

- no permissive regime currently requires prospective approval
  - so no direct evidence about how it would work
- proponents of legalisation tend to prefer prospective consultation (independent peer review) + some form of retrospective scrutiny
  - examples:
    - Dutch model also adapted for Belgian context
    - consultation requirements also imposed in Oregon, Washington, Vermont & California statutes

Calls for adoption

- calls for prospective approval tend to come from two different groups:
  1. opponents of legalisation
     - seeking to prevent legalisation
  2. proponents of legalisation
     - seeking to bring opponents with them, or
     - seeking to reach a compromise to avoid a [judicial approval] system they see as unworkable
- examples
  - Canada
  - England & Wales

Canada

Calls for prospective judicial approval

- groups seeking prior judicial approval in recent Canadian national consultation all oppose legalisation
  - Association for Reformed Political Action (Reformed Christians)
  - Euthanasia Prevention Coalition
  - Christian Legal Fellowship
  - Evangelical Fellowship of Canada
  - Christian Medical and Dental Society of Canada
  - Physicians' Alliance Against Euthanasia

Calls for alternative prospective approval

- less onerous prospective approval models (quasi-judicial eg tribunals or panels) also favoured by groups not opposed in principle to legalisation
  - Canadian Association of Community Living
  - Canadian Psychiatric Association
  - Canadian Association for Spiritual Care

Calls for retrospective scrutiny only

- proponents describe prospective approval as a 'barrier' to access
  - British Columbia Civil Liberties Association
  - Dying with Dignity Canada
  - Association québécoise pour le droit de mourir dans la dignité
- Special Joint Committee [of the Parliament of Canada] (2016) agreed:

  'requiring a review by either a panel or a judge would create an unnecessary barrier to individuals requesting [medical assistance in dying]. The Committee recommends therefore:

  > That the Government of Canada work with the provinces and territories, and their medical regulatory bodies to ensure that the process to regulate medical assistance in dying *does not include a prior review and approval process*.' [emphasis added]

Calls for retrospective scrutiny only

- most medical organisations & professional regulatory bodies also see prospective approval as unnecessary interference in the doctor-patient relationship
  - some suggestion though that a formal process might improve patients' ability to obtain needed assessments

England & Wales

Failed legalisation attempts in the UK Parliament

- roughly 10 legalisation attempts since 1936, all unsuccessful
- modern attempts all restricted to the terminally ill
- the most recent attempts incorporate prospective approval by a judge of the High Court (Family Division)
  - different versions introduced as amendments by both opponents and proponents of legalisation during debate at the Committee stage of the Assisted Dying Bill [House of Lords (HL)] 6 (2014-2015 session) on 7 November 2014
  - subsequently incorporated into later Bills, both of which failed
    - Assisted Dying Bill [HL] 25 (2015-2016 session)
    - Assisted Dying Bill (No. 2) [House of Commons (HC)] (2015-2016 session)

Genesis of this requirement

- explicitly based on judicial 'suggestion' by 3 Supreme Court judges in *Nicklinson* (HL Deb 7 November 2014 c1853, c1879, c1855-6)
- but misconstrued by Parliamentarians?
  1. intended to rebut claim by Secretary of State (Lord Neuberger [108])
  2. intended to apply only to cases where the patient is not terminally ill (Lord Neuberger [123], Lord Wilson [197(g)], [205]), yet Bill applies *only* to the terminally ill (as do successor Bills)

Opponents' version: Lord Carlile's amendment

3(1) The Court may make an order under this Act in any case where on the evidence the Court is satisfied beyond reasonable doubt that—

(a) the provisions of section 1(2) are satisfied;

(b) to refuse the order would amount to a breach of Article 3 of the European Convention on Human Rights; and

(c) to refuse the order would amount to a breach of Article 8 of the European Convention on Human Rights.

(2) In deciding whether subsection (1) is satisfied, the Court shall consider the rights of the applicant and also the rights of others who may be affected by the applicant's suicide.

Article 3: No one shall be subjected to … inhuman or degrading treatment …

Article 8: Everyone has the right to respect for his private and family life …

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Article 3: No one shall be subjected to … inhuman or degrading treatment …

Article 8: Everyone has the right to respect for his private and family life …

Opponents' version: Lord Carlile's amendment

1 (1) A person who is terminally ill may request and lawfully be provided with assistance to end his or her own life.

(2) Subsection (1) only applies where the person—

(a) has capacity commensurate with a decision to end his or her own life and has a clear, settled and voluntary intention to end his or her own life;

(b) has made a written declaration to that effect in the form of the Schedule before two independent witnesses, one of whom must be a solicitor in practice; and

(c) on the day the declaration is made—

(i) is aged 18 or over; and

(ii) has been ordinarily resident in England and Wales for not less than one year immediately prior to making the declaration at paragraph (b).

Opponents' version: Lord Carlile's amendment

For the purposes of this Act, an applicant has capacity commensurate with a decision to end his or her own life and a clear, settled, informed and voluntary intention to do so if he or she—

(a) is not suffering from any impairment of, or disturbance in, the functioning of the mind or brain or from any condition which might cloud or impair his or her judgement;

(b) is able to communicate clearly an intention to end his or her life;

(c) has maintained over a reasonable period of time a firm and unchanging intention to end his or her life;

(d) is not the subject of influence by, or a sense of obligation or duty to, others."

Opponents' version: Lord Carlile's amendment

For the purposes of this Act, an applicant has capacity commensurate with a decision to end his or her own life and a clear, settled, informed and voluntary intention to do so if he or she—

(a) is not suffering from **any** impairment of, or disturbance in, the functioning of the mind or brain or from any condition which **might** cloud or impair his or her judgement;

(b) is able to communicate clearly an intention to end his or her life;

(c) has maintained over a reasonable period of time a firm and unchanging intention to end his or her life;

(d) **is not the subject of influence by, or a sense of obligation or duty to, others**.

This is not a system to provide prospective approval of cases meeting the criteria for assistance, this is a system designed to prevent prospective approval.

Proponents' version: Lord Pannick's amendment

1 (1) A person who is terminally ill may request and lawfully be provided with assistance to end his or her own life.

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

(a) has a voluntary, clear, settled and informed wish to end his or her 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; and

(ii) has the capacity to make the decision to end his or her own life; and

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

- **agreed and added to the Bill, HL Deb 7 November 2014 c1885, c1906**
- **included in both 2015-2016 Bills (HC & HL), both of which failed**

Pannick amendment

"[the Bill] would be improved, and some of those who are concerned about it may be reassured, if judicial safeguards were to be added." (HL Deb 7 November 2014 c1853)

2 claims:

1. better decision-making
2. reassurance
   - focus on reassurance suggests strategic move designed to avoid passage of Carlile amendment?
   - inclusion of this requirement did not 'reassure' sufficient Parliamentarians at the time or for the subsequent two Bills
   - result appears to be that future legalisation attempts will (need to?) incorporate judicial approval

Prospective approval for patients close to the end of life

Prospective approval at the end of life

- average patient will be dying of cancer
- formal prospective approval mechanism particularly burdensome for patients nearing end of life
  - patients will be discouraged from applying
    - analogies to judicial involvement in other end of life decisions—most of which involve patients who lack capacity—fail to recognise that patients in those cases not expected to bring legal proceedings
      - tiny number of cases in which patients with capacity have sought judicial assistance in defending their rights, none of which involve patients thought to be close to the end of life
  - doctors will be reluctant to agree to provide assistance
- would perpetuate existing incentives in prohibitive regimes
  - travel to permissive jurisdictions
  - underground practice

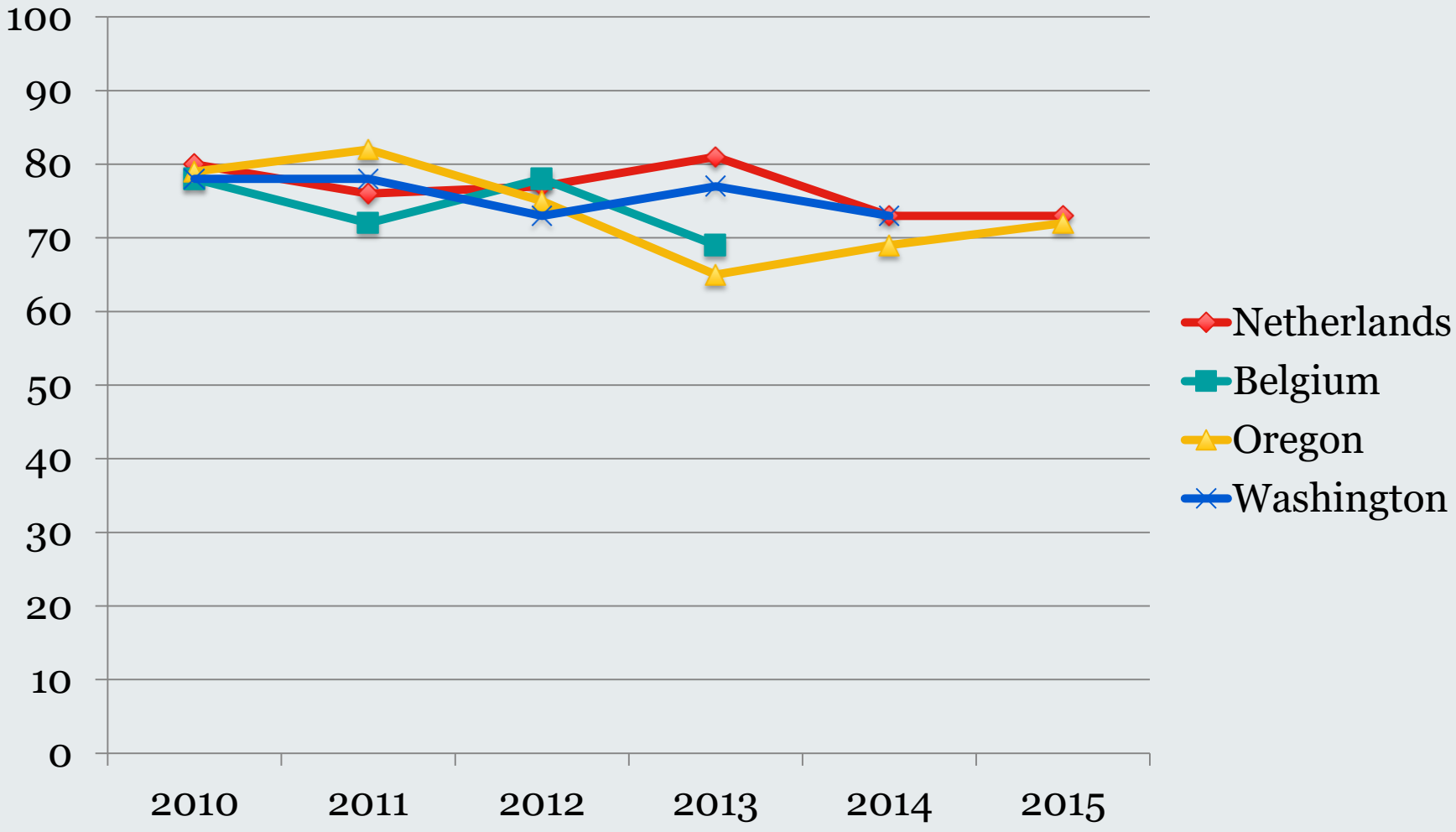
Average patient

- **legal requirements relating to the requesting person's condition and/or experience of suffering vary widely across permissive jurisdictions**
- **in both regimes which impose a 'terminal illness' requirement (A) and those that use a 'suffering' based requirement not limited to terminal illness (B):**
- over 70% of all reported cases of euthanasia or physician assisted suicide (PAS) involve cancer patients
- data from

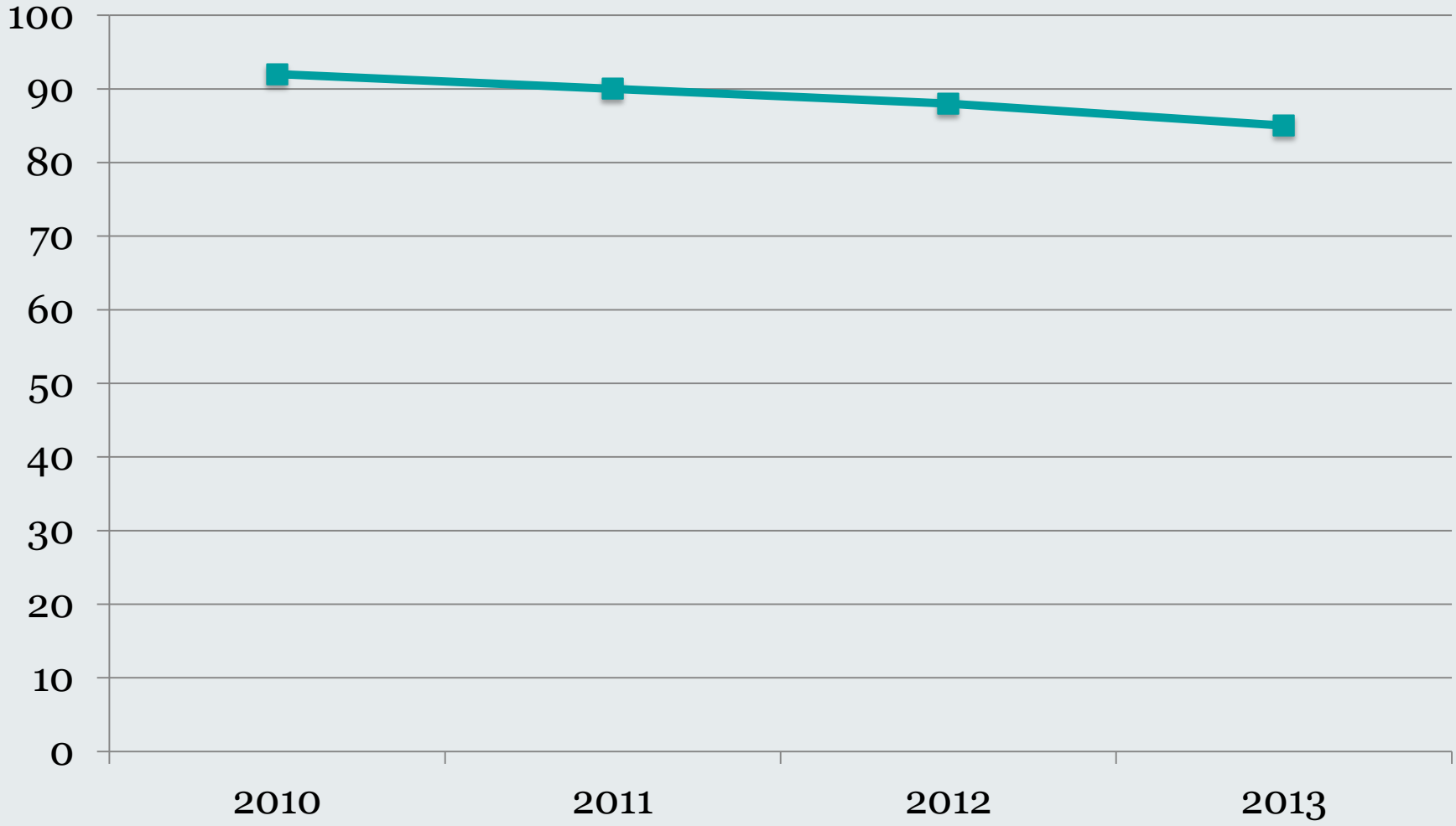
  A: Oregon and Washington

  B: Netherlands and Belgium
  - data are less comprehensive for Switzerland, but it is clear that the rate of cancer patients is significantly lower than 70%
- Belgian legislation draws distinction between patients who are expected to die in the near future (well over 80%) and those who are not

Rate of cancer in reported euthanasia/PAS cases



Percentage of reported Belgian euthanasia cases where patient expected to die in the near future



Burden

depends on details of regime but could include:

- additional examination(s) by
  - physician(s)
  - psychiatrist
  - coroner/medical examiner
- periodic re-certification of
  - capacity
  - request
  - voluntariness
- time limit
- court/tribunal application
- involvement of lawyers
- hearing

Incentives

- travel to permissive jurisdiction without such a requirement
  - possibly earlier than the patient would otherwise wish
- if not possible, for financial or health reasons, then patients may:
  - seek judicial approval earlier than they would wish while still strong enough to go through the process
  - commit suicide without assistance earlier than they would have wished
  - give up their request
  - seek assistance 'underground'
    - assister likely to have no experience, little access to relevant information, and little access to appropriate medications
    - attempts to provide assistance likely to be more difficult, less successful & more stressful for patient and their loved ones

Conclusions

- **some (most?) calls for prospective approval are designed to prevent legalisation or (if that does not succeed), to minimise the number of patients seeking assistance**
- calls from proponents seeking to reassure opponents unlikely to succeed and may create precedent for future proposals
- **highly formal prospective approval too burdensome for majority of cases where P close to end of life**
- claims for improved decision-making fail to take into account lived experience of the relevant patient group
- quality of decision-making is not improved by incentivising off-shore and underground practice

Proposal

- **highly formal prospective approval mechanisms should not form part of regimes restricted to the terminally ill**
- **more assessment of different models of decision-making needed, to determine impact on quality of decision-making**
  - prospective approval could be studied as part of such an assessment
  - should be reserved for more complex cases where P not terminally ill or expected to die in the near future
    - drawing on experience of those jurisdictions which have already made such legal distinctions
    - would focus attention on more complex cases
      - eg dementia, psychiatric illness, existential suffering ('tired of life'), possible reasonable alternatives

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