



The overwhelming majority of Australians believe in the right of the terminally ill to seek and obtain medical assistance to end their life with dignity

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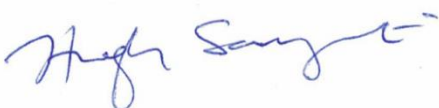
1 July 2021

### **A Submission in relation to the Queensland Voluntary Assisted Dying Bill**

This submission responds to the invitation by the Queensland Health and Environment Committee to address aspects of the Bill to be debated in September 2021.

Since 19 June 2019 Assisted Dying legislation has been in force in Victoria. We offer opinions based on the experience in Victoria as observed by members of this organisation.

We would be pleased to respond to any questions that may arise as a result of this submission.



Hugh Sarjeant  
President



Jane Morris  
Vice President

In our opinion this Bill provides the best set of options and controls of the three cases of VAD legislation we have seen to date, and we commend the authors for their work. We offer the following comments under the headings provided by the Queensland Health website.

### What is voluntary assisted dying?

It is important that the Bill notes (8) that Voluntary assisted dying not suicide. Whilst it seems implicit in the Victorian Act, the lack of clarity has been an issue in some cases.

### Eligibility

The eligibility criteria are similar to those that apply in Victoria. They are reasonable in view of community expectations at this time.

The residency requirement is a great improvement on the Victorian version, which has caused a great deal of unnecessary suffering.

### Administration of the substance

The provisions are similar to those of Victoria. In respect of administering via an 'administering practitioner', we suggest that the same medication be used as for self-administration. There seems no need for there to be a different chemical used, if it is the same one as is used for self-administration in Victoria.

### Access for regional and remote Queenslanders

As noted, the issue of use of telehealth is an important one. The current interpretation of The Commonwealth Criminal Code makes this means of communication an offence. We agree that the first consultation should be in person, but consider that the rest may be via telehealth.

Issues of cost, time, and convenience make this essential, especially for people in remote areas. Telehealth also permits (say) two medical attendants, and family, to be effectively present during consultations.

We will be surprised if this matter is not resolved satisfactorily before long. For now, we include an Opinion from Barristers Robert Richter QC and William Stark.

### Safeguards

The criterion of decision-making capacity clears many of the causes of concern that the process may be open to interference. The prevention in Victoria of initiation by the physician is considered by many to place them in breach of a professional duty of care. The provisions of Section 7(2) are a suitable solution.

### Information for health professionals

The Victorian process of training by doctors, and the paperwork associated with the provision of VAD, has been widely criticised. We suggest the implementation process review the Victorian experience.

### Information for health care providers (entities)

While we respect the right of institutions to consciously object, we believe there should be a requirement to provide direction to an alternative service.

### Implementation

#### **Witnessing – sections 38-39.**

At the stage where independent individuals were required to witness a person's request for VAD, it became evident that some VAD persons found it difficult to find individuals to fill the role. DWDV implemented a 'witnessing' program, which has been extremely successful. Two years on, July 1, 2021, witnesses have been provided on 103 occasions.

In hindsight it does appear that the role of the witness has been understated in its importance. The witness becomes privy to many personal and identifying details about the VAD person. These details include the person's name, the nature of the disease/illness/medical condition as well as the location of the person which may include details of a private residential address. Occasionally the witness may learn of the exact date that the person wishes to carry out the VAD process. Some VAD persons do not want family and friends to be aware of the choice they have made and are therefore entrusting unknown individuals, witnesses, with a lot of identifying information.

A couple of issues have been brought to our attention in recent times. It was reported that witnesses occasionally engaged in conversation relating to the VAD process with the VAD person and associated family. On other occasions, comments were made about the amount of time-consuming paperwork that was associated with that relevant stage of the VAD process. It is an extremely anxious time for the VAD person and often they are in extreme pain and in a state of exhaustion, just wanting to complete the process. The role of the witness is self-explanatory, they are not present to provide their personal VAD view. The Victorian VAD Act, unlike the proposed Queensland VAD Act, requires witnessing to be conducted in the presence of a Health Practitioner. In fact, witnesses are advised not to present themselves to the VAD person until the overseeing Health Practitioner is present. This safeguards against the possibility of a witness speaking inappropriately.

It has been noted that Queensland VAD Legislation does not require the witnessing process to take place in the presence of a Health Practitioner. We suggest that consideration be given to the above points.

#### **Lack of participation by doctors.**

*The Victorian Voluntary Assisted Dying Act 2017*, did not make provision for nurses to act in the role of 'Administering Practitioners', specifically stating that only doctors, who were deemed eligible, could fulfill this position.

The 6-month report released by the Victorian Voluntary Assisted Dying Review Board (1) indicated that 33% of VAD registered medical practitioners were located outside of

Metropolitan Melbourne with this figure increasing to more than 36%, in the 18-month VAD Review Board report (2). It was also noted in this latter report that “*There remain limited numbers of medical practitioners participating in voluntary assisted dying in eastern and western Victoria.*”

A 2017 cross sectional survey of clinicians from 7 Victorian Hospitals, conducted after VAD Legislation had been passed in the Parliament but not yet implemented, concluded that about 73% of those surveyed supported VAD however only a small number of medical specialists stated that they would be willing to participate in the process (3). This study also reported that a great majority of nurses expressed support for VAD compared to medical specialists who were more evenly divided. Furthermore, nurses appeared far more willing to participate in a VAD death, a majority indicating they would be prepared to insert an IV canula for the necessary VAD medication, than the comparable small number of medical specialists.

Perhaps the consideration of the utilization of specialized nurses, in the VAD procedure, may have helped counter the inadequate numbers of VAD medical providers in the Victorian rural areas mentioned.

DWDV is therefore supportive of the Queensland Bill’s **Section 83, Eligibility to act as administering practitioner, (a) (ii) and (iii)**, that allows qualified nurses to act in this role.

1. [Voluntary Assisted Dying report of operations \(June to December 2019\)](#)
2. [Voluntary Assisted Dying report of operation \(July to December 2020\)](#)
3. [Support for and willingness to be involved in voluntary assisted dying: a multisite, cross-sectional survey study of clinicians in Victoria, Australia.](#)

## MEMORANDUM OF ADVICE

THE IMPACT OF COMMONWEALTH *CRIMINAL CODE*  
ON OPERATION OF *VOLUNTARY ASSISTED DYING ACT 2017 (Vic)*

1. You have sought advice about the potential impact of the *Commonwealth Criminal Code* upon medical professionals providing voluntary assisted dying (“VAD”) advice to patients over the means of a carriage service (such as telephone or the internet). The issue is known colloquially as the ‘Carriage Service’ issue.
2. You have provided us with copies of the following documents:
  - a. A copy of the Victorian Voluntary Assisted Dying Act 2017 (“**the VAD Act**”). It is notable that it does not mention the word ‘suicide’.
  - b. An article that appeared in The Age newspaper on 26 June 2019 titled: “Doctors, families warned they could be breaking law discussing euthanasia on phone, internet”.
  - c. A copy of a letter from the Attorney General for Western Australia to the Attorney General for Australia dated 20 August 2019. No response to that letter has been provided.
  - d. Advice dated 29 June 2020 provided by, Stephen Walker, a barrister in WA and president of DWDWA, providing his opinion as to how it would apply in WA. The relevant parts of the *Commonwealth Criminal Code* are annexed to Walker’s memorandum of advice.
  - e. A copy of your letter dated 2 July 2020 sent to Richter QC.
  - f. A memorandum from Victorian DWD Vice-President John Hont dated 4 August 2020, which is to the effect that actions which only assist in providing certain information are not prohibited by this Carriage Service law.
  - g. An article printed in the *Journal of Law and Medicine*, (2020) 27 JLM 839, titled: “Suicide-related Materials and Voluntary Assisted Dying” at pages 839 to 845, apparently published on 17 August 2020.
3. You have also pointed out that for VAD cases the recorded cause of death is the underlying illness, not suicide or VAD. Section 119 of the VAD Act provides for this.

**Summary of advice**

4. In our opinion:
  - a. A medical practitioner who is engaging in a discussion about VAD will not have the intent required to be guilty of an offence under the Commonwealth Code;
  - b. The relevant sections of the federal Criminal Code relating to use of telecommunications are not breached by persons complying with the relevant state legislation. This conclusion is based upon, among other things, the fact that voluntary assisted death is a new legal kind of dying, which is not common law suicide.

- c. A discussion by a medical practitioner with a patient about the eligibility criteria set out in the VAD Act, without any discussion about the process, neatly avoids any potential conflict with the Commonwealth Criminal Code provisions.
  - d. Section 79 of the VAD Act provides a defence to a prosecution (although this is a State Act, and if it conflicts with a Commonwealth Act, section 109 of the Constitution provides: “When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.”)
5. In those circumstances, in our opinion, it is unlikely that a medical practitioner who complies with the requirements of the VAD Act will be committing an offence under the Commonwealth Criminal Code.
  6. This is due to the fact that the VAD Act authorises a medical practitioner to undertake various matters that are set out in detail in, for example, section 19 of that Act.

### **Detailed advice**

#### **Background**

7. You have instructed us that the Commonwealth legislation was originally introduced to limit action by Dr Nitschke.
8. However, the legislation has more recently been interpreted as possibly outlawing the use of e.g. telehealth, or even the telephone, by doctors acting to provide service under the VAD Act. For example, the VAD Review Board, in its report of February 2020, noted “This commonwealth law means that it is an offence to use a carriage service (such as telephone or telehealth) for suicide-related material (which may include voluntary assisted dying)”.
9. This may pose a problem for all doctors concerned in providing VAD advice, especially during lockdown.
10. Unlike the situation in section 154 of the WA Act (noted in the advice of Walker), the Victorian Act makes no mention of Audiovisual communication.

#### **Commonwealth Criminal Code**

11. The relevant provisions are attached as annexure “A”.
12. Most notable is the requirement for intent, which is contained in paragraphs 474.29A(1)(c), 474.29A(2)(c) and 474.29B(1)(c). The intent required, which forms a part of the relevant offence, is very specific. For example, paragraph 474.29(1)(c) requires an intention on the part of the person “to use the material to counsel or incite committing or attempting to commit suicide”; or “that the material be used by another person to counsel or incite committing or attempting to commit suicide.”
13. In our opinion, it would be very difficult to establish that a medical practitioner who is engaging in a discussion about VAD had the requisite intent.

14. As a result, a conviction under those sections of a medical practitioner who is engaging in a discussion about VAD would be extremely difficult to achieve.

***Voluntary Assisted Dying Act, 2017***

15. Section 79 of the VAD Act provides:

Protection from criminal liability of person who assists or facilitates request for or access to voluntary assisted dying

A person who in good faith does something or fails to do something—

- (a) that assists or facilitates any other person who the person believes on reasonable grounds is requesting access to or is accessing voluntary assisted dying in accordance with this Act; and
- (b) that apart from this section, would constitute an offence at common law or under any other enactment—  
does not commit the offence.

16. This section makes it clear that a medical practitioner who is engaging in a discussion about VAD in accordance with the provisions of the VAD Act is not committing any offence.

**Recent article giving consideration to the issue**

17. In any event, we note that a learned article by 4 eminent legal theorists has recently been published in Volume 27 of the *Journal of Law and Medicine*, titled: “Suicide-related Materials and Voluntary Assisted Dying” at pages 839 to 845.

18. In that article, Professor Cameron Stewart, Professor Ian Kerridge, Dr Camille Le Brooy and Professor Paul Komesaroff conclude that the relevant sections of the federal Criminal Code relating to use of telecommunications are not breached by persons complying with the relevant state legislation. They reach this conclusion after analysing the Victorian and Western Australian Assisted Dying legislation. Their conclusion is based upon, among other things, the fact that voluntary assisted death is a new legal kind of dying, which is not common law suicide.

19. In those circumstances, it seems extremely unlikely that the Commonwealth Director of Public Prosecutions would launch a prosecution against a medical practitioner who was providing services under the VAD Act.

Dated 25 September 2020

Robert Richter QC  
William Stark

**ANNEXURE "A"****RELEVANT PROVISIONS OF *CRIMINAL CODE (CTH)*****Subdivision G—Offences relating to use of carriage service for suicide related material****474.29A Using a carriage service for suicide related material**

(1) A person commits an offence if:

(a) the person:

(i) uses a carriage service to access material; or

(ii) uses a carriage service to cause material to be transmitted to the person; or

(iii) uses a carriage service to transmit material; or

(iv) uses a carriage service to make material available; or

(v) uses a carriage service to publish or otherwise distribute material; and

(b) the material directly or indirectly counsels or incites committing or attempting to commit suicide; and

(c) the person:

(i) intends to use the material to counsel or incite committing or attempting to commit suicide; or

(ii) intends that the material be used by another person to counsel or incite committing or attempting to commit suicide.

Penalty: 1,000 penalty units.

(2) A person commits an offence if:

(a) the person:

(i) uses a carriage service to access material; or

(ii) uses a carriage service to cause material to be transmitted to the person; or

(iii) uses a carriage service to transmit material; or

(iv) uses a carriage service to make material available; or

(v) uses a carriage service to publish or otherwise distribute material; and

(b) the material directly or indirectly:

(i) promotes a particular method of committing suicide; or

(ii) provides instruction on a particular method of committing suicide; and

(c) the person:

(i) intends to use the material to promote that method of committing suicide or provide instruction on that method of committing suicide; or

(ii) intends that the material be used by another person to promote that method of committing suicide or provide instruction on that method of committing suicide; or

(iii) intends the material to be used by another person to commit suicide.

Penalty: 1,000 penalty units.

(3) To avoid doubt, a person does not commit an offence against subsection (1) merely because the person uses a carriage service to:

(a) engage in public discussion or debate about euthanasia or suicide; or

(b) advocate reform of the law relating to euthanasia or suicide;

if the person does not:



(c) intend to use the material concerned to counsel or incite committing or attempting to commit suicide; or

(d) intend that the material concerned be used by another person to counsel or incite committing or attempting to commit suicide.

(4) To avoid doubt, a person does not commit an offence against subsection (2) merely because the person uses a carriage service to:

(a) engage in public discussion or debate about euthanasia or suicide; or

(b) advocate reform of the law relating to euthanasia or suicide;

if the person does not:

(c) intend to use the material concerned to promote a method of committing suicide or provide instruction on a method of committing suicide; or

(d) intend that the material concerned be used by another person to promote a method of committing suicide or provide instruction on a method of committing suicide; or

(e) intend the material concerned to be used by another person to commit suicide.

#### **474.29B Possessing, controlling, producing, supplying or obtaining suicide related material for use through a carriage service**

(1) A person commits an offence if:

(a) the person:

(i) has possession or control of material; or

(ii) produces, supplies or obtains material; and

(b) the material directly or indirectly:

(i) counsels or incites committing or attempting to commit suicide; or

(ii) promotes a particular method of committing suicide; or

(iii) provides instruction on a particular method of committing suicide; and

(c) the person has that possession or control, or engages in that production, supply or obtaining, with the intention that the material be used:

(i) by that person; or

(ii) by another person;

in committing an offence against section 474.29A (using a carriage service for suicide related material).

Penalty: 1,000 penalty units.

(2) A person may be found guilty of an offence against subsection (1) even if committing the offence against section 474.29A (using a carriage service for suicide related material) is impossible.

(3) It is not an offence to attempt to commit an offence against subsection (1).