

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).