

23 March 2022

Our ref: BT-MC

Ms Margery Nicoll
Acting Chief Executive Officer
Law Council of Australia
19 Torrens Street
Braddon ACT 2612

By email:

Copy to:

Dear Ms Nicoll

Voluntary assisted dying and offences relating to use of carriage service for suicide related material under the *Criminal Code Act 1995* (Cth)

Thank you for the opportunity to provide feedback on the memorandum titled 'Voluntary assisted dying (VAD) and offences relating to the use of carriage service for suicide related material under the *Criminal Code Act 1995* (Cth) (**Cth Criminal Code**)'. The Queensland Law Society (QLS) thanks the Law Council of Australia (LCA) for bringing this issue to the wider attention of its constituent bodies.

This response has been compiled by the QLS Health & Disability Law and Elder Law Committees, whose members have substantial expertise in this area.

Executive Summary:

- The Society is strongly in favour of amendments to the Cth Criminal Code to place beyond doubt that the suicide material offences do not extend to conduct in compliance with VAD laws enacted by state legislatures.
- We suggest the insertion of a definition declaring that "suicide" does not include voluntary assisted dying carried out lawfully pursuant to a law of a State or Territory.
- We would prefer legislative amendment to the Cth Criminal Code to ensure clarification of the position for medical practitioners. Where legislative amendment is not supported, we would advocate for the issuance of prosecutorial guidelines indicating that medical practitioners and other persons acting in accordance with State or Territory VAD legislation will not be prosecuted under the suicide material offences.
- The Society would be assisted by the LCA coordinating policy advocacy to the Commonwealth Attorney-General on the urgent need for legislative amendment.

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VAD legislation in Queensland

The LCA memorandum sets out the relevant provisions of the Cth Criminal Code, namely sections 474.29A and 474.29B make it an offence to use a carriage service for suicide-related material and it is an offence to possess, control, produce, supply or obtain suicide-related material for use through a carriage service.

To access VAD in Queensland, a person must make three separate requests and be assessed by two independent medical practitioners.¹ Accordingly, there are numerous points at which a medical practitioner needs to meet with the patient, whether in-person or via audio-visual link or telephone. For example, not only does the person need to complete two eligibility assessments, after each assessment the practitioner must provide the person with wide-ranging information about numerous matters, including (among others): the person's treatment options; the risks of self-administration the VAD substance; and, the expected outcome of self-administering the VAD substance.²

The VAD Act also makes provision for referrals between practitioners and prescription of the VAD substance. For example, if the medical practitioner is uncertain about the person's capacity or medical condition, the practitioner must refer the person to another practitioner.³ Section 52 of the VAD Act authorises the person's coordinating practitioner to 'prescribe a voluntary assisted dying substance for the person'.⁴

Today, the most common method by which practitioners make referrals and write prescriptions is electronically. Prescribers can also 'print evidence of an electronic prescription in the form of a token and fax/email to a pharmacy with the patient's consent'.⁵ The Australian Department of Health has highlighted the numerous benefits of electronic prescribing, for example it: provides greater choice for patients; makes prescribing and dispensing medicines more efficient; may reduce prescribing and dispensing errors; supports electronic medication charts in hospitals and residential aged care facilities; and, supports digital health services to ensure continuity of patient care.⁶

Additionally, the coordinating practitioner must, before prescribing the VAD substance, inform the person of a number of matters in writing, including: the VAD substance; that the substance must be stored in accordance with certain requirements; how to prepare and self-administer the substance; the expected effects of self-administration of the substance; the period within which the person is likely to die after self-administration of the substance; and, the potential risks of self-administration of the substance.⁷

Section 50 of the VAD Act provides, in relation to an administration decision, that the person may, 'in consultation with and on the advice of the coordinating practitioner for the person' decide to self-administer a voluntary assisted dying substance. Although a VAD substance can

¹ *Voluntary Assisted Dying Act 2021* (Qld) pt 3.

² *Voluntary Assisted Dying Act 2021* (Qld) ss 22(1), 33(1).

³ *Voluntary Assisted Dying Act 2021* (Qld) s 21.

⁴ *Voluntary Assisted Dying Act 2021* (Qld) s 52.

⁵ Department of Health, Australian Government, *Electronic prescribing* (web page, 1 March 2022) <<https://www.health.gov.au/initiatives-and-programs/electronic-prescribing>>.

⁶ *Ibid.*

⁷ *Voluntary Assisted Dying Act 2021* (Qld) s 65(1).

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be administered by a practitioner in certain circumstances,⁸ self-administration is the default administration method under the Queensland VAD Act.

The Queensland VAD legislation protects medical practitioners, and other health practitioners, from any criminal or civil liability in relation to acts or omissions made in good faith and without negligence where they comply with the VAD Act.⁹ To remove any doubt, the VAD Act provides that a person who acts in accordance with the legislation does not commit the offence of aiding suicide under s 311 of the *Criminal Code Act 1899* (Qld). Further, s 8 of the VAD Act states:

For the purposes of the law of the State, and for the purposes of a contract, deed or other instrument entered into in the State or governed by the law of the State, a person who dies as the result of the self-administration or administration of a voluntary assisted dying substance in accordance with this Act –

- (a) does not die by suicide; and
- (b) is taken to have died from the disease, illness or medical condition ... from which the person suffered.¹⁰

Nonetheless, these provisions apply to the word “suicide” in the context of Queensland laws and thus have no effect on the interpretation of the word in Commonwealth legislation, as State and Commonwealth laws operate independently.¹¹

The need for equitable access to VAD services

A key consideration for delivering health services in regional, rural and remote communities in Queensland is access to telehealth services. Queensland's telehealth program enables patients to receive medical care via telecommunication technology, reducing the need to travel for specialist advice. While in-person assessments may be preferable, ‘evidence from Canada suggests high-quality assessments can take place via telehealth, improving equity of access’.¹²

This is particularly important where individuals do not have easy access to a VAD provider, which is the case in regional, rural and remote Queensland communities. Queensland has a population of around 4.7 million people, with approximately 1.6 million (30%) living in rural locations.¹³ Specialist health services across the state are generally available only in large urban centres, with approximately 25-35% of people living in rural parts of Queensland regularly needing to travel to access specialist healthcare.¹⁴ One study that interviewed 47 participants about their awareness, experiences and perceptions of telehealth in rural Queensland found that people commonly travelled ‘long distances over several days to attend specialist

⁸ *Voluntary Assisted Dying Act 2021* (Qld) s 50(2).

⁹ *Voluntary Assisted Dying Act 2021* (Qld) ss 147, 148.

¹⁰ *Voluntary Assisted Dying Act 2021* (Qld) s 8.

¹¹ Katrine Del Villar et al, ‘Voluntary Assisted Dying and the Legality of using a Telephone or Internet Service: The Impact of Commonwealth ‘Carriage Service’ Offences’ (2022) *Monash University Law Review* (forthcoming) 22.

¹² Ibid 9. Stephanie Dion, Ellen Wiebe, Michaela Kelly, ‘Quality of Care with Telemedicine for Medical Assistance in Dying Eligibility Assessments: A Mixed-Methods Study’ (2019) 7(4) *Canadian Medical Association Journal* E721.

¹³ Natalie K Bradford, Liam J Caffery and Anthony C Smith, ‘Awareness, experiences and perceptions of telehealth in a rural Queensland community’ (2015) 15 *BMC Health Services Research* 1.

¹⁴ Ibid 1-2.

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appointments.¹⁵ It is not uncommon for people in some areas of Queensland to need to drive for 5 or more hours one way to attend a specialist appointment.¹⁶

People in regional, rural and remote communities in Queensland already face significant barriers to equitable healthcare access. They will face increased difficulties where VAD services cannot be offered through telehealth and other telecommunications (e.g. the use of electronic prescriptions). The experiences of other states in which VAD laws have commenced provide some insight into the difficulties experienced by people living outside metropolitan areas. As at October 2021, 38 medical practitioners in Western Australia had completed their VAD training, with 29 providers in Perth and the remaining 9 providers in country Western Australia.¹⁷ With only 9 providers to service country Western Australia, it is reported that the state's size 'means any restriction on modern communication will have a disproportionate effect for patients who may, as a result, have to travel many hundreds of kilometres for face-to-face consultations, and may have to depend on a postage service that can take days.'¹⁸

In Victoria, it is reported that only 65 medical practitioners throughout regional and rural Victoria are trained and registered to be able to provide VAD assessments.¹⁹ To ensure compliance with the Cth Criminal Code, guidance published by the Victorian Department of Health and Human Services requires 'all discussions, consultations and assessments with patients, family and carers regarding voluntary assisted dying must occur face-to-face'.²⁰ One study that investigated the perspectives of doctors involved in the Victorian VAD scheme criticised the requirement for in-person appointments because it placed additional burden on doctors, pharmacists and patients, particularly patients living in rural and remote areas.²¹ This burden was exacerbated during COVID-19 lockdowns. The study reports:

Doctors spoke of the immense burden for very sick patients required to travel, sometimes for hours and several times, for eligibility assessments. Some also noted the burden on already busy doctors who travelled long distances to undertake assessments. ... Concerns were also expressed about requiring doctors and pharmacists to meet personally to transfer the prescription for the voluntary assisted dying medication; that is, not permitting the coordinating doctor to email it to the pharmacist. Requiring pharmacists to meet face-to-face with patients also had practical implications in terms of delays in providing voluntary assisted dying.²²

¹⁵ Ibid 5.

¹⁶ Ibid 7.

¹⁷ Katie Hampson, 'Perth doctor reveals how WA's voluntary assisted dying laws are making an impact', *The West Australian* (online, 27 October 2021) <<https://thewest.com.au/lifestyle/health-wellbeing/dying-with-dignity-ng-b881982971z>>.

¹⁸ Charles Corke, 'Voluntary assisted dying will begin in WA this week. But one Commonwealth law could get in the way', *The Conversation* (online, 29 June 2021) <<https://theconversation.com/voluntary-assisted-dying-will-begin-in-wa-this-week-but-one-commonwealth-law-could-get-in-the-way-161982>>.

¹⁹ Del Villar et al (n 11) 9.

²⁰ Health and Human Services, Victoria State Government, *Voluntary assisted dying: Guidance for health practitioners* (4 July 2019) <<https://www.health.vic.gov.au/publications/voluntary-assisted-dying-guidance-for-health-practitioners>> 4.

²¹ Lindy Willmott, Ben P White, Marcus Sellars and Patsy M Yates, 'Participating doctors' perspectives on the regulation of voluntary assisted dying in Victoria: a qualitative study' (2021) 215(3) *Medical Journal of Australia* 125, 127.

²² Ibid.

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Doctors in Victoria have also reported that problems are 'particularly acute for those with motor neurone disease or respiratory conditions, where specialists who are willing to participate are concentrated in metropolitan areas'.²³ These factors lead to the practical necessity in certain cases of doctors and patients being able to interact via telehealth services in relation to the VAD process. Uncertainty as to liability under the Cth Criminal Code and the resulting impact on telehealth services for VAD patients 'has negatively impacted implementation of voluntary assisted dying in Victoria and is likely to cast an even darker shadow in states such as WA and Queensland, with geographically dispersed populations'.²⁴

Put simply, requiring all VAD consultations and communications to occur in person will deny Queenslanders equitable access to healthcare, and place medical practitioners in the unacceptable position of having to choose, in some instances, between providing VAD services to a very ill patient and potentially falling foul of the Cth Criminal Code. Accordingly, the Society considers it imperative that the Cth Criminal Code is amended to place beyond doubt that the suicide material offences do not extend to conduct in compliance with VAD laws enacted by state legislatures.

The need for legislative amendments to the Cth Criminal Code

The LCA memorandum rightly points out that the legalisation of VAD in various Australian states and the carriage laws under the Cth Criminal Code give rise to some legal uncertainty; namely, whether VAD would fall within the scope of the definition of "suicide". The LCA memorandum makes reference to one view, namely 'the effect of the State laws is to differentiate the legal forms of voluntary assisted dying from suicide and assisted suicide, with the effect that Federal prohibitions do not apply to telecommunications between health practitioners and their patients regarding voluntary assisted dying'.²⁵ This view is based on two assumptions:

- Voluntary assisted dying does not fall within the definition of "suicide", because the court will ordinarily favour the meaning of a particular word which achieves consistency in the interpretation of like language in the codes of other Australian jurisdictions, and jurisdictions in which VAD is legal do not consider voluntary assisted dying to be "suicide". As the Cth Criminal Code does not postulate 'any definition of suicide which is different from that used by the States, no issues of inconsistency' arise.²⁶
- It was not the Australian Parliament's intention to regulate state-based legalised assisted dying schemes, but rather to ban people from disseminating material to irresponsibly incite suicide, and the carriage laws were not intended to ban discussion of law reform on voluntary euthanasia.²⁷

We highlight, however, that other scholars have also considered whether VAD would fall within the meaning of the definition of "suicide", concluding that 'although the legal position is untested VAD would likely meet the definition of "suicide" under Australian law and hence fall under the Commonwealth Criminal Code'.²⁸ The authors also undertake a detailed analysis of the extent

²³ Eleana Close et al, 'Voluntary assisted dying and telehealth: Commonwealth carriage service laws are putting clinicians at risk' (2021) 25(9) *Medical Journal of Australia* 406, 408.

²⁴ *Ibid.*

²⁵ Cameron Stewart et al, 'Suicide-Related Materials and Voluntary Assisted Dying' (2020) 27(4) *The Journal of Law and Medicine* 839.

²⁶ *Ibid* 841.

²⁷ *Ibid* 843.

²⁸ Del Villar et al (n 11) 1.

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of potential criminal liability for using a carriage service in each step of the VAD process, finding 'there are areas with real legal risk, especially for activities that directly facilitate VAD, requiring urgent reform of the Commonwealth law.'²⁹ We find this research persuasive as to the legal ambiguity that remains without amendment of the Cth Criminal Code. To avoid the need to repeat the authors' good work, we **enclose** a copy of the article for ease of reference.

The Queensland Law Reform Commission (QLRC) in its report, *A legal framework for voluntary assisted dying*, noted that 'uncertainty about the possible application of the Commonwealth "carriage service" offences to conduct that is authorised by state voluntary assisted dying laws is unsatisfactory' and recommended that Queensland and other states with voluntary assisted dying laws 'raise the issue of legal uncertainty with senior members of the Commonwealth government and including the ministers responsible for the justice and health portfolios' with a view to the Cth Criminal Code being amended.³⁰ The QLRC also recommended that prosecutorial guidelines be issued, but that these should be an interim measure while amendments to the Cth Criminal Code are progressed.³¹

We also refer to the Commonwealth Attorney-General's comments made in response to a Queensland Government request for amendments to the suicide material offences in light of VAD legislation being passed in Queensland, that it 'is the responsibility of states to ensure their laws are compatible with Commonwealth laws.'³² In our view, this is suggestive of a level of incompatibility between the various positions. However, without any consideration of the issue by Australian courts, the argument remains an academic one.

In light of continuing ambiguity, we would support amendments to the Cth Criminal Code to place beyond doubt that the suicide material offences do not extend to conduct in compliance with VAD laws where enacted by state legislature. We suggest the insertion of a definition declaring that "suicide" does not include voluntary assisted dying carried out lawfully pursuant to a law of a State or Territory.³³ This carve out would not impact the Cth Criminal Code's application to pro-suicide websites and other actions intended to be caught by the suicide material offences.³⁴

Managing the issue via non-legislative measures

We would prefer legislative amendment to the Cth Criminal Code to ensure clarification of the position for medical practitioners. Where legislative amendment is not supported, we would advocate for the issuance of prosecutorial guidelines indicating that medical practitioners and other persons acting in accordance with State or Territory VAD legislation will not be prosecuted under the suicide material offences. However, we note that managing this issue via non-legislative means may give rise to insurance issues and continue to deter medical practitioners from participating in the scheme via telehealth services out of an abundance of caution.

²⁹ Ibid.

³⁰ Queensland Law Reform Commission, *A legal framework for voluntary assisted dying* (Final Report, 2021) 646 [20.74].

³¹ Ibid 648 Recommendation 20-2.

³² Domanii Cameron and Madura McCormack, 'Voluntary assisted dying Qld laws move closer but regions at risk', *The Courier Mail* (online, 26 May 2021)

<<https://www.couriermail.com.au/news/queensland/qld-politics/voluntary-assisted-dying-qld-laws-move-closer-but-regions-at-risk/news-story/4cd4d9e7f93e925e31e47f9d4e259ec3>>.

³³ Ibid 58.

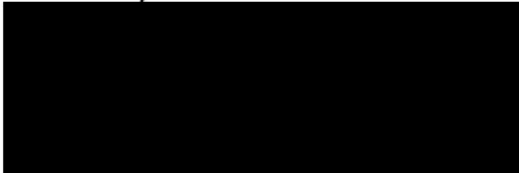
³⁴ Ibid.

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Given the importance of this issue to our members, the Society would be most appreciative of any advocacy to the Commonwealth Attorney-General the LCA might be able to coordinate at a national level.

If you have any queries regarding the contents of this letter, please do not hesitate to contact our Legal Policy team via policy@qls.com.au or by phone on (07) 3842 5930.

Yours faithfully



Kara Thomson
President