Voluntary Assisted Dying and the Merits of Offence-specific Prosecutorial Guidelines in Australia

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Over the past three decades jurisdictions in Australia and overseas have grappled with questions surrounding the regulation of Voluntary Assisted Dying (VAD). Most past law reform attempts in Australia have failed. Yet, in recent years Victoria and Western Australia have introduced specific VAD laws including protections from criminal liability. This article analyses what liability can arise from participation in VAD under current criminal law in Australia prior to providing an overview of past failed VAD law reform attempts. It ponders the merits of introducing offence-specific prosecutorial guidelines in the context of VAD, as available in England and Wales in relation to assisted suicide, in those Australian jurisdictions, where law reform has been continuously unsuccessful. It concludes that these guidelines are not an appropriate way of creating VAD reform in Australia and that, where reform is deemed necessary, this must be addressed by the democratically elected legislature through the enactment of statutory law.

I. Introduction

Prior to 2017, participating in Voluntary Assisted Dying (VAD) was unlawful in all Australian jurisdictions.[1] Assisting another person to end their life or ending another person's life upon their request fell into the ambit of homicide and suicide offences. However, in 2017, Victoria introduced the *Voluntary Assisted Dying Act 2017* (Vic), which commenced on 19 June 2019. This was followed in 2019 in Western Australia by the *Voluntary Assisted Dying Act 2019* (WA), commencing in mid-2021. As per the Acts, VAD is defined as "the administration of a voluntary assisted dying substance and includes steps reasonably related to such administration".[2] VAD may occur in one of two ways; through a registered medical practitioner who administers the VAD substance to a person to bring about their death, so-called practitioner administration,[3] and through a person taking a prescribed VAD substance themself to bring about their death, so-called self-administration.[4] Participating in assisted dying schemes in the spirit of the respective VAD framework has been decriminalised in both States.[5]

Contrary to the two Australian jurisdictions, England and Wales have not introduced VAD legislation and decriminalised related conduct. Rather, even though participation in VAD remains a criminal offence, England and Wales have enacted prosecutorial guidelines setting out when an individual will likely be

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[1] In 1995, the Northern Territory enacted the *Rights of the Terminally Ill Act 1995* (NT). In 1997, less than two years after its enactment, the federal government passed the *Euthanasia Laws Act 1997* (Cth), depriving the Territories of their power to legislate on VAD, and repealing the NT legislation.

[2] *Voluntary Assisted Dying Act 2017* (Vic) s 3; *Voluntary Assisted Dying Act 2019* (WA) s 5.

[3] See *Voluntary Assisted Dying Act 2017* (Vic) ss 46, 48; *Voluntary Assisted Dying Act 2019* (WA) ss 56(1)(b), 59. According to the Acts, the primary method is self-administration and practitioner administration is only possible, where the person is incapable of self-administration, see *Voluntary Assisted Dying Act 2017* (Vic) s 48(3)(a); *Voluntary Assisted Dying Act 2019* (WA) s 56(2).

[4] See *Voluntary Assisted Dying Act 2017* (Vic) ss 45, 47; *Voluntary Assisted Dying Act 2019* (WA) ss 56(1)(a), 58. This article employs the terminology and definitions used in the Victorian and WA Acts.

[5] *Voluntary Assisted Dying Act 2017* (Vic) ss 79–82; *Voluntary Assisted Dying Act 2019* (WA) ss 113–115.

prosecuted for assisting another in dying.[6] In other words, the criminal law has not been amended but merely is not being enforced in certain cases.

This article first examines what criminal responsibility can arise from participation in VAD in light of Australian homicide and suicide laws, while taking into account the recent decriminalisation in Victoria and Western Australia. It subsequently provides a brief history of past attempts at VAD law reform in Australia, highlighting that the majority of these attempts have failed. On this basis, this article examines the merits of another legal reform mechanism for those Australian jurisdictions, where criminal law reform has been continuously unsuccessful: VAD-specific prosecutorial guidelines. Some consider the enactment of such offence-specific guidelines as the "second-best path to reform" after the amendment of the criminal law.[7] This article concludes that while prosecutorial guidelines could provide more transparency and consistency regarding the charging decision in this space than is currently the case, this approach is not without risk as it can create protection gaps for vulnerable individuals. Moreover, regulating this heavily contested and debated area cannot fall on the executive in form of a policy. If reform is deemed necessary, then this must be addressed by the democratically elected legislature through enactment of comprehensive statutory law.

This article does not consider the frequently debated question whether VAD should be made lawful in Australia and what the perimeters of VAD schemes should be. This has been discussed in-depth by others elsewhere.[8]

II. The Status Quo of VAD and Criminal Law in Australia

A. VAD and Criminal Law in Australia

Traditionally, each Australian State and Territory enacts their own criminal offences. In addition, federal criminal law exists. Some Australian States base their criminal law on criminal codes,[9] while others rely more heavily on common law.[10] In relation to VAD, the following criminal law situation arises across Australian jurisdictions.

1. General Liability under Criminal Law

In all Australian jurisdictions, taking one's own life or attempting to do so no longer gives rise to criminal responsibility.[11] However, aiding, counselling or inciting another person to kill himself or herself is generally a criminal offence.[12] As a consequence, in most Australian jurisdictions, family members and medical professionals cannot lawfully assist individuals in ending their lives.[13]

Moreover, intentionally ending the life of another, even upon the person's request and with their consent, generally amounts to murder, punishable with a maximum or mandatory penalty of life imprisonment

[6] Director of Public Prosecutions, *Suicide: Policy for Prosecutors in Respect of Cases of Encouraging or Assisting Suicide – Legal Guidance, Violent Crime* (2010, updated 2014) <https://www.cps.gov.uk/legal-guidance/suicide-policy-prosecutors-respect-cases-encouraging-or-assisting-suicide>.

[7] Udo Schueklenk et al, "End-of-life Decision-making in Canada: The Report by the Royal Society of Canada Expert Panel on End-of-life Decision-making" (2011) 25(1) *Bioethics* 1, 69.

[8] See, in general, Andrew McGee, "Should It Be Legalised in Queensland" (2019) 39(9) *Proctor* 20; Lindy Willmott and Ben White, "Assisted Dying in Australia: A Values-based Model for Reform" in Ian Freckleton and Kerry Peterson (eds), *Tensions and Traumas in Health Law* (Federation Press, 2017) 479–510; Andrew McGee et al, "Informing the Euthanasia Debate: Perceptions of Australian Politicians" (2018) 41 *University of New South Wales Law Journal* 1368.

[9] Northern Territory, Queensland, Tasmania, Western Australia, the Australian Capital Territory.

[10] New South Wales, Victoria, South Australia.

[11] See, eg, *Crimes Act 1900* (ACT) s 16; *Crimes Act 1900* (NSW) s 31A; *Criminal Law Consolidation Act 1935* (SA) s 13A (1); *Crimes Act 1958* (Vic) s 6A.

[12] *Crimes Act 1900* (ACT) s 17; *Crimes Act 1900* (NSW) s 31C; *Criminal Code Act 1983* (NT) s 162; *Criminal Code Act 1899* (Qld) s 311; *Criminal Law Consolidation Act 1935* (SA) s 13A(5); *Criminal Code Act 1924* (Tas) s 163; *Crimes Act 1958* (Vic) s 6B(2); *Criminal Code Act Compilation Act 1913* (WA) s 288.

[13] With the exception of Victoria and Western Australia to a certain extent, which is discussed in detail below.

depending on the jurisdiction.[14] Where the required intent for murder cannot be established or certain partial defences apply, criminal responsibility remains for manslaughter, punishable with a maximum sentence of life imprisonment.[15] The law in Queensland, Tasmania and Western Australia specifically sets out that it is irrelevant for the question of causation and, therefore, the criminal responsibility of the perpetrator, that the person requesting assistance in dying would have died sooner or later due to an illness or medical condition.[16] Under Queensland criminal law, for example, any person who hastens the death of another person who "is labouring under some disorder or disease arising from another cause" is deemed to have killed that person.[17]

To prevent or limit criminal responsibility for participation in VAD, two Australian jurisdictions have decriminalised relevant conduct when enacting specific VAD frameworks. The exceptional situation in Victoria and Western Australia, which departs in certain cases from the above outlined general stance of the criminal law, is discussed in detail in the next section.

2. Decriminalisation of Specific Conduct in Victoria and Western Australia

In 2017, Victoria introduced the *Voluntary Assisted Dying Act 2017* (Vic).[18] This was followed by the *Voluntary Assisted Dying Act 2019* (WA) in Western Australia.[19]

For a person to be eligible to access the VAD schemes in the two jurisdictions, the person must be diagnosed with a disease, illness or medical condition, which is advanced, progressive and is expected to cause death[20] within six months (or within 12 months if it is neurodegenerative and causes suffering to the person that cannot be relieved in a manner that the person considers tolerable).[21] In addition, the person must be 18 years or older, be an Australian citizen or permanent resident and have been ordinarily resident of the respective State for at least 12 months at the time of making their first request for access to VAD.[22] The person requesting their death must be acting voluntarily, with decision-making capacity in relation to VAD and their request must be enduring.[23] The frameworks contain explicit offences for non-compliance with enshrined regulations.[24] Moreover, the laws protect certain individuals from criminal (and civil) responsibility, who assist, facilitate, do not act or act in accordance with the Acts.[25]

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[14] *Crimes Act 1900* (ACT) s 12; *Crimes Act 1900* (NSW) s 18; *Criminal Code Act 1983* (NT) s 156; *Criminal Code Act 1899* (Qld) ss 302, 305; *Criminal Law Consolidation Act 1935* (SA) s 11; *Criminal Code Act 1924* (Tas) ss 156, 158; *Crimes Act 1958* (Vic) s 3; *Criminal Code Act Compilation Act 1913* (WA) s 279. The different situation in Victoria and Western Australia in relation to the VAD Acts is discussed below.

[15] *Crimes Act 1900* (ACT) s 15; *Crimes Act 1900* (NSW) s 18; *Criminal Code Act 1983* (NT) s 160; *Criminal Code Act 1899* (Qld) s 303; *Criminal Law Consolidation Act 1935* (SA) s 13; *Criminal Code Act 1924* (Tas) s 159; *Crimes Act 1958* (Vic) s 421(1); *Criminal Code Act Compilation Act 1913* (WA) s 280.

[16] *Criminal Code Act 1899* (Qld) s 296; *Criminal Code Act 1924* (Tas) s 154(d); *Criminal Code Act Compilation Act 1913* (WA) s 273.

[17] *Criminal Code Act 1899* (Qld) s 296.

[18] *Voluntary Assisted Dying Act 2017* (Vic) assented to 5 December 2017 commenced on 1 July 2018 with initial framework and the remainder of the Act on 19 June 2019.

[19] *Voluntary Assisted Dying Act 2019* (WA) assented to on 19 December 2019 with an expected commencement of mid-2021.

[20] *Voluntary Assisted Dying Act 2017* (Vic) s 9(1)(d); *Voluntary Assisted Dying Act 2019* (WA) s 16(1)(c). In Victoria, the illness, disease or condition must be incurable. In Western Australia it is required that the disease will, on the balance of probabilities, cause death.

[21] *Voluntary Assisted Dying Act 2017* (Vic) s 9(4); *Voluntary Assisted Dying Act 2019* (WA) s 16(1)(c).

[22] *Voluntary Assisted Dying Act 2017* (Vic) s 9(1)(a)–(b); *Voluntary Assisted Dying Act 2019* (WA) s 16(1)(a)–(b). In Victoria, must be ordinarily resident of the State.

[23] *Voluntary Assisted Dying Act 2017* (Vic) ss 9(1)(c), 20(1)(a), (c)–(d), 29(1)(a), (c)–(d); *Voluntary Assisted Dying Act 2019* (WA) ss 6(2), 16(1)(d), (f). That the request is enduring is per se no eligibility criterion in Victoria. However, the practitioners assessing the person must each be satisfied that the person's request "is enduring" in the context of their eligibility assessment: *Voluntary Assisted Dying Act 2017* (Vic) ss 20(1)(d), 29(1)(d).

[24] *Voluntary Assisted Dying Act 2017* (Vic) ss 83–91; *Voluntary Assisted Dying Act 2019* (WA) ss 99–108.

[25] *Voluntary Assisted Dying Act 2017* (Vic) ss 79–82; *Voluntary Assisted Dying Act 2019* (WA) ss 113–115.

Lastly, the Acts contain oversight mechanisms in form of a review board.[26] This article analyses how the Acts protect individuals from criminal responsibility for participation in VAD. Due to the ambit of this article it does not provide detailed analysis of other aspects of the legislation.[27]

(a) Victoria

As pointed out above, Victoria introduced the first law permitting VAD in Australia in over two decades in form of the *Voluntary Assisted Dying Act 2017* (Vic). The Victorian Act contains three sections specifically relating to the protection of participants from criminal responsibility. While one section refers to the criminal responsibility of any person, the other two sections are particularly concerned with health practitioners. Section 79 titled "Protection from criminal liability of person who assists or facilitates request for or access to voluntary assisted dying" states that:

> 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.

In addition, s 80(a) states that a health practitioner who acts in good faith and without negligence, believing on reasonable grounds that they are acting in accordance with the VAD Act, is not guilty of a criminal offence. Lastly, s 81 enshrines that no liability shall arise for the failure of a registered health practitioner or an ambulance paramedic, who is present after the person administers the VAD substance, to administer lifesaving treatment.

White et al comment that these protections from criminal liability "provide certainty and confidence for those who help a person to access VAD in accordance with the Act".[28] It should be noted, however, that those who fail to act in accordance with the Act or act negligently continue be subject to criminal liability. As in Victoria, the WA Act also decriminalises certain VAD-related conduct.

(b) Western Australia

The *Voluntary Assisted Dying Act 2019* (WA) was passed in 2019 and is expected to commence mid-2021. As in Victoria, the Act contains specific protections for participants from criminal liability. Yet, in the WA Act, and different to the situation in Victoria, most protections relate to any person and do not specifically address health practitioners:

> **113. Protection for persons assisting access to voluntary assisted dying or present when substance administered**
>
> A person does not incur any criminal liability if the person –
>
> (a) in good faith, assists another person to request access to, or access, voluntary assisted dying in accordance with this Act; or
> (b) is present when another person self-administers or is administered a prescribed substance in accordance with this Act.
>
> **114. Protection for persons acting in accordance with Act**
>
> (1) This section applies if a person, in good faith and with reasonable care and skill, does a thing –
>
> (a) in accordance with this Act; or
> (b) believing on reasonable grounds that the thing is done in accordance with this Act.
>
> (2) The person does not incur any civil liability, or any criminal liability under this Act, for doing the thing.

[26] *Voluntary Assisted Dying Act 2017* (Vic) ss 92–118; *Voluntary Assisted Dying Act 2019* (WA) ss 116–155.

[27] For detailed analysis of the Victorian Act see Ben White et al, "Does the Voluntary Assisted Dying Act 2017 (Vic) Reflect Its Stated Policy Goals?" (2020) 43(2) *University of New South Wales Law Journal* 417.

[28] White et al, n 27, 447.

Lastly, s 115 provides, inter alia, that certain persons, including ambulance officers and medical practitioners as well as others who have a duty to administer lifesaving treatment, do not incur criminal liability if they act in good faith and fail to administer lifesaving treatment to another person if they believe on reasonable grounds that the person is dying due to receiving a prescribed substance in accordance with the Act.

According to the above protections, participation in VAD is not criminalised in Western Australia, where individuals act in the spirit of the law or believe on reasonable grounds to be acting in accordance with it. Yet, homicide and suicide offences continue to apply to those who act outside of the provisions of the VAD Act.

Even though law reform efforts to legalise VAD to a certain extent have been successful recently in Victoria and Western Australia, the majority of past law reform attempts in this area have failed.

III. Voluntary Assisted Dying Law Reform in Australia

Many attempts at VAD law reform have occurred over three decades in all Australian jurisdictions except for Queensland.[29] The first VAD Bill was introduced into the Legislative Assembly of the Australian Capital Territory as early as 1993.[30] Legislating VAD was seen as "inopportune" and the Bill never became law.[31] Shortly after, in 1995, a private member's Bill on VAD was tabled in the Northern Territory.[32] The Bill passed in May 1995 and the *Rights of the Terminally Ill Act 1995* (NT) was enacted making VAD lawful in the Northern Territory as the first jurisdiction in the world. In 1997, less than two years after its enactment, the Federal government passed the *Euthanasia Laws Act 1997* (Cth), depriving the Territories of their power to legislate on VAD, and repealing the NT legislation. Subsequent years saw six unsuccessful attempts at removing the legislative limitations imposed on the Territories.[33]

Overall, between 1993 and 2017, 57 Bills dealing with VAD law reform had been unsuccessfully introduced in Australian jurisdictions.[34] Few managed to reach the Committee or third reading stage.[35]

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[29] In March 2020, the Queensland Parliament Health, Communities, Disability Services and Domestic and Family Violence Prevention Committee (Parliament Committee) recommended that the Queensland Government introduce a legislative VAD scheme: Parliament Committee, *Voluntary Assisted Dying* (Report No 34, Queensland Parliamentary Committees, 2020) Recommendation 1, 105 <https://www.parliament.qld.gov.au/Documents/TableOffice/TabledPapers/2020/5620T490.pdf>. The Parliament Committee recommended the use of draft legislation by Willmott and White referred to as "The White and Willmott Voluntary Assisted Dying Bill 2019" (W&W Bill) as a basis for the legislative scheme. Under current Queensland law, persons suffering from certain life-limiting illnesses may receive palliative care and other support services. Yet, a VAD scheme is not currently available. The matter was referred to the Queensland Law Reform Commission (QLRC) on 21 May 2020 for development of a framework for VAD legislation in Queensland with a final report, including draft legislation, due to the Attorney-General in 2021. The terms of reference make it clear that the task of the QLRC is not to consider whether such laws are desirable in Queensland but merely to develop the necessary legislative scheme. To do so, the QLRC has issued a community consultation paper in October 2020 titled "A Legal Framework for Voluntary Assisted Dying": Queensland Law Reform Commission, *A Legal Framework for Voluntary Assisted Dying* (Consultation Paper – WP No 79, October 2020).

[30] *Voluntary and Natural Death Bill 1993* (ACT).

[31] Select Committee on Euthanasia Parliament of the Australian Capital Territory, *Report: Voluntary and Natural Death Bill 1993* (1994) 6–7 <https://www.parliament.act.gov.au/__data/assets/pdf_file/0011/382196/Select_com_on_enthunasia.pdf>.

[32] Northern Territory, *Parliamentary Debates*, Legislative Assembly, 22 February 1995 (Marshall Perron) <https://parliament.nt.gov.au/__data/assets/pdf_file/0009/367947/serial67speech.pdf>.

[33] See Lindy Willmott et al, "(Failed) Voluntary Euthanasia Law Reform in Australia: Two Decades of Trends, Models and Politics" (2016) 39 *University of New South Wales Law Journal* 1, 9–10.

[34] McGee et al, n 8, 1374. Overall, between 1993 and 2017, 58 bills had been introduced and the *Voluntary Assisted Dying Bill 2017* (Vic) passed in Victoria in late 2017. Between 1993 and 2015, 51 bills had been unsuccessfully introduced see Willmott et al, n 33, 10. Out of the 51 bills, 39 explicitly aimed at permitting VAD, see Ben White and Lindy Willmott, "Future of Assisted Dying Reform in Australia" (2018) 42(6) *Australian Health Review* 616, 617.

[35] Willmott and White, n 8, 479, 482.

As most past reform efforts failed, White and Willmott note that there was no "majority support from politicians as a group for changing the law".[36]

Given the many failed attempts, the article below considers whether the introduction of offence-specific prosecutorial guidelines could be an alternative reform option in this area.

IV. The Merits of Introducing VAD-Specific Prosecutorial Guidelines in Australia

As noted above, assisting another in their death or ending someone's life on their request falls within the scope of homicide and suicide laws in most Australian jurisdictions. Yet, because the public prosecution in all Australian States and Territories has discretion in relation to the charging decision, namely whether to charge an individual and if so, with what offence, it does not follow automatically that an individual will be prosecuted for assisting in the death of another.

Due to the discretionary nature of the charging decision, all Australian jurisdictions have introduced prosecutorial policies aimed at guiding the decision-making process and to "encourage consistency, efficiency, effectiveness and transparency in the administration of justice".[37] The decision to prosecute is traditionally based on a two-tier test with the first tier relating to the question of whether there is sufficient evidence to justify bringing a prosecution. If this can be affirmed, the second tier subsequently addresses the question whether the prosecution is in the public interest in the particular case at hand. In relation to the second tier, a number of factors need to be taken into account including the seriousness or triviality of the alleged offence; the existence of mitigating or aggravating circumstances; personal characteristics of the alleged offender and witness, including age and physical and mental health; the degree of culpability of the alleged offender in regards to the offence; the attitude of the victim; and the effect on public order and morale.[38]

While some of these factors may be directly relevant for the charging decision in VAD cases, no offence-specific prosecutorial policies setting out when VAD prosecutions tend to be likely are currently in place in Australia. This is different in England and Wales.

A. Prosecutorial Guidelines on Assisted Suicide in England and Wales

Like Australia, England and Wales have a long history of failed law reform attempts concerning VAD.[39] Under current law, suicide and attempted suicide are no longer an offence. Yet, similar to most Australian jurisdictions, encouraging or assisting in the suicide of another is a criminal offence, punishable with up to 14 years imprisonment.[40] However, under the *Suicide Act 1961* (UK) s 2(4) "no proceedings shall be instituted for an offence under this section except by or with the consent of the Director of Public Prosecutions". In 2010, the Director of Public Prosecutions (DPP) introduced its *Policy for Prosecutors in Respect of Cases of Encouraging or Assisting Suicide*,[41] updated in October 2014. The policy only relates to assistance in suicide and does not extend to actively ending the life of another upon their request, which remains a homicide offence.

The policy was introduced as a result of the judgment in *R (on the application of Purdy) v Director of Public Prosecutions*[42] requiring the DPP "to clarify what his position is as to the factors that he regards

[36] Ben White and Lindy Willmott, "How Should Australia Regulate Voluntary Euthanasia and Assisted Suicide?" (2012) 20(2) JLM 410, 415.

[37] Heather Douglas et al, *Criminal Process in Queensland and Western Australia* (Thomas Reuters, 2010) 94.

[38] See, eg, Queensland, Department of Justice and Attorney-General, *Director's Guidelines* (2016) Guideline 4 (ii).

[39] In 2015, the British House of Commons voted on assisted dying for the first time since 1997 and rejected the proposed assisted dying bill with 74% of MPs voting against the Bill. See James Gallagher and Philippa Roxby, "Assisted Dying Bill: MPs Reject 'Right to Die' Law", *BBC News*, 11 September 2015 <https://www.bbc.com/news/health-34208624>.

[40] *Suicide Act 1961* (UK) s 2(1).

[41] Director of Public Prosecutions, n 6.

[42] *R (on the application of Purdy) v DPP* [2010] 1 AC 345; [2009] UKHL 45.

as relevant for and against prosecution"[43] in relation to encouraging and assisting suicide. The case concerned Debbie Purdy, who had primary progressive multiple sclerosis for which no known cure existed. She inquired with the DPP whether her husband would likely be prosecuted for accompanying her to a country, such as Switzerland, where she planned on obtaining lawful assistance in suicide. Purdy successfully challenged the prosecutorial refusal to provide said information in the court system, relying on Art 8 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms* containing the right to respect for private life. The House of Lords noted that there was a divide between the prohibition of assisted suicide in the law and how the prohibition was being applied in practice. This, so they found, required the DPP to release a policy identifying the circumstances to be taken into account when exercising his discretion under s 2(4) of the *Suicide Act 1961* on whether to prosecute a person for aiding and abetting an assisted suicide abroad.[44]

The subsequently enacted policy makes clear that encouraging or assisting suicide is not decimalised in the United Kingdom (UK) noting:

> This policy does not in any way "decriminalise" the offence of encouraging or assisting suicide. Nothing in this policy can be taken to amount to an assurance that a person will be immune from prosecution if he or she does an act that encourages or assists the suicide or the attempted suicide of another person.[45]

The prosecution policy contains 16 factors tending in favour of a prosecution and six factors tending against prosecution. The listed factors, however, are not exhaustive and the policy makes clear that decisions will be made on a case by case basis. A prosecution will occur more likely if the victim: was under the age of 18; was lacking capacity for an informed decision to commit suicide or had not reached that decision; had not clearly and unequivocally communicated that decision; did not request assistance from the suspect out of their own initiative; or, was physically able to carry out the acts which they received assistance for. Moreover, a prosecution will occur more likely if the suspect: did not act out of compassion but due to other motivations including financial gain; pressured the victim to commit suicide or failed to ensure that the victim was not pressured to commit suicide by other persons; had a history of violence or abuse against the victim; was unknown to the victim; encouraged several victims unknown to one another; was paid by the victim or their friends and family for the assistance; was acting in his or her capacity as a medical doctor, nurse, other health care professional, a professional carer (whether for payment or not), or as a person in authority, such as a prison officer, and the victim was in his or her care; knew that the victim intended to commit suicide in a public place with members of the public likely present; or, was involved in an organisation or group, aimed at assistance in suicide (paid or unpaid). As per the policy, prosecutions are less likely if: the victim had reached the informed decision to commit suicide; the suspect's exclusive motivation was compassion; the suspect provided only minor encouragement; the suspect had sought to dissuade the victim from taking the course of action which resulted in his or her suicide; the suspect's actions constituted reluctant encouragement or assistance in light of the determined wish of the victim; the suspect reported the victim's suicide to the police and fully assisted in the investigation.

In 2014, the policy was amended to clarify that a medical doctor, nurse, other health care professional and a professional carer is only more likely to be prosecuted than others if the victim was previously in their care. Without a prior care relationship, prosecution is not more likely than the prosecution of family members.[46]

Mullock points out that according to the guidelines whether someone will be subject to prosecution mostly depends on their motives and whether a person acted "wholly motivated by compassion".[47]

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[43] *R (on the application of Purdy) v DPP* [2010] 1 AC 345, [55]; [2009] UKHL 45.

[44] *R (on the application of Purdy) v DPP* [2010] 1 AC 345, [54]; [2009] UKHL 45.

[45] Director of Public Prosecutions, n 6.

[46] The amendment came about after *R (on the application of Nicklinson) v Ministry of Justice* [2014] 2 All ER 32; [2013] EWCA Civ 961 concerning the lack of clarity in the DPP policy on whether a health care worker would be more likely prosecuted in assisting in suicide than a family member.

[47] Alexandra Mullock, "Overlooking the Criminally Compassionate: What Are the Implications of Prosecutorial Policy on Encouraging or Assisting Suicide?" (2010) 18 *Medical Law Review* 442, 446.

Therefore, in the UK context "compassion is the key determining factor that places an act which remains criminal beyond the reach of the criminal courts".[48]

The statistics published by the Crown Prosecution Service (CPS) from 1 April 2009 until 31 July 2020 highlight that there have been very few prosecutions concerning assisting another in suicide. Overall, 162 cases had been referred to the CPS concerning assisted suicide during the time period. Of these, the CPS did not proceed with 107 and 32 cases were withdrawn by the police. As of 31 July 2020, there were seven ongoing cases. Moreover, three cases of encouraging or assisting suicide had been prosecuted successfully. One accused who had been charged with assisted suicide was acquitted after a trial in May 2015. Nine cases were referred on for prosecution for homicide or other serious crimes.[49]

Due to the low prosecution rates, Downie concludes that the introduction of VAD-specific prosecutorial guidelines "may be a path to a somewhat permissive legal regime …in some circumstances".[50] Whether the introduction of VAD-specific prosecutorial guidelines should be contemplated in Australian jurisdictions is discussed below.

B. VAD-specific Prosecutorial Guidelines in Australia?

With two Acts permitting VAD recently passed in Victoria and Western Australia, momentum may be building for law reform in other States and Territories. At the time of writing, the Queensland Law Reform Commission (QLRC) is tasked with making recommendations on an appropriate VAD scheme and preparing draft VAD legislation with a final report and draft bill expected in May 2021.[51] In Tasmania, a VAD Bill passed the Upper and Lower House in November/December 2020 and will be further considered when Parliament resumes in March 2021.[52] A new VAD Bill modelled after the Victorian Act was tabled in both Chambers of the South Australian Parliament in December 2020. Debate was adjourned until Parliament resumes in February 2021.[53]

Despite above developments, it cannot be overlooked that most law reform attempts in Australia in the past two decades in this area have been unsuccessful. White and Willmott note that whether political and public interest in this area translates into law reform is a "vexed issue",[54] as reform is contested and faces major hurdles.[55] They highlight that while there is significant public support of VAD, majority political support to change the law had been missing in the past.[56] Yet, the researchers predict that other Australian States will follow the Victorian example and enact specific VAD laws,[57] highlighting that since 2016, a higher percentage of bills relating to VAD had been closer to passing.[58] Concurring McGee et al state that "there may be a shift in the political willingness to grapple" with VAD.[59] If and when reforms are likely to occur in Australian jurisdictions, however, is unclear. This gives rise to the question of whether

[48] Mullock, n 47, 445.

[49] Crown Prosecution Service, *Latest Assisted Suicide Figures* (17 August 2020) <https://www.cps.gov.uk/publication/assisted-suicide>.

[50] Jocelyn Downie, "Permitting Voluntary Euthanasia and Assisted Suicide: Law Reform Pathways for Common Law Jurisdictions" (2016) 16(1) *QUT Law Review* 84, 93.

[51] Queensland Government Statement, *Government Agrees to VAD Laws Extension* (14 December 2020) <https://statements.qld.gov.au/statements/91158>.

[52] Emily Baker, "Voluntary Assisted Dying Legislation Passes Tasmanian Upper House", *ABC News*, 10 November 2020 <https://www.abc.net.au/news/2020-11-10/tasmania-voluntary-assisted-dying-legislation-passes-upper-house/12866180>. The relevant Bill is the *End of Life Choices (Voluntary Assisted Dying) Bill 2020* (Tas).

[53] *Voluntary Assisted Dying Bill 2020* (SA).

[54] White and Willmott, n 34, 616.

[55] White and Willmott, n 34, 617.

[56] White and Willmott, n 36, 414–415.

[57] White and Willmott, n 34, 617.

[58] White and Willmott, n 34, 618.

[59] McGee et al, n 8, 1369.

the introduction of prosecutorial guidelines on how discretion concerning the charging decision in VAD cases will be exercised could be beneficial in Australian jurisdictions in the interim.[60]

In 2012, the Quebec Select Committee on Dying with Dignity recommended the enactment of such prosecutorial guidelines in the Canadian context.[61] At the same time in Australia, White and Downie noted that discretion as to when acts related to VAD will be prosecuted is a topic which "has not yet received sufficient attention in the Australian context" and developed offence-specific guidelines stipulating how discretion should be exercised in this space.[62] The researchers emphasised, however, that it went beyond the scope of their work to make a case for these guidelines.[63] The paragraphs below considers whether a case can be made for their introduction by first outlining the associated benefits prior to considering imminent risks.

1. Benefits of Offence-specific Prosecutorial Guidelines in Australia

It may be argued that in jurisdictions where it is unlawful to assist another in dying or ending another person's life upon request, individuals must be prosecuted for these acts. Consequently, offence-specific prosecutorial guidelines deviating from this principle to some degree should not be enacted. This consideration, however, does not appear necessarily in line with the situation in practice. Moreover, the introduction of these guidelines could enhance transparency and consistency of prosecutorial decision-making as discussed below.

(a) Transparency of Prosecutorial Decisions

Even though participation in VAD is criminalised in most Australian States, evidence suggests that criminal law breaches occur in practice.[64] Yet, prosecutions for these acts occur infrequently in Australia. Bartels and Otlowski note that having "a situation where it is commonly known that the law is being breached, yet breaches are either being ignored or pass unpunished, threatens to undermine public confidence in the law".[65] Introducing VAD-specific guidelines setting out when prosecutions tend to occur could "promote high quality decision-making" and ensure that prosecutorial discretion is exercised in a consistent and transparent fashion.[66] Improving the transparency of the prosecutorial charging decision in the context of VAD, an area of grave concern to many, could, as White and Downie point out, "engender public confidence in the exercise of prosecutorial discretion".[67] Therefore, VAD-specific prosecutorial guidelines, containing factors when prosecution likely tend to occur, could contribute to filling the current "legal vacuum" arising from the challenging application of criminal law.[68]

In the UK context, prosecutorial decision-making in relation to the charging decision and assisted suicide had been described as "shrouded in a veil of secrecy" prior to the introduction of the offence-specific guidelines.[69] Heywood concludes that the introduction of the prosecutorial policy in the United Kingdom has had the advantage of making factors relevant in this decision-making process more explicit.[70] Yet, because the guidelines lack specificity on many issues, others conclude that since their enactment the

[60] See also suggestion in Hadeel Al-Alosi, "A Time to Fly and a Time to Die: Suicide Tourism and Assisted Dying in Australia Considered" (2016) 17(2) *Marquette Benefits and Social Welfare Law Review* 257, 283.

[61] Select Committee, *Dying with Dignity* (Report, 2012) Recommendation 20, 90.

[62] Ben White and Jocelyn Downie, "Prosecutorial Guidelines for Voluntary Euthanasia and Assisted Suicide: Autonomy, Public Confidence and High Quality Decision Making" (2012) 36 *Melbourne University Law Review* 656, 658.

[63] White and Downie, n 62, 659.

[64] See summary of studies in White and Willmott, n 36, 423.

[65] Lorana Bartels and Margaret Otlowski, "A Right to Die? Euthanasia and the Law in Australia" (2010) 17 JLM 532, 552.

[66] White and Downie, n 62, 677–678.

[67] White and Downie, n 62, 679.

[68] Excerpt from the Quebec brief, General Consultation, 114, 118, 119, cited in Select Committee, n 61, 91.

[69] Rob Heywood, "The DPP's Prosecutorial Policy on Assisted Suicide" (2010) 21 *King's Law Journal* 425, 435.

[70] Heywood, n 69, 436.

situation has not become much clearer giving rise to the possible complaint that people are "not much the better or wiser" for their publication.[71]

While VAD-specific guidelines, depending on their wording, could make prosecutorial decisions more transparent to the public and thus increasing public confidence in this area, the introduction of guidelines may also increase the consistency of charging decisions made by different agencies.

(b) Consistency of Prosecutorial Decisions

As pointed out above, general prosecutorial policies relating to the charging decision were introduced, inter alia, to create consistency and efficiency in the administration of justice. The introduction of specific guidelines may further this goal by providing public prosecutors with more detailed guidance on what factors to consider during the charging decision in VAD cases, which can generate grave moral and ethical challenges. This, in turn, could lead to greater consistency in decision outcomes across different prosecution agencies.

To illustrate this point further, in 2019, the DPP (ACT) in *Police v O*,[72] a case concerned with a defendant charged with aiding his terminally ill partner in committing suicide, dropped the charges as the prosecution was not considered in the public interest. The DPP noted in the decision that "in considering the public interest in proceeding with this prosecution, I have been assisted by the *Policy for Prosecutors in Respect of Cases of Encouraging or Assisting Suicide* in the United Kingdom".[73] While noting that they do not formally adopt this policy, the DPP commented that the policy's "existence informs … [their] discretion to resolve the issue in this case with judgment, sensitivity and common-sense, consistent with the demands of fairness".[74] It is remarkable that the DPP relied on a prosecutorial policy operating in another state, the United Kingdom.[75] This suggests that there may be a greater practical need for direction on how to exercise prosecutorial discretion in the context of VAD so much so that the DPP's decision in this case was informed by foreign prosecutorial guidelines not in force in Australia.

Greater consistency and transparency as to when a prosecution for participation in a VAD case will likely occur can offer assurances for persons planning to end their lives as well as family members or medical practitioners who plan to assist them. In this context, Al-Alosi comments that enacting offence-specific prosecutorial policies "would ensure that decisions to prosecute are rendered predictably and consistently, which would benefit a range of people, including the family members of terminally ill patients, medical practitioners, and prosecutors".[76]

While the above outlined the potential benefits of VAD-specific prosecutorial guidelines the following paragraphs analyse the imminent risks including the creation of protection gaps and the infringement upon the rule of law.

2. Problems with Offence-specific Guidelines in Australia

In 2012, White and Downie developed VAD-specific prosecutorial guidelines for the Australian context.[77] The guidelines are extensive and detailed, including factors relating to the autonomy of decision-making by the person wishing to end their life as well as the obligation for the DPP to publish reasons for a non-prosecution decision to increase transparency.[78] Yet, as they are only prosecutorial guidelines applying after a death has already occurred and not a holistic VAD framework, as is in place in Victoria and Western Australia, they cannot set out detailed factors relating to the eligibility of the victim to

[71] John Coggon, "Prosecutorial Policy on Encouraging and Assisting Suicide – How Much Clearer Could It Be?" (2010) 36 *Journal of Medical Ethics* 381, 382.

[72] Decision of the DPP (ACT), *Police v O-CC2019/3260* (2019).

[73] Decision of the DPP (ACT), n 72, 3 (footnote omitted).

[74] Decision of the DPP (ACT), n 72, 3.

[75] Decision of the DPP (ACT), n 72, 3.

[76] Al-Alosi, n 60, 283.

[77] White and Downie, n 62.

[78] White and Downie, n 62, 703–705.

participate in VAD or enshrine oversight and reporting mechanisms. This can create potential protection gaps for vulnerable individuals.

(a) Protection Gaps

Offence-specific prosecutorial guidelines remove certain conduct relating to VAD from the sphere of the criminal justice system. For example, in the UK context, a person who acts exclusively compassionately and assists another person over the age of 18 in dying is unlikely to be prosecuted and the particular case therefore unlikely to be subject to a court ruling. A similar situation may arise in Australia if comparable guidelines were introduced. Moreover, in Australia, the non-prosecution decision is final and generally immune from court review.[79] As a consequence, the assessment of whether death really was voluntary in an individual case could be entirely withdrawn from the sphere of the justice system. As prosecutorial policies cannot establish external monitoring mechanisms, such as VAD oversight boards in place in Western Australia and Victoria, there is limited scrutiny of potential abuse, which may place vulnerable individuals at risk.

Protection gaps are furthered by the lack of a positive VAD regulatory regime. Prosecutorial guidelines apply after death has already occurred and, due to their legal nature, lack specific regulation on eligibility requirements for participation in VAD, which can be found in legislative frameworks. These include, for example, the health condition of the victim, as well as the validity of the request to die, including possible waiting periods. In addition, the guidelines do not set out safeguards such as the necessary involvement of medical practitioners or the use of prescription medication to bring about death. O'Sullivan agrees in the UK context that in order to holistically regulate VAD and to reduce potential abuse "clear legislative safeguards are preferable to a Policy … that is applied behind closed doors after a suicide has been assisted".[80]

In addition to potentially decreasing the protection for some individuals, VAD-specific prosecutorial guidelines amount to a de facto decriminalisation of certain aspects of VAD by the executive thus constituting an infringement of the rule of law.

(b) Decriminalisation of VAD by the Executive and the Rule of Law

By enacting prosecutorial guidelines in relation to VAD ultimately outlining what conduct will or will not likely be prosecuted, the executive de facto decriminalises certain conduct relating to VAD. Luna refers to this general concept as "prosecutorial decriminalization"[81] noting that because of their discretion "prosecutors are treating some conduct as non-criminal and handling other conduct as not quite as criminal as it could be".[82]

Criminalising and decriminalising specific conduct, however, is not the task of the unelected executive but the legislature. The Commission on Assisted Dying made clear in the context of VAD-specific guidelines in England and Wales that "the decision about whether the law should be changed, in a contested area (contested in the sense there are strong views for and against law change) is not being made by the law-makers (Parliament), but by the DPP".[83] It noted that, as a consequence, whether prosecution will take place is a discretionary decision by the DPP "rather than the letter of the law"[84] resulting in a situation where the "basic tenet of the rule of law is broken".[85] Lewis suggests that the lack of specificity in the English guidelines, for example, the choice not to include waiting periods, may be related to the DPP's

[79] See, eg, *Maxwell v The Queen* (1996) 184 CLR 501, [26] (Gaudron and Gummow JJ); 87 A Crim R 180.

[80] Catherine O'Sullivan, "Mens Rea, Motive and Assisted Suicide: Does the DPP's Policy Go to Far?" (2015) 35(1) *Legal Studies* 96, 112.

[81] Erik Luna, "Prosecutorial Decriminalization" 102 (2012) *Journal of Criminal Law and Criminology* 785, 791.

[82] Luna, n 81, 796–797.

[83] *The Commission on Assisted Dying* (Final Report, 2011) 285.

[84] *The Commission on Assisted Dying*, n 83, 285–286.

[85] *The Commission on Assisted Dying*, n 83, 286.

desire to ensure that he was not creating a legal regime and thus not usurping the role of Parliament.[86] While this may be the case, the general existence of these prosecutorial guidelines, even if lacking specificity around certain issues, nevertheless is at odds with Parliament's decision to make assisting in suicide a criminal offence.

Williams has criticised the obligation placed on the DPP in England and Wales to create these guidelines noting that "ordering the DPP to publish a policy guidance document which effectively decriminalizes assisted suicide is not the way in which the law can or should be changed in the UK. As such, the decision is both 'unsound and unconstitutional' because it is not for the DPP to resolve an issue which is within Parliament's domain".[87] Concurring, Hurford comments that the DPP is not allowed to "trespass on Parliament's turf".[88] Montgomery remarks that an extensive VAD prosecutorial policy "raises questions about the authority of prosecutors to legislate so as to make the law what they desire to be, not what it actually is".[89]

Issuing VAD-specific prosecutorial guidelines ultimately exempting certain conduct from prosecution in Australian jurisdictions, in which Parliament takes the view that assisting another in dying should remain a criminal offence (whether one agrees with this stance or not), challenges the rule of law, regardless of whether the guidelines are broadly phrased or more detailed. Parliaments may lack interest in regulating this area due to its polarising nature and related electoral politics. Yet, in democratic societies such legislative failure cannot be compensated by the unelected executive through policies that can be easily and speedily amended at will. Rather, it is up to the legislature, informed by public and parliamentary debate, to decide whether to bring about law reform in this space. In Australian jurisdictions, where law reform has been continuously unsuccessful, Parliament has already made its decision on this matter.

V. Conclusion

Australia has a three-decade long history of mostly failed law reform attempts in the area of VAD. The recent enactment of VAD laws in Victoria and Western Australia and the respective decriminalisation of certain conduct aligning with the legislation may mean that law reform in other Australian jurisdictions will follow. Yet, whether and when this is likely to occur is unclear. On this basis, this article contemplated whether another legal mechanism, VAD-specific prosecutorial guidelines, as in place in England and Wales for assisted suicide, could be employed to achieve reform in this area in the interim. Their development can hold certain benefits including enhancing the transparency and consistency of prosecutorial decision-making in this area. Yet, this article argued that the associated risks, namely the potential creation of protection gaps for vulnerable individuals due to limited scrutiny of specific cases and the undermining of the rule of law, outweigh these benefits. Consequently, the development of these guidelines is not an appropriate way of creating reform in Australia. Ultimately, if the law on assisting someone to die is seen as in need of reform, then this highly contested area requires legislative intervention in form of a specific framework including safeguards and oversight. Regulation cannot be left up to those enforcing the law through a simple policy.

Postscript

Since submission of this article, Tasmania passed Voluntary Assisted Dying legislation on 24 March 2021.

[86] Penney Lewis, "Informal Legal Change on Assisted Suicide: The Policy for Prosecutors" (2011) 31(1) *Legal Studies* 119, 123.

[87] Glenys Williams, "Assisting Suicide, the Code for Crown Prosecutors and the DPP's Discretion" (2012) 2 *Common Law World Review* 181, 191–192 (footnote omitted).

[88] James Hurford, "Crossing the Natural Frontier: Has Assisted Dying Been De Facto Decriminalised in the UK?" (2020) 25(3) *Judicial Review* 197, 208.

[89] Jonathan Montgomery, "Guarding the Gates of St Peter: Life, Death and Law Making" (2011) 31(4) *Legal Studies* 644, 664. See also discussion in Julia Shaw, "Fifty Years On: Against Stigmatising Myths, Taboos and Traditions Embedded with the Suicide Act 1961(UK)" (2011) 18 JLM 798, 809.