

25 September 2020

Ms. Elizabeth Curtis

Commonwealth Director of Public Prosecutions

By email only: Elizabeth.Curtis@cdpp.gov.au

Dear Ms. Curtis,

Voluntary assisted dying & potential breach of the Criminal Code

Issue

The Law Institute of Victoria ('LIV') is concerned that Victorian health practitioners may face criminal prosecution for discussing voluntary assisted dying ('VAD') under the *Voluntary Assisted Dying Act 2017* (Vic) with patients via a carriage service such as over the phone, via email or through the use of telehealth. The Department of Health and Human Services Victoria ('DHHS') currently advises that this could be a breach of sections 474.29A and 474.29B of the *Criminal Code Act 1995* (Cth)¹ ('the **Criminal Code**').

Legal arguments

The LIV refers to the following documents, which legally distinguish a voluntary assisted death from suicide, and conclude that telecommunications about VAD via a carriage service do not contravene the Criminal Code.

- [Cameron Stewart et al, 'Suicide-related materials and Voluntary Assisted Dying' \(2020\) 27 \(4\) *The Journal of Law and Medicine* 839.](#)
- [Letter from Western Australian Attorney-General the Hon. John Quigley to Australian Attorney-General the Hon. Christian Porter, titled 'Voluntary Assisted Dying Bill 2019 \(WA\) and the Criminal Code Act 1995 \(Cth\)'.](#)

¹ Department of Health and Human Services Victoria, 'Voluntary assisted dying – guidance for health practitioners' (July 2019) <[file:///C:/Users/miche/Downloads/Voluntary%20assisted%20dying%20guidance%20for%20health%20practitioners%20\(2\).pdf](file:///C:/Users/miche/Downloads/Voluntary%20assisted%20dying%20guidance%20for%20health%20practitioners%20(2).pdf)> 74.

Clarification

The LIV seeks clarification on the following issues:

- whether the Commonwealth Director of Public Prosecutions ('**CDPP**') considers that a health practitioner, who provides a patient with information about VAD via a carriage service, such as over the telephone, via email or through the use of telehealth, in accordance with the *Voluntary Assisted Dying Act 2017* (Vic), is in breach of section 474.29A or 474.29B of the Criminal Code;
- if so, whether the CDPP would prosecute a health practitioner for breaching the Criminal Code in the above circumstances;
- whether the CDPP would consider that it was in the public interest to prosecute a health practitioner in the above circumstances; and
- whether the CDPP has any policy position on prosecuting a health practitioner in the above circumstances.

The LIV submits that clarity on this issue is urgently required, particularly in light of COVID-19 restrictions which have resulted in an exponential increase in telehealth consultations by health practitioners and the curtailing of a health practitioner's ability to have face-to-face VAD discussions with patients. The inability to have such discussions electronically also restricts access to VAD advice for seriously ill patients in rural and regional areas of Victoria.

The LIV understands the medical profession through the Australian Medical Association ('**AMA**') has already expressed concerns to the Commonwealth Attorney General and remain deeply concerned about the lack of clarity and exposure for medical practitioners supporting their patient's needs in the current pandemic as well as those in remote or extreme circumstances.

This letter is informed by members of the LIV Disability, Elder and Health Law Section and the Joint LIV/AMA/VicBar Medico Legal Standing Committee. If there is any aspect of this correspondence that you would like to discuss further, please contact Michelle Luarte, Policy Lawyer to the Disability, Elder and Health Law Section (03 9607 9413 or MLuarte@liv.asn.au), or Alexander Laurence, Paralegal to the Disability, Elder and Health Law Section (03 9607 9565 or ALaurence@liv.asn.au).

Yours sincerely,

Sam Pandya
President
Law Institute of Victoria

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