

The right to die

Camille Broadhurst and Andrew Aitken RUSSELL KENNEDY AITKEN LAWYERS

The commencement of the Voluntary Assisted Dying Act 2017 (Vic) (VAD) in Victoria on 19 June 2019 has re-sparked national discussions on euthanasia and assisted dying. The VAD conservatively constructs a legal end of life option for Victorians who *will die* within 6 months with or without the assistance of the VAD. However, Australians who are ineligible to access the VAD continue to look to international counterparts for assistance.

So what does the “end of life” landscape look like for Australians?

What is assisted suicide and euthanasia?

Assisted suicide can generally be divided into two categories:¹

- physician-assisted suicide — in which a person requests their doctor to assist them to commit suicide
- general assisted suicide — in which a person requests another person, who generally has the means and know-how, to assist them to commit suicide

In both cases, the “assistant” is generally required to prescribe or obtain a lethal drug.

Euthanasia can generally be divided into four categories:²

- Voluntary — in which a *competent* person requests another person to end their life.
- Involuntary — in which a *competent* person’s life is ended by another without their express request. An example of this is where a doctor injects a person at a terminal stage of a terminal illness with a lethal drug.
- Non-voluntary — in which a non-competent person’s life is ended by another. An example of this may be where a person is in a persistent vegetative state and a doctor injects that person with a lethal drug.
- Passive — in which a person refuses to accept life-sustaining treatment or in lieu of capacity, a substituted decision-maker declines life-sustaining treatment. This approach interplays with discussions about palliative care, which will not be explored here.

The key difference is that an assisted suicide is still intentionally killing oneself. Whereas, with euthanasia,

another person carries out a lethal act. Under current Australian laws, euthanasia is illegal and a person actively carrying out any act that intentionally results in the death of another will likely be prosecuted for murder or manslaughter.

Understanding the VAD in Australia

Victoria is currently the only Australian state or territory to have passed assisted suicide legislation since the abolition of the world-first Northern Territory legislation, Rights of the Terminally Ill Act 1995 (NT) in 1997, which only remained effective for 1 year before federal intervention on constitutional grounds.

The purpose of the VAD

Section 3 of the VAD provides that the purpose of the legislation is to provide for, and regulate access to, the administration of a voluntary assisted dying substance.

The threshold for access to the VAD

To access the VAD, a person:

- must be over the age of 18 years
- an Australian resident, ordinarily resident in Victoria and, at the time of making a request for access, have been ordinarily resident in Victoria for at least 12 months
- must have decision-making capacity
- must be diagnosed with an incurable, advanced, progressive disease, illness or medical condition that will cause death within 6 months (or 12 months where neurodegenerative), which causes that person intolerable suffering that cannot be relieved

The VAD process

After making three separate requests of a registered doctor for access to the VAD and undergoing two separate medical assessments, an applicant can be issued one of two administration permits:

- a *self-administration permit* authorising the requested registered doctor to prescribe and supply the lethal drug and for the applicant to obtain, possess, store and use such lethal drug or
- where a competent person is incapable of self-administering, a *practitioner administration permit* authorising the doctor to prescribe, supply and administer the lethal drug in the presence of a witness

International counterparts

Countries such as the Netherlands,³ Belgium,⁴ Luxembourg,⁵ Canada⁶ and some states of the United States,⁷ have already legalised varying degrees of assisted suicide and euthanasia laws.

Interestingly, in Switzerland, legislation making assisted suicide or euthanasia legal has not been passed. Rather, its Criminal Code has a curious juxtaposition:

Art. 114

Any person who for commendable motives, and in particular out of compassion for the victim, causes the death of a person at that person's own genuine and insistent request is liable to a custodial sentence not exceeding three years or to a monetary penalty.

Art. 115

Any person who for selfish motives incites or assists another to commit or attempt to commit suicide is, if that other person thereafter commits or attempts to commit suicide, liable to a custodial sentence not exceeding five years or to a monetary penalty.

Under Art 114, it is clear that euthanasia remains illegal. However, under Art 115, assisted suicide is only illegal if it is for selfish motives. Whether by design or otherwise, a lack of designated assisted suicide legislation has resulted in a lower threshold for protection from prosecution. There is no requirement for a person seeking to carry out an assisted suicide to have a terminal illness.

It is not uncommon for assisted-suicide organisations to assist nationals and foreigners to operate within the legislative framework of the relevant country. In our experience with a Swiss organisation, assistance is only provided to persons with a terminal illness, unbearable pain and/or an unendurable incapacitating disability. However, whether a disability is unendurable is generally assessed subjectively and therefore, even persons with mildly incapacitating disabilities are granted assistance. No greater recent example of this was the story of Dr David Goodall who travelled to Switzerland in 2018 to end his life due to old age. He was 104 years old.

To add another level of intrigue, in the Netherlands, Belgium and Luxembourg, a person does not necessarily have to be competent at the time but rather an advanced care statement can be acted upon.⁸

Where to for Australia?

Australians continue to have a healthy debate about the ethical and moral intersection of assisted suicide and euthanasia. On the one hand, we uphold the sanctity of human life but on the other hand, there exists an almost paternalistic attitude towards the extent of our autonomy

over our own bodies. We are also cognisant of protecting the vulnerable and putting in place the appropriate regulations and safeguards.

With growing “comfort” with the Victorian legislation, comparable legislation will likely be brought in nationally. However, it will be interesting to see whether such comfort will lead to an even more liberal attitude towards the “right to die”, one that is not limited to those where death is shortly imminent.

Could a person include a direction in his or her advance directive, form of enduring guardianship, enduring power of attorney or medical treatment decision-maker that he or she be assisted to commit suicide or euthanised in certain serious circumstances, like where he or she is in a persistent vegetative state or in the last stages of a terrible disease or illness?

Would the trauma that suicide inflicts on those left behind be *different* if not *less* in a controlled, planned and potentially transparent environment?

Only time will tell.



Camille Broadhurst

Associate

Russell Kennedy Aitken Lawyers

CBroadhurst@rk.com.au

www.russellkennedy.com.au



Andrew Aitken

Partner

Russell Kennedy Aitken Lawyers

AAitken@rk.com.au

www.russellkennedy.com.au

Footnotes

1. B White and L Willmott “How should Australia regulate voluntary euthanasia and assisted suicide?” (2012) 20(2) *Journal of Law and Medicine* 410.
2. Above.
3. Termination of Life on Request and Assisted Suicide Act (Review Procedures) 2000 (Netherlands).
4. Act on Euthanasia 2002 (Belgium).
5. Law of 16 March 2009 on Euthanasia and Assisted Suicide (Luxembourg).
6. Criminal Code 1985 (Canada).
7. Death with Dignity Act 1994 (Oregon); Death with Dignity Act 2009 (Washington).
8. Above n 1.