Law and Justice Committee

Inquiry into provisions of VAD Bill 2021

Supplementary questions of Hon Greg Smith SC

1. Comments on s.6(2), "presumed capacity"

In my view these provisions aren't appropriate for decisions which involve requesting assistance in dying, under the provisions of the VAD Bill 2021.

The "treatment" requested is final and irreversible. Our laws have always been against assisting in the death of another human being, even denying the defence of "necessity" where another person faces "imminent peril". The decision in ***R v Dudley and Stephens (1884) 14 QBD 273 DC*** prevails today. Dudley and Stephens is a leading English criminal case which established a precedent throughout the common law world that necessity is not a defence to a charge of murder. It concerned survival cannibalism following a shipwreck and its purported justification on the basis of a custom of the sea. It marked the culmination of a long history of attempts by the law, in the face of a bank of public opinion sympathetic to famished castaways, to outlaw the custom (cases of which were little-publicised until after the death of perpetrators) and it became a legal cause célèbre in late 19th century Britain, particularly among mariners.

Dudley and Stephens were shipwrecked along with two other men. When one of them, the cabin boy Richard Parker, fell into a coma, Dudley and Stephens decided to kill him for food.

In SECRETARY, DEPARTMENT OF HEALTH AND COMMUNITY SERVICES v. J.W.B. AND S.M.B. (MARION'S CASE.), a case decided by the HIGH COURT OF AUSTRALIA[1992] HCA 15; (1992) 175 CLR 218, Brennan J stated at [6] "The law will protect equally the dignity of the hale and hearty and the dignity of the weak and lame; of the frail baby and of the frail aged; of the intellectually able and of the intellectually disabled."

The VAD Bill doesn't require the Patient's doctor to be consulted, nor the spouse or partner or other family member. They may have experience of lack of capacity of the Patient, or even of misunderstandings which have personally hurt the Patient who then decides he wants to be put out of his misery, where the grievance can be resolved. In my view the provisions pose threats and dangers to Patients who suffer from mental illness or defective memory, which may not be easily detected by non-specialist doctors who are dealing with his request. According to Dr Chris Nickson an Intensivist and ECMO specialist at the Alfred ICU, the more serious the decision to be made, the greater the care needed to ensure that capacity can be assumed.* A research article by Torisson et al BMC Geriatrics 2012. 12.47, in a Swedish study involving 200 inpatients aged over 60 years, concluded *"Cognitive impairment is frequent in medical inpatients and associated with increased mortality. Recognition rates of cognitive impairment need to be improved in hospitals"*

* https://litfl.com/capacity-and-competence/

2. Contrast between Victorian VAD Act 2017 prohibition on initiating discussion on Voluntary Assisted Dying with a patient and the absence of such a provision in the NSW VAD Bill.

In my view clause 10(1) of the NSW VAD Bill is similar to Clause 8 of the Victorian Act, except that it is restricted to "health care workers". The NSW Bill creates confusion by using different descriptions for medical practitioners, health care workers and registered health practitioners.

I think clause 8 of the Victorian Act is clearer and preferable to Clause 10 of the NSW Bill.

3. Minimum requirements for medical practitioners

In my view the NSW Bill is deficient in not requiring medical practitioners with "relevant expertise and experience in the disease, illness or medical condition expected to cause the death of the person being assessed."

Although I wish to see the NSW Bill defeated, I consider that a clause based on Clause 10 of the Victorian Act is preferable, in the hope that lives will be saved.

Greg Smith SC

26 January 2022

* https://litfl.com/capacity-and-competence/