Submission No 6

INQUIRY INTO PROVISIONS OF THE VOLUNTARY ASSISTED DYING BILL 2021

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VOLUNTARY ASSISTED DYING

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We will all die and how we do it is important - to us, to our families, friends and acquaintances of all kinds. Mercifully (perhaps) we do not presently know when or how it will happen; but it is at least possible that it will be after a life well-lived and a period of suffering that we would prefer not to prolong.

First a note on terminology. I am using the description "voluntary assisted dying" to refer to what was once (incredibly) described as "mercy killing" and later as "voluntary euthanasia" (and perhaps other terms). That is the preferred description of the Dying with Dignity organisation (https://dwdnsw.org.au/) and advocates such as Andrew Denton (https://en.wikipedia.org/wiki/Andrew_Denton) and others and is the description adopted in Australian legislation generally. Those three words encapsulate what is involved: voluntary because it is the freely formed choice of the person involved; assisted because medical professional assistance is required to carry it out with dignity (and the position of those professionals - doctors, nurses, pharmacists, etc - needs to be taken into account); and dying, because it is the end of life that is being contemplated.

I have seen the process described by opponents as "state-sanctioned murder" and that people would be "put to death against their will because they are inconvenient". Nothing could be further from the truth – factually or legally.

THE PROBLEM

Article 3 of the Universal Declaration of Human Rights (1948) provides: "Everyone has the right to life, liberty and the security of person". Article 6(1) of the International Covenant on Civil and Political Rights (1976) reinforces it: "Every human being has the inherent right to life. The right shall be protected by law. No one shall be arbitrarily deprived of his life".

The life in question is that of the person, so it seems to me, whose right to that life is protected and who should have a choice (within proper limits, of course) as to how that life is lived and whether or not it is ended. It should be noted that suicide is not (any more) a crime.

So a legal problem arises if a person, typically suffering greatly from a terminal illness, seeks assistance from another to die. Of course, some people who are not so suffering may simply want to end it all, with assistance – and that can be done in Switzerland, for instance – remember "Laura's Choice" on ABC TV in March 2021 about Laura Henkel's trip to Basel? But here we are talking about a deeply suffering person with a limited lifespan, with mental capacity who freely and voluntarily chooses to end it in a dignified fashion, which requires professional assistance.

To provide any such assistance is presently a crime. Depending on what is done and with what intention, it could be murder, manslaughter or aiding or abetting suicide (which is a crime with a maximum penalty of 10 years imprisonment). If death doesn't eventuate, involvement may still be criminal. Doctors, nurses, pharmacists and their assistants may all be exposed to legal consequences.

We all know that it goes on, but it is illegal and if there is a glitch, people can be prosecuted. A parallel can be drawn with abortion which until 2019 in NSW was a crime. That didn't stop about 36,000 terminations p.a. in NSW; but in every case all those involved had to pass through a loophole identified by Judge Levine in the District Court in 1971 and that was challenging – so much so that it deterred many pregnant women from even taking the first step to seek professional advice and assistance.

SOLUTIONS

Other countries and jurisdictions have legislated to enable a person in the position I have described to end his or her life and the sky has not fallen in. The theoretical basis may vary from place to place but the result is the same. Ten of the United States enable it and it is under consideration in 4 other states. It has been done in Switzerland as assisted suicide for decades. It is available in Belgium, Canada, Luxembourg and The Netherlands. Spain and Portugal have passed legislation for it.

In Australia (putting to one side the overruled scheme in the Northern Territory in 1995) it began with legislation coming into force in Victoria on 19 June 2019 – the first case being on 15 July 2019. Legislation commenced in Western Australia on 1 July 2021. Legislation was assented to in Tasmania on 22 April 2021 and passed in South Australia on 24 June 2021. Queensland had legislation introduced into Parliament on 25 May 2021 and it passed on 16 September 2021. In a binding referendum that accompanied the last national election in New Zealand in October 2020, 66% voted in favour of it. Surveys in NSW show over 80% in favour. A Bill to create a VAD program in NSW was defeated in the Legislative Council in 2017 by one vote.

Some features that appear in such legislation are directed towards ensuring that the choice is, in fact, voluntary and that medical professionals and others involved are suitably protected from adverse legal consequences. The two central pillars of such legislation, broadly speaking, are safety and access. There are built-in safeguards – checks and balances to ensure that the scheme is not abused for improper motives. Those features include:

- the preconditions for the operation of the law, including: age, (in many cases) residence, the nature of the disease or condition, symptoms, level of capacity (physical and mental), prognosis, terminality;
- the capacity of the person to freely, voluntarily and after due consideration with relevant advice understand the facts relevant to the illness or condition, the medical treatment and care options available, the consequences of a decision to end life and their impact and the ability to communicate decisions;
- the relationship between the person and medical professionals involved;
- the involvement and assessment by medical professionals – their number and qualifications;
- procedural steps to be taken;
- legal protection for the medical professionals and others involved, including provisions relating to conscientious objection to participation;
- the availability and supply of relevant drugs;
- the means of administration of drugs;
- protection from manipulation of the person or the process, especially by any person likely to benefit from the process – including the creation of criminal offences for breach;
- the ability to withdraw from the arrangement, right to the end – and cooling off periods;
- the ability of related persons to challenge the process in the Supreme Court;

- a review process to monitor the operation of the scheme.

A price to pay in all schemes – but one that reinforces their integrity - is that suffering individuals who do not have the capacity to give free and voluntary consent will not be able to participate. In May 2021 Barbara Eckersley was tried for murder in the Supreme Court at Goulburn. She was found, by a jury, not guilty of murder but guilty of manslaughter and sentenced to a Community Corrections Order (not involving imprisonment) for 2 years. She had administered a drug to her terminally ill and profoundly disabled mother in a nursing home, Dr Mary White (a noted Australian paleobotanist and author), to ease her suffering and she died later that day. Legislation for voluntary assisted dying would not have helped in that case, however, because Dr White did not have the capacity at that stage to make the necessary free and voluntary choice. She would have had to exercise choice at an earlier stage of her suffering.

NSW LEGISLATION

The Bill prepared by Independent MP Alex Greenwich is for presentation in Parliament in October 2021.

The Bill seems to me to address the features to which I have referred. Specifically it provides for the following matters (not being an exhaustive list and omitting much detail):

- continues the description of voluntary assisted dying, which is not to be suicide;
- provides for commencement 12 months after assent (acknowledging that there needs to be a lead time to get processes in place);
- sets out a number of principles to guide the operation of the Act, including (paraphrasing): every human life has equal value; a person's autonomy should be respected; informed choice should be supported by appropriate advice; suffering is to be minimized; full, supported discussion is to occur; regional, as well as metropolitan, persons should have equal consideration; there should be protection from pressure or duress; and all involved, including medical professionals, have the right to have their beliefs, etc respected;
- a request and assistance process is described in detail;
- health professionals may decline to be involved if they have a conscientious objection;
- health care professionals providing care or treatment may not suggest or raise for discussion voluntary assisted dying unless standard care and treatment options are also discussed;
- the process involves a first request by the person, an assessment of eligibility by treating and referral practitioners, a written declaration, a final request, certification by the treating practitioner of compliance with all procedures, if a self-administration decision has been made then a contact person has been appointed, an authority has been issued by the Voluntary Assisted Dying Board (which records and superintends all actions taken);
- information and advice are to be given to the person about specified matters at certain stages of the process;
- requires that the person be adult, an Australian citizen or a permanent Australian resident or has been resident in Australia for at least 3 continuous years, has been ordinarily resident in NSW for at least 12 months, has been diagnosed with at least one disease, illness or condition that is advanced, progressive and will cause death on the balance of probabilities within 6 months (or if neurodegenerative, within 12 months) OR is causing suffering to the person that cannot be relieved in a way that the person considers tolerable;

- requires the person to have decision making capacity (which is described) and to be acting voluntarily and not subject to pressure or duress, and the request is enduring – the person may withdraw at any time;
- a disability or mental health impairment as defined in other legislation will not be sufficient qualification;
- there are required qualifications for medical practitioners to be involved (specialists, practitioners with at least 10 years practice, overseas qualified specialists with limited or provisional registration) who must undergo training, not be a family member or beneficiary under a will or may otherwise benefit (except by reasonable fees);
- a paper trail is created during the process;
- the second medical practitioner may refer issues to a psychiatrist or other qualified practitioner.

The Supreme Court may be engaged to review decisions made in the process. A number of offences are created for contravention of various requirements. Specific protections from legal liability are provided to persons engaged in the process if done regularly. The Act and its operation are to be kept under review.

I strongly support the Bill. In my view it benefits from the experience of other jurisdictions and distills the most beneficial features of schemes elsewhere into a regime that protects human rights and appropriately considers the positions of all who may become involved. NSW is in a position to deliver the best and most considerate options to the community in a highly civilized fashion.