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Future of assisted dying reform in Australia

Ben White[1,2] DPhil, LLB(Hons), Professor of Law
Lindy Willmott[1] PhD, LLM, LLB(Hons), BCom, Professor of Law

[1]Australian Centre for Health Law Research, Faculty of Law, Queensland University of Technology, 2 George Street, Brisbane, Qld. 4000, Australia. Email: l.willmott@qut.edu.au
[2]Corresponding author. Email: bp.white@qut.edu.au

Abstract. The *Voluntary Assisted Dying Act 2017* (Vic) will come into force in June 2019, becoming the first law in Australia in 20 years to permit voluntary assisted dying (VAD). This paper considers how other Australian states and territories are likely to respond to this development. It analyses three key factors that suggest that law reform is likely to occur in other parts of Australia: (1) the growing international trend to permit VAD; (2) social science evidence about how VAD regimes operate; and (3) changes to the local political environment. The paper argues that these three factors, coupled with the effect of Victoria changing its law, suggest that other VAD law reform is likely to occur in Australia. It also considers the different types of laws that may be adopted, including whether other states and territories will follow the very conservative Victorian approach or adopt more liberal models.

What is known about the topic? Despite sustained law reform efforts in parliaments across the country, Victoria is the first Australian jurisdiction to pass a law permitting VAD in 20 years.
What does this paper add? This paper addresses likely future trends in VAD law reform in Australia. Drawing on international developments, a growing body of social science evidence about how VAD regimes work in practice, and evidence about a changing local political environment, the paper argues that other states and territories in Australia will also enact laws about VAD.
What are the implications for practitioners? The legalisation of VAD has significant implications for health professionals, health administrators and health systems. Understanding how reform may occur and what legal models may be considered supports participation in the law reform process and preparation for likely change.

Additional keywords: health law, law reform, voluntary assisted dying.

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Introduction

In November 2017, the Victorian Parliament passed the *Voluntary Assisted Dying Act 2017* (Vic). Following a planned implementation period of 18 months, the regime will come into force on 19 June 2019. This will be the first time voluntary assisted dying (VAD) has been lawful in Australia since the Northern Territory's short-lived *Rights of the Terminally Ill Act 1995* (NT), which was overturned by the Commonwealth Government's *Euthanasia Laws Act 1997* (Cth).

The *Voluntary Assisted Dying Act 2017* (Vic) permits an adult with decision-making capacity who is resident in Victoria to seek assistance to die, provided that request is made voluntarily and without coercion. To be eligible under the Act, a person must have an incurable disease, illness or medical condition that is advanced, progressive and will cause death within 6 months (12 months for neurodegenerative conditions). That condition must also be causing suffering that cannot be relieved in a manner that the person considers tolerable. The nature of the assistance to die is intended to be primarily through prescribing lethal medication that the person then takes themselves (often called physician-assisted dying). However, there is an exception that operates when a person cannot physically take or digest that medication. In such a case, a doctor is permitted to administer the medication to the person (often called voluntary euthanasia).[1] Overall, the regime is very narrow in scope and has a large number of safeguards (68 in total). This enabled the Victorian Premier and others to describe it as the 'most conservative scheme in the world'.[2]

As Victoria moves towards implementation of its VAD laws in June 2019, questions arise about whether other Australian states and territories will follow. There is considerable political activity and interest in many jurisdictions,[3–5] but whether this translates into law reform is a vexed issue. The Victorian experience, which saw an extended reform process and bitter parliamentary debate, demonstrates the major challenges of changing the law in this area. This paper considers the likelihood of future VAD reform in Australia having regard to both local and international developments. It ultimately concludes that

VAD is a 'train that has left the station'[6] in Australia, with reform likely to occur steadily but surely across the country.

Short history of reform attempts

Commonwealth, state and territory governments have been attempting to reform laws relating to VAD for more than three decades. In 1995, the Northern Territory was the first jurisdiction in the world to have operative legislation legalising VAD with the enactment of the *Rights of the Terminally Ill Act 1995* (NT). As noted above, this Act was overturned by the Commonwealth Government under its constitutional powers that relate to territory laws; that federal law still operates today to prohibit territories from passing laws about VAD.

The difficulty in effecting law reform on this topic is evidenced by the significant number of failed legislative attempts in Australia. A study of law reform efforts up to the end of 2015 documented 51 bills, introduced at the commonwealth, state and territory level, dealing with the issue of VAD.[1] Although some bills dealt with matters such as referendums to consider the issue, 39 of these bills specifically aimed to legalise VAD.

A high level of legislative activity has continued since that review, with a further seven bills being tabled from the beginning of 2016. It is interesting to observe that the bills that have been tabled over more recent years have come close to passing the relevant parliamentary chamber (or chambers) where they have been tabled. These bills include the Victorian bill that ultimately became law, the *Death with Dignity Bill 2016* (SA), which was defeated by one vote in the House of Assembly, and the *Voluntary Assisted Dying Bill 2017* (NSW), which was also defeated by a single vote in the Legislative Council. At the commonwealth level, the *Restoring Territory Rights (Assisted Suicide Legislation) Bill 2015*, a bill designed to allow territories to legislate on VAD, was defeated in the Senate by two votes in August 2018.

Recent years have also witnessed a greater investment by sitting governments with the establishment of parliamentary reviews that have been funded to undertake careful consideration of the complex issues raised at the end of life. In addition to the Victorian Parliamentary Committee that recommended the reform that preceded the VAD Act,[7] another three Australian jurisdictions have or will engage a parliamentary committee process. The Western Australia Joint Select Committee on End of Life Choices recently delivered its major report proposing, among other things, that VAD be permitted and that a government-sponsored reform process be initiated to achieve that.[4] In the Australian Capital Territory, a Select Committee on End of Life Choices has been established to inquire into VAD and other end of life issues;[3] it is due to report by 29 November 2018 as the last sitting day of the parliament. Most recently, in Queensland, the only State not to have considered a VAD bill in its parliament, the Premier announced an intention to establish a parliamentary committee to consider end of life care.[5]

Will other states follow?

The authors predict that other states will follow Victoria and permit VAD. Territories too may follow, although that will require the Commonwealth to overturn the *Euthanasia Laws Act 1997* (Cth), which prohibits territories from legalising VAD. Over the past three decades, there have been many complex factors that have combined to make reform difficult, despite ongoing public support to change the law.[8] However, there are three key factors that have become increasingly significant over time and now suggest further reform in Australia is likely: (1) international trends to permit VAD; (2) the growth of social science evidence about VAD; and (3) changing local political conditions. A fourth significant factor that will affect the prospect of wider reform is how the new Victorian VAD regime operates in practice. However, because the Victorian regime will not commence until June 2019, data on its operation are unavailable and therefore its effect on the likelihood of reform is unknown at this point.

International trends to permit VAD

There are two main parts of the world where VAD is legal: Europe and North America.[9] Europe has experienced decades of VAD with permissive legislation in the Netherlands (*Termination of Life on Request and Assisted Suicide (Review Procedures) Act 2001*), Belgium (*Act on Euthanasia 2002*) and Luxembourg (*Legislation Reglementant Les Soins Palliatifs Ainsi Que L'euthanasie Et L'assistance Au 2009*). The European model is broadly based on voluntary euthanasia or physician-assisted dying to relieve unbearable suffering. Switzerland has had a longer history of decriminalisation of assisted suicide.

In North America, VAD is permitted in the US by legislation in Oregon (*Death with Dignity Act, Ore Rev Stat §§ 127.800–127.995 1994*), Washington (*Death with Dignity Act, Wash Rev Code §§ 70.245.010–70.245.904 2008*), Vermont (*Patient Choice and Control at End of Life Act, Vt Stat Ann §§ 5281–93 2013*), California (*End of Life Option Act, Cal Health and Safety Code §§ 443–443.22 2015*), Colorado (*End-of-Life Options Act, Colo Rev Stat §§ 25-48-101 – 25-48-123 2016*), District of Columbia (*Death with Dignity Act, Law 21-577 D.C 2016*) and Hawaii (*Our Care Our Choice Act, HB 2739 2018*), as well as in Montana by court decision (*Baxter v Montana* 224 P 3d 1211 2009). The US model permits physician-assisted dying for people with a terminal illness. VAD is also lawful in Canada with *An act to amend the Criminal Code and to make related amendments to other Acts (medical assistance in dying)* (SC 2016) passing in 2016. This legislation was in response to the Supreme Court decision the year before of *Carter v Canada (Attorney General)* [2015] 1 SCR 331 (https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/14637/index.do, accessed 22 October 2018), which found that the blanket prohibition on assisting a person to die was overly broad and in breach of the *Canadian Charter of Rights and Freedoms*. The Canadian law permits 'medical aid in dying', which allows both voluntary euthanasia and physician-assisted dying for a person with a grievous and irremediable condition, and for whom a natural death is foreseeable.

In an increasingly globalised world, the growing international trend to permit VAD is important as Australian states and territories consider their positions. Some may argue that the European countries that permit VAD are different from Australia in terms of the delivery of health services, health law, policy and culture, and there may be some merit in such assertions.

However, the same cannot be said in relation to North America given our shared legal, political and cultural heritage. For example, law and policy in Canada is frequently used as a comparator by law reform bodies when considering future directions for reform in Australia. The reach of VAD in terms of population for whom this is now an option is also significant for the Australian debate. It is no longer a 'boutique' activity available only in a small number of places: approximately 37 million Canadians[10] now have VAD as an end-of-life option, and with California (population 40 million) passing its law, almost one in five Americans live in a state where VAD is lawful.[11] It is difficult for politicians to avoid the reality of these international developments.

Growth of social science evidence about VAD

A key objection to reform is that VAD poses risks to the vulnerable in society.[12] One concern raised is that of all who may be eligible under the relevant legislation, it is more likely to be the vulnerable within our society who choose to access assistance to die. Another concern is that there are some in our community, particularly the vulnerable, who will receive assistance to die even though they are not eligible under the legislative framework. This latter argument is sometimes referred to as a 'slippery slope'. However, modern debates can now draw on high-quality peer-reviewed research about how VAD regimes have been functioning over some decades, including whether vulnerable groups in society are disproportionately choosing VAD. Studies undertaken both in Europe and the US have consistently found that groups generally regarded as vulnerable are not more likely to access VAD.[13–15] There is also evidence that illegal medical practices are not more likely to occur after the legalisation of VAD.[14]

This social science evidence has been highly influential in recent law reform. In the Canadian *Carter v Canada* case, the trial judge found that it was possible to design VAD regimes that protect the vulnerable.[16] This finding of fact was not overturned by the Supreme Court of Canada on appeal. Both the Victorian[7] (p. 212) and Western Australian[4] (Finding 42, p. 181) parliamentary committees also concluded that the vulnerable need not be at risk in a properly designed VAD regime. This social science research is likely to continue to shape VAD debates, making claims about risks to the vulnerable and slippery slopes more difficult to sustain.[17] By removing or weakening a key argument against reform, there is now diminishing space or a 'shrinking battlefield' within which those opposing reform can operate.

Changing local political conditions

The sustained efforts over some decades to change the law in Australia to permit VAD are likely to continue. However, it seems that now there may be more favourable conditions for reform. Of the 39 bills aiming to legalise VAD that were introduced before 2016, only seven were described as 'close to passing', namely having support of at least 70% of the number of members required to pass the bill in the parliamentary chamber.[1] However, since 2016, a higher percentage of bills has been 'close to passing'. (Note that of the seven bills introduced since the beginning of 2016, two were Commonwealth bills that sought to restore territory powers to enact VAD legislation.) Of the five bills seeking to legalise VAD, three had either passed (Victoria) or been defeated in the relevant chamber by a single vote (South Australia and New South Wales). This may signal an increased willingness for politicians to contemplate reform. The authors anticipate that this mindset will grow now that Victoria has 'broken through the wall'.

Effect of the Victorian VAD experience

A final key factor that will be relevant for the future of VAD reform in Australia is how Victoria's law operates in practice. A particular challenge for the Victorian regime will be its complexity, with its many safeguards and processes. Some evidence will emerge from data generated by the mandated reporting and other oversight mechanisms. There will also, no doubt, be independent empirical research undertaken into its functioning. However, equally significant may be the wider public and political perceptions of the regime's success or failure. These may be based on less reliable sources, such as anecdotes or media reports, but may nevertheless be influential because political debates can sometimes be coloured by such evidence. Other Australian governments will closely watch the operation of the Victorian law, as well as community and other key stakeholder perceptions.

What VAD model will other states adopt?

In a federation such as Australia, reform at state level can occur in two ways. The first is the 'laboratory of a federation' approach where states each adopt their own model that can be adapted to reflect the particular circumstances of that state. This approach also facilitates comparative assessments of strengths and weaknesses, hence the 'laboratory' reference. The second is for states to 'follow the leader' by adopting the original model. This latter approach has been the experience in the US, with the Oregon model largely copied by the legislation in other states. It is too early to know which approach will be taken in Australia.

There may be political advantages for taking the second 'follow the leader' approach. As noted above, the Victorian VAD law is very conservative, with the focus on providing assistance to a person to die (rather than allowing doctors to administer medication except in limited circumstances) and a large number of detailed safeguards and processes. Proposing such a conservative model was a deliberate strategy to secure the required support for the bill to pass through the Victorian Parliament. Adopting this approach may also have political appeal for other state governments seeking to pass VAD laws. There may be less opposition in proposing a bill that another parliament has endorsed as an acceptable model. Displacing the default Victorian approach will require a plausible alternative.

However, there are also clear opportunities for states in adopting the 'laboratory of a federation' approach. Indeed, it would be logical to expect some departures from the Victorian model. On the one hand, it could be politically attractive to increase the safeguards and processes so that the new model is more conservative than the 'most conservative model in the world'. Commentators have argued this has happened with the

addition of new safeguards in the VAD laws that were recently passed in Hawaii.[18] Alternatively, some of the processes of the Victorian regime may be regarded as unreasonably complex and so could be removed or changed while leaving the broad legal framework intact. There are indications this could happen in Western Australia, with its Parliamentary Committee report indicating a different view on some aspects of the Victorian law, such as the prohibition on doctors raising VAD as a possible option.[4] A further option would be to depart from the Victorian model by allowing doctors to provide assistance to die if so requested by the patient, rather than the role being limited to the prescription of medication.

Decisions about variations of the Victorian model (and indeed whether to adopt it at all) will, of course, be informed by how the regime operates in practice. This is currently an unknown. But states engaging in reform further down the track will have access to more evidence from Victoria (and different VAD models internationally) to inform deliberations.

Conclusion

VAD in Australia is 'a train that has left the station'. International trends, growing Australian political support (coupled with strong and continued community expectation) and the weakening of key opposing arguments all point to other states following Victoria's lead by legalising VAD. It will be interesting to observe whether the next states will adopt (or just tweak) the Victorian model, whether they will take an even more conservative path or whether they will throw off the shackles of conservatism and adopt the more liberal Canadian model. The authors consider it very unlikely that the European regimes of Belgium and the Netherlands will be serious contenders in Australia.

As the discussion shifts from if VAD becomes lawful to when it will become lawful, questions of timing arise. This is necessarily speculative because when there would be sufficient consensus within a parliament for the law to change depends on so many factors, including the political party in power and the individuals in the parliament (given it is likely to be a conscience vote).[1] However, we may reasonably expect the same sort of trends seen in the uptake of other initiatives (including health policy initiatives) with an early adopter (Victoria), a middle majority and perhaps a laggard.

A concluding comment is to note that despite the suggestions that reform is travelling in the direction of legalising VAD, we should expect surprises in the politics of assisted dying. The heated debates last year in the Victorian Parliament about VAD laws revealed a depth of raw emotion from many politicians.[19] The late changes of position that saw support for reform recently disappearing in the parliaments of South Australia and the Commonwealth also show how illusory the task of securing and maintaining consensus on VAD reform is. Although reform in other Australian states is likely, that train journey will be one that is slow, uphill and with plenty of twists and turns.

Competing interests

The authors (with colleagues) are providing the mandatory training under the *Voluntary Assisted Dying Act 2017* (Vic) for doctors participating in VAD. Lindy Willmott is also a board member of Palliative Care Australia. This article represents only the authors' views.

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References

1 Willmott L, White B, Stackpoole C, Purser K, McGee A. (Failed) Voluntary euthanasia law reform in Australia: two decades of trends, models and politics. *Univ N S W Law J* 2016; 39: 1–46.

2 State of Victoria. Voluntary assisted dying model established ahead of vote in Parliament. [Media release] 2017. Available at: https://www.premier.vic.gov.au/voluntary-assisted-dying-model-established-ahead-of-vote-in-parliament/ [verified 18 September 2018].

3 ACT Legislative Assembly. Select committee of end of life choices in the ACT. 2017. Available at: https://www.parliament.act.gov.au/in-committees/select_committees/end-of-life-choices [verified 18 September 2018].

4 Joint Committee on End of Life Choices. My life, my choice. Perth, WA: The Parliament of Western Australia; 2018.

5 Burke G, Gartry L. Voluntary euthanasia inquiry announced in Queensland, issue must be confronted Premier says. *ABC News*, 2 Sep 2018. Available at: https://www.abc.net.au/news/2018-09-02/voluntary-euthanasia-inquiry-in-queensland/10192716 [verified 22 October 2018].

6 Pope TM. Legal history of medical aid in dying: physician assisted death in US courts and legislatures. *N M Law Rev* 2018; 48: 267–301.

7 Legislative Council Legal and Social Issues Committee. Inquiry into end of life choices final report. Melbourne, Vic.: Parliament of Victoria; 2016.

8 Cartwright C. FactCheck Q&A: do 80% of Australians and up to 70% of Catholics and Anglicans support euthanasia laws? *The Conversation* 1 May 2017. Available at: http://theconversation.com/factcheck-qanda-do-80-of-australians-and-up-to-70-of-catholics-and-anglicans-support-euthanasia-laws-76079 [verified 22 October 2018].

9 Willmott L, White B. Assisted dying in Australia: a values-based model for reform. In: Freckelton I, Petersen K, editors. Tensions and traumas in health law. Annandale: The Federation Press; 2018. pp. 484–8.

10 Statistics Canada. Table 17-10-0009-01. Population estimates, quarterly. Ottawa: Statistics Canada; 2018. Available at: https://www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=1710000901 [verified 30 October 2018]

11 Pope TM. D.C. Death with Dignity Act – Still under attack in Congress. Medical Futility Blog. 20 July 2018. Available at: http://medicalfutility.blogspot.com/2018/07/dc-death-with-dignity-act-still-under.html [verified 2 November 2018].

12 Sprung CL, Somerville MA, Radbruch L, Steiner Collet N, Duttge G, Piva JP, Antonelli M, Sulmasy DP, Lemmens W, Ely EW. Physician-assisted suicide and euthanasia: emerging issues from a global perspective. *J Palliat Care* 2018; 33: 197–203. doi:10.1177/0825859718777325

13 Rietjens JA, Deschepper R, Pasman R, Deliens L. Medical end-of-life decisions: does its use differ in vulnerable patient groups? A systematic review and meta-analysis. *Soc Sci Med* 2012; 74: 1282–7. doi:10.1016/j.socscimed.2011.12.046

14 Emanuel EJ, Onwuteaka-Philipsen BD, Urwin JW, Cohen J. Attitudes and practices of euthanasia and physician-assisted suicide in the United States, Canada and Europe. *JAMA* 2016; 316: 79–90. doi:10.1001/jama.2016.8499

15 Blanke C, LeBlanc M, Hershman D, Ellis L, Meyskens F. Characterizing 18 years of the Death with Dignity Act in Oregon. *JAMA Oncol* 2017; 3: 1403–6.

16 *Carter v Canada (Attorney General)* [2012] BCSC 886 [852], [1242]. Available at: https://www.canlii.org/en/bc/bcsc/doc/2012/2012bcsc886/2012bcsc886.html [verified 2 November 2018].

17 Downie J. Social science and humanities evidence in Charter litigation: lessons from Carter v Canada (Attorney General). *Int J Evid Proof* 2018; 22: 305–13. doi:10.1177/1365712718787523

18 Buchbinder M, Pope TM. Medical aid in dying in Hawaii: appropriate safeguards or unmanageable obstacles? Bethesda, MD: Health Affairs; 2018. Available at: https://www.healthaffairs.org/do/10.1377/hblog20180808.14380/full/ [verified 18 September 2018].

19 Alcorn G. Victoria poised to become first Australian state to legalise assisted dying after historic vote. *The Guardian* 22 November 2017. Available at: https://www.theguardian.com/society/2017/nov/22/victoria-to-become-first-australian-state-to-legalise-euthanasia-after-historic-vote [verified 30 October 2018].