



## Précis Paper

### Voluntary Assisted Dying Act 2017 (Vic)

A discussion of Victoria's Voluntary Assisted Dying Act 2017 – which sets out to provide for, and regulate access to, voluntary assisted dying – and the eligibility criteria, and application and review process that it proposes

#### **Discussion Includes**

- Background
- Criteria to be satisfied to qualify for voluntary assisted dying under the new legislation
- Issues of voluntariness, undue influence, and unconscionability
- Changes made to the Bill to ensure crossbench support
- What provision is made for reviews and appeals?
- What protections exist for doctors who may not want to be involved in the scheme?
- Conclusion

## Précis Paper

### Voluntary Assisted Dying Bill 2017 (Vic)

1. In this edition of BenchTV, Peter Willis SC (Barrister, Aickin Chambers, Victoria) and Ian Benson (Solicitor, AR Conolly & Company Lawyers) discuss Victoria's Voluntary Assisted Dying Act 2017, and the eligibility criteria, and application and review process, which it proposes.

#### Background

2. Victoria's Voluntary Assisted Dying Act 2017 (the 'Bill') is the second time in Australia that legislation has been passed which permits somebody who is of sound mind voluntarily to ask to be given a substance that will end their life, and to do so in circumstances which will not make it a criminal offence for anyone who participates or assists them, within in the parameters laid down in the law
3. Back in the 1990s, the Northern Territory government passed such a law. It lasted for about 18 months until the Federal Parliament in 1997, exercising the Territories Power of the Constitution, rescinded the law. Victoria is of course immune from any such Commonwealth interference or oversight.
4. Peter was retained to critique the Bill. He was opposed to the Bill, particularly in the form in which it was introduced. That is not to say that it had not been prepared with considerable care by those who were its proponents. Indeed, it was much trumpeted as having the tightest controls and protections against abuse of any legislation of this kind throughout the world.
5. Peter's assessment of it, nonetheless, is that it is insufficient. Peter found it to contain legal difficulties, and to raise questions of public policy.
6. There have been some 30 attempts in Australia in the last 25-30 years to introduce euthanasia or voluntary assisted dying legislation. Interestingly, this was only the second attempt in Victoria.
7. The Bill was introduced and passed over the course of 2-3 months, with very high levels of public interest. It was a conscience vote, as a matter of form, and many members of Parliament agonised over it.
8. Perhaps this Bill will serve as a case study of how exactly new laws of a radical or controversial nature come to be introduced.

9. There had been a longstanding campaign in the Victorian media by a well-known and well-connected medical practitioner to educate the public about this issue. A parliamentary committee of the Victorian Legislative Council was instituted, and inquired into end of life choices. It produced a very thorough and detailed report after a thousand submissions were received and public hearings were held.
10. It made 49 recommendations, of which 48 were unanimous, and which included recommendations about improvements in palliative care, resources, and education. The last recommendation was for the introduction of legislation to permit voluntary or physician-assisted dying under appropriate safeguards, which was hotly contested.
11. The State Government, receiving the report, accepted many of the unanimous recommendations, but said that it did not have enough detail about the last recommendation to legislate.
12. The Minister for Health then appointed a well-credentialed panel, chaired by Sydney neurosurgeon Professor Brian Owler, and otherwise made up of medical, nursing, palliative care, public guardianship and advocacy professionals.
13. The Owler Committee then produced the blueprint for the Bill, which was introduced as a government measure, and was then subject to a conscience vote, which happens relatively rarely. The Bill fairly closely followed the Committee's recommendations, but with one particular (and in the end unsuccessful) departure, which was the period of time within which a person who wishes to take advantage of the Act must be expected to die.
14. The Bill as introduced allowed a person with a medical diagnosis that predicted death to occur within 12 months to take advantage of the Bill. The recommendation in the Committee's report had suggested a 6 month time frame to be appropriate. In the end, the proponents of the Bill were forced to concede on this point in order to secure the Bill's necessary passage through the Victorian Legislative Council, and a compromise was reached, whereby for ordinary patients (that is, persons suffering from cancer, or some other incurable disease which is expected to take the life of the person) the period of diagnosis was agreed to be 6 months.
15. There is one exception to this, and the 12 month time frame remains for those who are diagnosed with motor neurone disease.

#### Criteria to be satisfied to qualify for voluntary assisted dying under the new legislation

16. In order to take advantage of the Act, a person is required to:
  - be a resident of Victoria for at least 12 months
  - have full decision-making capacity

- have a terminal illness, as diagnosed by a competent medical physician or practitioner, and be enduring suffering to the extent that he or she feels is unbearable
17. Originally, the person was only required to be 'resident in Victoria'. Peter criticised this requirement for being too loose. As a result of the criticisms, the legislation was amended to require the person to have been a resident of Victoria *for at least 12 months*.
  18. The second requirement – that is, for the person to have full decision-making capacity – comes with a rider, which is that a person is not disqualified from having decision-making capacity for the purposes of this requirement by the mere fact that he or she suffers a formally diagnosed mental illness (as defined by general Victorian legislation). The rider was controversial, but it nevertheless passed.
  19. The scheme then has a detailed three-stage process of assessment and double-checking of some of the medical parts of the threshold requirements. What is much emphasised in the legislation is the requirement for a voluntary and enduring request to be prescribed a poison which will have the effect of killing oneself.

#### Issues of voluntariness, undue influence, and unconscionability

20. In assessing voluntariness of the request, physicians who receive the request (usually a GP in the first instance, and a consultant specialist in the second) are required to be satisfied that the request made is voluntary and without undue influence.
21. To Peter's mind, the difficulty lies in the legislation's use of a technical legal concept ('undue influence'), which happens to be part of a suite of concepts from the law of contract, and the law of wills and estates. To Peter's mind, the risk is that these protections will be confined by reference to these classic concepts, when really we should have some more overarching protection against what is recognised in other literature, and certainly in the law, as elder abuse.
22. A person, after having gone through all the assessment processes, having satisfied all the requests, and having so far been assessed as eligible under the scheme, makes their final request - which is to be prescribed the substance that will end their life
23. These stages are required to be witnessed. They have to be witnessed by two persons, one of whom can be a family member, but neither of whom can knowingly be a beneficiary under the will or estate of the patient.
24. An additional protection of the Act is that a person cannot give a request in advance for voluntary assisted dying (a person still needs to have their full decision-making capacity).

The capacity for patients to give an 'advanced medical directive' is not subsumed under this Act.

#### Changes made to the Bill to ensure crossbench support

25. Four principal changes were made in order to secure a group of upper house MPs:
  - changing the period of diagnosis from 12 months to 6 months
  - restoring the jurisdiction and general oversight of the coroner to investigate deaths occurring as a consequence of ingesting a prescribed substance which causes death
  - establishing a minimum period of residency in Victoria (12 months) in order to qualify under the Act
  - changing how deaths are recorded on death certificates
26. In relation to the last point, originally it was proposed that deaths occurring by way of voluntary assisted dying would not be recorded as such, and instead, the cause of death would be recorded as the underlying medical condition from which the patient would otherwise have died.
27. This was considered to be untruthful, and inimical to the function and necessary public interest in recording accurately the causes of death on a death certificate. A compromise was reached: that is, the cause of death is to still be recorded as the underlying medical condition, but with a notation cross-referring to the voluntary assisted dying process.
28. The legislation was assented to in December 2017, 10 days or so after passage.
29. It comes into force on a day to be proclaimed. The backstop date as set out in the Act is June 2019, which gives the community and relevant professions (particularly medical) time to establish the necessary procedures and to conduct the requisite training

#### What provision is made for reviews and appeals?

30. The provision for review is to apply to the Victorian Civil and Administrative Tribunal, which exercises the primary jurisdiction within Victoria in guardianship matters. The process of review is slanted towards allowing a patient, who has otherwise been denied the necessary certification, to qualify for voluntary assisted dying.
31. So the first ground for appeal or review of a decision is available to the person who is directly affected by the eligibility criteria under the Act. Other persons are able to seek review of a particular decision – this is only generally expressed in the Act,

#### What protections exist for doctors who may not want to be involved in the scheme?

32. There is express provision for conscientious objection, which is an important and necessary step (bearing in mind it is a fundamental human right). The right of conscientious objection under this scheme is recognised in s 9. It is limited in a sense to registered medical practitioners (including doctors, nurses and pharmacists); it does not deal with the employing hospital or corporate institution within which such persons may be practising or employed.
33. Importantly, and in comparison to other legislation in Victoria, there is no requirement that a medical practitioner, who has a conscientious objection, refer the patient on to somebody else.

### Conclusion

34. There is still a fair amount of time until the legislation comes into effect in Victoria. In that time, there is a lot of work to be done, and many promises to be fulfilled by government in terms of providing additional resources for palliative care, additional training, additional research, and additional procedures and protocols for medical practitioners who will necessarily be involved in the scheme.
35. Although the model is not perfect, and it is not a panacea for all difficult or upsetting processes of death, it certainly has many formal and rigorous controls. Whether they are all as effective as they are made out to be, only time will tell.

## **BIOGRAPHY**

### Peter Willis SC

Barrister, Aickin Chambers, Victoria

Peter Willis was called to the Bar in 1999 before taking silk in 2015. Prior to joining the Bar, he was a partner of Mallesons Stephen Jaques. Peter's distinguished and diverse legal career also led him to serve as Ministerial Adviser to two Federal Attorneys-General. Peter is an Executive Committee member of the International Law Association Victorian Chapter and Australian representative on the ILA's International Securities Regulation Committee of experts. He is also a Senior Advisor to Transparency International Australia.

### Ian Benson

Solicitor, AR Conolly and Company

Ian Benson is a solicitor at AR Conolly and Company and holds a First Class Honours degree in law.