

9 November 2020

The Hon. Jill Hennessy MP  
Attorney-General  
Level 26, 121 Exhibition St  
Melbourne VIC 3000

By email only to: [jill.hennessy@parliament.vic.gov.au](mailto:jill.hennessy@parliament.vic.gov.au)

CC: The Hon. Martin Foley, Victorian Minister for Health  
[minister.health@health.vic.gov.au](mailto:minister.health@health.vic.gov.au)

Dear Attorney,

**Seeking clarification: voluntary assisted dying & potential breach of the  
*Criminal Code Act 1995 (Cth)***

**Issue**

The Law Institute of Victoria ('LIV') is concerned that Victorian health practitioners may face criminal prosecution for discussing voluntary assisted dying ('VAD') under the *Voluntary Assisted Dying Act 2017 (Vic)* with patients via a carriage service such as over the phone, via email or through the use of telehealth. The Department of Health and Human Services Victoria ('DHHS') currently advises that this could be a breach of sections 474.29A and 474.29B of the *Criminal Code Act 1995 (Cth)*<sup>1</sup> ('the **Criminal Code**'), and therefore all discussions, consultations and assessments with patients, family and carers regarding VAD must occur face-to-face.

**Correspondence with AHPRA**

On 25 September 2020, the LIV wrote to the Australian Health Practitioner Regulation Agency ('AHPRA') ('**Attachment A**'). This letter sought clarification of whether AHPRA considers that provision of information about VAD via a carriage service would be in breach of section 474.29A or 474.29B of the Criminal Code, and if so, whether AHPRA would take disciplinary action and/or refer a health practitioner to the Federal Police for a possible prosecution. In that letter, the LIV also referred to two legal documents, which legally distinguished a voluntary assisted death from

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<sup>1</sup> Department of Health and Human Services Victoria, 'Voluntary assisted dying – guidance for health practitioners' (July 2019)  
<[file:///C:/Users/miche/Downloads/Voluntary%20assisted%20dying%20guidance%20for%20health%20practitioners%20\(2\).pdf](file:///C:/Users/miche/Downloads/Voluntary%20assisted%20dying%20guidance%20for%20health%20practitioners%20(2).pdf)> 74.

suicide, and concluded that provision of information about VAD via a carriage service does not contravene the Criminal Code.

On 15 October 2020, the LIV received a response from AHPRA (**'Attachment B'**). The response notes the following:

*"If there are different legal views about the application of the Criminal Code in this situation we agree that clarification would be helpful for medical practitioners, particularly given the current impacts of COVID-19 and the increased necessity for telehealth consultations with patients. We would welcome the opportunity to publish further guidance for practitioners if the application of the Criminal Code can be further clarified. However, **the Commonwealth and Victorian governments, which are responsible for administering their respective legislation, are in the best position to provide further clarity**"* (my emphasis).

#### **Need for clarification**

AHPRA's letter reflects the LIV's concern that clarification is urgently required, particularly in light of the increase in telehealth due to the current impacts of COVID-19 and the likelihood that telehealth will remain after the pandemic has passed.

Voluntary assisted dying legislation is due to commence operation in Western Australia in 2021. It is being debated in New South Wales, South Australia and Tasmania. The Queensland Government has announced it will introduce voluntary assisted dying legislation. The problem caused by the wording of sections 474.29A and 474.29B of the Criminal Code in the LIV's view needs to be addressed at a national level.

The LIV kindly requests that you seek to include this issue on the agenda for the next national meeting of attorneys-general or the National Cabinet.

If there is any aspect of this correspondence that you would like to discuss further, please contact Michelle Luarte, Policy Lawyer to the Disability, Elder and Health Law Section (03 9607 9413 or [MLuarte@liv.asn.au](mailto:MLuarte@liv.asn.au)), or Alexander Laurence, Paralegal to the Disability, Elder and Health Law Section (03 9607 9565 or [ALaurence@liv.asn.au](mailto:ALaurence@liv.asn.au)).

Yours sincerely,



Sam Pandya  
**President**  
Law Institute of Victoria  
enc.

25 September 2020

**Mr. Chris Robertson**

Executive Director, Strategy and Policy  
Australian Health Practitioner Regulation Agency

CC: Clarissa Martin, State Manager of Victoria

By email only: [Chris.Robertson@ahpra.gov.au](mailto:Chris.Robertson@ahpra.gov.au); [Clarissa.Martin@ahpra.gov.au](mailto:Clarissa.Martin@ahpra.gov.au)

Dear Mr. Robertson

**Voluntary assisted dying & potential breach of the Criminal Code**

**Issue**

The Law Institute of Victoria ('LIV') is concerned that AHPRA may take unwarranted disciplinary action against Victorian health practitioners for discussing voluntary assisted dying ('VAD') under the *Voluntary Assisted Dying Act 2017* (Vic) with patients, via a carriage service such as over the phone, via email or through the use of telehealth. The Department of Health and Human Services Victoria ('DHHS') currently advises that this could be a breach of sections 474.29A and 474.29B of the *Criminal Code Act 1995* (Cth)<sup>1</sup> ('**the Criminal Code**').

**Legal arguments**

The LIV refers to the following documents, which legally distinguish a voluntary assisted death from suicide, and conclude that telecommunications about VAD via a carriage service do not contravene the Criminal Code.

- **Attachment A:** Cameron Stewart et al, 'Suicide-related materials and Voluntary Assisted Dying' (2020) 27 (4) *The Journal of Law and Medicine* 839.
- **Attachment B:** Letter from Western Australian Attorney-General the Hon. John Quigley to Australian Attorney-General the Hon. Christian Porter, titled 'Voluntary Assisted Dying Bill 2019 (WA) and the Criminal Code Act 1995 (Cth)'.

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<sup>1</sup> Department of Health and Human Services Victoria, 'Voluntary assisted dying – guidance for health practitioners' (July 2019)  
<[file:///C:/Users/miche/Downloads/Voluntary%20assisted%20dying%20guidance%20for%20health%20practitioners%20\(2\).pdf](file:///C:/Users/miche/Downloads/Voluntary%20assisted%20dying%20guidance%20for%20health%20practitioners%20(2).pdf)> 74.

## Clarification

The LIV seeks clarification on the following issues:

- whether the Australian Health Practitioner Regulation Agency ('AHPRA') considers that a health practitioner, who provides a patient with information about VAD via a carriage service, such as over the telephone, via email or through the use of telehealth in accordance with the *Voluntary Assisted Dying Act 2017* (Vic), is in breach of section 474.29A or 474.29B of the Criminal Code;
- if so, whether AHPRA would:
  - take disciplinary action against a health practitioner in the above circumstances, including for unsatisfactory professional conduct or professional misconduct;
  - refer a health practitioner to the Federal Police for a possible prosecution;
- consider that it was in the public interest to take disciplinary action against a health practitioner in the above circumstances<sup>2</sup>; and
- whether AHPRA has any policy position on prosecuting a health practitioner in the above circumstances, under the Health Practitioner Regulation National Law.

The LIV submits that clarity on this issue is urgently required, particularly in light of COVID-19 restrictions which have resulted in an exponential increase in telehealth consultations by health practitioners and the curtailing of a health practitioner's ability to have face-to-face VAD discussions with patients. The inability to have such discussions electronically also restricts access to VAD advice for seriously ill patients in rural and regional areas of Victoria.

The LIV understands the medical profession through the Australian Medical Association ('AMA') has already expressed concerns to the Commonwealth Attorney General and remain deeply concerned about the lack of clarity and exposure for medical practitioners supporting their patient's needs in the current pandemic as well as those in remote or extreme circumstances.

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<sup>2</sup> Australian Health Practitioner Regulation Authority, 'Prosecution Guidelines' (July 2019) [file:///C:/Users/miche/Downloads/AHPRA---Guidelines---Prosecution-Guidelines%20\(2\).PDF](file:///C:/Users/miche/Downloads/AHPRA---Guidelines---Prosecution-Guidelines%20(2).PDF).

This letter is informed by members of the LIV Disability, Elder and Health Law Section and the Joint LIV/AMA/VicBar Medico Legal Standing Committee. If there is any aspect of this correspondence that you would like to discuss further, please contact Michelle Luarte, Policy Lawyer to the Disability, Elder and Health Law Section (03 9607 9413 or [MLuarte@liv.asn.au](mailto:MLuarte@liv.asn.au)), or Alexander Laurence, Paralegal to the Disability, Elder and Health Law Section (03 9607 9565 or [ALaurence@liv.asn.au](mailto:ALaurence@liv.asn.au)).

Yours sincerely,

A handwritten signature in black ink, appearing to read 'S. Pandya', with a stylized flourish at the end.

Sam Pandya  
**President**  
Law Institute of Victoria

enc.



15 October 2020

Sam Pandya  
President  
Law Institute of Victoria  
Email: [President@liv.asn.au](mailto:President@liv.asn.au)

Dear Mr Pandya

### **Voluntary assisted dying and potential breach of the Criminal Code**

Thank you for your letter dated 25 September 2020 raising concerns about how medical practitioners may be impacted by the interaction between *Voluntary Assisted Dying Act 2017* (Vic) (Victorian VAD legislation) and the *Criminal Code Act 1995* (Cth) (the Criminal Code).

In particular we note your concern that unwarranted disciplinary action might be taken against medical practitioners for discussing voluntary assisted dying with patients, via a carriage service such as over the phone, via email or through the use of telehealth, which you consider could breach sections 474.29A and 474.29B of the Criminal Code.

The Australian Health Practitioner Regulation Agency (Ahpra) and the Medical Board of Australia (Board) have not published detailed guidance for practitioners about the application of the Victorian VAD legislation.

In January 2020 the Board provided an alert to medical practitioners about the Victorian VAD legislation through the Board's [newsletter](#). The Board encouraged Victorian medical practitioners to review the Act and familiarise themselves with its requirements, and also referred practitioners to the Victorian Department of Health and Human Services ([DHHS website](#)) for further information.

In developing policy guidance for practitioners Ahpra and the Board are careful to appropriately reflect, and not contradict or go beyond, legislation or advice published by Commonwealth, State or Territory health departments, especially where these departments are responsible for administering relevant legislation. In cases where there are potential inconsistencies between legislation in different jurisdictions, we would generally direct practitioners to consult with their professional indemnity insurer and professional association for further guidance.

We have not yet had to consider this situation in relation to a notification about a practitioner. When we receive a concern about a practitioner we consider all the circumstances of the particular case to determine whether the conduct was or may have been unprofessional. If a concern is raised with us about whether a practitioner had breached any criminal legislation, we would not investigate that alleged breach and would leave that to be determined by the relevant police service. If we were notified the police service laid charges, we would consider whether regulatory action was necessary at that point.

Before we take any action we ensure that a practitioner has the opportunity to make submissions, and the application of the Criminal Code in the context of the VAD legislation may be a relevant issue for a practitioner to raise in appropriate circumstances. If the issue was raised in this context, that would be the appropriate time for AHPRA and the Board to further examine this issue and consider all circumstances in deciding how to approach the issue.

If there are different legal views about the application of the Criminal Code in this situation we agree that clarification would be helpful for medical practitioners, particularly given the current impacts of COVID-19 and the increased necessity for telehealth consultations with patients. We would welcome the opportunity

Australian Health Practitioner Regulation Agency  
National Boards  
[GPO Box 9958 Melbourne VIC 3001](mailto:GPO.Box.9958.Melbourne.VIC.3001) [Ahpra.gov.au](http://Ahpra.gov.au) 1300 419 495

Ahpra and the National Boards regulate these registered health professions: Aboriginal and Torres Strait Islander health practice, Chinese medicine, chiropractic, dental, medical, medical radiation practice, midwifery, nursing, occupational therapy, optometry, osteopathy, paramedicine, pharmacy, physiotherapy, podiatry and psychology.

to publish further guidance for practitioners if the application of the Criminal Code can be further clarified. However, the Commonwealth and Victorian governments, which are responsible for administering their respective legislation, are in the best position to provide further clarity.

I hope this information is helpful. Please contact me at [Chris.Robertson@ahpra.gov.au](mailto:Chris.Robertson@ahpra.gov.au) or 0413 247 996 if you would like to discuss this further.

Yours sincerely

A handwritten signature in black ink, appearing to read "Chris Robertson". The signature is written in a cursive, slightly slanted style.

**Chris Robertson**  
Executive Director  
Strategy and Policy