JOINT SELECT COMMITTEE ON END OF LIFE CHOICES (WA)

INQUIRY INTO END OF LIFE CHOICES

Submission by
Nicholas Cowdery AM QC[1]

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My submission is that the Committee should recommend to the Parliament of Western Australia that laws should be made that allow citizens to make informed decisions regarding their own end of life choices and enable those decisions to be implemented.

I make that submission from the professional perspective of one who has spent 48 years in criminal justice in various capacities (as a professional assistant preparing Commonwealth prosecutions, as a public defender in Papua New Guinea, as a Barrister in NSW and elsewhere, as an acting Judge, as Director of Public Prosecutions, as a consultant and as a teacher). I am not drawing upon any personal experience of persons facing end of life choices, although I have known some and I am generally aware of the issues that arise. In more recent times I have spoken and written on the issues before the Committee in support of the submission made above, particularly as they concern NSW.

My submission is directed principally towards terms of reference (b) and (c).

CRIMINAL LAW

Crime is created by lawmakers. Ever since humans came to live together we have needed rules for our conduct, in order to live together harmoniously and to have ways of resolving disputes that inevitably arise. Those rules are often enacted in our laws. Criminal laws are the rules that deal with matters arising in our relationships that are thought appropriate to be regulated and enforced by the state for the greater good, usually to prevent harm. Traditionally crimes have been regarded as offences against society generally, not just against any direct victims.

How we die is considered to be a suitable subject for the criminal law because of the impact that particular actions and practices attending it might have on society's standards and principles and our ability to share life. Inevitably criminal laws intersect with other systems of rules based on morals, ethics, religion and philosophy. But criminal laws apply to all of us – they cannot be evaded by reliance upon other codes.

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Life has a beginning and an end. Most of us do not know in advance when or how the end will come; but I would argue that, in particular circumstances, some should be allowed to know that and indeed to choose it.

One of the pre-eminent international standard-setters for human rights, the International Covenant on Civil and Political Rights (ICCPR) came into force in 1976 and Australia is a party to it and enforces the principles it lays down. Article 6(1) says:

> "Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life."

It seems simple enough – the right to life is the starting point for a civilised human existence. The right is non-derogable, meaning that it cannot be laid aside no matter how severe and threatening a crisis confronting a nation may be. When it is said that this right "shall be protected by law", however, does it mean that a state cannot legislate even to allow it to be qualified in certain conditions? I think not. When it is said that "No one shall be arbitrarily deprived of his life", how far does "arbitrarily" extend? Does a law enabling the right to be qualified constitute "arbitrary" action by a state? I think not. And whose right is it, anyway – is it a mandatory right that even the right-holder cannot abrogate; or is it a discretionary right that he or she may waive, especially by informed consent?

Legal scholars have expounded on these matters at great length before and since 1976 without consensual resolution. But we need to be aware of the existence and force of this provision because some argue (incorrectly, in my view) that even the right-holder cannot waive or qualify it and to attempt to do so might be beyond power.

We talk about "voluntary euthanasia", "medically assisted death", "physician assisted death", "assisted suicide" and so on – what might happen is described in various ways. I prefer the description "voluntary assisted dying" which seems now to be adopted in other jurisdictions (eg Victoria and NSW), because I think it focuses on the elements of the conduct involved. Nobody is suggesting that causing involuntary death of any kind should be allowable. Those elements that need to be considered are:

- voluntary, being the product of informed consent, free and voluntary agreement by a person with capacity to give it to the action that will end life;
- assisted, involving the conduct of another party, whose position must then be appropriately protected; and
- dying, by the ending of one's own life by oneself, even if another party assists or is the agent providing the cause of death. This is indeed "suicide" – the killing of oneself. Many choose to avoid the term, but the law does not.

In the present criminal law regime the offences of murder, manslaughter and aiding suicide (especially) arise for consideration whenever voluntary assisted dying may have occurred or have been contemplated. We need laws for those offences, of course – but should they be modified to meet different sets of circumstances? I think so.

I draw from the NSW context in the discussion of laws below.

Murder deals with the situation where the person causing death (or administering the cause of death) intended to kill or to do grievous bodily harm or was reckless as to causing death, having turned his or her mind to that probability (or was in the process of committing another serious offence, which does not apply here). You can see that, for example, a person administering to another a drug with the intention that it should end that person's life and it does, is committing murder – whether that be a doctor, nurse, family member or friend and regardless of the wishes, views, intentions or expressions of the deceased. You cannot consent to be killed by someone else so as to excuse that person from criminal liability. The position is therefore brutally simple and there is no way around that. People assisting the person who causes death, if they have the right mental state, are also committing offences.

Manslaughter deals with all other unlawful homicides (except infanticide and suicide), usually committed as a result of dangerous and unlawful acts or in conditions of seriously negligent conduct. That does not usually arise in the circumstances we are discussing here, although it might be possible to imagine a case.

Suicide is no longer a criminal offence (in NSW, section 31A of the *Crimes Act* 1900) – but it was. So a person who independently successfully causes his or her own death, without the direct causative involvement of anyone else, is not committing an offence. But if he or she is unsuccessful, then the offence of attempted suicide is committed. It should be noted that the deliberate refusal of treatment is not an offence, regardless of the consequences.

Aiding or abetting suicide or attempted suicide are still serious offences, carrying maximum penalties (in NSW) of 10 years imprisonment (section 31C of the *Crimes Act* 1900). Inciting or counselling suicide, as a consequence of which the person commits or even attempts to commit suicide, carries 5 years imprisonment. (Any survivor of a partially successful suicide pact may be guilty of the same offence.) So if someone even encourages another to take the actions that will cause that person's death, an offence is committed.

There is probably a legitimate social purpose in seeking to discourage people generally from killing themselves or encouraging others to kill themselves and so it may be argued that even that law has a role to play. But the question is whether it should apply to all cases of suicide, including voluntary assisted dying.

CRIMINAL LAW DEVELOPMENT

It is important to acknowledge that the criminal law develops and changes over time, in order to accommodate changes in society and in accordance with changes in the will of the people. It usually lags a little behind the pace, but that is no bad thing. Conservative development is preferable to sudden and perhaps ill-thought change that becomes problematic. Social factors, including changes in social mores, guide and motivate such changes.

I think it is time for change in the area we are discussing and some of the factors indicating that are:

- improved standards of general education in the community – people are in a better position to seek relevant information and to make informed judgments;
- the ageing of the population – people become more susceptible to certain life-threatening diseases of ageing and more people live longer with serious incapacities;

- advances in medical science, improving ways of prolonging life and of ending it peacefully;
- changes in social attitudes to matters of choice;
- weakening of the influence of religion in the community and in lawmaking; and
- legal developments in this area in cognate jurisdictions and similar societies.

A view from the past is reflected in a UK House of Lords Select Committee on Medical Ethics report in 1993/4 which said:

> "We do not think it is possible to set secure limits on voluntary euthanasia. It would be impossible to frame safeguards against non-voluntary euthanasia if voluntary euthanasia were to be legalised. It would be next to impossible to ensure that all acts of euthanasia were truly voluntary, and that any liberalisation of the law was not abused. Moreover, to create an exception to the general prohibition of intentional killing would inevitably open the way to its further erosion, whether by design, by inadvertence, or by the human tendency to test the limits of any regulation. These dangers are such that we believe that any decriminalisation of voluntary euthanasia would give rise to more and more grave problems than those it sought to address."

That passage identifies some concerns that were felt then about the integrity of voluntary assisted dying; but fortunately those dire prognostications have not been borne out in practice where it has been allowed. Even in the UK the view has shifted in subsequent House of Lords inquiries (and elsewhere) and on the criminal law front the DPP for England and Wales has issued a Policy for Prosecutors in Respect of Cases of Encouraging or Assisting Suicide: http://www.cps.gov.uk/publications/prosecution/assisted_suicide_policy.html

Lawful voluntary assisted suicide of one description or another has been introduced (as I understand) in six of the United States (California, Colorado, Montana, Oregon, Vermont and Washington) and in Belgium, Canada, Luxembourg and the Netherlands. Switzerland has had it for decades. The "slippery slope" or "floodgate" fears of the House of Lords have not been realised anywhere and stringent legal requirements have been formulated that appear to be achieving the socially desired ends.

In contemplating change to the law in this area one must ask: what is the harm that the present state of the law is intended to ameliorate? One then must ask: what harm(s), if any, would a changed law introduce – and if there are any, what measures can be put in place to eliminate or mitigate them?

REQUIREMENTS OF A LAW

In my view any new law to address end of life choices must address at least the following matters:

- the preconditions for its operation: age, (possibly) residence, nature of disease or condition, symptoms, incapacity, prognosis, terminality.

- the capacity of the person involved to freely, voluntarily and after due consideration, understand the facts relevant to his/her illness and condition, the medical treatment and care options available, the consequences of a decision to end life and their impact and to communicate decisions.

- the relationship between the person and relevant medical practitioner(s).

- involvement and assessment by medical practitioner(s) – number, qualifications.

- procedural steps to be taken.

- legal protection of medical practitioner(s), including provisions relating to conscientious objection to participation.

- availability and supply of drug(s).

- means of administration of drug(s).

- protection from manipulation of the person or the process, especially by any person likely to benefit from the death – including creation of criminal offences for breach.

- ability to withdraw from the arrangement; cooling off periods.

- ability of related persons to challenge the process in the Supreme Court.

BILLS

The Bill introduced in the NSW Parliament on 21 September 2017, in my view, frames appropriate safeguards against abuse – in my view it fills the present gaps and provides an excellent model for future reform: https://www.parliament.nsw.gov.au/bills/DBAssets/bills/BillText/3422/b2016-044-d30_House.pdf. It is aligned with the legislation that works seemingly well in the US State of Oregon. It also creates a Voluntary Assisted Death Review Board to monitor the operation of the law.

The Victorian Bill introduced on 20 September 2017 is, in my view, overly cautious. On top of the NSW provisions there are over 60 protections of various kinds for various actors that are built into the Bill in an apparent attempt to address all possible risks and to include all possible safeguards that may be included. I think this is an unnecessary measure and a mistake.

At a political level, in the arguments that will accompany the Bills in the respective States, it will be easier for the proponents to add safeguards in NSW (if that is considered desirable) than for unnecessary safeguards to be seen to be removed in Victoria.

At the practical level, the profusion of safeguards in Victoria may mean that voluntary assisted dying becomes unachievable for many citizens, especially those in lower socio-economic groups – and so it becomes unnecessarily an issue of equity. Those presently accessing voluntary assisted suicide in that State may not be unduly affected. There is a risk, in attempting to cover all possible eventualities, of entrenching existing unregulated and unaccountable practices.

A PERSONAL/PROFESSIONAL STORY

In NSW, even though there may be evidence capable of proving one of the offences that I have mentioned (murder, manslaughter, aiding suicide), police do have a limited discretion as to any charge that may be laid and the DPP's Prosecution Guidelines come into operation to give discretion

(limited and controlled) to the prosecution. There are similar provisions in other jurisdictions, including Western Australia. I would like to illustrate what can happen by giving one example of how it was done a few years ago in a case that was well publicised at the time (so I am not disclosing confidential information).

I am cutting the story short. An ageing couple from the Central Coast of NSW had enjoyed a very long and loving marriage during which the wife had become progressively ill and incapacitated by multiple sclerosis that would eventually – but only after many, many years of increasing suffering – end her life. The husband had been her sole carer, attending to her every need and giving up his business to do it, for many years. The wife, who was mentally capable but physically totally incapacitated, frequently begged that she be relieved from her suffering as her condition deteriorated. One night, after yet another such request, the husband gave his wife sleeping tablets (that they had hoarded) and they had a last drink and said goodbye. When she was asleep, he suffocated her with a pillow. He called their doctor who had been expecting death from MS at any time and who certified it as a consequence of the disease. After the cremation the husband visited their children overseas and returned after some weeks. He then went into the local police station and told the police what he had done. They were in a quandary, but in accordance with the application of the law charged him with murder – and he had committed murder. Police discretion did not extend to any other course. (He was released on bail throughout the proceedings.)

I had to decide whether or not to prosecute him and, if so, on what charge. Prosecution Guideline 4, the Decision to Prosecute, applied in the circumstances (see: http://www.odpp.nsw.gov.au/prosecution-guidelines). I had regard to the discretionary factors that may be taken into account in appropriate circumstances and I agreed to accept a plea of guilty to aiding suicide, a lesser offence also made out on the evidence available. That probably required some creative construction and application of some legal concepts, but it seemed a just outcome, given the state of the law and the facts of the particular case. It was dealt with in the Local Court and the husband was released on a bond.

I think those are the sorts of situations where good men and women – like that husband – should not be left at the mercy of the criminal law for acting humanely and compassionately, in a principled way and with the informed consent of the holder of the right to life. Where is the dignity in that? I also think that no police officer or prosecutor or court should be placed in the positions that we were in that case. This is not just a discussion about the medical profession.

That is why the law should change.

Nicholas Cowdery AM QC