Voluntary assisted dying legislation keeps gaining pace

If there were any doubt where the right to die in Australia was headed, the argument has now been settled. It’s only weeks since Victoria’s benchmark voluntary assisted-dying law for the terminally ill came into effect and the goalposts have already shifted.

The changes are subtle but immensely significant. The legislation that the West Australian parliament began to debate this week waters down or dispenses with key safeguards in the Victorian law, while a draft bill circulating in Queensland — the work of former full-time members of the state law reform commission — goes even further in widening access to doctor-aided suicide.

Call it what you will — the slippery slope, mission creep, progress — but the direction is undeniable: the scope of assisted-dying law in Australia is being expanded when the ink is barely dry on the prototype law, gainsaying any realistic assessment of its effectiveness.

The discussion is being conducted piecemeal, siloed in one state parliament or another, with little regard to how the emerging regimes would intersect at the national level. Yet the momentum seems unstoppable.

Opponents and proponents of voluntary euthanasia agree on this. “The draft legislation in Western Australia is more liberal than Victoria and the draft bill in Queensland is more liberal again,” the former primate of the Anglican Church of Australia and the Archbishop of Brisbane, Phillip Aspinall, told a state parliamentary inquiry last week, warning of the slippage.

Testifying at the same hearing, Jos Hall of the Dying with Dignity organisation urged the MPs to consider extending assisted dying to under-18s and sufferers of end-stage dementia who had prepared when they were mentally competent an advance healthcare directive to be euthanised. Her group’s 1300 members and supporters in Queensland also wanted the residency requirement dropped and VAD to be extended to the non-terminally ill, a position backed by the father of euthanasia law in Australia, former Northern Territory chief minister Marshall Perron. Asked by Inquirer if she accepted Aspinall’s point, Hall says: “He’s right. People have looked at the Victorian legislation and said, ‘This is so tight’ … and come up with some very carefully considered minor points of change to improve it while keeping the protections in place.” It’s important to remember that the Victorian law was framed and delivered by Daniel Andrews’s Labor government as a “minimalist” reform, bristling with safeguards for those accessing voluntary assisted dying and the doctors who would necessarily be involved. Eligibility is confined to adult Australian citizens diagnosed with a terminal illness who have been resident in the state for at least 12 months before
making an initial request for VAD. The patient has to be assessed to have less than six months to live, or a year in the case of those with a neurodegenerative condition such as motor neurone disease.

Their pain and suffering must be such that it “cannot be relieved in a manner that the person considers tolerable”. Victorian doctors are prohibited from raising VAD in the first instance; once the request is made by the patient, two medicos of at least five years’ standing, each trained in VAD and approved by the state, one of them a specialist and both independent of the other financially, have to agree that the patient qualifies.

In all, a minimum of three separate requests to die must be entered by the patient. The first can be verbal, but a nine-day cooling-off period is mandated before the second, written entreaty is lodged with an official review panel, possibly in tandem with the final request. If accepted, a permit for VAD is issued by the state health department.

The default position in the Victorian law is that the patient self-administers the lethal dose by drinking it, most likely at home. No doctor is required to be present. Only in exceptional circumstances — typically where the person is unable to swallow or ingest the medication — can a medical professional be involved. In that event, an additional deathbed request must be made by the patient. To date, 11 people have been given access to VAD in Victoria.

The WA legislation picks up most of the eligibility criteria and process but differs critically at the starting point: doctors are permitted to suggest VAD. The Australian Medical Association says this is a very big deal.

“The intention was to protect the treating doctor and also to some degree put a barrier to the possibility that it becomes the default position of the doctor,” says Chris Moye, an Adelaide GP who chairs the AMA’s ethics and medico-legal committee. “We saw that as a very important protection in the Victorian legislation.” The requirement for the involvement of a medical specialist in the clinical assessment process — likely an oncologist for a dying cancer patient or neurologist in the case of a MND sufferer — is waived in the McGowan government’s bill in WA, as is the need for a permit to be issued by both consulting doctors in every instance.

Self-administration remains the preferred option, but the dial is moved so patients can ask a doctor to dose them if they are concerned about taking the medication on their own. In some circumstances nurse practitioners with only two years’ experience can step in.

Whereas doctors in Victoria can readily opt out by citing a conscientious objection to VAD, this is made more onerous under the WA legislation.

In Victoria, doctors have a week to inform the patient that they don’t want to be involved; the bill in the West says this must be conveyed immediately, accompanied by general information on where VAD can be accessed. There is no obligation under Victorian law for an objecting doctor to refer on a patient.

The draft legislation in Queensland framed by Ben White and Lindy Willmott, collaborating professors of law at Queensland University of Technology, goes even further. Granted, this has no
formal status. But it is informing the all-party state parliamentary committee weighing the introduction of VAD alongside the provision of end-of-life care in homes for the aged and through palliative medicine.

Importantly, both academics are former commissioners of the Queensland Law Reform Commission, which stands to get the job of drafting legislation to go to the lone-chamber state parliament if Annastacia Palaszczuk follows the approach her Labor government used last year to decriminalise abortion, a reform that was more than a century coming in Queensland and was enacted with relative ease. (Given her travails in NSW, Gladys Berejiklian might wish.) The White-Willmott bill also reflects many of the key features of the Victorian law. Again, access is restricted to terminally ill adults who must make three requests to die and are deemed eligible for VAD by two appropriately trained and experienced doctors.

“We are in all instances talking about a person who has an illness or condition that is going to cause their death, who is over 18, resident in the appropriate state, whose illness is advanced, progressive and causing a considerable degree of suffering,” says White, who has conducted doctor training in Victoria.

The principal departure is in the mandated timeframe in which the patient is expected to die. There is none in the draft bill. White argues that the six to 12-month stipulation in the Victorian statute is arbitrary — no doctor can say with precision how long a terminal patient will take to die, so why write it into law?

“There was no reason to say that someone, for example, who was eight months away from their anticipated death and in unbearable pain and suffering, who had an illness that was advanced, incurable, and definitely going to kill them, why they should not be able to access assisting dying at eight months instead of, say, four of five months,” he says. “We could not find a justification that was sufficiently defensible to impose an arbitrary time limit.” Instead, the threshold is “enduring and intolerable suffering”, a higher bar than in Victoria, White insists. Aspinall, however, tells Inquirer that this can have only one outcome: to broaden VAD to those who don’t qualify under the Victorian law or the WA legislation as it stands.

The archbishop warns that sufferers of advanced dementia and mid-stage MND could be pulled into the net.

“These factors might be taken as contemporary evidence of the potential existence of a slippery slope in this country,” he says.

This term gets quite a workout in the voluntary euthanasia/assisted dying debate. Early on, comparisons were made by critics to the situation in The Netherlands and Belgium, where the scope of VAD was progressively widened within those jurisdictions to cover the non-terminally ill and teens.

But Australia’s federation offers an even faster track for what Archbishop Mark Coleridge, the president of the Australian Catholic Bishops Conference, calls the “death creep” that is happening with the WA legislation.
He is troubled that the Victorian model has been altered too soon. “It’s not just the statistics that will tell you the facts about death creep, mission creep or whatever you want to call it,” the Brisbane-based church leader says.

“There’s also the huge cultural threshold that is crossed once the medical profession becomes an agent of death and not of life. The symbolic and psychological import of that, I think, is vast.” White, Hall and Kiki Paul of Go Gentle Australia, the lobby group founded by television identity and businessman Andrew Denton to pursue euthanasia reform nationally, reject this argument.

“When people talk about a slippery slope in terms of the law, they are talking about law X in a particular state or country that is enacted and over time gets changed,” says White.

“We live in a federation ... and there are differences in laws from one state to another, reflecting a range of factors, including geography. What might be appropriate for a state like Victoria might ... require different solutions in Western Australia or Queensland.” Says Paul: “From what I have seen, the eligibility criteria in Victoria and the WA bill are very similar. They both say the person has to be over 18, of sound mind, six months’ life expectancy or less, and if there is a neurodegenerative disorder in play it can be 12 months. I can’t quite see what the issue is.” Hall, who musters 48 years of experience on the coalface of nursing, says her call for under-18s to be given access to VAD on a “case-by-case” basis is tempered by realism. “This is what our members want, but I’ve told them these things are not going to happen. It may in the future but not now,” she admits.

Likewise Perron, whose world-first right-to-die law in the Territory in 1995 was quashed by the federal government under John Howard. He acknowledges that his desire to have VAD extended to the non-terminally ill won’t fly. For the moment.

“For people who are not terminal, whose life is unbearable for them and who ... will live longer than a terminally ill person, I think there is even a greater argument for voluntary assisted dying,” Perron says. “However, it is politically unacceptable to go there in Australia today and I accept that.” This issue is infused with such passion and raw emotion it’s easy to get lost in the tumult. Like most of us, those leading the debate have their own deeply personal stories to tell. Movingly, WA Opposition Leader Liza Harvey, who is torn on VAD, this week recounted the pressure she was put under by “well-meaning but ill-informed friends” to end her dying husband’s struggle with end-stage cancer. She told the WA parliament she was concerned that the bill failed to require that patients undergo a mental health assessment before deciding to die.

Aspinall gave evidence to the parliamentary inquiry in Brisbane last week burdened by the recent diagnosis of his father with dementia; next up was Campbell Newman, who made an impassioned plea for the right to die, citing the lingering death from Alzheimer’s disease of his mother, Jocelyn, a federal politician who became the highest ranked woman in the Howard government, and his regret at not reforming the law when he had the chance.

Coleridge makes the obvious point. Who isn't in favour of compassion for people who are dying and suffering? Of personal freedom? In arguing against the introduction of voluntary assisted dying in Victoria, and now the rollout, he concedes that the tide is against the churches and opponents of euthanasia.
Coleridge argues that a seismic shift is happening in Australian society at the point of individual autonomy, to the detriment of the common good. “If you take a spectrum at one end, the common good, and at the other end individual autonomy, we have lurched so quickly and dramatically to one end of the spectrum to the point where the other is almost completely obliterated,” he says.

The churches won’t compromise on assisted dying — Catholic healthcare and aged-care homes could not possibly be involved — and Coleridge accepts they have simultaneously lost moral authority “in quite a massive way” as a consequence of the sexual abuse crisis. The conviction of George Pell and the failure this month of his appeal in the Victorian courts was the “coup de grace” undermining the church’s voice in society, the archbishop says.

“George Pell’s voice, of course, was a particularly strong one, but controversial,” he explains. “To identify the voice of Cardinal Pell with the Catholic Church would not always be the way to go. But nonetheless the drama surrounding him in recent times has affected the church’s authority and positioning in social debate, I think there is no doubt about that. But is all part of a larger process.”

In this context, the future of WA’s Assisted Dying Bill 2019 takes on outsized connotations. Passage of the legislation will signpost the path for other state parliaments, including Queensland and South Australia, which is also holding an inquiry into VAD. Paul is “cautiously confident” the WA legislation will get up, albeit narrowly. If so, Coleridge says it will be incumbent on the state’s politicians, and those who might follow them, to explain why now: why expand VAD before the verdict has been entered on the Victorian experiment?

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