

Introduction

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On 19 June 2019, the *Voluntary Assisted Dying Act 2017* (Vic) ('the Act')¹ came into effect in Victoria, Australia. Notwithstanding the Northern Territory's brief foray into legalised euthanasia in the mid-1990s, which was subsequently overturned by the federal government, this was the first time such a piece of legislation was brought into existence in an Australian jurisdiction.²

The Act opened up the possibility of two hitherto unavailable interventions in Victoria, known collectively as voluntary assisted dying ('VAD'). Terminally ill persons who meet the eligibility criteria and have been through the mandated process are now able to access a drug that when taken, will end their life. In some instances, when self-administration is impossible, a doctor is able to administer the substance to a person, again with a view to ending their life.

The enactment of VAD brought with it the mix of shock and praise in Victoria and around Australia that had been seen in other jurisdictions and during the debate. Lobby groups on both sides of the debate made grand claims, and the Victorian politicians responsible for implementing the regime constructed their role as one of statecraft becoming, with

1 Throughout this volume, 'voluntary assisted dying' is abbreviated to VAD, and the *Voluntary Assisted Dying Act 2017* (Vic) is referred to as the Act. For more of the Australian legal history on this topic see the work of Lindy Willmott et al '(Failed) Voluntary Euthanasia Law Reform in Australia: Two Decades of Trends, Models and Politics' (2016) 39(1) *University of New South Wales Law Journal* 1. The legal and other information contained in this collection was first presented in February 2019. The information contained is current as at June 2021 unless otherwise noted.

2 The Northern Territory had legalised euthanasia with its *Rights of the Terminally Ill Act 1995* (NT). This was almost immediately overturned by the Commonwealth. See *Euthanasia Laws Act 1997* (Cth).

the passing of the Act, ‘the compassionate state’.³ The enactment was productive too of a whole plethora of expert opinion and debate. Medical practitioners were asked to share their views on-air. Government and non-government health services were scrutinised. Legal academics provided commentary on the law itself, while the many safeguards built into the legislation became a matter of public commentary, a key feature of the Act and its operation.

In the midst of this debate, other voices became lost in the intensity of the rhetoric. This includes those for whom VAD and its legalisation speak to a broader set of concerns regarding the governance of death in Australia and elsewhere. Such critical reflection is best – and perhaps only – practised with the advantages of time and space from the moment of high-stakes debate and change. Wanting to ask both broader and more critical questions of the new regime, a group of scholars from a variety of disciplines and traditions gathered four months prior to the operationalisation of VAD to attempt to move beyond the public discussion to a more subtle and critical analysis of the Act, its assumptions and its impact on the governance of death. This volume is one result of that symposium, held in February 2019 at the University of Technology Sydney (UTS).

Scholarship from the disciplines of law, philosophy, ethics and theology was exchanged in a genuine attempt to reflect on the new era in the governance of death that the passage of the Act marked. Those gathered represented a diversity of views in terms of the morality of the interventions that the Act brought into law. In this context, they were challenged to use their expertise to study the Act and its implementation process from perspectives that had hitherto remained absent from discussion in public and in the academy. We, the organisers, were interested in what was not being seen because of the spectacle of the legislation: what assumptions underpin it? How does it relate to other legislation? What is new about it? What is familiar? What might we learn about VAD from aligned areas elsewhere?

This volume is the fruit of this gathering. And while the contributions were first developed prior to the Victorian Act coming into force, the authors have taken time between then and now to reflect on learnings

3 @JillHennessyMP (Twitter, 29 November 2017, 12:09pm AEST) <<https://twitter.com/jillhennessymp/status/935676976064487424?lang=en>>.

from the nearly three years of VAD in Victoria. In addition, most other Australian jurisdictions have now either passed or enacted similar legislation, making the enduring importance of the chapters that follow clear in the Australian context.

In the first chapter presented here, ‘The Constitution of “Choice”’, bioethicist Courtney Hempton engages with the logics of choice that undergird VAD. This is the first chapter of three that focus on the figure of choice, independence and relationships as they appear in the wake of VAD. From its ancestry in a Victorian Parliamentary Inquiry into End of Life Choices, to the ways in which the rhetoric of choice facilitates the state’s governance of (voluntary assisted) dying, Hempton’s target is the ways in which VAD first constitutes and then operationalises ‘choice’ in and through law, clinical practice and discourse for patients, their families and health practitioners. Hempton turns her gaze towards the conflict between a ‘responsibilising’ of patients for their own deaths through the mechanism of choice, and the cooption of health and medical practitioners in this process as ‘assisted dying-gatekeepers’; whether they choose to participate or not. Hempton’s contribution pushes us to see VAD within this broad rhetorical landscape, asking how the mobilisation of ‘choice’ in this regime is consistent or inconsistent with the state’s governance of other medical care and decision-making practices.

This centrality of ‘choice’ as the rhetorical machinery that produces VAD and the state’s continued governance of this (new) form of death is echoed in the jointly authored work of critical health geographer Hamish Robertson and health services researcher Joanne Travaglia. In the second chapter in this collection, Robertson and Travaglia think through ageing, aged care and the application of palliative care as a necropolitical technology. By posing a challenge to the construction of healthcare interventions, such as palliative care, as ‘scientific’ and ‘evidence-based’, their work demonstrates how the reality of variable levels of evidence and a corresponding raft of political and social choices, policies and practices that undergird them are occluded. For Robertson and Travaglia, ageing as *actually experienced* is not highly valued. Only where it is ‘successful’ is it valued, as measured by adherence to a model that values a certain form of independence and the exercise of particular forms of choice at all stages of life. With VAD now extending this structuring of ageing to include a ‘successful’ exercise of independence and ‘choice’ even as to death, this means an extension of the always-already vulnerability of older people. This opens up the potential for new pressure to engage in a variety of new

interventions including advance directives, living wills and palliative care that can have life-or-death implications for the individual. And all of this in the name of the exercise of assertion of independence and choice.

These technologies of decision support are already being drawn upon in decision-making around health and other services like palliative and aged care. How VAD might place new pressures on these already complex decisions and technologies is a concern raised by Nola Ries and Elise Mansfield's contribution to this collection. They ask, in our third chapter, how might decision-making be 'done' in a manner that is responsive to the lived experience of individuals, and to the traditions of law that aim to protect the vulnerable in this new context. Ries and Mansfield's contribution makes an attempt at thinking through this challenge by way of 'supported decision-making'. Supported decision-making is grounded in the normative claim that adults have the right to make decisions for themselves and people with cognitive impairments should receive appropriate supports to maximise their decisional capacity. It is a deeply relational process, and in their empirical study those facing the question of supported decision-making highlight these very things. For participants, the formation and reliance on relationships of trust and support means a reduction in worry about being taken advantage of and a gain in confidence about decision-making; participants believe that this approach provides a context within which they would be able to more readily make their own decisions while giving expression to their own wishes. In short, the approach promises to achieve important outcomes for those facing decisions regarding end of life through a form of relational autonomy, recognising the reality that human beings exist always already in relation to one another.

Compassion is the topic of ethicist Daniel Fleming's contribution to this collection, and his contribution is the first of three that think through the economisation of death and the neoliberal tenor of the VAD regime. In his contribution, Fleming calls us to see how VAD is 'compassionate' only within a particular narrative: the narrative of neoliberalism with its ethical demand to create 'one's own story' and to 'provide for one's self'; the very opposite of the relational autonomy and care. Alasdair MacIntyre is a key dialogue partner in this undertaking, inspiring Fleming's interrogation of the incommensurability at the foundations of contemporary moral claims around VAD. For Fleming, we see this incommensurability most clearly in the fact that 'compassion' is able to be mobilised 'with equal public weight to describe VAD by those who are in favour of it, and to

sharply critique it by those who are opposed to it'. Fleming demonstrates how the mobilisation of compassion in support of VAD can only make sense as an expression of a broader neoliberal frame. Those who mobilise compassion in this way do so by referencing and resonating with neoliberalism's hallmarks of autonomy without reference to the common good: the construction of a self-surveilling and self-regulating individual. The implications of such a frame are not merely theoretical. Mobilising compassion in its neoliberal form risks further compounding the signal features of a healthcare and economic system structured according to neoliberal norms: a tendency to serve those who have the means to act autonomously, and thus a privileging of those who hold economic power. His conclusion is that neoliberal 'compassion' can only distract us from other forms of justice and compassion, with its aversion to any form of economic or healthcare dependency, and a self-understanding of those who are unwell that prioritises self-governance and autonomy.

The figure of neoliberalism also motivates the contribution by legal academic Marc Trabsky, who in a rich contribution traces the neoliberal rationality of VAD as a legal technology. Trabsky describes VAD as a 'jurisdictional device'. Rather than VAD as only medical, as a jurisdictional device VAD is able to cultivate 'legal relations between ... the living, the dying and the state'. Trabsky conceives of VAD as part of governmental practice that works by economising the relationship between the living, the dying and the state. This innovative analysis resonates with other contributions in the collection in its pointing to a 'thick' account of neoliberalism – beyond its thinner configuration as an economic doctrine – to a view of neoliberalism as it extends economisation into areas of life that were hitherto thought to be outside the economic. The analysis provided by Trabsky is put to work in showing that this movement of economisation has come to saturate VAD: by shaping legal relations between decision-makers, medical practitioners and the state, and by mobilising a model of 'human capital' as the model for government and governing the self. What is at stake here is the resulting exacerbation of socio-economic inequality and the further economisation of life through the regime of VAD – for both those who are able to access a (voluntary assisted) death, and those who cannot.

There are many significant shifts in the governance of death brought about by the entrance of VAD into law. While each contribution to this collection asks us to 'step back' and to critically assess what these shifts look like, the contribution of critical animal studies scholar Jessica Ison

does so with a provocation: what about animals? Why are some animals not eligible to be euthanised? Why, instead, are they killed or slaughtered? Ison's intervention begins demonstrating the significant complexities that arise when we see that only some animals are considered worthy of euthanasia. For Ison, the pervasiveness of animal exploitation and our reliance on animal death in almost all facets of life further complicates why it is that these deaths are not rendered as 'deaths' at all. By tracing a history of animal euthanasia and its relation to animal anti-cruelty laws, Ison begins to draw our attention to the complex interplay of multiple interests within the domain of animal death: from entertainment, 'innovations' in worker control and exploitation, environmental pollution and other technologies of psychological conditioning and control made possible by the abattoir production line, to the rise of our contemporary form of domestic pet ownership. Ison ends her reflections by gesturing towards why it is time for animal death and VAD to be thought of together. For Ison, there is work to be done to render visible the figure of control and management within our ways of death dealing. Animal euthanasia is framed as offering comfort in death. Yet, even in this moment, we cannot escape that every facet of animal life is controlled, and their exploitation remains infinite and total: being 'put down' might be framed as care for animals, but it remains always a form of animal management and not an uncomplicated form of care. 'If nothing else', writes Ison, 'it shows us that we can construct elaborate layers of meaning that obfuscate cruelty and solidify a moral and ethical position that refuses to engage with the myriad inconvenient concerns'.

The potential for sanitising realities that are inconvenient is the warning issued by moral theologian Nigel Zimmermann's writing in this collection. Zimmermann begins with the promise that VAD offers a 'sanitising promise' to us and to those who suffer: 'your pain will be lessened and your autonomy increased'. But this promise of lightening the burden of death covers over what becomes in fact a far heavier burden placed on the shoulders of the dying person: responsibility for their own death. The thought of René Girard and Emmanuel Levinas stand as the two poles around which Zimmermann weaves his claims. Girard is mobilised primarily for his warning about the false promises of euthanasia, and Levinas for his ethics of alterity with its unsettling of views of human autonomy and the command not to kill. The conclusion Zimmermann draws highlights that what he terms the 'seductions of VAD' can in fact

operate as a denial of the actual vulnerability and fragility of the Other – of us all – felt in especially heavy ways by those with fewer resources – spiritual, material, familial and social.

Those with few resources – particularly the aged – form the centre of criminal law and legal theory scholar Penny Crofts’s chapter. In this contribution, Crofts takes the healthcare quality and safety failures at Gosport Hospital as an opportunity to interrogate law’s inability to sustainably differentiate between unlawful and lawful homicide, particularly in the context of a health system that functions to veil such deaths – both consensual or not. Crofts mounts a discussion at the intersection of criminal theory of group culpability and systemic failure, of serial killer analysis and euthanasia. Her conclusions focus on the nature and productivity of vagueness in law and lexicon used to distinguish between various forms of unlawful homicides and euthanasia – presented by the central trope of ‘foreshortening of life’, used by *The Report of the Gosport Independent Panel* to describe the 456 deaths brought about by opioid prescribing practices that were used without appropriate clinical justification at Gosport Hospital.

Extending the discussion in this collection on VAD as ‘law’, health law scholar David Carter’s contribution targets the place of the criminal law in relation to VAD. In his contribution, Carter notes how so much of the shift brought about with the introduction of VAD is as much about access to voluntary assisted dying as it is about a shift away from the criminal law’s governance of this form of death. However true this transition is, Carter argues that it fails to fully capture the vital and ongoing role that the criminal law plays in the establishment and operation of VAD itself. In dialogue with Ben Golder’s recent theorisation of biopolitics and the criminal law, this contribution first argues that the legal ‘machinery’ of VAD remains fundamentally criminal in nature. Building on that claim, Carter describes how criminal law is what then brings about the new biopolitical configuration of VAD, rendering visible the ‘biopolitics of criminal law’; that is, how criminal law achieves a rationing of life by its organisation of a differential distribution of death within a population to be governed.

The VAD landscape is changing quickly across Australia. It is our hope that this volume provides some of the critical analysis of this area that has been largely missing as our community attempts to navigate this new terrain.⁴

⁴ The editors wish to acknowledge Jordan Roods and Katrina Mathieson for their research assistance, Beth Battrick for her copyediting, and the UTS Law Health | Justice | Research Centre for funding the initial symposium, which gave rise to this collection. David Carter is a National Health and Medical Research Council ('NHMRC') Early Career Fellow (Grant ID: 1156520). The contents are solely the responsibility of the individual authors and do not reflect the views of NHMRC.

This text is taken from *Voluntary Assisted Dying: Law? Health? Justice?*,
edited by Daniel J Fleming and David J Carter, published 2022 by
ANU Press, The Australian National University, Canberra, Australia.