

Briefing: Voluntary assisted dying and the telehealth ban

Summary

The *Criminal Code Act 1995 (Cth)* prohibits the use of a carriage service to incite or encourage suicide e.g. email, telehealth.

Even though all state laws (bar Victoria) explicitly assert that voluntary assisted dying **is not** suicide, the Code's prohibition means health professionals are reluctant to use telehealth when discussing VAD for fear of fines and/or prosecution.

The Code's prohibition on using telehealth in the VAD process does not make VAD safer. In fact, it causes harm:

- Unnecessary suffering and delays for terminally ill people (especially if they cannot travel to in-person consults)
- Inequity of access for people living in rural, regional and remote areas
- Increased complexity and stress for health professionals delivering VAD care (e.g. they must deliver scripts in-person, rather than fax them, and often make lengthy, repeated journeys to visit patients at home)
- Legal uncertainty (different states have chosen to interpret the Code differently).

Even if not enforced, the Code inhibits high quality VAD practice. There is no logical reason to forbid the discussion of VAD by telehealth:

- Telehealth is an integral part of high quality clinical care and is routinely used for serious decisions concerning life and death
- Doctors are subject to the same Medical Board of Australia standards, irrespective of whether consultations happen in person or via telehealth; what's more, there is stricter supervision of VAD practitioner's assessments than any other area of medical practice
- Whether telehealth is appropriate for a patient being assessed for VAD should be a matter of clinical judgement, as it is in all other areas of telehealth
- The use of telehealth does not prohibit a face to face consultation by either, or both, assessing doctors, if they deem that necessary

- At least one face to face consultation is preferred by VAD practitioners, and in the rare case that this is not possible, doctors will require additional due diligence to be satisfied that the applicant meets the already strict conditions of VAD law

In the United States, the **Drug Enforcement Administration (DEA)** has recently extended **telemedicine flexibilities**, introduced as special measures during the COVID-19 pandemic, to allow controlled substances to be prescribed via telemedicine - including VAD substances in states where it is legal.¹ They are considering making these flexibilities permanent.

The issue

Two subsections of the *Criminal Code Act 1995* (Cth) “the Code” prohibit the use of a carriage service to incite or encourage suicide.² However, it is unclear whether this prohibition extends to health professionals using telecommunications for voluntary assisted dying (VAD). This is despite five state VAD laws clearly distinguishing VAD from suicide.

We ask for urgent clarification of the law through a simple amendment of the Code so that health professionals can follow their state VAD laws without the threat of legal consequence.

We join the independent VAD Boards of Victoria, Western Australia, Queensland, Tasmania and South Australia, the Queensland Law Reform Commission, the AMA NSW, leading end-of-life researchers, individual VAD practitioners, as well as patients and their families, in calling on the Commonwealth Government to amend this law by explicitly exempting VAD from its purpose.

The Code inhibits quality VAD practice

A ban on telecommunications for VAD practice causes:

- Unnecessary suffering and delays for terminally ill people, many of whom are too sick to travel to an in-person consultation
- Inequity of access for people living in rural, regional and remote areas, whose access to repeated in-person consultations may be even more limited (in Victoria, more than a third of VAD applicants live in regional areas - 36.5%, n=564³; in Queensland, the figure is close to half - 49%, n=295)⁴

¹ DEA and HHS Extend Telemedicine Flexibilities through 2024. Accessed 19 October 2023: <https://www.dea.gov/documents/2023/2023-10/2023-10-06/dea-and-hhs-extend-telemedicine-flexibilities-through-2024>

² *Criminal Code Act 1995* (Cth), Ss 474.29A and 474.29B

³ Voluntary Assisted Dying Review Board, [Report of Operations July 2021 - June 2022](#), Safer Care Victoria, p15.

⁴ Voluntary Assisted Dying Review Board, [Annual Report 2022- 2023](#) , Queensland Health, p17.

- Increased complexity and stress for health professionals delivering VAD care, including the threat of \$200,000+ fines if they contravene the Code.

A strict interpretation of the Code means:

- No part of the VAD assessment process can take place via phone, email or video conference - including telehealth
- In states that require permits to be issued before the prescribing of VAD medications, these permits must be hand-delivered or couriered to a person's doctor
- Scripts for VAD medications, which must come from all across the state to a single statewide pharmacy service who are solely responsible for dispensing VAD medications, cannot be accepted via email; they must be hand-delivered, couriered or posted
- Updates, for example to practitioner protocols, must be sent to all qualified VAD practitioners by paper, which is time-consuming, inefficient and risks proper version control
- Parts of the VAD process are rendered virtually unworkable, for example
 - Mandatory VAD training for health practitioners, which currently takes place via online modules - would have to be in-person
 - Review Boards would have to meet in-person to decide cases, severely limiting their membership and adding delays for patients.

The Code has created confusion among states

Most states have adopted a conservative interpretation of the Code, hindering access to VAD laws in their jurisdictions.

Victoria, South Australia and Queensland, responding to their own legal advice, have placed restrictions on the use of telehealth for VAD purposes.

Tasmania and Western Australia have taken a less conservative approach, yet confusion remains.

Western Australia has issued guidelines advising that:

- First and consulting VAD assessments may be by video conference, so long as VAD medications and administration are not mentioned
- Final requests may be by video conference (although this usually happens just before the administration decision, so is affected by the below)

- Administration requests by video conference are **advised against** due to possible interference with the Code.

Tasmania makes provision for the use of ‘audio-visual link’ throughout its VAD legislation⁵. As a result, telecommunications are being used for VAD in Tasmania to great benefit.

Dr Bryan Walpole, emergency physician and VAD practitioner from Hobart told us:

Telemedicine makes VAD possible... We have used telehealth from the start and we disregard the threat from the Commonwealth Code on the basis that nobody's going to charge you because you're acting in good faith.

Telehealth makes distant cases really achievable. I have one patient with terminal cancer who lives about three hours from Hobart. All the patient has to do is one trip to meet me face to face. Everything else is done from their home. It cuts five hours of work getting there and back down to 20 minutes. They can have support people, spouse, family, friends at the table, to hear what is taking place. It is so much easier than everyone having to come to Hobart. And the patient is grateful because they haven't had to travel.

Telehealth is appropriate for VAD

Telehealth is an integral part of high quality clinical care

Telehealth is used in everyday medical practice, including for the discussion of, and decisions on, life and death matters.

Dr Roger Hunt, a pioneering palliative care specialist in South Australia, told us:

There is nothing novel or new about using telehealth for important decisions that may have life and death consequences for a patient. In fact, it's part of usual practice for many clinicians - especially if they are working with patients in rural and remote regions. For example, oncologists based in the city routinely use telehealth to consult with patients in rural and remote areas about decisions concerning the investigation and management of cancer - which can have direct impacts on cancer's progression. Without telehealth, rural patients would suffer additional disadvantage, inequity, and poorer health outcomes due to barriers in accessing all manner of health services.

Clinicians from VADANZ (Voluntary Assisted Dying Australia and New Zealand) gave examples of telemedicine's benefits in fields as diverse as

- Assessing suitability for chemotherapy

⁵ Tasmanian End-of-Life Choices (Voluntary Assisted Dying) Act 2021
<https://www.legislation.tas.gov.au/view/whole/html/asmade/act-2021-001>

- Advance and end-of-life care planning⁶
- Psychiatry⁷ and emergency mental health consultations⁸
- Transplantation⁹
- Surrogate decision-making
- Arranging certification of death via telephone so that First Nations people in rural and remote communities can die on Country.

The Medical Board of Australia expects medical practitioners to follow the *Good Medical Practice Code of Conduct* at all times, regardless of whether consultations take place via telehealth or in-person¹⁰.

The Medical Board has also issued telehealth-specific guidelines which detail the steps that should be taken before, during and after telehealth consultations to; ensure a high standard of care; protect patient privacy and confidentiality; minimise technological issues; maintain secure information transfer; and to keep careful records.¹¹

There is no logical reason to prohibit the use of telehealth for VAD

Michael Dooley, Director of the Victorian Statewide VAD Pharmacy Service, Director of Pharmacy at Alfred Health and Professor of Clinical Pharmacy at Monash University told us:

This is not a proposal to do away with in-person consultations, nor to replace face to face with telehealth for more convenience. Using telehealth for VAD will enable pharmacists and prescribers to discuss over the phone the patient and medication-related issues in a timely and appropriate way to improve the care we deliver.

*The Victorian Statewide VAD Pharmacy Service, like other services across the nation, has detailed guidelines and structures to ensure that telehealth would be accessed when it is safe and to the benefit of patients. **There is no medical or pharmacy reason not to use telehealth for voluntary assisted dying.***

⁶ For example, The Alfred's service can be accessed via telehealth:

<https://www.alfredhealth.org.au/services/advance-care-planning>

⁷ 'A number of studies have demonstrated that telehealth can be as effective as face-to-face consultations [in psychiatric assessment] in achieving improved health outcomes.' [The Royal Australian and New Zealand College of Psychiatrists](#). Accessed 20 June 2023.

⁸ E Saurman, D Perkins, R Roberts, A Roberts, M Patfield, D Lyle. [Responding to Mental Health Emergencies: Implementation of an Innovative Telehealth Service in Rural and Remote New South Wales, Australia](#). *Journal of Emergency Nursing*, 2011, Volume 37, Issue 5, Pp 453-459

⁹ Andrew N, Barraclough KA, Long K, et al. Telehealth model of care for routine follow up of renal transplant recipients in a tertiary centre: A case study. *Journal of Telemedicine and Telecare*. 2020;26(4):232-238. doi:[10.1177/1357633X18807834](https://doi.org/10.1177/1357633X18807834)

¹⁰ [Good medical practice: a code of conduct for doctors in Australia](#), Medical Board of Australia

¹¹ [Guidelines: Telehealth consultations with patients](#) - effective 1 Sept 2023 - Medical Board of Australia

Removing this unnecessary barrier means we can provide care as we do in many other clinical settings every day of the week.

Whether telehealth is appropriate should be a matter of clinical judgement

In April 2023, the Australian Medical Association (NSW) urged immediate change to the Code to allow for the use of telehealth.¹² Dr Michael Bonning, AMA NSW President, said:

*Telehealth is an accepted part of healthcare delivery, particularly after a pandemic that saw a rise in telehealth uptake. **The decision regarding whether telehealth is an appropriate form of consultation is a matter for the treating doctor and patient to discuss. The doctor is subject to the same level of regulation and accountability for that service as would apply in other settings.***

There are situations where a clinician would decide telehealth is not appropriate; for example, a physical examination is required, a suitable level of privacy cannot be achieved, or the patient prefers in-person consultation.

VADANZ (Voluntary Assisted Dying Australia and New Zealand)¹³ agrees there will be situations where, after an initial telehealth consultation, it is necessary to follow up with an in-person consultation.

In-person consultations are preferred

VADANZ's position statement on the use of telehealth for VAD states that their preference is always for at least one in-person consultation during the VAD assessment process:

There are distinct advantages in conducting VAD assessments in person, and this remains the preferred modality for at least one, if not both of the VAD eligibility assessments required.¹⁴

In the case that in-person consultation is not possible, clinicians are best placed to determine if telehealth offers a suitable alternative for VAD practice. Dr Cam McLaren, a medical oncologist and VAD practitioner working in Victoria told us:

I anticipate the case where no in-person consultation is possible for a VAD patient to be very rare. If it did arise, the appropriateness of using telehealth for VAD assessments would need to be decided by the treating doctors to ensure that standards of care are maintained.

¹² Australian Medical Association NSW. [AMA \(NSW\) urges immediate change to the Criminal Code Act](#) [media release]. 23 April 2023.

¹³ The peak body for VAD professionals in Australia and New Zealand: <https://www.vadanz.com.au/>

¹⁴ VADANZ 'Telehealth and VAD Assessments' <https://www.vadanz.com.au/telehealth-and-vad-assessments/>

This would involve a very thorough assessment with phone calls to the patient's usual GP, usual specialist, next of kin and any other key care providers, with extremely detailed notes about the steps taken to ensure correct assessments of coercion have been undertaken. I would recommend even recording the consultation to ensure that if the assessment were ever challenged, the entire consult could be replayed to a jury of the assessing doctor's peers.

However, I personally - and my colleagues, too - would want to avoid this situation wherever possible. At least one in-person consultation is always my preference, and that is also the position of VADANZ.

The Code adds unreasonable barriers to the VAD process

Unacceptable delays

Professor Liz Reymond, who leads Queensland's QVAD Support and Pharmacy Service, told us how the Code's conflict with VAD affects their services.

The Commonwealth Carriage Law severely impacts many eligible persons' legal right to access VAD services in a timely manner, if at all.

Vulnerable, suffering patients from regional, rural and remote locations who are too sick to travel have to wait, sometimes for weeks, until a face-to-face consultation can be arranged with a VAD Practitioner. Three patient/VAD clinician consultations must take place, at disparate times, before a VAD prescription can be couriered, posted or personally delivered to the central VAD pharmacist, and then the substance dispensed and hand-delivered either to the patient at their home or the practitioner.

Given Queensland's transportation constraints, this process is unacceptably time consuming. Patients risk increased suffering, loss of cognitive capacity (rendering them ineligible for VAD), and indeed some have died while waiting.

Impedes access to care and exacerbates inequities

All VAD Review Boards and Commissions (in Victoria¹⁵, Western Australia¹⁶, South Australia¹⁷, Queensland¹⁸ and Tasmania¹⁹) have called for the Code to be amended to excise VAD from its

¹⁵ *ibid* n1 p2

¹⁶ Voluntary Assisted Dying Board Western Australia, [Annual Report 2021-22](#), p3.

¹⁷ Voluntary Assisted Dying Board South Australia, [Quarterly Report | 31 January to 30 April 2023](#), p3.

¹⁸ Voluntary Assisted Dying Review Board Queensland, Annual Report 2022-2023, p28.

¹⁹ Voluntary Assisted Dying in Tasmania, Report on the End-of-Life-Choices (Voluntary Assisted Dying) Act 2021's operation in its first six months, p11.

scope, citing equity of access as a major concern.

The Australian Centre for Health Law Research, QUT, published a note in the Medical Journal of Australia in 2021 concluding that carriage service laws put clinicians at risk:²⁰

[The telehealth ban] poses an “immense burden” on very sick patients to travel or, if this is not possible, it requires doctors to travel large distances to see patients. There are currently limited specialists willing to participate in voluntary assisted dying leaving patients in rural and remote areas with constrained access.

Unnecessary distress and anguish

Recent research from QUT Professor Ben White and colleagues, featuring qualitative interviews with more than 30 people in Victoria, were told the prohibition of using telehealth for VAD left people “in tears and distressed and [in] hysterics”.²¹

Although this problem was often raised by people in regional areas, metropolitan participants were also concerned about requiring very unwell people to travel. The widespread use of telehealth during the coronavirus disease 2019 (COVID-19) pandemic compounded participants’ sense of its prohibition being unjustified.

The Code makes health professionals’ jobs harder

Frustration and risk for hardworking medics

A VAD practitioner from Western Australia, who wished to remain anonymous, told us about the approach he takes to the legal ambiguity surrounding telemedicine for VAD.

I have undertaken an administration decision via video conference twice; once for a patient in Kununurra (~3000km away), where there was both desire to get through the process quickly and where it is impossible to travel there and back in a day due to flight schedules, and the second time for a patient in Narrogin (~170km away) where I had commitments with another VAD patient meaning I couldn’t get there and back on the day I needed to travel. Both were for practitioner administration via IV.

I chose to consider the risk and argue that IV administration is not conceivably suicide as the patient plays no part in the administration of medication. On both occasions I lodged the forms via VAD-IMS (the central form repository).

²⁰ Willmott L, White BP, Del Villar K, Close E [Voluntary assisted dying and telehealth: Commonwealth carriage service laws are putting clinicians at risk](#). *Med J Australia* 2022; 215 406-409.

²¹ White BP, Jeanneret R, Close E, Willmott L [Access to voluntary assisted dying in Victoria: a qualitative study of family caregivers’ perceptions of barriers and facilitators](#). *MJA* 2023.

I could regularly be seen to violate the Criminal Code as I tell every patient I see over video conference the names of the medications and how they're administered. I used to be mildly anxious. Now I just think the whole thing is ridiculous. I don't want to be prosecuted, but if nothing else it would force the Commonwealth to do something about this.

Practitioners will continue to do what they see is best for patients, which will lead to clinicians such as myself deliberately violating guidelines, without clarity as to whether there truly is a risk to us from a legal perspective.

Creates clinical uncertainty

The Law Institute of Victoria, a peak legal body, says it is:

*deeply concerned about the lack of clarity and exposure for medical practitioners supporting the needs of patients, particularly in remote areas or extreme circumstances.*²²

The Australian Medical Association has said medical practitioners are rightly concerned about potential prosecution. The immediate-past AMA WA president Andrew Miller told the ABC in 2019:

*medico-legally, doctors are quite rightly conservative and we have long experience of being investigated for far less than this.*²³

The Queensland Law Reform Commission report concluded:

*It is inherently undesirable that health practitioners should be left under such an apparently unintended grey cloud.*²⁴

Moreover, VAD is not suicide

Words matter. Experts in mental health have long acknowledged that we must communicate carefully to minimise stigma and harm.²⁵ This includes distinguishing between VAD and suicide.

The Code's current conflation of VAD and suicide has direct and damaging effects on patients, their families and health professionals by:

²² Law Institute of Victoria. [Telehealth ban for voluntary assisted dying needs to end now says LIV](#) [media release]. 20 Apr 2021.

²³ Jacob Kagi 'Doctors may face prosecution for discussing euthanasia with patients over phone, computer' ABC News 23 Aug 2019.

²⁴ Queensland Law Reform Commission. [A legal framework for voluntary assisted dying \(Report No. 79\)](#). Brisbane: QLRC, 2021.

²⁵ Our Words Matter: Guidelines for Language Use, Mindframe. Accessed 19 June 2023: <https://mindframe.org.au/our-words-matter-guidelines-for-language-use>

- Suggesting terminally ill people seeking VAD are suicidal, when their option to continue living has been taken away.
- Stigmatising VAD as an ethically-compromised choice, in comparison to other end-of-life choices e.g. palliative care, refusing life-sustaining treatment, which can make it harder to open discussions and plan ahead for the end of life.
- Discouraging medical professionals from participating in VAD, implying they will not be acting in their patients' best interests - and demoralising those already working in VAD
- Detering individuals and families affected by VAD from accessing mainstream loss, grief and bereavement support.

VAD is not suicide. It is not a choice between life and death, but a choice about how we die when death has become imminent and certain. What's more, it is planned with the support of health professionals and clinical infrastructure.

Our VAD laws explicitly state that VAD is not suicide. VAD is not treated as suicide in coronial data nor suicide statistics. The cause of death on a patient's death certificate is recorded as the disease that gave them access to VAD - not VAD or suicide.

Even if not enforced, the prohibition harms VAD practice

If the Code is interpreted strictly, it severely hinders the application of VAD laws, limiting the intended benefit to the Australian people.

If a looser interpretation is adopted, health professionals are left on their own to decide how much risk they are willing to assume. In Western Australia, doctors from the VADANZ group have described to us the feeling of working in a 'no man's land', where they are advised not to use telecommunications for VAD but also not precluded from doing so.

Only the Federal Government can provide definitive assurance to health professionals providing VAD care under state laws that they will not fall foul of Commonwealth legislation by amending the Code.