

VOLUNTARY ASSISTED DYING AND THE LEGALITY OF USING A TELEPHONE OR INTERNET SERVICE: THE IMPACT OF COMMONWEALTH 'CARRIAGE SERVICE' OFFENCES

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Over the last five years, all Australian states have passed legislation to permit voluntary assisted dying ('VAD'), under strict conditions. Although laws on VAD are a state responsibility, a significant hurdle to their implementation has been prohibitions in the Criminal Code Act 1995 (Cth) ('Commonwealth Criminal Code') on using a carriage service (including the telephone or internet) to counsel, promote or provide instruction on suicide. These provisions, enacted when VAD was unlawful in every Australian jurisdiction, have led state governments to instruct health practitioners to avoid discussing or facilitating VAD via telehealth. This article examines whether these concerns are founded and evaluates the extent of Commonwealth

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criminal liability that health practitioners might face for engaging in various conduct under the state assisted dying laws. The article argues that although the legal position is untested, VAD would likely meet the definition of ‘suicide’ under Australian law and hence fall under the Commonwealth Criminal Code. The article then evaluates the extent of potential criminal liability for using a carriage service in each step of the VAD process. It concludes that there are areas with real legal risk, especially for activities that directly facilitate VAD, requiring urgent reform of the Commonwealth law.

I INTRODUCTION

Following the lead of a number of other jurisdictions worldwide, Australia has recently experienced widespread law reform to permit voluntary assisted dying (‘VAD’) for terminally ill individuals who are experiencing unbearable suffering.¹ VAD (also known as voluntary euthanasia or assisted suicide),² was legalised in Victoria in 2017, with the passage of the *Voluntary Assisted Dying Act 2017* (Vic) (‘*VAD Act* (Vic)’), which commenced operation on 19 June 2019. Shortly after, in December 2019, Western Australia enacted the *Voluntary Assisted Dying Act 2019* (WA) (‘*VAD Act* (WA)’), which came into force on 1 July 2021. Legislation passed in Tasmania in March 2021,³ South Australia in June 2021,⁴ Queensland in September 2021,⁵ and New South Wales in May 2022, although none of these laws has yet commenced operation.⁶

A significant challenge to implementing VAD laws, however, is presented by provisions of a Commonwealth law, the *Criminal Code Act 1995* (Cth) (‘*Commonwealth Criminal Code*’), which were enacted when assisted dying was

1 See generally Ben White and Lindy Willmott, ‘Future of Assisted Dying Reform in Australia’ (2018) 42(6) *Australian Health Review* 616.

2 ‘Voluntary euthanasia’ refers to a medical practitioner administering a lethal medication to a terminally ill person at the person’s request. ‘Assisted suicide’ occurs when a medical practitioner prescribes a lethal medication at the person’s request, but the person takes the medication themselves, generally by ingesting it orally, but in some cases by activating a machine which gives a lethal injection. The term ‘voluntary assisted dying’ can encompass both voluntary euthanasia and assisted suicide, although in some jurisdictions (such as Switzerland and some states of the United States) only assisted suicide is lawful.

3 The *End-Of-Life Choices (Voluntary Assisted Dying) Act 2021* (Tas) was passed by the Tasmanian Parliament on 23 March 2021, received royal assent on 22 April 2021, and will commence on or before 23 October 2022.

4 The *Voluntary Assisted Dying Act 2021* (SA) was passed by the South Australian Parliament on 24 June 2021, received royal assent on 24 August 2021, and will commence in early 2023.

5 The *Voluntary Assisted Dying Act 2021* (Qld) was passed by the Queensland Parliament on 16 September 2021, received royal assent on 23 September 2021, and will commence on 1 January 2023.

6 The *Voluntary Assisted Dying Act 2022* (NSW) was passed by the NSW Parliament on 19 May 2022, received royal assent on 27 May 2022, and will commence on 28 November 2023.

unlawful in every jurisdiction.⁷ Shortly after the *VAD Act* (Vic) commenced, the Victorian government became aware that doctors and others involved in providing VAD who communicated with patients through a 'carriage service' risked contravening the *Commonwealth Criminal Code*.⁸ In 2005, the federal government had introduced three new criminal offences into the *Commonwealth Criminal Code* prohibiting the use of a carriage service 'for suicide related material'.⁹ 'Carriage service' is defined as 'a service for carrying communications by means of guided and/or unguided electromagnetic energy'.¹⁰ Telephones, television, the internet, radio, and fax all satisfy this definition. The federal government's stated purpose in enacting these offences was to target pro-suicide websites, internet chat rooms, and online cyberbullying, which were proliferating and readily accessible, and might incite vulnerable people to commit suicide.¹¹ In particular, websites were providing detailed instructions on how to build your own suicide device in Australia, circumventing customs regulations prohibiting the importation of suicide devices.¹² However, these laws were also reportedly¹³ in part a response to a campaign led by right-to-die activist Dr Philip Nitschke, who drew considerable

- 7 VAD was briefly legal in the Northern Territory under the *Rights of the Terminally Ill Act 1995* (NT), until that law was overturned by the Commonwealth government's *Euthanasia Laws Act 1997* (Cth). Twenty years elapsed before the *Voluntary Assisted Dying Act 2017* (Vic) ('*VAD Act* (Vic)') was enacted.
- 8 Jacob Kagi, 'Doctors May Face Prosecution for Discussing Euthanasia with Patients over Phone, Computer', *ABC News* (online, 23 August 2019) <<https://www.abc.net.au/news/2019-08-23/doctors-fear-prosecution-over-wa-voluntary-euthanasia-laws/11440394>>; 'Risk to Vic Doctors Discussing Euthanasia', *The Canberra Times* (online, 27 June 2019) <<https://www.canberratimes.com.au/story/6243599/risk-to-vic-doctors-discussing-euthanasia/?cs=14264>>.
- 9 The offences were inserted by the *Criminal Code Amendment (Suicide Related Material Offences) Act 2005* (Cth) sch 1 ('*Criminal Code Amendment Act 2005*'). Australia was the first country in the world to criminalise such conduct: Jane Pirkis et al, 'Legal Bans on Pro-Suicide Web Sites: An Early Retrospective from Australia' (2009) 39(2) *Suicide and Life-Threatening Behavior* 190, 190, citing Brian L Mishara and David N Weisstub, 'Ethical, Legal, and Practical Issues in the Control and Regulation of Suicide Promotion and Assistance over the Internet' (2007) 37(1) *Suicide and Life-Threatening Behavior* 58, 61. Although constitutionally, criminal law (including assisted suicide) is a state responsibility, the Commonwealth government retains power to legislate for federal criminal offences (including those that relate to 'carriage services'). The power to legislate with respect to telecommunications services is contained in the *Commonwealth Constitution* s 51(v). This is why the offences concerning suicide only apply to pro-suicide communication over telephone, chat rooms or internet services, and do not include printed material: *Criminal Code Act 1995* (Cth) ss 474.29A–474.29B ('*Commonwealth Criminal Code*').
- 10 *Commonwealth Criminal Code* (n 9) Dictionary (definition of 'carriage service') defines the term as having the same meaning as in the *Telecommunications Act 1997* (Cth) s 7 (definition of 'carriage service').
- 11 Commonwealth, *Parliamentary Debates*, House of Representatives, 10 March 2005, 4 (Philip Ruddock, Attorney-General); Pirkis et al (n 9) 191, discussing *Criminal Code Amendment Act 2005* (n 9).
- 12 Evidence to Senate Legal and Constitutional Legislation Committee, Parliament of Australia, Canberra, 14 April 2005, 46 (Kimberley Anne Williams).
- 13 See, eg, Kemal Atlay, 'Will Doctors Be Committing Crimes When Discussing Euthanasia over the Phone?', *Australian Doctor* (online, 23 August 2019) <<https://www.ausdoc.com.au/news/will-doctors-be-committing-crimes-when-discussing-euthanasia-over-phone>>.

media attention in Australia by promoting methods for terminally-ill individuals to end their lives.¹⁴ Voluntary euthanasia groups and their supporters opposed the introduction of these offences at the time, arguing it would affect both their potential and existing activities if it was illegal for them to ‘share information over the phone, host websites ... or even to provide help and advice to people who request it by phone or the internet’.¹⁵

Now that VAD is lawful in Victoria and Western Australia, these Commonwealth offences have raised concerns that doctors and other health professionals could be criminally liable under the *Commonwealth Criminal Code* for actions which are lawful under state legislation, when they provide information about VAD or conduct VAD consultations and assessments using a carriage service (such as a telephone or the internet).¹⁶ Indeed, the then Victorian Health Minister, Jenny Mikakos, instructed all doctors and other practitioners involved in the provision of VAD services to conduct all discussions, consultations and assessments face-to-face, so as to avoid potentially breaching the Commonwealth law.¹⁷ This issue was also of considerable concern in the subsequent parliamentary debates on the Voluntary Assisted Dying Bill 2019 (WA). Because of Western Australia’s geography, provisions allowing for consultations and assessments to occur via telephone or telehealth are specifically included in the *VAD Act* (WA).¹⁸ Several

14 Over the last 40 years, in response to thwarted law reform efforts, a number of ‘right-to-die’ advocacy groups have published guidance to terminally ill individuals about how to end their lives. The first reported publication was *How to Die with Dignity*, published by the Scottish Voluntary Euthanasia Society in 1980, followed closely by the English Voluntary Euthanasia Society’s *Guide to Self-Deliverance*: Fred Charatan and Clare Dyer, ‘Assisted Suicide: 1. America 2. Britain’ (1991) 303(6800) *British Medical Journal* 431. In 2006, the United States branch of the international organisation, Final Exit, published *The Peaceful Pill Handbook*, written by two Australian authors: Philip Nitschke and Fiona Stewart, *The Peaceful Pill Handbook* (Exit International, rev ed, 2007). Increasingly, these materials are now available online, and the websites of Exit International, Final Exit Network, and the Scottish Voluntary Euthanasia Society sell how-to guides such as *The Peaceful Pill eHandbook* (first released in 2008), *Final Exit, Departing Drugs and Five Last Acts*.

15 Department of Parliamentary Services (Cth), *Bills Digest* (Digest No 13 of 2004–05, 2 August 2004) 14 (‘*Bills Digest* No 13 of 2004–05’), quoting Australian Democrats, ‘Government Bans Voluntary Euthanasia Info’ (Media Release 04/302, 19 April 2004) <https://parlinfo.aph.gov.au/parlInfo/download/media/pressrel/GK9C6/upload_binary/gk9c64.pdf;fileType=application%2Fpdf#search=%22Senator%20Brian%20Greig%202000s%202004%2004%22>.

16 Kagi (n 8); ‘Risk to Vic Doctors Discussing Euthanasia’ (n 8). Concerns were also expressed that family members supporting a loved one through the process of VAD via telephone or email may potentially be subject to criminal prosecution under the *Commonwealth Criminal Code* (n 9), but this is beyond the scope of the present paper: Melissa Cunningham, ‘Doctors, Family Warned They Could Be Breaking Law Discussing Euthanasia on Phone, Internet’, *The Age* (online, 26 June 2019) <<https://www.theage.com.au/national/victoria/doctors-family-warned-they-could-be-breaking-law-discussing-euthanasia-on-phone-internet-20190626-p521ks.html>>.

17 Cunningham (n 16). See also Department of Health and Human Services (Vic), *Voluntary Assisted Dying: Guidance for Health Practitioners* (Policy Guide, July 2019) 4, 74 (‘*VAD Guidance for Health Practitioners*’).

18 *Voluntary Assisted Dying Act 2019* (WA) ss 158–9 (‘*VAD Act* (WA)’). Geography has also been identified as a reason for using telehealth to provide VAD services in the United States:

Liberal members of Parliament sought reassurance from the Commonwealth government that health practitioners would not risk prosecution under the *Commonwealth Criminal Code* for providing VAD-related services via telehealth, but no such assurance has been provided.¹⁹ The risk of prosecution for using a carriage service to provide VAD services assumed increased significance with COVID-19 related lockdown and social distancing measures,²⁰ which encourage telehealth or telephone consultations with general practitioners and medical specialists where feasible.²¹

The purpose of this article is to examine whether these concerns about potential criminal liability under the *Commonwealth Criminal Code* are warranted. This will be achieved by examining the intersection of the *Commonwealth Criminal Code* with those VAD laws which are currently operational — the *VAD Act* (Vic) and the *VAD Act* (WA) — to evaluate the degree of potential criminal liability health practitioners may face if they use a carriage service to facilitate VAD. Part II describes the VAD framework in both Victoria and Western Australia, and how the telephone or internet can be used in the process. Part III briefly sets out the relevant offences in the *Commonwealth Criminal Code*. Part IV then considers two threshold issues which affect whether the *Commonwealth Criminal Code* applies to the VAD regimes: whether VAD is suicide and the constitutional issue of whether there is any inconsistency between the federal *Commonwealth Criminal Code* and the state VAD laws. After concluding that the *Code* likely applies to conduct under the VAD regimes, Part V discusses the interpretation of the relevant *Commonwealth Criminal Code* provisions. Part VI then provides a detailed analysis of the degree to which activities undertaken pursuant to the VAD laws, including providing information or conducting an assessment over the phone or internet, may breach the *Commonwealth Criminal Code* provisions. Finally, Part VII makes recommendations for reform, and argues the *Commonwealth Criminal*

Konstantin Tretyakov, 'Medical Aid in Dying by Telehealth' (2020) 30 *Health Matrix* 325, 329. It is possible in Canada to provide VAD services via telehealth, which is of particular importance for rural and remote communities: Catharine J Schiller, 'Medical Assistance in Dying in Canada: Focus on Rural Communities' (2017) 13(9) *Journal of Nurse Practitioners* 628, 631.

- 19 Western Australia, *Parliamentary Debates*, Legislative Assembly, 24 September 2019, 7264 (Zak Kirkup), 7265 (Mia Davies); Western Australia, *Parliamentary Debates*, Legislative Council, 22 October 2019, 8008 (Adele Farina); Western Australia, *Parliamentary Debates*, Legislative Council, 24 October 2019, 8281 (Aaron Stonehouse).
- 20 Nick Carr, 'Outdated Law Makes Doctors Criminals, Leaves Dying Patients Anxious', *Crikey* (online, 2 April 2020) <<https://www.crikey.com.au/2020/04/02/coronavirus-voluntary-assisted-dying-law/>>. In relation to social distancing, see 'Social Distancing for Coronavirus (COVID-19)', *Australian Government Department of Health* (Web Page, 24 March 2020) <<https://web.archive.org/web/20200331021012/https://www.health.gov.au/news/health-alerts/novel-coronavirus-2019-ncov-health-alert/how-to-protect-yourself-and-others-from-coronavirus-covid-19/social-distancing-for-coronavirus-covid-19>>.
- 21 Greg Hunt and Michael Kidd, 'COVID-19: Whole of Population Telehealth for Patients, General Practice, Primary Care and Other Medical Services' (Media Release, Australian Government Department of Health, 29 March 2020) <<https://www.health.gov.au/ministers/the-hon-greg-hunt-mp/media/covid-19-whole-of-population-telehealth-for-patients-general-practice-primary-care-and-other-medical-services>>.

Code should be urgently amended to provide that ‘suicide’ does not include VAD carried out lawfully pursuant to a state law.

II VAD LEGAL FRAMEWORK

Both the *VAD Act* (Vic) and the *VAD Act* (WA) provide a detailed process to enable adults with decision-making capacity resident in Victoria or Western Australia to receive medical assistance to die.²² To be eligible, individuals must have a disease, illness or medical condition that is advanced, progressive and is expected to cause death within six months (12 months if the condition is neurodegenerative), and be experiencing intolerable suffering caused by that condition.²³ This section of the article sets out the obligations of medical practitioners, pharmacists (acting as part of the Statewide Pharmacy Service)²⁴ and VAD Care Navigators²⁵ under the respective VAD laws, as well as how a carriage service could be used in the process (absent any concerns about the *Commonwealth Criminal Code*). Although in both jurisdictions VAD can be administered by a practitioner in certain circumstances,²⁶ this paper focuses on discussions when self-administration is contemplated (the default model of VAD). This is because practitioner administration does not involve ‘suicide’, as the person dying does not perform the act causing death. Hence it does not intersect with the *Commonwealth Criminal Code* provisions.

To access VAD, a person must make three requests over a period of at least nine days, and be assessed as eligible by two independent medical practitioners, one of

- 22 For a more detailed analysis of the *VAD Act* (Vic) (n 7), see Ben P White et al, ‘Does the *Voluntary Assisted Dying Act 2017* (VIC) Reflect Its Stated Policy Goals?’ (2020) 43(2) *University of New South Wales Law Journal* 417. For a comparative analysis that includes the *VAD Act* (Vic) (n 7) and the *VAD Act* (WA) (n 18), see Ben P White et al, ‘Comparative and Critical Analysis of Key Eligibility Criteria for Voluntary Assisted Dying under Five Legal Frameworks’ (2021) 44(4) *University of New South Wales Law Journal* 1663.
- 23 *VAD Act* (Vic) (n 7) s 9(1); *VAD Act* (WA) (n 18) s 16. In Victoria, but not in Western Australia, the condition must also be incurable.
- 24 Information about the Statewide Pharmacy Service is available here: ‘Health Services Information’, *Victoria State Government Department of Health* (Web Page, 27 October 2021) <<https://www2.health.vic.gov.au/hospitals-and-health-services/patient-care/end-of-life-care/voluntary-assisted-dying/health-services-information>>. The Service was established to provide a single point from which VAD medication could be dispensed and is currently based at the Alfred Hospital.
- 25 As part of the implementation of the *VAD Act* (Vic) (n 7), the Victorian government established the Statewide VAD Care Navigator Service. The VAD Care Navigators, who provide information, support and education, are currently part of the Peter MacCallum Cancer Centre in Melbourne: see ‘Getting Support’, *Victoria State Government Department of Health* (Web Page, 4 June 2019) <<https://www.health.vic.gov.au/patient-care/getting-support>>.
- 26 In Victoria, practitioner administration is possible if a person is ‘physically incapable of the self-administration or digestion’: *VAD Act* (Vic) (n 7) s 48(3)(a). In Western Australia, practitioner administration is permitted if a doctor considers that self-administration is inappropriate having regard to the method of administration, the patient’s physical abilities or the patient’s concerns: *VAD Act* (WA) (n 18) s 56(2).

whom must have relevant expertise in the person's medical condition.²⁷ The 'coordinating medical practitioner' takes primary responsibility for coordinating the assessment process and access to VAD.²⁸ In response to the first request, they conduct the first assessment, and if they consider the person is eligible for VAD, they refer the person to a 'consulting medical practitioner'²⁹ for a second assessment.³⁰ As is common in modern medical practice, a convenient way to contact the other medical practitioner to facilitate the referral is over the telephone, email or through another electronic system.

Both the first and second assessments are designed to evaluate whether the person meets the eligibility criteria, and whether their request is voluntary and enduring.³¹ Although there are advantages to in-person assessments, evidence from Canada suggests high-quality assessments can take place via telehealth, improving equity of access.³² This is beneficial if an individual has difficulty locating a VAD provider. There are currently only 92 medical practitioners throughout regional and rural Victoria who are trained and registered to be able to provide VAD assessments.³³ Some people wishing to access VAD have reported difficulty in locating a medical practitioner willing to assist.³⁴ Telehealth would also be advantageous when the patient is too unwell to travel. Oncologist Cameron McLaren reports commonly conducting home visits to do VAD assessments, as many patients are house-bound or bed-bound and unable to travel.³⁵ It would also be beneficial where the patient lives in a regional or rural area, hours away from a registered participating VAD provider, or a suitably qualified specialist. For example, although there are 224 qualified neurologists in Victoria, only 11 are currently registered to provide VAD, and all of these are located in metropolitan areas.³⁶ Therefore, it is unlikely a patient with advanced motor neurone disease in

27 The legislative requirements for medical practitioners to provide a VAD assessment are contained in the *VAD Act* (Vic) (n 7) ss 10, 17, 26 and *VAD Act* (WA) (n 18) ss 17, 25, 36.

28 *VAD Act* (Vic) (n 7) s 15; *VAD Act* (WA) (n 18) s 23.

29 *VAD Act* (Vic) (n 7) s 24; *VAD Act* (WA) (n 18) s 34.

30 *VAD Act* (Vic) (n 7) s 22; *VAD Act* (WA) (n 18) s 30.

31 *VAD Act* (Vic) (n 7) ss 16, 20, 25; *VAD Act* (WA) (n 18) ss 16, 24, 28, 35.

32 Stephanie Dion, Ellen Wiebe and Michaela Kelly, 'Quality of Care with Telemedicine for Medical Assistance in Dying Eligibility Assessments: A Mixed-Methods Study' (2019) 7(4) *Canadian Medical Association Journal Open* E721, E725.

33 Voluntary Assisted Dying Review Board, *Report of Operations: January to June 2021* (Report, August 2021) 5 <<https://www.safercare.vic.gov.au/sites/default/files/2021-08/VADRB%20August%202021%20report%20FINAL.pdf>> ('*VADRB Report 2021*').

34 *Ibid* 19.

35 Cameron McLaren, 'An Update on VAD: (Almost) A Year in Review', *Dying with Dignity Victoria* (Web Document, 16 June 2020) 3 <https://www.dwdv.org.au/wp-content/uploads/2020/07/One_Year_of_VAD-Dr_Cameron_McLaren.pdf>.

36 See *ibid* 2–3; *VADRB Report 2021* (n 33) 5; Voluntary Assisted Dying Review Board, *Report of Operations: June to December 2019* (Report, February 2020) 7 <https://www.bettersafercare.vic.gov.au/sites/default/files/2020-02/VADRB_Report%20of%20operations%202019-2020.pdf> ('*VADRB Report 2019*').

a rural or remote area would be able to locate a participating consultant neurologist willing to travel to the patient's place of residence for a home visit.

In Western Australia, the *VAD Act* (WA) specifically allows the assessment to occur using audiovisual communication³⁷ if in person communication is not practicable.³⁸ If the medical practitioner is uncertain about the person's capacity or whether their medical condition meets the eligibility criteria, they must refer the person to an appropriately trained specialist for assessment on either question.³⁹ A logical method to make this referral would be electronically.

After each eligibility assessment, if the coordinating or consulting medical practitioner finds the person is eligible for VAD, they must provide the person with comprehensive and wide-ranging information, including about their diagnosis and prognosis, treatment options, palliative care options, the risks of taking a VAD medication, and their right to decide at any time not to continue with their request for VAD.⁴⁰ In Western Australia, the *VAD Act* (WA) specifically allows this information to be provided electronically (including by telephone, email, and audiovisual communication).⁴¹ The *VAD Act* (Vic) does not explicitly mention electronic methods of communication but neither does it prohibit them.

Once the assessments are complete, if the person is found eligible, they may then make a written declaration, signed in the presence of two witnesses and the coordinating medical practitioner ('the second request').⁴² If a person has been assessed as eligible by both the coordinating and consulting medical practitioners, and at least nine days have elapsed since the first assessment, the person can then make a third and final request for VAD to the coordinating medical practitioner.⁴³ In Western Australia, this final request is expressly permitted to occur via audiovisual communication,⁴⁴ while the Victorian Act is silent on this. At this point, in Victoria, the coordinating medical practitioner may apply to the Department of Health and Human Services for a VAD permit, which authorises the medical practitioner to prescribe (and the person to self-administer) the VAD

37 This is defined to mean 'a method of electronic communication that is designed to allow people to see and hear each other simultaneously': *VAD Act* (WA) (n 18) s 158(1). This would include video calling apps such as Skype, FaceTime or Zoom.

38 *Ibid* s 158(2). In Western Australia, an 'access standard' will also be issued 'setting out how the State intends to facilitate access to [VAD]' for residents, particularly regional residents: at s 156.

39 *Ibid* ss 26, 37; *VAD Act* (Vic) (n 7) ss 18, 27.

40 *VAD Act* (Vic) (n 7) ss 19, 28; *VAD Act* (WA) (n 18) ss 27, 38.

41 *VAD Act* (WA) (n 18) s 158(3). However, s 158(4) of the Act also states that this provision is subject to a contrary or inconsistent Commonwealth law.

42 *Ibid* s 42; *VAD Act* (Vic) (n 7) s 34.

43 *VAD Act* (Vic) (n 7) s 38; *VAD Act* (WA) (n 18) ss 47–8. The person seeking to access VAD must also appoint a contact person: *VAD Act* (Vic) (n 7) s 39; *VAD Act* (WA) (n 18) s 65.

44 *VAD Act* (WA) (n 18) s 158(2).

substance.⁴⁵ The permit application is completed online through the VAD Portal.⁴⁶ In Western Australia, the coordinating practitioner may prescribe a VAD substance without a permit.⁴⁷

The coordinating medical practitioner's final duty to the patient is to prescribe the VAD medication. The medical practitioner sends the prescription directly to the Statewide Pharmacy Service, which later dispenses the medication to the patient on their request.⁴⁸ At the point of prescription, the medical practitioner must give the person further information specific to the administration process,⁴⁹ and must inform them that there is no obligation to proceed with VAD.⁵⁰ The dispensing pharmacist⁵¹ must also provide the person with similar information when dispensing the VAD medication,⁵² including stating that the person is not obliged to self-administer the medication even once it has been dispensed.⁵³ In Western Australia, the provision of this information and advice via any method of communication (including internet-based, telephone and email) is specifically authorised.⁵⁴

There are also requirements at every step of the assessment and request process for medical practitioners and pharmacists to report to the Board appointed for this

45 *VAD Act* (Vic) (n 7) ss 43, 47. If the person is physically unable to self-administer or digest a VAD medication, a VAD permit may authorise the coordinating medical practitioner to administer the VAD medication for them: at s 48. However, the focus of the present paper is on self-administration.

46 'Voluntary Assisted Dying Portal', *Voluntary Assisted Dying Review Board* (Web Page, 7 April 2018) <<https://vadportal.bettersafecare.vic.gov.au>> ('VAD Portal').

47 *VAD Act* (WA) (n 18) ss 58–9.

48 'Health Services Information' (n 24).

49 *VAD Act* (Vic) (n 7) s 57; *VAD Act* (WA) (n 18) s 69.

50 *VAD Act* (Vic) (n 7) ss 57(b), (d); *VAD Act* (WA) (n 18) ss 69(2)(b)–(c).

51 In Western Australia, this person is called an 'authorised supplier': *VAD Act* (WA) (n 18) s 71.

52 *VAD Act* (Vic) (n 7) s 58; *ibid* s 72.

53 *VAD Act* (Vic) (n 7) s 58(c); *VAD Act* (WA) (n 18) s 72(2)(a). Some of this information (such as the purpose of the dose, the dangers of self-administration, how the VAD medication is required to be stored, and where any unused or remaining medication must be returned for safe disposal) is included on the labelling statement on the lethal medication, although this does not include a statement that the person is not obliged to proceed with VAD: *VAD Act* (Vic) (n 7) s 59; *VAD Act* (WA) (n 18) s 73.

54 *VAD Act* (WA) (n 18) s 158(3).

purpose.⁵⁵ Reporting is done through an online portal in both Victoria and Western Australia.⁵⁶

In both Victoria and Western Australia, the state government has appointed VAD Care Navigators to act as a contact point for people interested in VAD, in addition to health practitioners. They are not mentioned in the legislation, but their role includes providing general advice, specific information and support to people who wish to access VAD, such as connecting them with medical practitioners prepared to participate in VAD.⁵⁷

Finally, the *VAD Act* (Vic) and the *VAD Act* (WA) protect medical practitioners, and other health practitioners who assist or facilitate a request for VAD from any criminal or civil liability or liability for professional misconduct or contravention of a professional code of conduct, provided they act in accordance with the Act.⁵⁸

III COMMONWEALTH CRIMINAL CODE PROHIBITION

The *Commonwealth Criminal Code* provisions which prohibit using the internet or other telecommunications to incite or promote suicide were introduced in 2005.⁵⁹ The key provisions are ss 474.29A and 474.29B of the *Commonwealth Criminal*

- 55 In Victoria, this is the Voluntary Assisted Dying Review Board. Obligations to provide information to the Board are contained in: *VAD Act* (Vic) (n 7) ss 21(2), 30(1)(b)(i), 41(2), 49(4)(b), 60(2), 63(2), 66(2). In Western Australia, this is the Voluntary Assisted Dying Board. Obligations to provide information to the Board are contained in: *VAD Act* (WA) (n 18) ss 22(1), 29(2), 33(1), 40(2), 46, 50(1), 60(1)(b), 61(4), 63(3)(c), 66(4), 74(3), 76(3), 78(3), 157(4)(c).
- 56 ‘VAD Portal’ (n 46); ‘Voluntary Assisted Dying: Information Management System’, *VAD-IMS* (Web Page, 1 September 2021) <<https://vad-ims.health.wa.gov.au/VAD/>>.
- 57 ‘Getting Support’ (n 25); Department of Health (WA), *Accessing Voluntary Assisted Dying in Western Australia: What Is the Western Australian Voluntary Assisted Dying Statewide Care Navigator Service?* (Information Sheet, 1 July 2021) <<https://ww2.health.wa.gov.au/~media/Corp/Documents/Health-for/Voluntary-assisted-dying/Care-Navigator-Service.pdf>> (‘*Accessing VAD in WA*’).
- 58 *VAD Act* (Vic) (n 7) ss 79–81; *VAD Act* (WA) (n 18) ss 113(a), 114.
- 59 The provisions were originally introduced as part of an omnibus bill, the Crimes Legislation Amendment (Telecommunications Offences and Other Measures) Bill 2004 (Cth), containing numerous offences concerning inappropriate use of telecommunications services for a range of purposes, including child pornography, abhorrent violent material, and internet grooming of minors for sexual purposes. The suicide related offences were later separated from the general Bill, reintroduced as the Criminal Code Amendment (Suicide Related Material Offences) Bill 2004 (Cth). This Bill lapsed when Parliament was prorogued in August 2004, and was reintroduced in substantially identical form as the Criminal Code Amendment (Suicide Related Material Offences) Bill 2005 (Cth). The Bill received Royal Assent on 6 July 2005 and entered into force on 6 January 2006. For more detail on the legislative history, see Senate Legal and Constitutional Legislation Committee, Parliament of Australia, *Provisions of the Criminal Code Amendment (Suicide Related Material Offences) Bill 2005* (Report, 12 May 2005) 1 [1.2]–[1.4] (‘*Senate Report*’). See also Jennifer L Prinz, ‘The Phenomenon of Cybersuicide: An Examination of Australia’s Solution, the Criminal Code Amendment (Suicide Related Material Offences) Act 2005 and the Difficulty of International Implementation’ (2008) 18(2) *Indiana International and Comparative Law Review* 477, 486–9.

Code, which are part of a broader range of offences relating to the use of a carriage service for unlawful purposes.⁶⁰ The offences cover:

- counselling or inciting suicide;
- promoting suicide or giving instructions on particular methods of suicide; and
- possessing or supplying suicide related material intended to counsel suicide or provide instructions.⁶¹

The *Commonwealth Criminal Code* generally classifies offences into two main components: physical elements and fault elements. Sections 474.29A and 474.29B are lengthy and complex and are summarised in Table 1 using these classifications and the language of the statute.

Table 1. Elements of Offences in the *Commonwealth Criminal Code* Concerning Use of a Carriage Service for Suicide Related Material

Provision	Summary	Physical Elements		Fault Element
		<i>The person ...</i> ⁶²	<i>The material directly or indirectly ...</i> ⁶³	
474.29A(1) Maximum penalty: person = 1,000 penalty units (\$222,000) ⁶⁴ corporation = 5,000 penalty	Counsel or incite suicide	<ul style="list-style-type: none"> • uses a carriage service • to access/cause to be transmitted/transmit/make available/publish or otherwise distribute • material 	<ul style="list-style-type: none"> • counsels or incites • committing or attempting to commit suicide 	the person intends to use the material (or the material be used by another) to <ul style="list-style-type: none"> • counsel or incite committing or attempting suicide

60 These include threatening or harassing a person, child pornography, grooming or engaging in sexual activity with a child, sharing abhorrent violent material (relating to terrorism, murder, torture, rape or kidnapping) or inciting trespass, property damage or theft on agricultural land: *Commonwealth Criminal Code* (n 9) pt 10.6 div 474.

61 Ibid ss 474.29A–474.29B.

62 The physical elements of the *Commonwealth Criminal Code* (n 9) also have their own fault elements: at s 5.1. In relation to conduct, this is intention: at ss 5.2, 5.6(1).

63 The fault element for these circumstances is recklessness: ibid ss 5.4(1), 5.6(2). In other words, the prosecution would need to establish that the accused was reckless as to the existence of these circumstances: see Explanatory Memorandum, Criminal Code Amendment (Suicide Related Material Offences) Bill 2005 (Cth) 4–5 ('Criminal Code Amendment Bill 2005 Explanatory Memorandum').

64 The maximum penalty for an individual is 1,000 penalty units. Currently, a penalty unit is \$222 as indexed on 1 July 2020: *Crimes Act 1914* (Cth) ss 4AA(1), 4AA(3) ('*Commonwealth Crimes Act*'); Attorney-General (Cth), *Notice of Indexation of the Penalty Unit Amount* (1 July 2020).

units (\$1,110,000) ⁶⁵				
474.29A(2) Maximum penalty: person = 1,000 penalty units (\$222,000) corporation = 5,000 penalty units (\$1,110,000)	Promote or provide instructions on methods of suicide	<ul style="list-style-type: none"> • use a carriage service • to access/cause to be transmitted/transmit/make available/ publish or otherwise distribute • material 	<ul style="list-style-type: none"> • promotes or • provides instruction <p>on a particular method of committing suicide</p>	<p>the person intends to use the material (or the material to be used by another) to</p> <ul style="list-style-type: none"> • promote/provide instruction on a method of suicide; or • the person intends it be used by another person to commit suicide
474.29B Maximum penalty: person = 1000 penalty units (\$222,000) corporation = 5,000 penalty units (\$1,110,000)	Possess or supply suicide related material	<ul style="list-style-type: none"> • has possession/control of/ produces/ supplies/obtains material 	<ul style="list-style-type: none"> • counsels or incites committing or attempting to commit suicide; or • promotes or provides instruction on a particular method of committing suicide 	<p>the person has possession/engages in supply with the intention that the material be used:</p> <ul style="list-style-type: none"> • by that person; or • by another person; <p>in committing an offence against s 474.29A (even if committing the offence is impossible).</p>

It is not an offence to use a carriage service to engage in public discussion and debate about euthanasia or suicide, or to advocate law reform in that area, if there is no intention that the discussion be used to counsel or incite suicide, or to promote or provide information about a method of committing suicide.⁶⁶

These offences only apply to conduct and communications which use a ‘carriage service’. Accordingly, subject to other arguments (considered below), it may be an offence under s 474.29A or s 474.29B of the *Commonwealth Criminal Code* to use telephone, email, or internet-based methods, including telehealth services, text

65 The penalty imposed on a body corporate is five times the maximum penalty for an individual: *Commonwealth Crimes Act* (n 64). Sections 474.29A and 474.29B are the only offences in pt 10.6 of the *Commonwealth Criminal Code* (n 9) which impose on an individual a pecuniary penalty rather than a term of imprisonment for conduct related to a carriage service. There are also pecuniary penalties imposed on internet service providers or content hosts for failure to refer child abuse material or abhorrent violent content to the police: at ss 474.25, 474.33.

66 *Commonwealth Criminal Code* (n 9) ss 474.29A(3)–(4). See also *Senate Report* (n 59) 25 [2.3], 26 [3.78]. These provisions were inserted in response to concerns that the restrictions would infringe the constitutional implied freedom of political communication: see Prinz (n 59) 488–9.

messages or social media,⁶⁷ to discuss VAD with another person. The Code offences will apply even to conduct which is lawful under the *VAD Act* (Vic) and the *VAD Act* (WA).⁶⁸

IV IS VAD 'SUICIDE'?

The authors could not locate any prosecutions for offences under either s 474.29A or s 474.29B of the *Commonwealth Criminal Code*. The interpretation of the provisions remains to be judicially settled. There are several terms in the *Commonwealth Criminal Code* whose meaning has not been considered by the courts but the most significant is 'suicide'. If VAD does not meet the definition of 'suicide' under the legislation, then the provisions of the *Commonwealth Criminal Code* have no application to anyone acting under the Victorian or Western Australian VAD Acts. On the other hand, if VAD falls within the *Commonwealth Criminal Code*'s definition of 'suicide', then how activities authorised under VAD laws are conducted needs careful consideration. This section accordingly addresses the core threshold issue of whether VAD is 'suicide' according to the *Commonwealth Criminal Code*.⁶⁹

A Meaning of 'Suicide' in the Commonwealth Criminal Code

Although the term 'suicide' is used many times in ss 474.29A and 474.29B of the *Commonwealth Criminal Code*, it is not defined. Neither is there a definition of suicide in any other Commonwealth legislation, or in state or territory legislation, criminalising assisted suicide.⁷⁰ Therefore, its meaning falls to be determined by accepted principles of statutory construction, which seek to determine the 'ordinary and natural sense'⁷¹ of the language used, informed by the meaning the

67 The provisions when first enacted were specifically directed at communications using 'the Internet, email and other online applications': *Senate Report* (n 59) 25 [2.3], citing Criminal Code Amendment Bill 2005 Explanatory Memorandum (n 63) 3.

68 The interaction between Commonwealth and state laws is discussed in more detail in Part IV(B) below.

69 Whether VAD meets the definition of suicide under the *Commonwealth Criminal Code* (n 9) is an issue of statutory interpretation and is distinct from the broader normative debates that have resulted in a move away from the language of suicide to describe assisted dying. For an analysis of these debates, see, eg, Phoebe Friesen, 'Medically Assisted Dying and Suicide: How Are They Different, and How Are They Similar?' (2020) 50(1) *Hastings Center Report* 32.

70 The Northern Territory legislation uses the phrase 'kill ... himself or herself' interchangeably with the term 'commit suicide': *Criminal Code Act 1983* (NT) s 162. Some states use the section heading '[a]iding suicide', then define the offence as aiding 'another in killing himself or herself': see, eg, *Criminal Code Act 1899* (Qld) s 311; *Criminal Code Act 1924* (Tas) s 163.

71 *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129, 162 (Higgins J).

legislature intended the words to have, considering their context and purpose.⁷² This test is simple to state but notoriously difficult to apply. Accordingly, what constitutes a suicide under Australian law remains unclear.⁷³

1 A Legal Definition of the Word ‘Suicide’?

The Oxford English Dictionary defines suicide as ‘an act of taking one’s own life’.⁷⁴ Recent Australian judicial decisions adopt a similar definition. In *X v The Sydney Children’s Hospitals Network*, in the context of a decision to refuse life-saving medical treatment, Basten JA defined the legal concept of suicide as being ‘the intentional taking of one’s own life’.⁷⁵ Similarly, in *IL v The Queen*, three members of the High Court defined suicide as ‘self-murder’,⁷⁶ the ‘intentional taking of one’s own life’,⁷⁷ or ‘intentional self-killing’.⁷⁸ Expressed in these simple terms, an act of VAD pursuant to Victorian or Western Australian law would fall within the definition of suicide. A person who has been granted permission to access VAD performs an intentional act (ingesting lethal medication) which causes their death. Because the act is done with the intention of bringing about the person’s death, both elements of suicide are satisfied.

However, the legal definition of ‘suicide’ is likely to be more complex, as the early common law recognised. In *Stuart v Kirkland-Veenstra*, members of the High Court referred to Bracton, which is one of the early legal discussions of suicide.⁷⁹ Writing in the 13th century, Bracton distinguished four categories of suicide, differentiating the motive behind the act causing death.⁸⁰ The first two — killing oneself after committing a felony, to avoid punishment, and killing oneself

72 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 384 [78] (McHugh, Gummow, Kirby and Hayne JJ) (*‘Project Blue Sky’*). The construction that promotes the purpose or object underlying the Act is preferred: see *Acts Interpretation Act 1901* (Cth) s 15AA.

73 See generally Sir John Vincent Barry, ‘Suicide and the Law’ (1965) 5 (June) *Melbourne University Law Review* 1. See also Stephanie Jowett, Belinda Carpenter and Gordon Tait, ‘Determining a Suicide under Australian Law’ (2018) 41(2) *University of New South Wales Law Journal* 355, 363–9, discussing the variations between definitions of suicide used in different contexts.

74 *Oxford English Dictionary* (online at 14 February 2022) ‘suicide’ (def 1).

75 (2013) 85 NSWLR 294, 308 [59] (*‘X v Sydney Children’s Hospitals Network’*).

76 (2017) 262 CLR 268, 302 [79] (Bell and Nettle JJ), 314 [111] (Gageler J).

77 *Ibid* 302 [79] (Bell and Nettle JJ).

78 *Ibid* 314 [111] (Gageler J). Although the context of this case was different — the application of the felony murder rule in criminal law — the legal definition of suicide adopted was the same.

79 (2009) 237 CLR 215, 249–50 [94] (Gummow, Hayne and Heydon JJ).

80 Henrici de Bracton, *Bracton on the Laws and Customs of England*, tr Samuel E Thorne (William S Hein, 1997) vol 2, discussed in William E Mikell, ‘Is Suicide Murder?’ (1903) 3(6) *Columbia Law Review* 379, 379–80 and Danuta Mendelson and Ian Freckelton, ‘The Interface of the Civil and Criminal Law of Suicide at Common Law (1194–1845)’ (2013) 36(5–6) *International Journal of Law and Psychiatry* 343, 344.

'without justification, through anger and ill-will' — resulted in escheat of lands and forfeiture of goods and chattels. The third category — killing oneself from 'weariness of life or because [one] is unwilling to endure further bodily pain' — was punishable by forfeiture of goods and chattels but not land.⁸¹ The final category — killing oneself while insane, or by accident — was adjudged to be guiltless, and resulted in no criminal consequences.⁸²

Although Bracton's distinctions were lost by the end of the 13th century, the English common law retained a requirement that suicide be committed voluntarily and by a person with sound mind. A classic definition was provided in 1736 by Sir Matthew Hale: '*Felo de se* or *suicide* is, where a man of the age of discretion, and *compos mentis*, voluntarily kills himself by stabbing, poison, or any other way.'⁸³ According to this definition, 'suicide' was restricted to culpable killing of oneself, and did not apply to self-killing under compulsion or with an impaired mental state.⁸⁴ There is some authority to suggest that Hale's additional elements — voluntariness and decision-making capacity — may be part of the modern Australian legal definition of suicide.⁸⁵ Nevertheless, accessing VAD under Victorian or Western Australian law still falls within this conception of suicide, because in order to meet the eligibility criteria, VAD must be requested voluntarily and by a person with capacity.

2 Excluded Categories of Self-Killing

The law recognises that certain categories of self-killing do not amount to suicide. Most prominently in Australian law, provided a person has decision-making capacity, they can lawfully refuse life-sustaining treatment, even if it results in

81 Bracton (n 80) vol 2, 424. Bracton's third category of suicide has some resonance with the eligibility criteria for VAD, particularly the criterion of intolerable suffering: *VAD Act* (Vic) (n 7) s 9(1)(d)(iv); *VAD Act* (WA) (n 18) s 16(1)(c)(iii).

82 Bracton (n 80) vol 2, 424. Mikell claims Bracton borrowed this categorisation from Roman law, particularly Justinian, but he diverged from Justinian in preferring a punishment for suicide by a person who is weary of life or impatient of pain, whereas Roman law found these types of suicide justifiable: Mikell (n 80) 380.

83 Sir Matthew Hale, *Historia Placitorum Coronae: The History of the Pleas of the Crown* (1847) vol 1, 411. The English common law recognised three distinct categories of homicide, namely *felo de se*, murder and manslaughter: see William Blackstone, *Commentaries on the Laws of England* (Clarendon Press, 1769) bk 4, 189–90; Edward Coke, *The Third Part of the Institutes of the Laws of England: Concerning High Treason, and Other Pleas of the Crown and Criminal Causes* (W Clarke and Sons, 1817) 54. For a discussion of this history, see Barry (n 73); Mendelson and Freckelton (n 80); *IL v The Queen* (n 76) 274–5 [8]–[11], 278–9 [18] (Kiefel CJ, Keane and Edelman JJ).

84 *Clift v Schwabe* (1846) 136 ER 175, 188–91. See also Mendelson and Freckelton (n 80) 345.

85 In *Inquest into the Death of: Tyler Jordan Cassidy*, the coroner's test for suicide was described as 'a *voluntary* and deliberate course of conduct or act or acts in which he *consciously intended* at the moment of engagement in the acts, by those acts, to end his own life': (Coroners Court of Victoria, Coate J, 23 November 2011) 52 [244] (emphasis added). This accords with English case law, which describes suicide as 'voluntarily doing an act for the purpose of destroying one's own life whilst one is conscious of what one is doing': *R v Cardiff Coroner; Ex parte Thomas* [1970] 3 All ER 469, 472 (James J).

their death.⁸⁶ This is not legally regarded as suicide.⁸⁷ Several recent Australian cases have held that requesting the withholding or withdrawal of medical treatment (including blood transfusions,⁸⁸ a ventilator⁸⁹ or artificial nutrition and hydration)⁹⁰ is not suicide, even if the person's intention in refusing treatment is to bring about their death.⁹¹ By extension, in *HLtd v J*, Kourakis J held that the refusal of food and water is not suicide, but 'merely speeding "the natural and inevitable part of life known as death"'.⁹² Accordingly, a hospital or doctor respecting any of these wishes would not be liable for assisting suicide.⁹³

In *Seales v Attorney-General*, New Zealand's common law recognised a second category of intentional self-killing that would not be classified as suicide: that of altruistic self-killing (such as a soldier who sacrifices himself to save his comrades).⁹⁴ This has not yet been considered in Australia.

It could be argued that VAD is another category of 'self-chosen deaths ... regarded as non-suicidal',⁹⁵ and VAD deaths under a statutory regime should be recognised as a third category of exception to suicide.⁹⁶ Although there is a lively debate about the possible philosophical differences between suicide and assisted dying in the bioethical literature,⁹⁷ this has not been judicially considered in Australia. Courts

86 See, eg, *Brightwater Care Group v Rossiter* (2009) 40 WAR 84 ('*Brightwater v Rossiter*'); *Re JS* [2014] NSWSC 302.

87 *X v Sydney Children's Hospitals Network* (n 75) 308 [59] (Basten JA), quoted in *Re JS* (n 86) [34] (Darke J) with approval.

88 *X v Sydney Children's Hospitals Network* (n 75).

89 *Re JS* (n 86).

90 *Brightwater v Rossiter* (n 86).

91 *Re JS* (n 86) [3], [20], [25] (Darke J). 'Mr Rossiter has clearly and unequivocally indicated ... that he wishes to die on many occasions': *Brightwater v Rossiter* (n 86) 88 [11] (Martin CJ).

92 (2010) 107 SASR 352, 371 [56], 374 [67], quoting *Re Caulk*, 480 A 2d 93, 100 (Douglas J) (NH, 1984).

93 *H Ltd v J* (n 92) 374 [68] (Kourakis J); *Brightwater v Rossiter* (n 86) 97 [58] (Martin CJ); *Re JS* (n 86) [34] (Darke J), quoting *X v Sydney Children's Hospitals Network* (n 75) 308 [59] (Basten JA).

94 [2015] 3 NZLR 556, 588 [137], 589 [143] (Collins J) ('*Seales*'). It should be noted that these comments are obiter dicta.

95 Colin Gavaghan, 'Stopping Suicide after *Seales*' [2016] *New Zealand Criminal Law Review* 4, 6.

96 This is the position taken by Professor Cameron Stewart who suggested '[b]y definition "suicide" cannot apply to death under VAD legislation because such deaths are not suicides; they are prescribed forms of voluntary assisted deaths': Atlay (n 13).

97 See, eg, American Association of Suicidology, 'Statement of the American Association of Suicidology: "Suicide" is Not the Same as "Physician Aid in Dying"' (Position Paper, 2 November 2017); 'Physician-Assisted Death/MAID and Suicide', *Centre for Suicide Prevention* (Web Page) <www.suicideinfo.ca/resource/suicide-physician-assisted-death>; Malcolm Parker, 'Words and Reasons: Psychiatry and Assisted Suicide' (2012) 46(2) *Australian and New*

internationally have varied in their approach to this issue. In *Baxter v Montana*, Nelson J commented that terminally ill persons who wish to self-administer a physician-prescribed lethal medication 'do not seek to commit "suicide". Rather, they acknowledge that death within a relatively short time is inescapable because of their illness or disease'.⁹⁸

However, in *Seales*, Collins J rejected this analysis, stating such a case would satisfy the elements of suicide.⁹⁹ Further, in several Australian cases, courts have ruled that actions taken to assist a loved one to die, intending that death will occur, fall within the legal concept of assisting suicide, even where there may be a rational reason for desiring death, such as the presence of terminal illness or intolerable pain.¹⁰⁰

3 Legislative Purpose

Reference to the legislative purposes confirms that at the time the *Commonwealth Criminal Code* offences dealing with suicide-related material were enacted, acts of self-administered VAD would fall within the meaning of 'suicide'. Although neither the second reading speech¹⁰¹ nor the Explanatory Memorandum¹⁰² concerning these provisions considered whether the definition of 'suicide' was intended to apply to people seeking VAD. The parliamentary debate and submissions to the Senate's report on the Criminal Code Amendment (Suicide Related Material Offences) Bill 2005 (Cth) makes it clear that it was.

In the parliamentary debates, some senators criticised the Bill for precluding elderly and terminally ill people from accessing information that would enable

Zealand Journal of Psychiatry 80; Robert D Goldney, 'Neither Euthanasia nor Suicide, but Rather Assisted Death' (2012) 46(3) *Australian and New Zealand Journal of Psychiatry* 185, 186; Héctor Wittwer, 'The Problem of the Possible Rationality of Suicide and the Ethics of Physician-Assisted Suicide' (2013) 36(5–6) *International Journal of Law and Psychiatry* 419; Ellen R Wiebe et al, 'Suicide vs Medical Assistance in Dying (MAiD): A Secondary Qualitative Analysis' (2020) 44(12) *Death Studies* 802.

98 *Baxter v Montana*, 224 P 3d 1211, 1226 [71] (Mont, 2009). A similar point was made in *Truchon v Procureur général du Canada* [2019] QCCS 3792, [466] (Baudouin JCS).

99 *Seales* (n 94) 589 [144].

100 In several cases, a person who assisted a loved one to die in such circumstances was convicted of aiding and abetting suicide: see, eg, *R v Maxwell* [2003] VSC 278; *R v Godfrey* (Supreme Court of Tasmania, Underwood J, 26 May 2004); *Tasmania v Pryor* (Supreme Court of Tasmania, Hill AJ, 19 December 2005); *R v Rijn* (Melbourne Magistrates Court, Magistrate Lethbridge, 23 May 2011) ('*Rijn*'); *R v Justins* [2011] NSWSC 568; *R v Mathers* [2011] NSWSC 339. For a further analysis of these cases, see Katrine Del Villar, Lindy Willmott and Ben P White, 'Voluntary Requests, or Vulnerable Adults? A Critique of Criminal Sentencing in Assisted Suicide and "Mercy Killing" Cases' (2022) 45(2) *University of New South Wales Law Journal* 1.

101 Commonwealth, *Parliamentary Debates*, House of Representatives, 10 March 2005, 4–5 (Philip Ruddock).

102 Criminal Code Amendment Bill 2005 Explanatory Memorandum (n 63).

them to die with dignity.¹⁰³ They and pro-euthanasia advocacy groups¹⁰⁴ considered that the Bill would criminalise the electronic communication of material counselling or providing options to seriously or terminally ill persons wishing to end their lives,¹⁰⁵ including discussing methods of ‘voluntary euthanasia type deaths’.¹⁰⁶ The Attorney-General’s Department which sponsored the Bill confirmed this interpretation, saying: ‘If a doctor, in the course of that telephone communication, were to provide information about a method of suicide which encouraged the use of that method it would be caught.’¹⁰⁷ These views were, however, expressed at a time when VAD was not lawful in Australia, and the parliamentary debates did not consider the application of the *Commonwealth Criminal Code* if VAD was legalised.¹⁰⁸

4 Western Australia’s Exclusion of VAD from ‘Suicide’

The Western Australian government initially claimed that the *Commonwealth Criminal Code* offences did not apply in that state because the *VAD Act (WA)* expressly defines VAD as not being suicide:¹⁰⁹ ‘For the purposes of the law of the State, a person who dies as the result of the administration of a prescribed substance in accordance with this Act does not die by suicide.’¹¹⁰

However, this provision specifically applies only to the interpretation of the word ‘suicide’ in Western Australian laws and (as members of the Western Australian

103 Commonwealth, *Parliamentary Debates*, Senate, 23 June 2005, 237 (Brian Greig), 241–2 (Lyn Allison), 243 (Bob Brown).

104 Such as the Voluntary Euthanasia Societies of New South Wales, Victoria, Queensland, Western Australia, South Australia, Tasmania, and the Australian Civil Liberties Union.

105 *Senate Report* (n 59) 15 [3.31]–[3.33], 17–18 [3.40]–[3.44]; Evidence to Senate Legal and Constitutional Legislation Committee (n 12) 22 (Keppel Earl Enderby, President of the Voluntary Euthanasia Society of New South Wales).

106 *Senate Report* (n 59) 9–10 [3.10], quoting Evidence to Senate Legal and Constitutional Legislation Committee (n 12) 22 (Keppel Earl Enderby, President of the Voluntary Euthanasia Society of New South Wales). Right to life groups also considered this was the effect of the Bill. These included the Coalition for the Defence of Human Life, Right to Life Australia, Salt Shakers, Festival of Light, Catholic Women’s League Australia, and the Australian Christian Lobby.

107 *Senate Report* (n 59) 20 [3.52], quoting Evidence to Senate Legal and Constitutional Legislation Committee (n 12) 37–8 (Geoffrey Gray).

108 Stewart et al doubt that the Commonwealth Parliament intended to include lawful VAD schemes as ‘suicide’, although they did not specifically engage with the views of the Commonwealth Attorney-General’s Department: Cameron Stewart et al, ‘Suicide-Related Materials and Voluntary Assisted Dying’ (2020) 27 *Journal of Law and Medicine* 839, 843.

109 Letter from John Quigley to Christian Porter, 28 August 2019 <[https://www.parliament.wa.gov.au/publications/tabledpapers.nsf/displaypaper/4012693a8e51208c08d499584825846c0058d24b/\\$file/2693.pdf](https://www.parliament.wa.gov.au/publications/tabledpapers.nsf/displaypaper/4012693a8e51208c08d499584825846c0058d24b/$file/2693.pdf)>. See also Western Australia, *Parliamentary Debates*, Legislative Assembly, 3 September 2019, 6315 (Roger Cook).

110 *VAD Act (WA)* (n 18) s 12.

government later recognised)¹¹¹ it can have no effect on the interpretation of 'suicide' in Commonwealth laws such as the *Commonwealth Criminal Code*, as state and Commonwealth laws operate independently.¹¹²

During parliamentary debate, the Western Australian government stated that this section was not drafted to avoid potential inconsistencies with the *Commonwealth Criminal Code*.¹¹³ It subsequently conceded that it will not rely on this section to protect medical practitioners from liability for offences under the *Commonwealth Criminal Code*,¹¹⁴ and also appeared to concede that VAD would be considered suicide under the *Commonwealth Criminal Code*.¹¹⁵

5 Summary: Meaning of 'Suicide'

In summary, then, it appears likely that VAD by self-administration would fall within the ordinary English meaning of the word 'suicide', as well as the common law concept of suicide.¹¹⁶ Whether VAD would also be considered 'suicide' as a matter of statutory interpretation under the *Commonwealth Criminal Code* remains unsettled. It appears clear from the ordinary meaning of the word, and the discussion of legislative purpose at the time the offences were inserted in 2005, that the provisions were originally intended to encompass providing information or assistance to enable a seriously or terminally ill person to 'die with dignity'.¹¹⁷ However, that intention was formed at a time when VAD was unlawful in all Australian states and territories. Whether the provisions may be interpreted differently now that VAD is lawful under highly regulated and controlled conditions in Victoria and Western Australia remains to be tested. If the issue were raised in court, it is possible to argue that the *Commonwealth Criminal Code*

111 Western Australia, *Parliamentary Debates*, Legislative Council, 22 November 2019, 9170 (Simon O'Brien and Stephen Dawson), 9174 (Nick Goiran and Stephen Dawson).

112 Legislative definitions in state laws are not necessarily picked up by Commonwealth laws: see *Masson v Parsons* (2019) 266 CLR 554 concerning different provisions under New South Wales and Commonwealth laws as to whether a man who provided semen for artificial insemination was the 'father' of the child. Cf Stewart et al (n 108), who concluded that if VAD is excluded from the meaning of 'suicide' under state law, it must also be excluded from the definition of 'suicide' in the *Commonwealth Criminal Code*: at 845.

113 Western Australia, *Parliamentary Debates*, Legislative Assembly, 5 September 2019, 6576 (Roger Cook).

114 Western Australia, *Parliamentary Debates*, Legislative Council, 24 October 2019, 8281 (Stephen Dawson).

115 See also Western Australia, *Parliamentary Debates*, Legislative Council, 22 November 2019, 9174, 9176–7 (Stephen Dawson), 9175, 9177 (Nick Goiran). Perhaps the clearest discussion on this issue occurs when Goiran asks, 'would the death of a person as a result of the administration of a prescribed substance in accordance with this act still be considered a suicide under commonwealth law?', to which Dawson replies, '[y]es, it would, because this applies only to Western Australian law': at 9174. It is noted, however, that Dawson later stated, when talking about the Western Australian provision, that '[VAD] is not suicide': at 9176.

116 Note that Stewart et al (n 108) take a different view: at 841.

117 Evidence to Senate Legal and Constitutional Legislation Committee (n 12) 37–8 (Geoffrey Gray).

provisions should be restricted to unlawfully assisting a person to die rather than assisting a person to exercise a legal right under state VAD legislation. There is also scope to argue that VAD should fall within an excluded category of self-killings which are not considered ‘suicide’, based on a revival of the distinct motivations for suicide described in Bracton’s early categorisation, or relying on analogies with common law cases concerning refusals of treatment or of food or water to bring about death.¹¹⁸ However, neither of these arguments has been tested before the courts. Until the courts have an opportunity to authoritatively settle the question, it would be wise for medical practitioners to act on the assumption that VAD may be considered ‘suicide’ within the meaning of the *Commonwealth Criminal Code*. The following sections of this paper adopt this assumption.

B Potential s 109 Inconsistency

Assuming that VAD falls within the *Commonwealth Criminal Code* definition of ‘suicide’, the next question is whether the *Commonwealth Criminal Code* is inconsistent with the *VAD Act* (Vic) or the *VAD Act* (WA). Section 109 of the *Commonwealth Constitution* provides that where a state law is inconsistent with a Commonwealth law, the latter prevails to the extent of the inconsistency. The operation of s 109 is replicated by s 158(4) of the *VAD Act* (WA),¹¹⁹ which states that communication via audiovisual or other electronic means of communication is not authorised ‘if, or to the extent that, the use is contrary to or inconsistent with a law of the Commonwealth’.¹²⁰

The Western Australian government initially took the view that there was no inconsistency between its legislation and the *Commonwealth Criminal Code* provisions.¹²¹ This was based on initial legal advice¹²² that VAD is not suicide because the legislation states it is not suicide,¹²³ a view that was later (correctly) retracted during parliamentary debate.¹²⁴ The Western Australian government’s current position is that there is uncertainty and ambiguity surrounding the interaction of the *Commonwealth Criminal Code* and the *VAD Act* (WA), and that

118 It should be noted, however, that these cases all involved *omissions* causing death rather than *acts* causing death, so the analogy may not extend to acts of VAD.

119 These are now *VAD Act* (WA) (n 18) ss 158–9.

120 *Ibid* s 158(4).

121 Western Australia, *Parliamentary Debates*, Legislative Assembly, 5 September 2019, 6572, 6576 (Roger Cook); Western Australia, *Parliamentary Debates*, Legislative Assembly, 19 September 2019, 7162 (Mark McGowan).

122 The government of Western Australia received legal advice from the Department of Justice, the Solicitor-General, the State Solicitor’s Office and the Director of Public Prosecutions: Western Australia, *Parliamentary Debates*, Legislative Assembly, 5 September 2019, 6572, 6576 (Roger Cook).

123 Quigley (n 109).

124 Western Australia, *Parliamentary Debates*, Legislative Council, 24 October 2019, 8281 (Stephen Dawson); Western Australia, *Parliamentary Debates*, Legislative Council, 22 November 2019, 9174 (Stephen Dawson).

alternatives to telehealth may need to be considered in some circumstances.¹²⁵ The Victorian government clearly considers that there is potential for inconsistency between the *VAD Act* (Vic) and the *Commonwealth Criminal Code*, because it has instructed all medical practitioners and people involved with the administration of VAD to conduct all consultations face-to-face rather than via telehealth or telephone.¹²⁶ The Victorian government will arrange transport for patients or clinicians where necessary to allow clinicians to discuss VAD in face-to-face meetings only, avoiding any potential liability under the *Commonwealth Criminal Code*.¹²⁷ The Federal Attorney-General Christian Porter has confirmed that clinicians conducting face-to-face medical consultations will not breach the *Commonwealth Criminal Code*,¹²⁸ but has not given the same assurance for consultations conducted via telehealth or other electronic means of communication.

Whether the suicide related material provisions in the *Commonwealth Criminal Code* are inconsistent with the *VAD Act* (Vic) or *VAD Act* (WA) depends on whether there is a 'real conflict' between the two laws.¹²⁹ That question is answered by determining whether the state law alters, impairs or detracts from the Commonwealth law in a way that is significant and not trivial.¹³⁰ The tests of direct and indirect inconsistency are interrelated and there are overlapping tools for undertaking that analysis.¹³¹

125 This was mentioned at several points during debate in the Legislative Council: see, eg, Western Australia, *Parliamentary Debates*, Legislative Council, 16 October 2019, 7735 (Jacqui Boydell); Western Australia, *Parliamentary Debates*, Legislative Council, 23 October 2019, 8166 (Stephen Dawson).

126 See also *VAD Guidance for Health Practitioners* (n 17) 4, 74.

127 See Kemal Atlay and Paul Smith, 'Australia's First Euthanasia Doctor Tells His Story of Ending the Lives of Patients', *Australian Doctor* (online, 26 February 2020) <<https://www.ausdoc.com.au/news/australias-first-euthanasia-doctor-tells-his-story-ending-lives-patients>>.

128 'Risk to Vic Doctors Discussing Euthanasia' (n 8).

129 This is the language that the High Court has repeatedly used to expand the word 'inconsistent' in the *Commonwealth Constitution* s 109: see, eg, *Collins v Charles Marshall Pty Ltd* (1955) 92 CLR 529, 553 (Dixon CJ, McTiernan, Williams, Webb, Fullagar and Kitto JJ); *Jemena Asset Management (3) Pty Ltd v Coinvest Ltd* (2011) 244 CLR 508, 525 [42] (French CJ, Gummow, Heydon, Crennan, Kiefel and Bell JJ) (citations omitted) ('*Jemena*'); *Momcilovic v The Queen* (2011) 245 CLR 1, 233 [630] (Crennan and Kiefel JJ) (citations omitted) ('*Momcilovic*'); *Work Health Authority v Outback Ballooning Pty Ltd* (2019) 266 CLR 428, 458–9 [70]–[72] (Gageler J), 472 [105] (Edelman J) (citations omitted) ('*Outback Ballooning*').

130 *Victoria v Commonwealth* (1937) 58 CLR 618, 630 (Dixon J), quoted in *Telstra Corporation Ltd v Worthing* (1999) 197 CLR 61, 76 [28] (Gleeson CJ, Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ), *Dickson v The Queen* (2010) 241 CLR 491, 502 [13] (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ) ('*Dickson*'), *Jemena* (n 129) 524 [39] (French CJ, Gummow, Heydon, Crennan, Kiefel and Bell JJ) and *Outback Ballooning* (n 129) 447 [32] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ), 458 [70]–[72] (Gageler J), 472 [105] (Edelman J).

131 *Momcilovic* (n 129) 112 [245] (Gummow J), 134 [318] (Hayne J).

Indirect inconsistency occurs where the Commonwealth intends to exclusively ‘cover the field’ or be the only body to regulate a certain area of conduct, thus excluding any State laws on that subject. Here, the *Commonwealth Criminal Code* does not evince an intention to exclusively regulate telecommunications relating to suicide. Indeed, s 475.1(1) of the *Commonwealth Criminal Code* contains an ‘anti-exclusivity clause’,¹³² which explicitly states that ‘[t]his Part is not intended to exclude or limit the operation of any other law of the Commonwealth or any law of a State or Territory’. The intention behind this provision was to allow state laws criminalising the same conduct to continue to apply concurrently with the *Commonwealth Criminal Code* offences.¹³³

There are two different types of direct inconsistency. The first is where it is impossible to obey both the state and Commonwealth laws.¹³⁴ In this instance, there is no question of impossibility, because people providing VAD in Victoria or Western Australia can choose to avoid using a telecommunications service to conduct conversations, and thus comply with both laws. This is in fact the solution implemented by the Victorian government.¹³⁵

The second type of direct inconsistency occurs where one law confers a right, privilege or entitlement that the other law purports to take away or diminish.¹³⁶ This includes situations where one legislature criminalises certain conduct and hence closes off areas of liberty ‘designedly left [open]’ by the other polity.¹³⁷ There is a strong argument that there is a rights-based inconsistency between the *Commonwealth Criminal Code* and the relevant state VAD Acts. This is because the Victorian and Western Australian laws expressly authorise intentional self-killing where certain eligibility criteria for VAD are met. They allow medical practitioners and others in some circumstances to conduct conversations or assessments via telephone or telehealth and provide information via email or over the internet. As discussed above, although the position is not settled, this article proceeds on the basis that VAD will be ‘suicide’ under the Commonwealth law. If these electronic communications can be considered to counsel or incite VAD, or promote or provide instruction concerning VAD, they may breach the

132 *Outback Ballooning* (n 129) 481 [130] (Edelman J). Further, Edelman J cites a provision in terms similar to the *Corporations Act 2001* (Cth) s 5E(1): at 482 [133].

133 Explanatory Memorandum, Crimes Legislation Amendment (Telecommunications Offences and Other Measures) Bill (No 2) 2004 (Cth) 51, 53. Accordingly, the *Commonwealth Criminal Code* (n 9) is intended to be ‘supplementary to or cumulative upon’ state criminal law: *Outback Ballooning* (n 129) 449 [39] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ), quoting *Ex parte McLean* (1930) 43 CLR 472, 483 (Dixon J).

134 For example, where one law commands what the other forbids or one law compels disobedience to the other: *R v The Licensing Court of Brisbane*; *Ex parte Daniell* (1920) 28 CLR 23, 29 (Knox CJ, Isaacs, Gavan Duffy, Powers, Rich and Starke JJ).

135 *VAD Guidance for Health Practitioners* (n 17) 4, 74.

136 *Clyde Engineering Co Ltd v Cowburn* (1926) 37 CLR 466, 478 (Knox CJ and Gavan Duffy J); *Colvin v Bradley Brothers Pty Ltd* (1943) 68 CLR 151.

137 *Dickson* (n 130) 505 [25], quoting *Wenn v A-G (Vic)* (1948) 77 CLR 84, 120 (Dixon J).

Commonwealth's suicide related material offences.¹³⁸ Thus, the Victorian and Western Australian VAD Acts confer rights on medical practitioners and others which the *Commonwealth Criminal Code* restricts. As a result, the Victorian and Western Australian VAD Acts will be inoperative to the extent of the inconsistency. This means that any conduct that uses a carriage service to transmit material that encourages suicide (including VAD) would not be protected by the *VAD Act* (Vic) or *VAD Act* (WA),¹³⁹ but would be an offence under the *Commonwealth Criminal Code*.

V INTERPRETING THE PROVISIONS OF THE COMMONWEALTH CRIMINAL CODE

Having determined both that VAD could potentially be regarded as suicide under the *Commonwealth Criminal Code*, and that there is inconsistency between the Commonwealth criminal law provisions and state-based VAD laws, it is necessary to analyse the *Commonwealth Criminal Code* provisions to determine what, if any, conduct might give rise to possible criminal responsibility. As mentioned above, the proposed offences cover the use of a carriage service (including internet, email, telephone, and online applications)¹⁴⁰ for suicide-related material. What communication relating to VAD will be caught by these provisions depends on the meaning of key terms in each of the three offences. This Part considers the interpretation of these key terms, first addressing the physical elements of each offence (in Parts V(A)–(C)) and then discussing the fault elements (in Part V(D)).

A Section 474.29A(1) — Transmitting Material that Counsels or Incites Suicide

Section 474.29A(1) of the *Commonwealth Criminal Code* makes it an offence to access, transmit, make available, publish or otherwise distribute suicide-related material using a carriage service. '[A]ccess' is defined in terms which would include viewing, printing, downloading, copying or storing material from a computer.¹⁴¹ The other verbs are not specifically defined, but cover a variety of methods of conveying information to a specific person or unspecified class of people. The noun 'material' is broadly defined to include 'material in any form, or combination of forms, capable of constituting a communication'.¹⁴² Taken together, the action contemplated by this section can be broadly described as communicating information concerning suicide to other people, which would include: publishing content online for reading or downloading; online advertising

138 *Commonwealth Criminal Code* (n 9) ss 474.29A–474.29B.

139 The provisions which give health practitioners immunity from liability are *VAD Act* (Vic) (n 7) s 80 and *VAD Act* (WA) (n 18) ss 113(a), 114.

140 Criminal Code Amendment Bill 2005 Explanatory Memorandum (n 63) 3.

141 *Commonwealth Criminal Code* (n 9) s 473.1 (definition of 'access').

142 *Ibid* s 473.1 (definition of 'material').

of resources or workshops to potential participants; sending advice or information over email; and private verbal communication via the telephone or audiovisual means of communication (such as video calling apps).

To fall within the realm of conduct proscribed by s 474.29A(1), transmitting this material must have the consequence that it ‘directly or indirectly counsels or incites committing or attempting to commit suicide’.¹⁴³ During the Senate inquiry into the draft legislation, concerns were expressed that criminalising conduct that ‘directly or indirectly’ counsels suicide is very broad, and may not provide ‘a sufficiently certain legal standard for courts to measure conduct against’.¹⁴⁴ However, the Department responded that ‘directly or indirectly’ is a drafting device commonly used in the criminal law, which covers communication either in ‘express words’ or ‘by necessary implication’.¹⁴⁵

The term ‘counsels or incites’ is the most challenging element in this provision to interpret. Although ‘counsels’ is undefined, representatives of the Commonwealth Attorney-General’s department gave evidence to the Parliamentary Committee of Inquiry that it has the narrow meaning it bears in criminal offences concerning aiding, abetting and procuring. They stated: ‘It is not counselling in the medical sense of providing assistance and information; it is actually encouraging the person with an intent to bring about a result.’¹⁴⁶ Accordingly, it seems clear that ‘counselling’ means urging or encouraging a person to commit suicide, and is directed at the actual commission of suicide.¹⁴⁷ It encompasses intentionally using material to encourage a person to commit suicide,¹⁴⁸ but would not cover providing broad general advice which is not intended to be acted upon.

The term ‘incite’ is also not defined in the *Commonwealth Criminal Code*. Section 11.4 of the *Code* creates an offence of ‘incitement’, which is committed by a person

143 Ibid s 474.29A(1)(b).

144 *Bills Digest* No 13 of 2004–05 (n 15) 22. See also Department of Parliamentary Services (Cth), *Bills Digest* (Digest No 133 of 2004–05, 15 March 2005) 8; Electronic Frontiers Australia Inc, Submission No 28 to Senate Legal and Constitutional Legislation Committee, Parliament of Australia, *Inquiry into the Provisions of the Criminal Code Amendment (Suicide Related Material Offences) Bill 2005* (3 April 2005) 12 [62].

145 Evidence to Senate Legal and Constitutional Legislation Committee (n 12) 40 (Geoffrey Gray); Attorney-General’s Department, Submission No 32 to Senate Legal and Constitutional Legislation Committee, Parliament of Australia, *Inquiry into the Provisions of the Criminal Code Amendment (Suicide Related Material Offences) Bill 2005* (14 April 2005) 10.

146 Evidence to Senate Legal and Constitutional Legislation Committee (n 12) 38 (Geoffrey Gray). This narrow interpretation was repeated by Senator Chris Ellison in the parliamentary debate: Commonwealth, *Parliamentary Debates*, Senate, 23 June 2005, 246 (Chris Ellison). See also Supplementary Explanatory Memorandum, Criminal Code Amendment (Suicide Related Material Offences) Bill 2005 (Cth) [4], which states that ‘the term “counsels” is intended to have a narrow meaning. It would cover the encouragement or urging of a person to commit suicide and the giving of advice or assistance directed at the actual commission of suicide’.

147 *R v Morant* [2018] QSC 222, [20] (Davis J), citing *R v Oberbillig* [1989] 1 Qd R 342, 345 (Moynihan J).

148 *Senate Report* (n 59) 23 [3.63]–[3.64].

'who urges the commission of an offence'. Although this is not directly applicable to the offence contained in s 474.29A of the *Code*, it is an accepted principle of statutory construction that the meaning of words should be determined by reference to the language of the statute as a whole.¹⁴⁹ Accordingly, 'incite' should be given a meaning such as 'urge', which is similar to the meaning given to the word 'counsel'. The comparable state offence of inciting suicide has been briefly considered in one Victorian case: *R v Rijn*.¹⁵⁰ In that case, the charge preferred was 'incitement' rather than 'aiding or abetting' suicide, because the offender's role was characterised as 'passively encouraging' suicide rather than actively assisting.¹⁵¹ This confirms that 'incite' bears a very similar meaning to 'counsel' — namely, to urge or encourage a person to kill themselves.

In summary, therefore, the physical elements of the offence in s 474.29A are established when a person uses a carriage service to access material, provide it to someone else, or distribute or make it available, and that material encourages or urges committing or attempting to commit suicide. The person must also possess the necessary fault element, as will be discussed further below (Part V(D)).

B Section 474.29A(2) — Transmitting Material that Promotes or Provides Instruction on a Particular Method of Suicide

It is also an offence under the *Commonwealth Criminal Code* to access, transmit, make available, publish or otherwise distribute material which promotes or provides instruction on a particular method of committing suicide.¹⁵² The phrase 'promote or provide instruction' is not defined in the *Code*, and has not been the subject of judicial comment. The term 'promote' is used elsewhere in the *Code* as part of the definition of 'advocate' and appears there as a synonym of counsel, encourage or urge.¹⁵³ Thus it appears to suggest purposive conduct.

A similar phrase — 'promote, incite or instruct in matters of crime or violence' — was considered by the Federal Court in relation to offences under the classification legislation.¹⁵⁴ In *Brown v Members of the Classification Review Board of the Office of Film & Literature Classification*, 'promote' was defined as 'to further the growth, development, progress or establishment of (anything); to

149 *Project Blue Sky* (n 72) 381 [69] (McHugh, Gummow, Kirby and Hayne JJ), citing *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297, 320 (Mason and Wilson JJ).

150 *Rijn* (n 100).

151 The characterisation of the actions of Rijn is curious, given he provided his wife with the equipment needed to complete her suicide: *ibid* 1.

152 *Commonwealth Criminal Code* (n 9) s 474.29A(2).

153 *Ibid* ss 80.2C–80.2D.

154 The phrase is used in the schedule to the *Classification (Publications, Films and Computer Games) Act 1995* (Cth). See also *Classification of Films and Publications Act 1990* (Vic) s 3 (definition of 'Objectionable film' para (c) and 'Objectionable publication' para (e)); *Classification of Publications Ordinance 1983* (ACT) s 19(4)(b).

further advance, encourage'.¹⁵⁵ 'Instruct' was defined as 'to furnish with knowledge, especially by a systematic method; teach; train, educate',¹⁵⁶ but with a purposive meaning, going 'beyond the mere provision of information' which describes, depicts or teaches,¹⁵⁷ or conveys knowledge in a general way.¹⁵⁸ Sundberg J considered "'instruct in matters of crime" involves two elements: first, furnishing readers with information as to how crime can be committed, and secondly, encouraging them to use that information to commit crime'.¹⁵⁹ The test is purposive, but it is also objective: that is, whether the information has the effect of promoting or encouraging people to commit an action is to be assessed objectively, regardless of the actual intention of the person making the information available.¹⁶⁰ There is also no requirement to look at the effect or likely effect of the action.¹⁶¹

This phrase is not identical to the phrase used in s 474.29A(2) of the *Commonwealth Criminal Code*. For suicide related material, the words 'promote' or 'provide instruction' are used without the word 'incite', which is included in relation to matters of crime or violence. Applying the maxim *expressio unius est exclusio alterius*, it may be argued that the words 'promote' or 'provide instruction' should be interpreted more broadly, as the provision of information or instruction, without any element of incitement to suicide. However, courts have been cautious to apply this maxim of statutory construction, particularly where fundamental rights are involved.¹⁶² In this case, reading the phrase without reference to any purpose of inciting or encouraging suicide would broaden the class of persons potentially exposed to criminal sanctions. Such a construction is to be avoided. It also appears contrary to linguistic and contextual factors. It therefore seems likely that the words 'promote' or 'provide instruction' should be interpreted as having a purposive element, having embedded in it some notion of purposeful encouragement.

In summary, the physical element in s 474.29A(2) encompasses accessing or providing information using a carriage service, where the material provided directly or indirectly encourages or teaches a person how to commit suicide using a particular method. However, the offence would not apply to information which

155 (1998) 82 FCR 225, 239 (French J) ('*Brown*'), citing *Shorter Oxford English Dictionary*.

156 *Macquarie Dictionary* (online at 15 April 2021) 'instruct' (def 2); *Brown* (n 155) 239 (French J). See also *NSW Council of Civil Liberties Inc v Classification Review Board [No 2]* (2007) 159 FCR 108, 123 (Edmonds J) ('*NSW Council of Civil Liberties*').

157 *Brown* (n 155) 239 (French J).

158 *Ibid* 257 (Sundberg J).

159 *Ibid*.

160 *Ibid* 239 (French J), 242 (Heerey J), 257 (Sundberg J). See also *NSW Council of Civil Liberties* (n 156) 123 [57] (Edmonds J).

161 *NSW Council of Civil Liberties* (n 156) 126 [67] (Edmonds J).

162 Dennis C Pearce, *Statutory Interpretation in Australia* (LexisNexis Butterworths, 9th ed, 2019) 177 [4.45].

merely provided knowledge about suicide or a particular method of suicide. To establish the offence, the person must also possess the necessary fault element (discussed in Part V(D)).

C Section 474.29B — Being in Possession or Supplying Material that Is Intended to Be Used to Commit One of the Transmission Offences

Section 474.29B of the *Commonwealth Criminal Code* applies to the possession or supply of suicide related material which is intended to be used for the commission of either of the offences contained in s 474.29A.¹⁶³ A person can commit this offence without having a specific person in mind, or without anyone having committed or attempted suicide using this provision.

These offences are very broadly expressed. 'Possession or control' of suicide related material is defined to include possession of a computer or data storage device, possession of a document in which data is recorded, and control of data held in someone else's computer (even if that computer is not located in Australia).¹⁶⁴ The second composite phrase, 'producing, supplying or obtaining' material, is defined to include producing, supplying or obtaining data held in a computer or data storage device, or a document in which the data is recorded.¹⁶⁵ As with the two offences contained in s 474.29A, the final element of this offence is that the conduct must be accompanied by an intention that the material be used for committing an offence against s 474.29A.

D Fault Element

For an offence to be committed under either s 474.29A or s 474.29B of the *Commonwealth Criminal Code*, the prosecution must also prove beyond a reasonable doubt that the accused possessed the requisite fault element of intention. The framing of 'intention' varies slightly for each section, but all require the intention to use the relevant material for certain purposes. These are:

- That the person has an intention to use (or intention that another person use) the relevant material to **counsel or incite committing or attempting to commit suicide** (s 474.29A(1));
- That the person has an intention to use (or intention that another person use) the relevant material to **promote a method of suicide, to provide instruction**

163 Similarly worded provisions apply to preparatory conduct related to child abuse material: *Commonwealth Criminal Code* (n 9) ss 273.6, 471.20, 474.22A, 474.23.

164 Ibid s 473.2. Similar definitions are provided in relation to other offences: at ss 273.1(2), 470.4(2).

165 Ibid s 473.3. Similar definitions are provided in relation to other offences: at ss 273.1(3), 470.4(3).

on a method of suicide, or has an intention that another person use the material **to commit suicide** (section 474.29A(2)); and

- That the person has possession or control or produces, supplies or obtains the material with the intention to use (or intention that another person use) the relevant material **to commit an offence** against s 474.29A (s 474.29B).

Section 5.2 of the *Commonwealth Criminal Code* defines intention for conduct, a circumstance, and a result:

- 1) A person has intention with respect to conduct if he or she means to engage in that conduct.
- 2) A person has intention with respect to a circumstance if he or she believes that it exists or will exist.
- 3) A person has intention with respect to a result if he or she means to bring it about or is aware that it will occur in the ordinary course of events.

This definition combines the ordinary meaning of intention with a ‘stipulated, technical meaning’.¹⁶⁶ For example, s 5.2(3) refers to the ordinary meaning of ‘means to bring ... about [that result]’, and adds the technical meaning of where the person ‘is aware that [a result] will occur in the ordinary course of events’. The term ‘intention’ in s 5.2(3) is used more expansively in the *Commonwealth Criminal Code* than at common law, as the definition includes foresight of results which are certain or virtually certain to occur. This section has not been judicially interpreted, but the official commentary on the draft Code produced by the Model Criminal Code Officers Committee suggests that ‘aware ... it will occur in the ordinary course of events’ means the defendant knows the consequences or results of conduct are ‘morally or virtually certain to occur’.¹⁶⁷ There must be proof of actual subjective intention to achieve the result.¹⁶⁸

As will be discussed in Part VI, while it can be difficult to establish subjective intention, there is the potential for coordinating practitioners (or others involved in

166 Attorney-General’s Department (Cth), *The Commonwealth Criminal Code: A Guide for Practitioners* (Guide, March 2002) 53 <https://www.ag.gov.au/sites/default/files/2020-07/Criminal%20Code%20Guide%20for%20Practitioners_0.pdf>.

167 Criminal Law Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code Chapters 1 and 2: General Principles of Criminal Responsibility* (Report, December 1992) 25.

168 *Zaburoni v The Queen* (2016) 256 CLR 482, 501 [55] (Gageler J) (*‘Zaburoni’*), citing *R v Willmot [No 2]* [1985] 2 Qd R 413, 418 (Connolly J) and *R v Reid* [2007] 1 Qd R 64, 96–7 [108]–[109] (Chesterman J). This is similar to the English concept of oblique intention, which was described by Nettle J in *Zaburoni* (n 168) as ‘where it is proved that an accused foresaw that his or her actions would have an *inevitable or certain consequence*, it logically follows that the accused intended to bring about that consequence’: at 504 [66] (emphasis added). Nettle’s J’s statement is not the position of the majority, but it is analogous with the position in the *Commonwealth Criminal Code* (n 9). For further discussion: see Jordan Wei Peng Teng and Rebecca Mahony, ‘*Zaburoni v The Queen* (2016) 256 CLR 482’ (2016) 37(2) *Adelaide Law Review* 553, 559, 564–7.

navigating the VAD legislation) — particularly towards the latter stages of the process — to satisfy the fault element in the *Commonwealth Criminal Code*. Section 474.29A(2) is particularly concerning, given that a coordinating practitioner conducting a final VAD assessment or prescribing a VAD substance will necessarily need to provide material and instructions to their patient about how to carry out VAD (the method). In providing this information, they are doing so to instruct their patient on how to complete the VAD process if they choose, or to instruct another person (such as a family member or nurse) on how to provide support to the patient if needed. Arguably this information is provided with the intention to 'promote that method of committing suicide' (ie VAD) and almost certainly to 'provide instruction on that method of committing suicide'.¹⁶⁹ It would be difficult, then, to argue that a coordinating practitioner does not intend the relevant material to be used for that purpose.¹⁷⁰

For s 474.29A(1) of the *Commonwealth Criminal Code*, to prove intention, the coordinating practitioner must intend to use (or intend that another person use) the material to 'counsel or incite committing or attempting to commit suicide'. Because this is purposive, it may be more difficult to establish than the intention to provide instruction, which is the fault element under s 474.29A(2).

E Summary: Interpreting the Provisions of the Commonwealth Criminal Code

In summary, ss 474.29A and 474.29B of the *Commonwealth Criminal Code* are broad provisions which capture a wide range of conduct. As noted above, these offences have two main elements, which must be proved beyond a reasonable doubt: a physical element (or elements), and a fault element. In terms of the physical element, many *actions* conducted using a telephone, email, the internet, video calling facilities or social media applications are potentially caught if they involve possessing, supplying, discussing or sending material related to suicide (including VAD). However, the offences are limited by the fact that the conduct has a purposive component, such as 'counsel', 'incite' or 'promote'. The offences are further limited by the fault element of 'intention' — for example, to be prosecuted, a person must intend to counsel or encourage a person to commit suicide, intend to provide instruction which explains how and encourages a person to commit suicide, or intend that another person use the material to commit suicide. How these offences may apply at the various stages of the VAD process is discussed directly below.

169 *Commonwealth Criminal Code* (n 9) ss 474.29A(2)(e)(i)–(ii).

170 This is explored in more detail in Part VI(F) below.

VI PRACTICAL IMPLICATIONS OF THE COMMONWEALTH OFFENCE

Nationwide, telehealth is now a significant method for providing medical services, particularly for regional and rural patients.¹⁷¹ Telehealth is of critical importance in a state such as Western Australia, which has a vast geographical area, sparse population density,¹⁷² and limited medical services outside the capital city.¹⁷³ While Victoria is not as vast as Western Australia, telehealth is routinely used in this jurisdiction as well.¹⁷⁴ The social distancing measures introduced in response to the COVID-19 pandemic have greatly increased reliance on telehealth for the provision of medical services for all Australians.¹⁷⁵

Because of concerns about committing an offence under the *Commonwealth Criminal Code*, doctors in Victoria have been advised not to conduct eligibility assessments via the telephone or telehealth, but to either travel to the patient or make arrangements for the patient to travel to the doctor.¹⁷⁶ Similarly, VAD Care Navigators in Victoria have been advised not to respond fully to phone inquiries, but to conduct all discussions concerning VAD in person.¹⁷⁷

- 171 Medicare statistics show that in the five years between 1 July 2011 and 30 June 2016, there was an exponential increase in the use of telehealth services, with the largest users being general practitioners and specialists, from under 2,000 services per quarter to over 40,000 services per quarter: ‘Telehealth Quarterly Statistics Update’, *Australian Government Department of Health and Aged Care* (Web Page, 24 August 2016) <<http://www.mbsonline.gov.au/internet/mbsonline/publishing.nsf/Content/connectinghealthservices-factsheet-stats>>.
- 172 Western Australia has established over 900 videoconferencing endpoints, to give people access to specialists in Perth via the telehealth system. This system delivered 18,224 telehealth consultations in 2017 alone, saving regional patients 27.3 million kilometres of travel to access medical appointments: Western Australia, *Parliamentary Debates*, Legislative Council, 23 October 2019, 8130 (Jim Chown).
- 173 Many regional towns have only one general practitioner, and others have no medical service at all: *ibid* 8293 (Jim Chown). Because specialist doctors are concentrated in the capital city, and people living in regional or remote areas may be thousands of kilometres away, the Ministerial Expert Panel recommended that nurse practitioners could be involved in the delivery of VAD, and envisaged a key role for telehealth in delivering specialist advice: Department of Health (WA), *Ministerial Expert Panel Report on Voluntary Assisted Dying* (Final Report, 27 June 2019) 6 <<https://ww2.health.wa.gov.au/Reports-and-publications/Voluntary-assisted-dying-final-report>> (‘*WA Ministerial Expert Panel Report*’).
- 174 Alice King and Susan Jury, ‘Telehealth in Victoria: What, Where, Who and How?’ (Conference Paper, Rural Medicine Australia, October 2017) <<https://telehealthvictoria.org.au/wp-content/uploads/2017/10/Telehealth-in-Victoria.pdf>>.
- 175 Hunt and Kidd (n 21).
- 176 Statements of the former Health Minister Jenny Mikakos in Cunningham (n 16).
- 177 Department of Health and Human Services (Vic), *Voluntary Assisted Dying: Quick Reference Guide for Health Practitioners* (Policy Guide, 17 June 2019) 7 <<https://www2.health.vic.gov.au/about/publications/policiesandguidelines/voluntary-assisted-dying-quick-reference-guide-for-health-practitioners>> (‘*VAD Quick Reference Guide for Health Practitioners*’).

Similar 'alternative implementation strategies' were proposed in Western Australia prior to the Act commencing in 2021. These strategies included sending mobile crews or teams of medical professionals and support staff such as translators and care navigators into regional areas to service country people. Alternatively, travel packages were suggested to assist patients to travel to a doctor in the city if there is not one in a patient's region. Finally, a 'hub-and-spokes' model was proposed, under which requests are received by a central hub, which would facilitate the provision of information either by hard copy or in person, and arrange travel for the patient or health practitioner to conduct assessments in person. Western Australia eventually settled on a Regional Access Support Scheme, which funds either travel by a patient to a doctor, or travel by a doctor and support staff to a patient.¹⁷⁸

This section considers whether the obligations of medical practitioners, pharmacists and VAD Care Navigators at each step of the VAD process must be carried out in person, or can be carried out using a telecommunications service without breaching the *Commonwealth Criminal Code*.¹⁷⁹ It is not possible to comprehensively identify all possible communication that could occur via a carriage service, but the below discussion identifies in chronological order the key points in the VAD process where this is likely to arise. This paper focuses on the use of a carriage service by doctors, VAD Care Navigators or other health practitioners who act in good faith, in accordance with legislative requirements, and take a neutral role — allowing the patient to explore the option of VAD without either encouraging or discouraging a patient from accessing VAD. If a medical practitioner plays a more active role in encouraging patients to access VAD, this would be likely to increase their risk of contravening the *Commonwealth Criminal Code*.¹⁸⁰

It is important to acknowledge at the outset that these are difficult issues. Some conclusions are tentative only, either because of uncertainty in the interpretation of the law, or because it depends on the circumstances (such as the wording used by, or the subjective intention of, the health practitioner discussing VAD). The analysis concludes with Table 2, which outlines the nine identified actions that are examined under the seven headings below.

178 This scheme is administered by the Western Australian Voluntary Assisted Dying Statewide Care Navigator Service: *Accessing VAD in WA* (n 57).

179 Although there is also the potential for family or friends to breach the *Commonwealth Criminal Code* (n 9) when providing support via a carriage service to a loved one who is accessing VAD, the focus of the present paper is on the obligations of medical practitioners and other health practitioners.

180 Active encouragement could also constitute an offence under the VAD Acts if it induced a patient to request VAD, or to self-administer a VAD substance, through dishonesty or undue influence (or coercion in WA): *VAD Act* (Vic) (n 7) ss 85–6; *VAD Act* (WA) (n 18) ss 100–1.

A Providing Contact Information for a VAD Provider via a Carriage Service

A VAD Care Navigator may be a first point of contact for a person seeking information about VAD,¹⁸¹ and may provide general information, contact details of a trained VAD provider, and individualised support through the process.¹⁸² It could be argued that providing details of a VAD provider via a carriage service constitutes the transmission of material which indirectly promotes a method of committing suicide (ie VAD),¹⁸³ or indirectly counsels or incites suicide.¹⁸⁴ It is also arguable that in doing so the VAD Navigator intends to promote this method or counsel or incite the person into VAD because the information is provided to connect the patient to a medical practitioner to explore VAD. Due to such concerns, the Victorian government instructed VAD Care Navigators to conduct all conversations and provide all advice or information concerning VAD in person, rather than by telephone, email or internet.¹⁸⁵ This approach was also noted in the Western Australian Parliamentary debates.¹⁸⁶

Given the law is unclear, it is appropriate that VAD Care Navigators exercise caution. However, in our view several factors make it highly unlikely that simply providing the contact details of a VAD provider, via a carriage service, would be encouraging or inciting a person to access VAD or promoting a method of suicide:

- the referral is made at an early stage in the VAD process;
- the information provided is of a general nature;
- the person retains a discretion whether to use that information to further investigate VAD;
- the person has not yet been assessed as eligible for VAD; and
- the person will be informed repeatedly throughout the VAD process that they are under no obligation to proceed.

181 In the first year of operation of the *VAD Act* (Vic) (n 7), VAD Care Navigators provided support to 613 people seeking information about VAD: Voluntary Assisted Dying Review Board, *Report of Operations: January–June 2020* (Report, August 2020) 5 <https://www.safercare.vic.gov.au/sites/default/files/2020-08/VADRB_Report%20of%20operations%20August%202020%20FINAL_0.pdf> (*VADRB Report 2020*). However, VAD Care Navigators are not the only first point of contact. Some patients will seek VAD assistance from a medical practitioner with whom they have an existing relationship.

182 See Department of Health and Human Services (Vic), *The Statewide Voluntary Assisted Dying Care Navigator Service* (Factsheet, September 2019) <<https://www2.health.vic.gov.au/Api/downloadmedia/%7B443D45A2-9F81-4BCB-9D3A-EE3B36FD3306%7D>>.

183 *Commonwealth Criminal Code* (n 9) s 474.29A(2).

184 *Ibid* s 474.29A(1).

185 *VAD Quick Reference Guide for Health Practitioners* (n 177) 7.

186 Western Australia, *Parliamentary Debates*, Legislative Council, 24 October 2019, 8280–1, 8295–6 (Stephen Dawson).

Although this is highly unlikely to contravene the *Commonwealth Criminal Code*, this conclusion does not apply to all information and support that could be provided by a VAD Care Navigator via a carriage service. Particularly in the mid to later stages of the VAD process, the risks that VAD Care Navigators might breach the *Code* are similar to those discussed for other health practitioners below.

B Providing Information about VAD via a Carriage Service

In Victoria, a medical practitioner or other registered health practitioner (including nurse or pharmacist) cannot initiate conversations about VAD,¹⁸⁷ even where a patient asks about all available treatment options.¹⁸⁸ In Western Australia, medical practitioners or nurse practitioners (but not other health care workers) may initiate conversations about VAD provided, at the same time, they inform the person about treatment and palliative care options, and the likely outcomes of that care and treatment.¹⁸⁹ A health practitioner can, however, provide information about VAD after a person has specifically requested such information,¹⁹⁰ but this risks breaching the *Commonwealth Criminal Code* if this information is provided via a carriage service. As discussed below, the more detailed and specific the information provided, the greater the risk of contravening the *Code*.

The lowest level of risk is present in initial discussions with a patient about end-of-life options. Communications only relating to the range of treatment, non-treatment and palliative care options available to a patient (including VAD as a possible option), are highly unlikely to breach the suicide-related material provisions of the *Commonwealth Criminal Code*. Unless a doctor, VAD Care Navigator or health practitioner framed the conversation in a way which clearly encouraged a patient to choose VAD, it is unlikely that a general discussion of VAD as one among a number of options for treatment or care at the end of life would amount to counselling or inciting suicide,¹⁹¹ or promoting a method of suicide.¹⁹² It is also unlikely that a doctor, VAD Care Navigator or other health practitioner would have the necessary subjective intention to counsel or encourage

187 This is prohibited under the *VAD Act* (Vic) (n 7) s 8, and is considered unprofessional conduct, which is subject to mandatory notification to the Australian Health Practitioner Regulation Agency: at ss 75–6.

188 For critique of this provision: see Lindy Willmott et al, 'Restricting Conversations about Voluntary Assisted Dying: Implications for Clinical Practice' (2020) 10(1) *BMJ Supportive and Palliative Care* 105, 107–8; Carolyn Johnston and James Cameron, 'Discussing Voluntary Assisted Dying' (2018) 26(2) *Journal of Law and Medicine* 454; Bryanna Moore, Courtney Hempton and Evie Kendal 'Victoria's Voluntary Assisted Dying Act: Navigating the Section 8 Gag Clause' (2020) 212(2) *Medical Journal of Australia* 67.

189 *VAD Act* (WA) (n 18) s 10.

190 *VAD Act* (Vic) (n 7) s 8(2); *VAD Act* (WA) (n 18) s 10(4).

191 Within the meaning of the *Commonwealth Criminal Code* (n 9) s 474.29A(1).

192 *Ibid* s 474.29A(2).

suicide.¹⁹³ Accordingly, it seems that providing general information or discussing end-of-life options and preferences could safely occur using a carriage service without infringing the *Commonwealth Criminal Code*.

In contrast, more risk could be involved if doctors, VAD Care Navigators, or other health practitioners provide information including *specific advice* such as about a method of VAD, the drugs used, and the procedure followed by someone wishing to end their life in accordance with the statutory framework. These sorts of discussions could occur at the initial stages of seeking VAD or at other points in time, such as after eligibility assessments when mandated information must be provided. Depending on the context and the information being provided, it is possible that providing the mandated information could contravene s 474.29A(2) of the *Commonwealth Criminal Code* if the material was transmitted through a carriage service. The health practitioner's action in providing specific information about a method of VAD would be likely to be considered to have the effect of at least indirectly promoting or providing instruction on a particular method of suicide if that information is sufficiently detailed.¹⁹⁴ As mentioned above, whether providing information has the effect of promoting suicide is assessed purposively and objectively,¹⁹⁵ and providing information which can be used has been held to encourage its use.¹⁹⁶

Just as the physical element of promoting or providing instruction is likely made out if the material is sufficiently detailed, the fault element of intention would also appear to be satisfied in these circumstances, provided there is proof of the health practitioner's subjective intention. If the evidence showed a health practitioner only intended to facilitate their patient's access to medical options to which they are legally entitled, or to provide the patient with peace of mind that an option exists in the event that their pain later becomes unbearable, this intention would not be established. Given the possibility of criminal sanctions for breach of the *Commonwealth Criminal Code*, in our view, it would be prudent for doctors, VAD Care Navigators and other health practitioners to avoid providing patients with

193 Professor Ian Freckelton QC agrees, stating that doctors 'may be speaking to the person about what they can or can't do and explaining the possibilities and technicalities, but they ought not to be counselling or inciting the commission of suicide': Atlay (n 13).

194 *Commonwealth Criminal Code* (n 9) s 474.29A(2).

195 See discussion above in Part V(B).

196 Dawson J stated that '[t]o impart information which can be used ... is necessarily to encourage its use if the recipient of the information is so inclined': *Langer v Commonwealth* (1996) 186 CLR 302, 326 ('*Langer*'), quoted in *Brown* (n 155) 241 (Heerey J). Dawson J further stated, '[i]f there is a line between imparting information with an intention to encourage its application and imparting information with an intention merely to inform it must (save where there is active discouragement) be a thin one': *Langer* (n 195) 323. This was also the way the *Commonwealth Criminal Code* (n 9) was interpreted when these offences were inserted in 2005: see Evidence to Senate Legal and Constitutional Legislation Committee (n 12) 17 (Philip Nitschke), 47–8 (Brian Greig), 38 (Geoffrey Gray).

information about VAD medication, methods and procedures over the telephone or telehealth.¹⁹⁷

Finally, any conversation in which a practitioner specifically suggests over a carriage service that VAD is a preferable option for a patient is at a higher risk of breaching the *Commonwealth Criminal Code*, with the risk elevating with the strength of the practitioner's recommendation.¹⁹⁸ When communication suggesting VAD as an option reaches the point of encouraging or urging a patient to choose it, that would amount to counselling or inciting VAD.¹⁹⁹ If this included information about VAD methods, that would also likely meet the criteria for providing instruction or promoting suicide.²⁰⁰ In both cases, the prosecution would need to prove beyond a reasonable doubt that the medical practitioner also had the subjective intention to counsel or incite the person to access VAD.

C Assessing Eligibility for VAD via a Carriage Service

In Victoria, the government contemplated eligibility assessments by medical practitioners (and, if necessary, consultations with other specialists or psychiatrists) would occur in person, and thus would not breach the *Commonwealth Criminal Code* provisions. However, the recent COVID-19 pandemic will likely necessitate that some now occur via telehealth. The Western Australian legislation makes explicit provision for eligibility assessment to occur via telehealth,²⁰¹ acknowledging problems of geographical remoteness from relevant qualified medical practitioners which exist in that state.²⁰² Despite this, during debate in the upper house, the Western Australian government conceded that due to conflict with the *Commonwealth Criminal Code*, eligibility assessments 'may need to be undertaken in person, with either the patient travelling to the practitioner or the practitioner travelling to the patient'.²⁰³

197 A representative of the Attorney-General's Department told the Senate Committee inquiring into the Bill that '[i]f a doctor, in the course of that telephone communication, were to provide information about a method of suicide which encouraged the use of that method it would be caught': *Senate Report* (n 59) 20 [3.52], quoting Evidence to Senate Legal and Constitutional Legislation Committee (n 12) 37–8 (Geoffrey Gray).

198 As noted above, in Victoria, medical practitioners and others are specifically prohibited from raising the topic of VAD: *VAD Act* (Vic) (n 7) s 8. However, a practitioner may potentially encourage a patient once they have raised the topic.

199 Thereby breaching the *Commonwealth Criminal Code* (n 9) s 474.29A(1).

200 In breach of the *Commonwealth Criminal Code* (n 9) s 474.29A(2).

201 The *VAD Act* (WA) (n 18) s 158(2) specifically provides that a patient may make a request for VAD using audiovisual communication, and a medical practitioner may assess the person's eligibility and provide advice or information via telehealth where it is not practical to communicate in person.

202 *WA Ministerial Expert Panel Report* (n 173) 46–7.

203 Western Australia, *Parliamentary Debates*, Legislative Council, 24 October 2019, 8293 (Stephen Dawson). See also Western Australia, *Parliamentary Debates*, Legislative Council, 4 December 2019, 9846 (Stephen Dawson).

This conclusion may be an overly cautious interpretation of the *Code*. In our view, conducting a medical examination of a person, reviewing the person's clinical notes, evaluating decision-making capacity and verifying the person's residency do not constitute the transmission of 'material' which directly or indirectly counsels or incites suicide. Not only are these processes merely establishing relevant facts concerning the person, they also do not involve the sending of material of the nature that attracts the *Commonwealth Criminal Code* prohibition.

However, communicating the outcome of the eligibility assessment is a separate consideration. Using a carriage service to advise the person that he or she meets the eligibility criteria for VAD may fall within the ambit of transmission of 'material'. Although the matter has not been settled, and legal advice provided on this point to the governments of Victoria and Western Australia is not publicly available, it seems unlikely that a medical practitioner who used a carriage service to communicate that a person is assessed as eligible for VAD would be considered to meet the physical element of counselling or inciting suicide in the *Commonwealth Criminal Code*. Several factors contribute to this conclusion:

- eligibility assessment is an early step in the VAD process and one that is focused not on the provision of VAD but on a person's future ability to access it;
- both the coordinating and consulting medical practitioners are legally obliged to give the patient information which emphasises that the patient is under no obligation to proceed with VAD,²⁰⁴ and that other treatment or palliative care options are available;²⁰⁵ and
- the legislation in both states expressly provides that a person is under no obligation to continue with the request and assessment process.²⁰⁶

Because of these cumulative requirements, it can persuasively be argued that the purpose of eligibility assessment is not to encourage or incite a person to access VAD,²⁰⁷ but rather to evaluate whether the person meets strict legal criteria relating to age, terminal illness, capacity, voluntariness and residence.²⁰⁸

It may also plausibly be argued that a coordinating or consulting practitioner communicating that a person has met the eligibility criteria would not satisfy the fault elements for the offence under s 474.29A(1) of the *Commonwealth Criminal Code*. A medical practitioner could argue that communicating the result of the eligibility assessment was not intended to counsel or incite the person to access VAD, but was merely provided so the person can assess whether VAD is a viable

204 *VAD Act* (Vic) (n 7) ss 19(1)(f), 28(1)(f); *VAD Act* (WA) (n 18) ss 27(1)(i), 38(1).

205 *VAD Act* (Vic) (n 7) ss 19(1)(b)–(c), 28(1)(b)–(c); *VAD Act* (WA) (n 18) ss 27(1)(c), 38(1).

206 *VAD Act* (Vic) (n 7) s 12; *VAD Act* (WA) (n 18) s 19.

207 As required by the *Commonwealth Criminal Code* (n 9) s 474.29A(1).

208 *VAD Act* (Vic) (n 7) s 16; *VAD Act* (WA) (n 18) s 24.

option. If a medical practitioner did not possess the requisite intention, he or she would be able to communicate the results of eligibility assessments over the telephone or telehealth (if that were clinically appropriate), without breaching the *Commonwealth Criminal Code*.

The situation is more complex regarding the offence under s 474.29A(2) of the *Code*. As a VAD assessment is part of the VAD process, it is more likely that the coordinating or consulting practitioner would meet the criteria for providing instruction or promoting a particular method of suicide (that is, VAD).²⁰⁹ Although a medical practitioner in the course of assessing a person for eligibility for VAD may not intend to promote VAD to that person, their assessment of the person as eligible and discussion of the next step in the VAD process may constitute evidence of an intention to provide instruction about a particular methods of suicide (VAD), as eligibility assessment is a required step in the VAD process. Given this possibility that communicating the results of a VAD assessment may contravene the Code, some doctors may out of an abundance of caution prefer not to take the risk of conducting an eligibility assessment via a carriage service.

D Referral to Other Doctors or Specialists via a Carriage Service

As described above, the VAD legislation sets out circumstances where referrals must be made to a consulting practitioner for a second eligibility assessment,²¹⁰ or to an appropriately trained registered health practitioner when a medical practitioner is uncertain if the patient meets the illness, capacity or (in Western Australia) voluntariness criteria.²¹¹

It is highly unlikely that an electronic referral from one doctor to another would have the purpose of counselling or inciting a person to access VAD, or meet the stipulated fault element of the relevant *Commonwealth Criminal Code* offence,²¹² for a number of reasons:

- the communication itself occurs between two medical practitioners, not directly with the patient;
- the process does not directly or indirectly encourage (counsel or incite) a patient to access VAD; and
- it is unlikely that the doctor would intend the referral to encourage a patient to participate in VAD.

209 In breach of the *Commonwealth Criminal Code* (n 9) s 474.29A(2).

210 *VAD Act* (Vic) (n 7) s 22; *VAD Act* (WA) (n 18) s 30.

211 *VAD Act* (Vic) (n 7) ss 18, 27; *VAD Act* (WA) (n 18) ss 26, 37. In Western Australia, for assessments relating to voluntariness or coercion, that referral can be to 'another person [not necessarily a registered health practitioner] who has appropriate skills and training': at ss 26(3), 37(3).

212 *Commonwealth Criminal Code* (n 9) s 474.29A(1).

The Western Australian government is also confident that providing a referral for VAD electronically would not breach the *Commonwealth Criminal Code*.²¹³

E Requesting a VAD Permit via a Carriage Service (Victoria Only)

In Victoria, once the eligibility assessment is complete, the coordinating medical practitioner may apply for a VAD permit, and this must be done via the online VAD Portal.²¹⁴ This is required before the VAD substance can be prescribed. While there are arguments both ways, it is unlikely but remains possible that a permit application could constitute a breach of the *Commonwealth Criminal Code*.

The argument that making a permit application does not breach s 474.29A(1) of the *Commonwealth Criminal Code* is that this step is merely an administrative process, analogous to referral to another doctor. In this sense, it is not an action which has the effect of directly or indirectly encouraging a patient to proceed with VAD. Three factors support this interpretation:

- the material is not transmitted to the person wishing to access VAD, but to an independent third party: a government body;
- following the eligibility assessment, the patient must make a formal request for VAD which is a necessary precondition for the doctor to apply for the VAD permit: the medical practitioner is responding to the patient's request, not encouraging the patient; and
- the legislative provisions state that even after a permit has been issued and the VAD medication has been prescribed and dispensed, a person is still free to choose other options for treatment and care, and is under no obligation to proceed with VAD, therefore this is unlikely to satisfy the physical elements of the offences.²¹⁵

The effect of obtaining a permit, then, is part of providing a range of options, rather than the specific encouragement of VAD.

However, there remains an argument that transmitting an electronic application for a VAD permit amounts to indirectly encouraging a person to avail themselves of VAD under s 474.29A(1) of the *Commonwealth Criminal Code*. A permit application is one of the final steps in the VAD process, occurring after a final request. It occurs at a point in the VAD process when the person is highly likely to access VAD. In this context, the coordinating practitioner applying for a VAD permit may be described as (at least indirectly) encouraging or facilitating the

213 Western Australia, *Parliamentary Debates*, Legislative Council, 24 October 2019, 8280 (Stephen Dawson).

214 *VAD Act* (Vic) (n 7) ss 43, 47–8.

215 See *ibid* ss 57(b), (d), 58(c).

person to take up the option. It also may be argued that applying for a permit amounts to promoting VAD as a method of suicide under s 474.29A(2) of the *Commonwealth Criminal Code*, in the sense that a doctor applying for a permit advances the process by making a representation that the person concerned be granted permission to access VAD. Any prosecution would also need to prove that the coordinating medical practitioner possessed the requisite intention under both offences. Therefore, provided there is sufficient evidence of intention, it remains theoretically possible that applying for a permit could be interpreted to breach the *Commonwealth Criminal Code*.

F Prescribing and Dispensing a VAD Substance via a Carriage Service

The physical act of dispensing a VAD substance to a patient, contact person, or medical practitioner will take place in person — not via a carriage service — thus alleviating any risk of breaching the *Commonwealth Criminal Code*. However, it is conceivable that the information provided when prescribing or dispensing medication, or the prescription itself, may be transmitted electronically.²¹⁶ The VAD Acts set out a range of information that must be provided to the patient before prescribing,²¹⁷ and when dispensing,²¹⁸ a VAD substance.

The transmission of information to a patient regarding administration of the VAD substance via a carriage service probably constitutes promoting or providing instructions on methods of suicide, in contravention of the *Commonwealth Criminal Code*.²¹⁹ This is because the information contains very specific details concerning the VAD substance, and instructions on the methods of self-administration, which would directly provide instruction on a particular method of suicide.²²⁰ Depending on how the communication is framed, arguably there would be evidence to satisfy the fault element in s 474.29A(2)(c) that the coordinating medical practitioner or pharmacist intended to provide instruction on that method of committing suicide. As a result, it is probable that when providing this

216 The provision of advice or information by a medical or health practitioner by electronic means is specifically contemplated in the *VAD Act* (WA) (n 18) s 158(3).

217 At the prescription stage, the coordinating medical practitioner must inform the person how to self-administer the VAD substance, how to store it, what to do with an unfilled prescription, and how to dispose of any unused VAD substance: *VAD Act* (Vic) (n 7) s 57; *VAD Act* (WA) (n 18) s 69. In Western Australia, the coordinating practitioner must additionally inform the patient, contact person or agent collecting the medication what combination of poisons constitute the VAD substance, how to prepare the substance, the method by which the substance will be self-administered, the period within which the patient is likely to die after self-administration, and the potential risks of self-administration: at ss 72(1), 69. Both Acts also require the patient to be given notice that they are under no obligation to self-administer the VAD substance: *VAD Act* (Vic) (n 7) s 57(d); *VAD Act* (WA) (n 18) ss 69(2)(b)–(c).

218 Similar information is required to be provided at the time the medication is dispensed: *VAD Act* (Vic) (n 7) ss 58–9; *VAD Act* (WA) (n 18) ss 72–3.

219 *Commonwealth Criminal Code* (n 9) ss 474.29A(1)–(2).

220 *Commonwealth Criminal Code* (n 9) s 474.29A(2)(b).

information a doctor (when prescribing) and a pharmacist (when dispensing) may commit an offence under s 474.29A(2) of the *Commonwealth Criminal Code*. In addition, these same acts may also be considered to ‘counsel or incite’ suicide within the meaning of s 474.29A(1)(b). The fault element for this offence under s 474.29A(1)(c) might be more difficult to prove than merely intending to provide instruction, but still could be made out in the circumstances provided there is evidence of intent to counsel or incite committing suicide.

Transmitting the prescription itself electronically is also highly likely to breach the *Commonwealth Criminal Code*. Although the Victorian legislation contemplates a prescription being issued to the patient,²²¹ in practice, the coordinating medical practitioner provides it directly to a pharmacist in the Statewide Pharmacy Service.²²² In Western Australia, the coordinating practitioner must give the prescription directly to an authorised supplier.²²³ Because the prescription document would contain some instructions on taking the medication (for example doses and in combination with other medications such as anti-nausea drugs), this is likely to be regarded as providing instructions on a method of suicide.²²⁴ It would be difficult to argue that the coordinating practitioner does not also intend that the prescription instructions be used for that purpose. The risk of liability remains even though it is directed to the pharmacist rather than the patient, because the *Commonwealth Criminal Code* provisions include supplying material which is intended to be later used by another to commit suicide.²²⁵

However, liability for transmitting the prescription is less likely to meet the physical element under the ‘counsel or incite’ provision,²²⁶ for three reasons:

- the prescription is communicated to the pharmacist, not to the patient;
- it may be considered an administrative process, analogous to an application for a VAD permit; and
- the patient must again be notified, at both the prescription and dispensing stages, that there is no obligation to self-administer the substance.²²⁷

These factors in combination suggest that transmitting a prescription would not have the effect of directly or indirectly encouraging a person to commit suicide,

221 *VAD Act* (Vic) (n 7) ss 57(b), (e).

222 ‘Co-ordinating and Consulting Medical Practitioner Information’, *Victoria State Government Department of Health* (Web Page, 5 June 2019) <<https://www2.health.vic.gov.au/hospitals-and-health-services/patient-care/end-of-life-care/voluntary-assisted-dying/coordinating-consulting-medical-practitioner-information>>.

223 *VAD Act* (WA) (n 18) ss 70(6), 79(2).

224 This would constitute a breach of the *Commonwealth Criminal Code* (n 9) s 474.29A(2).

225 *Ibid* s 474.29B.

226 *Ibid* s 474.29A(1).

227 *VAD Act* (Vic) (n 7) ss 57(b), (d), 58(c); *VAD Act* (WA) (n 18) ss 69(2)(b)–(c), 72(2)(a).

but merely provides an end-of-life option. A contrary (and less compelling) argument, however, is that the electronic transfer of the prescription may be considered to indirectly encourage a person to proceed with VAD,²²⁸ because it is the very step which authorises the dispensing of the VAD substance to the patient.

G Reporting to the Review Board via a Carriage Service

Both doctors (the coordinating and consulting medical practitioners) and pharmacists must report to the Board at every step in the assessment and administration process. In both Victoria and Western Australia, these forms are submitted through an online portal. It is highly unlikely that submitting online forms would breach the *Commonwealth Criminal Code*. This is because, with the exception of the application for a VAD permit discussed above, the forms are submitted after the relevant conduct — eligibility assessment, prescribing, dispensing or administering a VAD medication — has occurred. The forms are also submitted to the Board, a government body, rather than communicating directly with the patient. The function of reporting is not to encourage conduct relating to VAD, but to report on conduct which has occurred relating to VAD.

Table 2. When Might Actions Pursuant to the VAD Legislation Undertaken via Carriage Service Contravene the *Commonwealth Criminal Code*?

Section of this article	Action	Person(s)	VAD Act (Vic) Provision(s)	VAD Act (WA) Provision(s)	Likelihood of breaching the Code
VI(A)	Provide contact details of a VAD provider	VAD Care Navigator (as first point of contact)	N/A	N/A	Highly unlikely
VI(B)	Discuss VAD generally as one of a range of end-of-life options	Doctor; other health practitioner; or VAD Care Navigator	N/A	N/A	Highly unlikely
VI(B)	Provide information about VAD as an option or information about specific methods of VAD	Doctor; other health practitioner; or VAD Care Navigator	ss 19(1), 28(1)	ss 27(1), 38(1), 158(2)	Highly unlikely to possible, depending on the nature of the information and intention of the practitioner
VI(C)	Conduct eligibility assessment	Coordinating and consulting	ss 16, 25	ss 24, 30	Unlikely

228 This would breach the *Commonwealth Criminal Code* (n 9) s 474.29A(1).

		medical practitioners			
VI(D)	Referral to other specialists for VAD consultations	Coordinating and/or consulting medical practitioner	s 22 (referral to consulting medical practitioner) ss 18, 27 (referral to specialist or psychiatrist when unable to determine eligibility)	s 30 (referral to consulting practitioner) ss 26, 37 (referral to specialist or psychiatrist when unable to determine eligibility)	Highly unlikely
VI(E)	Request a VAD Permit	Coordinating medical practitioner	s 43	N/A	Unlikely
VI(F)	Prescription of VAD substance and related processes	Coordinating medical practitioner	s 57	ss 69, 70	Highly likely
VI(F)	Processes relating to dispensing VAD substance	Pharmacist	s 58	s 72	Highly likely
VI(G)	Reporting required forms to Board	Coordinating and consulting medical practitioners, pharmacist	ss 21, 30, 41, 49, 60, 63, 66	s 22, 33, 46, 50, 60	Highly unlikely

VII CONCLUSION

The foregoing analysis reveals that the interpretation of the *Commonwealth Criminal Code* is not settled, hence its interaction with the provisions of the *VAD Act* (Vic) and *VAD Act* (WA) is unclear. As a result, it is difficult to draw a clear ‘line in the sand’²²⁹ and state with confidence which communications concerning VAD in Victoria and Western Australia may be conducted electronically and which must be conducted face-to-face. A threshold issue which remains unresolved is whether the word ‘suicide’ in the *Commonwealth Criminal Code* applies where self-administered VAD medication is authorised under state

229 The use of the phrase in this context is adopted from Western Australian Legislative Councillor Martin Aldridge: Western Australia, *Parliamentary Debates*, Legislative Council, 4 December 2019, 9844 (Martin Aldridge).

legislation.²³⁰ Assuming that it does, the likelihood of breaching the *Code* provisions relating to using a carriage service to promote or incite suicide will vary according to the conduct involved. The spectrum of risk will depend on the intersection of three domains: whether the communication involves the patient directly, the level of specificity of the information provided, and whether the communication occurs towards the beginning or end of the VAD process. Establishing breach of the *Code* also requires evidence of the health practitioner's subjective intention.

In relation to communication that involves the patient directly, Victoria has taken a conservative approach by requiring that all communications between patient and practitioner, or patient and VAD Care Navigator, must take place in person.²³¹ To some degree this is prudent, since the risk increases when the patient is directly involved. However, in our view, some communications with patients are highly unlikely to breach the *Commonwealth Criminal Code*: in particular, providing contact details of a VAD provider,²³² and discussing VAD in general terms as one of a range of end-of-life options.²³³ Conducting an eligibility assessment in neutral terms without advocating that a patient avail themselves of VAD is also unlikely to breach the *Code*.²³⁴ Further, most communications between practitioners (such as sending electronic referrals to the consulting practitioner, or a specialist to determine eligibility),²³⁵ or with the Board (submitting the prescribed reporting forms via the online portals in Victoria and Western Australia)²³⁶ are highly unlikely to constitute an offence against the *Commonwealth Criminal Code*.²³⁷

The second domain is that the more concrete or specific the information provided, the greater the risk of committing an offence against the *Commonwealth Criminal Code*. So, for example, discussing VAD in general terms as one option among several at the end of life is highly unlikely to constitute an offence.²³⁸ Providing information about specific methods of VAD may possibly constitute an offence,²³⁹ and providing the detailed information required when prescribing or dispensing a VAD substance is highly likely to contravene the *Commonwealth Criminal Code* if done via electronic means of communication.²⁴⁰

230 See above Part IV(A).

231 *VAD Guidance for Health Practitioners* (n 17) 4.

232 See above Part VI(A).

233 See above Part VI(B).

234 See above Part VI(C).

235 See above Part VI(D).

236 See above Part VI(G).

237 An exception is the issuing of a prescription from the doctor to the pharmacist: see above Part VI(F).

238 See above Part VI(B).

239 *Ibid.*

240 See above Part VI(F).

The final domain concerns the point in the process at which communication occurs. Where a doctor does not encourage a patient to access VAD, but merely provides information and responds to the patient's concerns and requests, it is unlikely that conversations occurring early in the VAD process will infringe the *Commonwealth Criminal Code*.²⁴¹ The risk increases after the eligibility assessments, and conversations with a patient about the final request for administration, prescription and dispensing of the VAD substance are highly likely to need to occur in person to avoid breaching the *Code*.²⁴² The risk increases towards the end of the VAD process because the level of detail concerning the method of VAD increases. Therefore, it is more likely that transmitting the material would meet the physical elements of the offences — counselling or inciting suicide or promoting a method or providing instruction.

Finally, to establish the offences, there would need to be evidence of subjective intention to satisfy the respective fault elements. This would turn on the facts of each case, but in some circumstances, in particular prescribing or dispensing the VAD substance, it would be difficult to argue the practitioner did not intend to provide instructions for how to access VAD.

If telehealth is prohibited for VAD and in-person communication is needed, numerous practical issues arise. Firstly, there are significant financial and resource costs in funding travel for medical practitioners, VAD Care Navigators and/or patients, to conduct consultations and assessments in person, which may be borne by the state and by individuals. But there are also likely to be issues regarding access to VAD. People in a terminal stage of illness may be too sick to travel, and a specialist who can spare an hour for a consultation in their usual place of business may be less willing to devote additional time (hours or days) to travel to a remote area.²⁴³ Further delays may occur where allied health practitioners or translators are unavailable at the same time as medical practitioners.²⁴⁴ Delays are concerning in this context, where the people seeking access to VAD are often critically ill and in significant pain or suffering.²⁴⁵ Concerns about criminal liability under the *Commonwealth Criminal Code* for performing functions which are lawful under state VAD laws lead to complex logistical arrangements which impair equality of access to VAD for people living in rural and regional areas and cause inefficiency and waste.

241 The spectrum of risk ranges from highly unlikely to possible, depending on the nature of the information provided and the intention of the doctor: see above Part VI(C).

242 See above Part VI(F).

243 Tretyakov (n 18) 329. These concerns were also noted by the Voluntary Assisted Dying Review Board in Victoria: *VADRBR Report 2019* (n 36) 10. See also McLaren (n 35) 2.

244 In one case, it was reported that arranging all the required appointments for the VAD process took six months, and many times the interpreter did not attend or cancelled at the last minute: *VADRBR Report 2020* (n 181) 16.

245 The Voluntary Assisted Dying Review Board report includes an anecdotal report of a woman in significant pain spending a long day travelling to a specialist appointment in Melbourne: *ibid*. See also *VADRBR Report 2021* (n 33) 20.

Certainty is needed about liability under the *Commonwealth Criminal Code* for using telephone or telehealth to communicate about VAD. Although the Western Australian government sought an undertaking that the Commonwealth would not prosecute acts done in accordance with state law,²⁴⁶ the federal government failed to provide any reassurance for medical practitioners. As a matter of practice, it is unlikely that doctors or VAD Care Navigators will be prosecuted, and none have been to date.²⁴⁷ While the Commonwealth Director of Public Prosecutions has discretion whether to prosecute (based on public interest considerations),²⁴⁸ so long as an offence is technically committed under the *Commonwealth Criminal Code*, prosecution remains a possibility.

It is clearly an undesirable legal situation where the residual uncertainty surrounding the application of the *Commonwealth Criminal Code* to medical practitioners, and others acting in accordance with state VAD laws, depends on an exercise of prosecutorial discretion.²⁴⁹ Federal government action is needed to clarify this unsatisfactory legal position and provide reassurance for doctors that their conduct is lawful, by amending the *Commonwealth Criminal Code* to provide that actions carried out under state VAD Acts do not breach the *Code*. This can be achieved by inserting a definition declaring that “suicide” does not include voluntary assisted dying carried out lawfully pursuant to a law of a State or Territory’.²⁵⁰ Such an exemption would not impact the *Commonwealth Criminal Code* offences’ application to pro-suicide websites.

246 Western Australia, *Parliamentary Debates*, Legislative Assembly, 3 September 2019, 6315, 6326 (Roger Cook).

247 The then Victorian Health Minister Jenny Mikakos stated: ‘I cannot imagine for a moment, any prosecutor worth their salt at the Commonwealth level wanting to proceed with this offence’: Cunningham (n 16). See also Atlay (n 13).

248 Ben White and Jocelyn Downie, ‘Prosecutorial Guidelines for Voluntary Euthanasia and Assisted Suicide: Autonomy, Public Confidence and High Quality Decision-Making’ (2012) 36(2) *Melbourne University Law Review* 656, 661–2. Factors which might affect the decision whether or not to prosecute include the relative triviality of the alleged offence; that the offence is of a ‘technical’ nature only; the effect on public confidence in the administration of justice; the obsolescence or obscurity of the law; whether a prosecution would bring the law into disrepute; and whether the alleged offence is of considerable public concern: CDPP, *Prosecution Policy of the Commonwealth: Guidelines for the Making of Decisions in the Prosecution Process* (Policy Guide, 19 July 2021) 5–6 [2.10] <<https://www.cdpp.gov.au/sites/default/files/Prosecution%20Policy%20of%20the%20Commonwealth.pdf>>.

249 See also comments of Georgie Haysom, Head of Research Education and Advocacy at Avant, a medical indemnity insurer: Atlay (n 13).

250 An alternative option is to insert an anti-exclusivity clause in the *Commonwealth Criminal Code* (n 9) s 474.29A, to the effect that ‘this Division is not intended to exclude or limit the operation of any law of the Commonwealth or any law of a State or Territory concerning voluntary assisted dying’. However, in our view, there remains a risk that this will not exclude direct inconsistency between the *Commonwealth Criminal Code* and a State VAD Act: see above Part IV(B). Thus, this option may be ineffective to provide the necessary certainty that actions under a state VAD law will not breach the *Commonwealth Criminal Code*.

Because this solution requires Commonwealth legislative action, which is likely to be slow if it happens at all, in the interim it would be highly desirable for the Commonwealth Director of Public Prosecutions to issue prosecutorial charging guidelines indicating that the offences in ss 474.29A and 474.29B of the *Commonwealth Criminal Code* will not be prosecuted where a doctor or other person is acting in accordance with the procedure outlined in state VAD laws.²⁵¹ This would also provide the necessary clarity to enable doctors and other practitioners to use telehealth and other electronic methods of communicating where necessary and appropriate to provide VAD services. If the *Commonwealth Criminal Code* is not amended, and prosecutorial guidelines are not issued, health practitioners face an unenviable choice between risking possible prosecution or insisting on some communications occurring in person, often involving cost and/or harm to them, their patients and the health system.

251 There is precedent for guidelines being issued in relation to the circumstances of particular offences, including child sex tourism, people smuggling, and disclosure offences committed by journalists in their professional capacity: CDPP, *CDPP's Relationship with the Attorney General* (National Legal Directions, October 2019) <https://www.cdpp.gov.au/sites/default/files/NLD%20-%20CDPP%27s%20%20Relationship%20with%20the%20Attorney-General%20Oct%202019_2.pdf>.

APPENDIX A: CARRIAGE SERVICE PROVISIONS OF THE COMMONWEALTH CRIMINAL CODE

474.29A Using a carriage service for suicide related material

(1) A person commits an offence if:

(a) the person:

- (i) uses a carriage service to access material; or
- (ii) uses a carriage service to cause material to be transmitted to the person; or
- (iii) uses a carriage service to transmit material; or
- (iv) uses a carriage service to make material available; or
- (v) uses a carriage service to publish or otherwise distribute material; and

(b) the material directly or indirectly counsels or incites committing or attempting to commit suicide; and

(c) the person:

- (i) intends to use the material to counsel or incite committing or attempting to commit suicide; or
- (ii) intends that the material be used by another person to counsel or incite committing or attempting to commit suicide.

Penalty: 1,000 penalty units.

(2) A person commits an offence if:

(a) the person:

- (i) uses a carriage service to access material; or
- (ii) uses a carriage service to cause material to be transmitted to the person; or
- (iii) uses a carriage service to transmit material; or
- (iv) uses a carriage service to make material available; or
- (v) uses a carriage service to publish or otherwise distribute material; and

(b) the material directly or indirectly:

- (i) promotes a particular method of committing suicide; or
- (ii) provides instruction on a particular method of committing suicide; and

(c) the person:

- (i) intends to use the material to promote that method of committing suicide or provide instruction on that method of committing suicide; or
- (ii) intends that the material be used by another person to promote that method of committing suicide or provide instruction on that method of committing suicide; or
- (iii) intends the material to be used by another person to commit suicide.

Penalty: 1,000 penalty units.

- (3) To avoid doubt, a person does not commit an offence against subsection (1) merely because the person uses a carriage service to:
 - (a) engage in public discussion or debate about euthanasia or suicide; or
 - (b) advocate reform of the law relating to euthanasia or suicide;
 if the person does not:
 - (c) intend to use the material concerned to counsel or incite committing or attempting to commit suicide; or
 - (d) intend that the material concerned be used by another person to counsel or incite committing or attempting to commit suicide.
- (4) To avoid doubt, a person does not commit an offence against subsection (2) merely because the person uses a carriage service to:
 - (a) engage in public discussion or debate about euthanasia or suicide; or
 - (b) advocate reform of the law relating to euthanasia or suicide;
 if the person does not:
 - (c) intend to use the material concerned to promote a method of committing suicide or provide instruction on a method of committing suicide; or
 - (d) intend that the material concerned be used by another person to promote a method of committing suicide or provide instruction on a method of committing suicide; or
 - (e) intend the material concerned to be used by another person to commit suicide.

474.29B Possessing, controlling, producing, supplying or obtaining suicide related material for use through a carriage service

- (1) A person commits an offence if:
 - (a) the person:

- (i) has possession or control of material; or
 - (ii) produces, supplies or obtains material; and
- (b) the material directly or indirectly:
- (i) counsels or incites committing or attempting to commit suicide; or
 - (ii) promotes a particular method of committing suicide; or
 - (iii) provides instruction on a particular method of committing suicide; and
- (c) the person has that possession or control, or engages in that production, supply or obtaining, with the intention that the material be used:
- (i) by that person; or
 - (ii) by another person;
- in committing an offence against section 474.29A (using a carriage service for suicide related material).

Penalty: 1,000 penalty units.

- (2) A person may be found guilty of an offence against subsection (1) even if committing the offence against section 474.29A (using a carriage service for suicide related material) is impossible.
- (3) It is not an offence to attempt to commit an offence against subsection (1).