

Death tourism

By Sascha Callaghan



'His wife holding one arm, his other hand resting on a stick, he walks slowly across the hotel lobby. She is in tears, he is calm. His breathing is laboured but his eyes are bright. It is 8.30am on Thursday and, in an hour, John Elliott expects to be dead.

"I'm squeezing your arm too tight, I'm sorry," he says. She tells him not to worry. It is minus five degrees in Zurich and she knots a white scarf around his neck. As he walks out the door he breathes and says faintly: "I'm free."¹

This was how the final morning in the life of Dr John Elliot was reported on the front page of the *Sydney Morning Herald* in January 2007. Dr Elliot, from NSW, was gravely ill with multiple myeloma, and had travelled to the Dignitas clinic in Switzerland for assisted suicide. About 200 people seek assisted suicide in Switzerland each year, including a cohort of foreign nationals, and a spokesman for Dignitas recently said that it has so far helped over 1,000 foreigners to die.² Earlier this year, a referendum proposing a ban on both assisted suicide and so-called 'suicide tourism' was overwhelmingly rejected by voters in the Canton of Zurich, with 78 per cent of voters opposing the ban on euthanasia for foreigners.³

In a magazine issue devoted to international torts and travel law – which for most people is associated with exploration, business opportunities, relaxation, the living of life – this article focuses on a type of travel that has come to be known, arrestingly, as 'death tourism'. Of course, it is commonplace for people to find themselves travelling on death-related missions. Most such trips involve visiting a dying relative, attending a funeral, or visiting a grave. Some people travel to a special destination to suicide spectacularly.⁴ Some will travel with the intention of importing a lethal medicine, such as the notorious barbiturate pentobarbital,⁵ to facilitate a suicide at home. And every now and then, gravely ill people like Dr Elliott will seek to travel overseas for a life-ending procedure in one of the few jurisdictions where this is lawful. This article looks at the reasons why some people travel to die in these circumstances, what legal barriers might prevent more of us from doing the same, and whether recent developments in UK law might be re-played here, creating, if not a 'right to die', a right to travel to die without interference.

ASSISTED DYING IN AUSTRALIA – RULES AND REALITY

It has been estimated that up to 30 per cent of Australian deaths occur as a result of a medical decision, which is known will lead to death.⁶ The majority of these medical end-of-life decisions are lawful. This is partly because of the legal distinction between acts and omissions, where withholding and withdrawing of medical treatment (which are considered to be 'omissions') may be permissible, even where it means the patient will die, while an 'act' of killing is a serious criminal offence. It is therefore lawful to withhold or withdraw life-sustaining medical treatment from a person who has refused it,⁷ or where treatment is considered futile or not to be in the patient's best interests.⁸ Ventilators can be turned off, feeding tubes can be removed, resuscitation can simply not be attempted – and palliative treatments can be provided to ease the person's suffering as they die. However, doing an 'act' that will end the life of a person who wants to die – say, by administering a lethal injection – constitutes an unlawful homicide in all Australian jurisdictions. In addition, although suicide and attempting suicide are no longer crimes,⁹ assisting – or aiding and abetting – suicide remains an offence throughout Australia.¹⁰ There have been

numerous convictions for assisting suicide,¹¹ and people who have claimed to have assisted a suicide have been prosecuted for manslaughter,¹² attempted murder¹³ and murder.¹⁴

It is true, though, that even in the realm of acts known to cause death, the law is not applied without exception, or without careful nuancing around yet another well-established legal distinction – this time, between unlawful killing, and the lawful 'hastening' of death as a side-effect of palliative medicine in the late stages of terminal illness. Under what is known as the 'doctrine of double effect', it is lawful for a doctor to provide whatever medication is necessary for the purposes of relieving the pain and suffering of a dying patient, even if an unintended consequence of providing that medication will mean the person may die a little sooner than they would have done without it. For example, sedatives or analgesics may be given to relieve pain and distress, even if the patient will likely eat and drink less than he or she otherwise might, and because of that, their lives may be shortened by hours, or even days. Provided medication was given for the purposes of relieving suffering and not for the purposes of killing the patient, there will not have been an unlawful homicide, or an assisted suicide.¹⁵

It also true that of those who are known to have actively assisted the suicide of seriously ill people, many are either not prosecuted;¹⁶ if prosecuted, not convicted;¹⁷ or if convicted, given light or suspended sentences.¹⁸ However, as deliberately killing a person, or helping them to suicide, >>

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remain criminal offences, the risks are still high for any person who involves themselves in acts of euthanasia, whatever the circumstances.

So, while several surveys have shown that many Australian doctors do, often, comply with patients' requests to hasten death,¹⁹ most who do so, act in great secrecy. And secrecy creates problems of its own. In his compelling research on the euthanasia underground²⁰

Roger Magnusson notes that 'absent doctors' were a feature of secret acts of euthanasia, with many doctors providing drugs for later administration by a non-physician, or attending the patient briefly to give an injection and then leaving. With a lack of medical supervision or adequate support for doctors who did attend patients, several of Magnusson's interviewees reported deaths that were far from peaceful. Medications frequently didn't work as quickly as expected, or even at all, leaving companions or attending doctors to 'finish patients off' using whatever crude means were available. In several cases, this involved suffocation using pillows or plastic bags, or whatever could be brought to hand. In one particularly harrowing account, a patient who took 15 tablets of a strong barbiturate but no anti-emetic, had to swallow his own vomit for the drug to take effect.²¹ Magnusson also describes 'an absence of norms or principles for deciding when it was appropriate to proceed', giving the example of a doctor who injected a young man on the first occasion they met, despite concerns from close friends that the patient was depressed. In another case, a patient's death had to be brought forward a week, so as to work in with a doctor's holiday plans.²²

It is perhaps not surprising, then, that many of the seriously ill people who seek some form of early death should want to travel to one of the few jurisdictions where

Doing an 'act' that will end the life of a person who wants to die constitutes an unlawful homicide in all Australian jurisdictions; and assisting – or aiding and abetting – suicide remains an offence.

this can be provided in controlled circumstances, with appropriate medical attention available and without fear of prosecution – either for themselves or for any of the people involved in the process. Prosecution for unlawful killing, or aiding and abetting a suicide, is a risk for any person providing lethal medication, helping to administer it, acting to hasten death after a suicide attempt goes wrong – and after the act, for a person who falsely completes death certificates

or cremation forms. It may also be a risk for people who knowingly help a person travel to another jurisdiction to get help in dying, including those helping with making travelling arrangements, those accompanying the person and possibly even healthcare professionals who provide fitness to travel and other necessary documentation.

DEATH TOURISM – TRAVELLING FOR LIFE-ENDING PROCEDURES

'Death tourism' began to be reported in the media as a phenomenon after the Dignitas clinic opened in Switzerland in 1998. Although assisted suicide has been lawful in Switzerland since 1941, the Dignitas Association openly offered an organised assisted-suicide service to people who met its criteria – including that the person must be suffering either from a terminal illness or an incurable illness with unbearable symptoms.²³ Euthanasia, or actively killing another person upon request, remains a criminal offence in Switzerland;²⁴ however, it is lawful to assist a person to kill *themselves* as long as the person assisting does not have selfish reasons.²⁵

Indeed, while life-ending medical treatments are legal in one form or another in the Netherlands, Belgium, Luxembourg and the states of Oregon and Washington

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in the USA, assisted suicide is only unambiguously lawful in respect to foreigners in Switzerland²⁶ – and even there, only Dignitas offers assisted suicide without a residency requirement. So while it would be possible for Australians to travel to other jurisdictions where life-ending medical treatment is available, provided residency and/or other requirements were met, Zurich would be the only option for most Australians who are prepared to travel for assisted suicide.

An Australian who travels to suicide lawfully in another jurisdiction will not have committed an offence under Australian laws *themselves*. However, the situation is not so clear in relation to those who help the person to travel, and it remains possible that supporters and travelling companions could be prosecuted for the criminal offence of aiding and abetting a suicide. This is particularly concerning for Australian residents, since getting to Zurich involves at least 22 hours' flying time plus transit time, and a travelling companion will almost certainly be necessary for a person who is ill enough to qualify for the Dignitas service. So far, no one in the travelling entourages of Australian death tourists has been prosecuted. However, the laying of criminal charges or in the very least, questioning by police, remain possibilities for travelling companions in such circumstances.

Since 2000, there has been a slew of court proceedings in the UK to clarify the law for Britons in this position. In the first series of cases,²⁷ British citizen, Diane Pretty, sought immunity from prosecution for her husband, Brian. Diane Pretty was becoming increasingly affected by motor neurone disease and, fearing a long and painful death, planned to seek assisted suicide at Dignitas with her husband's help. However, as this help would have made him vulnerable to prosecution for aiding and abetting a suicide under the *Suicide Act* 1961 (UK),²⁸ Pretty sought a ruling that such a prosecution would have contravened the *Human Rights Act* 1988 (UK).²⁹ Pretty's applications failed in all UK courts, the House of Lords ultimately finding that her rights under the European Convention on Human Rights, as enshrined in the *Human Rights Act*, were not abrogated by the prohibition on assisting suicide under the *Suicide Act*. However, the European Court of Human Rights later found that her rights to 'respect for private life' under Article 8(1) of the Convention *were* affected – and this difference of opinion opened the way for a second series of cases initiated by Debbie Purdy in similar circumstances.

Unlike Pretty, Debbie Purdy did not seek immunity from prosecution for her husband Omar, whom she also hoped would help her to travel to Dignitas when her suffering from multiple sclerosis became too much to bear. Already wheelchair-bound, Purdy would require assistance to travel to Switzerland, and she asked the court to order the Director of Public Prosecutions to make public its prosecution policy for assisting suicide under the *Suicide Act*, since the Act required the consent of the DPP before any prosecution could be commenced.³⁰ Like Diane Pretty, Purdy argued that the prohibition on assisting suicide was an interference with her right to respect for private life, and that the prohibition

would not be 'in accordance with the law' as permitted by Article 8 of the Convention, unless that law was sufficiently clear. This time the House of Lords agreed, noting that of the eight cases that had been referred to the DPP by the time of the hearing, all had been dismissed for varying and unclear reasons, and ordered that the DPP '*promulgate an offence-specific policy identifying the facts and circumstances which he will take into account in deciding ... whether or not to consent to prosecution [for assisting a suicide]*'.³¹ After extensive community consultation, the DPP released its *Policy for Prosecutors in Cases of Encouraging or Assisting Suicide* in February 2010. This included a list of public interest factors tending against prosecution, as follows:

'A prosecution is less likely to be required if:

1. the victim had reached a voluntary, clear, settled and informed decision to commit suicide;
2. the suspect was wholly motivated by compassion;
3. the actions of the suspect, although sufficient to come within the definition of the offence, were of only minor encouragement or assistance;
4. the suspect had sought to dissuade the victim from taking the course of action which resulted in his or her suicide;
5. the actions of the suspect may be characterised as reluctant encouragement or assistance in the face of a determined wish on the part of the victim to commit suicide; and/or

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6. the suspect reported the victim's suicide to the police and fully assisted them in their enquiries into the circumstances of the suicide or the attempt and his or her part in providing encouragement or assistance.³²

It is difficult to say whether or how the decision in Purdy might impact Australian law. Most Australians do not enjoy the protection of a charter of human rights, and those who do (in the ACT and Victoria) are unlikely to find that the 'right to privacy' protected in state human rights legislation³³ encompasses a right to suicide. For one thing, the right to 'private life' in the European Convention on Human Rights has been acknowledged to be broader than a mere right to 'privacy',³⁴ as is protected by human rights legislation in the ACT and Victoria. And, in any case, the decision in Purdy was a significant departure from previous, more conservative readings on the scope of the right to private life.³⁵ Even if the 'right to privacy' could be so extended, applicants would need to show that prosecution for aiding and abetting suicide in accordance with state law was 'arbitrary' and, on that basis, in contravention of human rights laws. Arbitrariness could perhaps be shown, similarly to how it was in *Pretty*, using examples of a patchy approach to prosecution of assisted suicide cases, which creates the dangerous situation Huxtable describes as 'the suicide tourist trap' – in which helping a person to travel to Switzerland might be illegal in theory but worth risking in practice.³⁶ But, for many, these risks are unacceptable, effectively depriving some gravely ill people of a right at least to travel

Assisted suicide is only unambiguously lawful in respect to foreigners in Switzerland – and even there, only Dignitas offers assisted suicide without a residency requirement.

to suicide. While still others, reassured by an apparent lack of prosecutions, may be surprised to find themselves called to account for activities they had not fully understood still fall within the category of serious criminal offences.

As it happens, no Australian crown prosecutor has made public its policy, if indeed any exists, on the prosecution of assisted suicide cases.

Therefore, those who assist a person to suicide by any means,

continue to risk criminal liability. If the evidentiary requirements were met, this might include those facilitating travel – perhaps medical practitioners signing fitness for travel documents, those prescribing medications for the trip – and those accompanying patients on a trip for the purposes of suiciding. Death tourism is still a dangerous activity, for all concerned. ■

Notes: 1 J Button, (2007), 'My name is Dr John Elliott and I'm about to die, with my head held high', *Sydney Morning Herald*, 26 January 2007. 2 I Foulkes (2010), 'Dignitas boss: Healthy should have right to die', *BBC News* (<http://www.bbc.co.uk/news/10481309>). 3 *BBC News, Switzerland*, 'Zurich votes to keep assisted suicide.' (2011) (<http://www.bbc.co.uk/news/world-europe-13405376>). 4 P Zabriskie, 'The Mysteries of the Suicide Tourist', *New York Magazine*, 11 May 2008. 5 Pentobarbital is a short-acting barbiturate which is commonly sold under various names including Nembutal. It can be purchased from veterinary supplies stores in Mexico and is recommended by euthanasia groups including Exit International for use as a suicide drug. See M Lacey, 'In Tijuana, A Market for Death in A Bottle', *New York Times*, 21 July 2008. 6 H Kuhse, P Singer, P Baume, M Clark and M Rickard, 'End-of-life decisions in Australian medical practice', (1997) 166 *Medical Journal of Australia*, 191-6. 7 Provided the person

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has capacity or has made a valid advance care directive. *Hunter and New England Area Health Service v A* (2009) 74 NSWLR 88; *Brightwater Care Group v Rossiter* [2009] WASC 229 at [26].

8 *Airedale National Health Service trust v Bland* [1993] AC 789 per Goff LJ at 870; *Messiah (by his tutor) v South East Health* [2004] NSWSC 1061; *Krommydas v Sydney West Area Health Service* [2006] NSWSC 90. For discussion, see L Skene, *Law and Medical Practice: Rights, Duties, Claims and Defences*, Lexis Nexis Butterworths (2008) (3rd edn), Chapter 10. **9** In Qld, Tas, WA and NT these offences are no longer included in the *Criminal Code*. In the remaining states and ACT the common law offences were abrogated by statute: *Crimes Act 1900* (NSW) s31A; *Crimes Act 1958* (Vic) s6A; *Criminal Law Consolidation Act 1935* (SA) s13A(1); *Crimes Act 1900* (ACT) s16. **10** *Crimes Act 1900* (NSW) s31C; *Crimes Act 1958* (Vic) s6B(2); *Criminal Code* (Qld) s311; *Criminal Code* (Tas) s163; *Criminal Law Consolidation Act 1935* (SA) s13A(5); *Criminal Code* (WA) s288; *Crimes Act 1900* (ACT) s17; *Criminal Code* (NT) s168. **11** *R v Maxwell* [2003] VSC 278; *R v Hood* [2002] VSC 123. **12** *R v Justins* [2008] NSWSC 1194; *DPP v Rolfe* [2008] VSC 528; *R v Raymond Douglas Sutton*; *R v Margaret Ellen Sutton* [2007] NSWSC 295. **13** *DPP v Rolfe* [2008] VSC 528; *R v Cox* (Unreported, Wincester CC, Ognall J, 18 September 1992).

14 Murder was apparently one of the charges arising in the Australian case of Joseph Mohr. See also *R v Jermielita* (1995) 81 A Crim R 409, and *People v Cleaves* 280 Cal. Rptr 146 (1991).

15 The classic statement on the operation on the doctrine of double effect in palliative care was made by Lord Devlin in *R v Adams* [1957] Crim LR 365, unreported, as quoted in P Devlin, (1985), *Easing the Passing: the trial of Dr John Bodkin Adams*, London: The Bodley Head, at p171. There is no Australian case on this point; however, given its wide acceptance in other jurisdictions, it would also appear to form a part of the Australian law. See Department of Health NSW (22 March 2005), *End-of-Life Care and Decision-Making-Guidelines*. (http://www.health.nsw.gov.au/policies/gl/2005/pdf/GL2005_057.pdf). **16** It is impossible to know precisely the extent of non-prosecution, but well-publicised instances of euthanasia where prosecutions fail to eventuate, abound. For example, in 1995 seven Victorian doctors told the media that they had contravened the law by giving larger than usual doses of drugs to terminally ill patients. No one was prosecuted and, after an initial inquiry, the Victorian Medical Practitioners Board decided not to proceed with any disciplinary action: Skene (see note 8 above) at [10.86]. No action was taken in relation to Nancy Crick's controversial suicide in 2002, or in relation to any Australian who has travelled to Dignitas for assisted suicide. **17** For example, in 1997 a Supreme Court jury in Melbourne took two-and-a-half hours to find Joseph Mohr not guilty of murder and manslaughter charges after he killed his wife, at her pleading, after a stroke: I Kerridge, M Lowe & C Stewart, (2009) *Ethics and Law for the Health Professions* (3rd edn), at 639. **18** For example, earlier this year, a 66-year-old man who suffocated his chronically ill partner with a plastic bag was given a suspended sentence. Hall J of the Supreme Court of NSW noted that the offender was faced with an 'agonising conflict' [78] and his only motivation 'was a selfless act borne out of the love the offender held for her'[85]. *R v Mathers* [2011] NSWSC 339. **19** See C Douglas, I Kerridge, K Rainbird, et al, 'The intention to hasten death: a survey of attitudes and practices of surgeons in Australia', *Medical Journal of Australia* (2001); 175(10): 511-15; and P Baume and E O'Malley, 'Euthanasia: attitudes and practices of medical practitioners', *The Medical Journal of Australia* (1994); 161(2): 137, cited in R Magnusson, 'Euthanasia: above ground, below ground', (2004) 30 *Journal of Medical Ethics*, 441-6. **20** *Ibid*. **21** *Ibid*, pp442-3. **22** *Ibid*, p443. **23** *Dying With Dignity Factsheet 14: A Guide to Dignitas* (<http://www.dwdnsw.org.au/ves/index.php/fact-sheet-14-guide-to-dignitas-vesnsw>).

24 *Strgesetzbuch* [StGB] (Swiss Criminal Code) Art 114. **25** *Ibid*, Art 115. **26** The legislation in the Netherlands and Belgium does not have a specific residency requirement, but the governments of both countries have stated that the assessments required of patients seeking assisted suicide effectively demands a long-standing doctor-patient relationship that is incompatible with fly-in death tourism. See R Srinivas, 'Exploring the potential for American death tourism', (2009) 13 *Michigan State University Journal of Medicine and Law* 91-122 at pp104-5. **27** Pretty pursued her case in the Divisional Court (*Pretty v Director of Public Prosecutions and Secretary of State for the Home Department*

[2001] EWHC Admin 788); the House of Lords (*Pretty* [2001] UKHL 61) and finally in the European Court of Human Rights (ECHR) (*Pretty v United Kingdom* (*Pretty v UK*) [2002] ECHR 427).

28 *Suicide Act 1961* (UK) s2(1) provides that any 'person who aids, abets, counsels or procures the suicide of another' is guilty of an indictable offence. **29** *Human Rights Act 1998* (UK) enshrines in UK law the provisions of the European Convention on Human Rights. Section 6(1) provides that '[i]t is unlawful for a public authority to act in a way which is incompatible with a Convention right'. **30** *Suicide Act 1961* (UK) s2(4): '... no proceedings shall be instituted for an offence under this section except by or with the consent of the Director of Public Prosecutions'. **31** *R (on the application of Purdy) v Director of Public Prosecutions & Ors* [2009] EWCA Civ 92 (at para 56), from the judgment of Lord Hope, with which all the other judges agreed. **32** Crown Prosecution Service (UK), *Policy for Prosecutors in Respect of Cases of Encouraging or Assisting Suicide*. Available at http://www.cps.gov.uk/publications/prosecution/assisted_suicide_policy.html. **33** *Human Rights Act 2004* (ACT) s12; *Charter of Human Rights and Responsibilities Act 2006* (Vic) s13. **34** In *X v Iceland* (1976) 5 DR 86, the European Commission on Human Rights found that the right to respect for private life in the Convention was broader than the 'right to privacy' as found in Article 12 of the *Universal Declaration of Human Rights* (1948) (UN). **35** J Coggon, R Huxtable, C Stewart, 'Recent Developments: Assisted Suicide at Home and Away', (2009) 6(3) *Journal of Bioethical Inquiry*: 405-13, at p409. **36** R Huxtable 'The suicide tourist trap: compromise across boundaries', (2009) 6(4) *Journal of Bioethical Inquiry*, 327-36.

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