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MEDIA RELEASE

VOLUNTARY ASSISTED DYING ACT'S GAG CLAUSE ETHICALLY PROBLEMATIC

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SECTION 8 of Victoria's Voluntary Assisted Dying Act is an "unprecedented, unwarranted infringement on communication between health practitioners and their patients", according to the authors of an Ethics and Law article published online today by the Medical Journal of Australia.

In November 2017, the state of Victoria passed the Voluntary Assisted Dying Act 2017 (Vic), legalising a model of voluntary physician-assisted death for adults at the end of life who meet a number of criteria, including rigorously assessed diagnostic and prognostic requirements. The Act came into effect on 19 June 2019.

Section 8 of the Act details a new legal prohibition specific to the practice of voluntary assisted dying. It states:

1. A registered health practitioner who provides health services or professional care services to a person must not, in the course of providing those services to the person—
 - a) initiate discussion with that person that is in substance about voluntary assisted dying; or
 - b) in substance, suggest voluntary assisted dying to that person.

Authors from the Monash Bioethics Centre, Deakin University, and the Center for Medical Ethics and Health Policy at Baylor College of Medicine in Texas, US, wrote that Section 8 "prevents all health practitioners registered with the Australian Health Practitioner Regulation Agency (AHPRA) from initiating a discussion of voluntary assisted dying with their patients, not only eligible providers of voluntary assisted dying". The authors conclude, therefore, that Section 8 is a "gag clause".

"Breaching the requirements of section 8 will be considered 'unprofessional conduct', as regulated by the Health Practitioner Regulation National Law. Breaches may result in AHPRA revoking a health practitioner's licence," wrote the authors.

"The stated intent behind Section 8 is not to discourage open discussion, but to ensure that patients are not coerced or unduly influenced into accessing voluntary assisted dying," they wrote.

"Although this aim is undeniably important, the Ministerial Advisory Panel on Voluntary Assisted Dying offered no evidence from other jurisdictions that such coercion has previously occurred. Indeed, it cited research indicating that 'fears that people from particular groups will be pushed into making such requests are ill-founded'.

"Given the Act's numerous other safeguards to ensure voluntariness, a mandate against health practitioners initiating discussion with patients is unnecessary."

Section 8 results in three potential implications for health practitioners and patients, according to the authors:

- it creates a tension between core professional, ethical and legal obligations contained in relevant codes of conduct for health practitioners – "providing treatment options based on the best available information and honesty as a core guiding principle";
- health practitioners may be receiving conflicting messages regarding whether and how Section 8 will change current approaches to end-of-life discussions – "the state has established voluntary assisted dying as a lawful end-of-life choice, while on the other hand, with Section 8, the state has simultaneously legally prohibited health practitioners from initiating discussion of this option";
- unknown to them, Section 8 places a burden of prior knowledge of voluntary assisted dying on patients – "it is unclear how legislators expect patients to glean enough knowledge to ask, in specific enough terms, about voluntary assisted dying".

A series of possible workarounds to Section 8 have been proposed, the authors wrote:

- In lieu of initiating a discussion verbally, health practitioners can direct patients to the Department of Health and Human Services end-of-life care webpage, which provides information about advance care planning, palliative care and voluntary assisted dying;
- health services to appoint a non-AHPRA-registered voluntary assisted dying "navigator", such as a clinical ethicist or patient advocate, who would not be bound by Section 8.

"While Victoria celebrates introducing voluntary assisted dying as a new end-of-life choice, Section 8 presents a significant barrier for the health practitioners tasked with facilitating it," the authors concluded.

"Ultimately, successful implementation of the voluntary assisted dying legislation will be influenced by how health practitioners understand their obligations to their patients."

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CONTACTS: Dr Bryanna Moore
 Postdoctoral Fellow
 Center for Medical Ethics and Health Policy
 Baylor College of Medicine
 Email: bryannasuemoore@gmail.com

 Courtney Hempton
 Doctoral Candidate
 Monash Bioethics Centre
 Monash University
 Email: courtney.hempton@monash.edu

 Dr Evie Kendal
 Lecturer in Bioethics and Health Humanities
 Deakin University
 Ph: 03 5227 8669
 Email: evie.kendal@deakin.edu.au