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In Support of a Decisional Paradigm for Assisted Dying

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In May 2018, a centenarian travelled from Australia to Switzerland to end his life. He was not suffering from a terminal or incurable illness. . The deceased travelled to Switzerland because that country permits self-determination of death, unconditional on it being consequential to palliative treatment for a terminal illness. Australia, like the United Kingdom and most developed nations, does not permit euthanasia and assisted suicide is criminal. This article examines the discretionary issues around criminal culpability for the journey of the deceased from Australia to Switzerland for the known purpose of suicide. We argue the allocation of prosecutorial discretion in cases of assisted suicide is contrary to public interest. We consider the decisional framework that informed the centenarian's decision. We explain why a decisional paradigm, rather than medical, moral or other structures, should inform law and policy regarding assisted dying and give developed nations, such as Australia, cause for reform.

I. INTRODUCTION

> At my age, I get up in the morning. I eat breakfast. And then I just sit until lunchtime. Then I have a bit of lunch and just sit. What's the use of that?[1]

Professor David Goodall (hereinafter, with great respect, "Goodall")[2] was an eminent ecologist, made a Member of the Order of Australia for his professional and academic contributions.[3] He travelled from his home city of Perth, Australia, to the city of Basel in Switzerland in early May 2018.[4] He committed voluntary euthanasia and died on 10 May 2018, being declared deceased at approximately 12.30 pm (local time).[5] Goodall died in the town of Liestal at the Eternal Spirit clinic where voluntary euthanasia costs A$10,000.[6] It is described as a "luxury" clinic where the time leading to death is spent in bright

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[1] Sheena McKenzie, "104-year-old Scientist David Goodall Ends Life Listening to 'Ode to Joy'", *CNN*, 10 May 2018 <https://edition.cnn.com/2018/05/10/health/david-goodall-australian-scientist-dies-intl/index.html>.

[2] We pause to explicitly state that the abbreviation of David Goodall's name is intended to divorce our analysis of personal or emotional sentiment, other than where capture of personal circumstances related to David Goodall are relevant to the principles under scrutiny. The abbreviation is not intended to convey brevity or disrespect to his life.

[3] Membership of the Order is an Honour granted on nomination. It is an Order of Chivalry, established in 1975 by Queen Elizabeth II.

[4] McKenzie, n 1.

[5] McKenzie, n 1.

[6] Co-founder of the Eternal Spirit Clinic, Ruedi Habegger, indicated in media reports associated with the death of Goodall that he has personally seen many people make the journey to his clinic in situations where it has caused great suffering due to their state of health. He also acknowledged that Switzerland is a high-cost country and observed with regards to people needing to travel to

surroundings. The client[7] arrives at the Clinic on the pre-arranged day of the euthanasia procedure, subject to the client deciding to proceed.[8] Five rooms are devoted to a client with the majority of those rooms for the use of family members and friends in attendance. The Eternal Spirit Clinic requires clients to be present in Switzerland for at least 48 hours prior to the arranged time of the end-of-life procedure. This facilitates the legally required medical assessment of the client, usually performed by a psychiatrist, to certify the client is of sufficiently sound mind to decide to terminate their life.

Goodall was not ill, terminally or otherwise. His mind was sound and, for his age, sharp. He was not homeless or without family. He had 12 grandchildren at the time of his death. He lived in a largely independent manner. He resided in his own home. He was able to move about his home, with a walking frame, and prepare his own meals. His life outside the home was more limited. Goodall regretted the loss of his driving licence at the age of 84 and remarked in the final stages of his life that he probably should have died at the time he lost his licence.[9] Goodall was significantly affected by the deterioration of his eyesight. In a press conference at Basel the day before his death, Goodall said: "My abilities have been in decline over the past year or two, my eyesight over the past six years. I no longer want to continue life. I'm happy to have the chance tomorrow to end it".[10] He hummed in chorus with Beethoven's Ninth Symphony, *Ode to Joy*, while it played in the background during his end-of-life procedure and wore a shirt with the following words printed on its front, "Ageing Disgracefully".[11]

The death of Goodall drew attention to the legal position that prevails in Australia as compared to that in Switzerland. Goodall, who was accompanied to Switzerland by long-time Australian activists for euthanasia rights,[12] permitted his journey to be reported by media, gave press conferences in his final days of life and was generally interested and proactive in drawing attention to the contrasting legal regimes. Goodall said, "I certainly hope my story will increase the pressure for people to have more liberal views on the subject".[13] Assisted suicide has been legal in Switzerland since the 1940s, if performed by someone with no direct interest in the death.[14] Australia widely criminalises assisted suicide. Only one State in Australia, Victoria, has passed legislation enacting a complex regulatory framework for assisted dying of persons with terminal illness, to take effect in June 2019.[15] The Victorian laws apply only to terminally ill patients who have a life expectancy of no more than six months.

It is difficult to divorce the issue of euthanasia from personal sentiment and belief. This was most recently reflected in the Parliamentary Debates in Victoria over the enactment of the legislation,

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Switzerland to end their life, that "[t]his has to stop. This is absolutely ludicrous": Christiane Barro, "David Goodall's Final Moments and the Luxury Dying Clinic that Helped Him", *The New Daily*, 10 May 2018 <https://thenewdaily.com.au/news/world/2018/05/10/david-goodall-last-words-switzerland/>.

[7] The Clinic often employs the term "patient". "Patient" in the Oxford English Dictionary is defined as an individual receiving or is "registered to receive medical treatment": *Oxford English Dictionary* (10 May 2019) "patient". The definition is suggestive of health restoration. Euthanasia is medical treatment the purpose of which is to end life. We therefore consider the term "patient" is connotative of a meaning inconsistent with the purpose of euthanasia treatments.

[8] The Eternal Clinic processes places extreme emphasis on the absence of any pressure on a client to proceed with the euthanasia process.

[9] McKenzie, n 1.

[10] Barro, n 6.

[11] See Guy Birchall, "'What We Waiting For?' Final Words of David Goodall, 104, as Poignant Pics Show Brit Scientist's Last Moments in Swiss Suicide Clinic following Last Meal of Fish and Chips", *The Sun*, 10 May 2018 <https://www.thesun.co.uk/news/6254539/dr-david-goodall-dead-scientist-switzerland-suicide-clinic/>, compare "David Goodall, 104, Spends His Last Day with Family in the Garden", *News.com.au*, 10 May 2018 <www.news.com.au/lifestyle/real-life/news-life/david-goodall-104-spends-his-last-day-with-family-in-the-garden/news-story/22340e341bc1450142bf64d27dbcabca>.

[12] Notably Philip Nitschke, founder of Exit International.

[13] David Goodall, 104, Spends His Last Day with Family in the Garden, n 11.

[14] *Stafgesetzbuch* [Criminal Code] (Switzerland) 20 December 1937, SR 311.0, Art 115.

[15] *Voluntary Assisted Dying Act 2017* (Vic).

mentioned above, that would permit assisted dying for terminally ill patients.[16] The maintenance of life and quality of life are intrinsically personal matters so, in our opinion, the injection of personal viewpoints on this subject must be embraced. It is not rational to have a reasoned debate on this topic without personal and emotive vantage points, but it is irrational not to apply reason to personally derived positions. We acknowledge the integrity of personal viewpoints regarding euthanasia and we offer some of our own below. We suggest, however, that such viewpoints must be objectively rationalised, giving credence rather than dismissal to subjectively held views.

Goodall's state of health makes his choice to die difficult to accept. Putting aside individual self-determination for present purposes, many others die in circumstances where, despite significant and debilitating illness, their will is to continue to live. The reasons for this are numerous. They include fear, uncertainty and hope. The point is that those who have witnessed family members die in such circumstances may be unsympathetic to an elderly and declining but, otherwise able-minded, able-bodied, cognisant and family-supported, person who voluntarily sacrifices life to which others would cling. Equally, life is intrinsically individual. Article 3 of the Universal Declaration of Human Rights provides for the right to "life, liberty and security of person".[17] The entitlement is suggestive to a state of quality not just of being. Quality of life is derived from its meaning for the individual. Once an individual loses satisfaction or will in that meaning, it is akin to cruelty to expect, let alone, demand that the life is maintained for the satisfaction or feeling of others.

We acknowledge that among the authors of this article there is a division of view regarding which of the above positions finds favour as well as, of course, a division of views regarding whether they adequately capture the considerations and sentiments involved. On that last point there is at least agreement that they do not. That discussion, on any view, is third-party premised. The views offered are from persons opining as to the position of their family members who have experienced prolonged death or suffering or offered by third parties considering the position of assisted dying from personal conceptualisations and experience. They are external views, looking from the outside into the internal realm and position of a decision to end human life. The euthanasia debate in Australia is usually, if not exclusively, premised on a raison d'être for the termination of life. For that reason, terminal or like illness or impairment is routinely foundational to any socio-economic legal discourse regarding euthanasia.[18] This is evidenced by the 2018 Victorian Parliamentary debates on assisted dying legislation.[19] The substance of the debate is, accordingly, concerned with the practical measures and safeguards certifying and determining decision-making in an environment where the individual is likely incapable of making real-time decisions to participate in their assisted suicide. The result is related debate on the permissible content of a species of estate-planning measures, known as Advanced Care Directives (ACD). While assisted suicide remains criminal, an ACD which effectively prohibits resuscitation is discharged by withdrawal of palliative treatments. Death usually results from suffocation or starvation.

It will be obvious that Goodall took the view that the right to die was the correlative of the right to life and should be within individual self-determination.[20] He said, "[i]f one chooses to kill oneself, then that should be fair enough. I don't think anyone else should interfere".[21] Goodall attested to his conviction,

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[16] See, eg, Victoria, *Parliamentary Debates*, Legislative Assembly, 28 November 2017, 4047 (Sam Hibbins) and Victoria, *Parliamentary Debates*, Legislative Council, 21 November 2017, 6219 (Craig Ondarchie).

[17] *Universal Declaration of Human Rights (UDHR)*, adopted and proclaimed by the General Assembly of the United Nations, Res 217A (III) (10 December 1948).

[18] "Emeritus Professor David Goodall, 104-years-old, to Fly to Switzerland to End His Life", *News.com.au*, 30 April 2018 <https://www.news.com.au/lifestyle/health/emeritus-professor-david-goodall-104yearsold-to-fly-to-switzerland-to-end-his-life/news-story/995a444fd5af8fdf1cb97062142ca831>.

[19] Victoria, *Parliamentary Debates*, Legislative Council, 21 November 2017, 6219 (Craig Ondarchie).

[20] David Goodall emphasised this right for the elderly, stating in an Australian interview that "[m]y feeling is that an old person like myself should have full citizenship rights including the right of assisted suicide": Charlotte Hamlyn, "Academic David Good Turns 104 and His Birthday Wish Is to Die in Peace", *ABC News*, 4 April 2018 <https://www.abc.net.au/news/2018-04-04/david-goodall-is-104-but-takes-no-pleasure-in-getting-older/9614344>.

[21] Birchall, n 11.

but the viewpoint alone remains a vantage point, open to contradiction, contrary opinion and emotive disagreement in the same manner as introduced above. Goodall's public and documented decision to end his life commands consideration of euthanasia not as a result of the philosophy Goodall propounded, but in consequence of the first-person, internal position it discloses with respect to the decision-making process that informs wilful death. It focuses attention on the decision-making matrix in ending life, as made by the subject of life termination, without recourse, reliance or refuge in the conditional circumstances of illness or impairment.

Goodall decided to end his life. Within that conclusory decision, is a matrix of facilitating decisions. As indicated above, one such decision is that Goodall decided to publicise his decision to die and allow invasive questioning and interrogation of his decisions by the media and persons remote from him. This created a public interface and notorious, national and international, public awareness that Goodall was taking direct and calculated actions to kill himself.[22] Critical was Goodall's decision to seek death in a foreign country and the related sub-set of decisions. This was critical for two reasons. First, because it was contrary to Goodall's desires. Goodall said in his final press statements that he would have preferred to die in Australia, but he decided to take the steps he did because "Australia is behind Switzerland in this move, as are most countries".[23] Second, the decisions Goodall took and allowed to be the subject of explicit public notoriety were causative of a reasonable, approximating certain, inference for Australian people, agencies and authorities that the steps Goodall was taking in Australia were for the purpose and with the intent of killing himself.

This article interrogates the decision-making involved in the death of Goodall for the purpose of articulating a normative philosophy for end-of-life policy, instructive of law-making, that is based in decisional analysis. The article begins with an examination of the decisions comprised in the second point we mentioned above; the decisions of third parties in Australia relating to Goodall's death in circumstances where there was a notorious volume of public, credible information indicating that the steps Goodall was taking in and around 8 May 2018 were for the purpose of ending his life. Part I examines the criminal liability that could (but has not) attached to the individuals and agencies in Australia involved in assisting Goodall to take steps that, we argue, can be regarded as proximate and necessary to his death and were steps undertaken knowing this to be the case and the purpose. We consider that the current criminal law in Australia could be invoked to prosecute these persons and agencies and such action has not been brought in the exercise of discretion. We pause to stress and emphasise that we in no way suggest prosecution should be brought or that discretion should be exercised in that regard. Our analysis is limited to demonstrating that prosecutions are not brought because there is a legal bar or restriction, but because of a discretionary decision. We argue that such consequences should not be within a discretion but be restricted as a matter of law. In Part II we shift from our focus on third-party decision-making to an analysis of the decisions that Goodall made in determining to end his life. We enumerate the decisions taken through a review of the public information available about the circumstances prior to Goodall travelling from Australia to Switzerland to end his life. We divide the decisions between those that were necessary to end life and those that were discretionary and idiosyncratically taken by Goodall to either facilitate his death or facilitate another purpose he had, such as public regard for the very process he was undertaking across nations. In Part III we discuss the decisional analysis that should underpin the philosophy for determining end-of-life procedures. We contend this analysis, as objectively based, should be given preference or, if not preference, then be used as a measure as against subjective belief, sentiment and moral views, as well as notions of utility and terminality of illness or disease.

II. THIRD PARTY DECISIONS

[22] See, eg, Charlotte Hamlyn, "The Final Move", *ABC News*, 5 May 2018 <https://www.abc.net.au/news/2018-05-05/david-goodall-trip-to-switzerland-for-voluntary-euthanasia/9716354>; see also, Yonette Joseph and Iliana Magra, "David Goodall, 104, Scientist Who Fought to Die on His Terms, Ends His Life", *New York Times*, 10 May 2018 <https://www.nytimes.com/2018/05/10/world/europe/david-goodall-australia-scientist-dead.html>.

[23] David Goodall, 104, Spends His Last Day with Family in the Garden, n 11.

The decisions taken by Goodall around the time of his death are detailed in Part II. For present purposes it suffices to premise our analysis of third-party involvement in the death on the following decisions of Goodall: one, it was *necessary* for him to travel out of Australia to legally die as killing himself was illegal in his home State and all other Australian jurisdictions. Two, it was *necessary* that Goodall travel to Switzerland because it is the only country that offers assisted-dying services to foreigners if the person assisting does not benefit from the person's death.[24] Three, it was *necessary* for him to have at least one person accompany him on the journey as his health would have made the individual journey very difficult, if not too onerous.

On that basis, Goodall needed to enlist the involvement of a third party to transport him from Australia and a third party to accompany him on the journey to the Eternal Spirit Clinic. The third party transporting him from Australia would necessarily need to be a carriage service with a domestic operation falling within Australian law while operated in Australian territory. The carriage service which transported Goodall from Australia was an airline; it is not important to name the particular airline and we do not. It was not necessary that the *amicus*, to use that term, be a citizen or resident of Australia but it was necessary that they were in Australia, on some legal basis, in order to board the flight with Goodall and accordingly the amicus was within the Australian territory and bound by its laws.[25] The third party accompanying Goodall was a nurse from *Exit International*,[26] an organisation founded and operated by Dr Philip Nitschke which assists persons who take the decision to end their life as Goodall did.

Having regard to the second, necessary premise we identified earlier, it is important to recognise that the flight path Goodall booked was not from Australia to Switzerland; it was from Australia to France. According to Goodall, as reported, he travelled to France prior to Basel to visit relatives in Bordeaux. It was from Bordeaux that Goodall then arranged a separate airline ticket for carriage between France and Switzerland. The itineraries, we submit, should be considered having regard to the widespread national and international media reporting prior to Goodall and his *amicus* boarding the flight, which media was based on explicit verbal statements by Goodall, his family and supporters, that Goodall was departing Australia to travel to France *en route* to Switzerland to end his life.

The flight from Australia departed from the Western Australian capital of Perth. The *Criminal Code Act Compilation Act 1913* (WA) governs criminal law in the State of Western Australia. Section 288(3) provides that:

> Any person who aids another in killing himself is guilty of a crime, and is liable to imprisonment for life.[27]

Western Australian criminal law does not criminalise suicide itself, which is both practical and in keeping with the general decriminalisation of suicide so failed attempts do not result in prosecution.[28] What is criminalised is procuring, counselling or aiding a person to kill themselves:[29] that is the principal offence.[30] This means a person who assists another to commit to suicide is not an accessory; their

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[24] Only 40 Australians are known to have made the journey, according to Exit International, because of the length of the flight and the cost of the trip: Joseph and Magra, n 22.

[25] We do not discuss and can assert that no person accompanying Goodall held diplomatic status or other status so as to give pause regarding their position with respect to Australian law.

[26] "Euthanasia: Australia's Oldest Scientist, David Goodall, 104, Chooses to Fly Overseas from Perth to Die", *The West Australian*, 29 April 2018 <https://thewest.com.au/news/perth/euthanasia-perth-academic-104-chooses-to-end-life-ng-b88820565z>.

[27] Compare *Suicide Act 1961* (UK) 9 & 10 Eliz 2, c 60, s 2, prior to amendment taking effect on 1 February 2010. See also *Criminal Attempts Act 1981* (UK).

[28] Compare, the *Suicide Act 1961* (UK) 9 & 10 Eliz 2, c 60 which decriminalised suicide in the United Kingdom so failed attempts could not be prosecuted.

[29] *Criminal Code Act Compilation Act 1913* (WA) s 288.

[30] D Caruso et al, *South Australian Criminal Law and Procedure* (LexisNexis Butterworths, 2nd ed, 2016) [9.5], citing JC Smith, "Aid, Abet, Counsel or Procure" in P Glazebrook (ed), *Reshaping the Criminal Law* (Stevens and Sons, 1978) 90, 95, who suggests that the "actual words used [in statutory formulations of the elements of complicity] are of no significance once it is clear that they were intended to incorporate the common law concepts of secondary participation". Smith remarks that the concept of complicity

criminal liability is as a principal, not derivative on an accessorial basis.[31] Section 288 has never been the subject of an indictment so there is a need to construe its provisions. In common law systems, "person" generally includes any relevant legal entity and this is made plain in Western Australia by the *Interpretation Act 1934* (WA), in which s 5 provides: "*person* or any word or expression descriptive of a person includes a public body, company, or association or body of persons, corporate or unincorporate". The term "aids", as employed within s 288, is not specially defined[32] and, accordingly, takes its meaning from the common law of Australia.[33] "Aid" is one term often incorporated in a portmanteau expression signifying the means of accessorial criminal liability. It is a term of wide import. It relates to physical assistance and there is no causative requirement that the assistance is only criminal if successful. As Leader-Elliott and Caruso record:

> To aid the commission of an offence is to provide physical assistance. For example, to supply a gun to a would-be robber, to drive an assassin to his victim's house or to keep a lookout while a house is burgled would all constitute aiding the commission of an offence. There is no requirement that the aid actually be of any assistance to the offender. The person who supplies a gun with a broken firing pin to the would-be assassin or the lookout who fails to notice the arrival of police still aids the offence, even though the assistance provided turned out to be quite useless.[34]

For accessorial liability, this actus reus of assisting conduct must be accompanied by mens rea, which requires intent to provide the assistance and knowledge of the crime to be committed.[35] It is important to recognise that intent relates to the assisting conduct and knowledge relates to the crime to be committed by the principal; there is no requirement to prove that the accessory intended the crime to be committed.[36] In respect of the s 288 offence, it is arguable that, because the criminal liability attached to the assistant as principal, not accessory, there is no relevant offence to which the mens rea of knowledge relevantly attaches, using accessorial liability as the model, because there is no principal offence of "killing yourself". It is, however, plain that s 288 falls to be determined according to ordinary principles of statutory construction of the common law.[37] The offence has a conduct element of aiding and a result element of the person aided actually dying: "killing himself".[38] Nothing would proscribe the ordinary attachment of the requirement to prove fault with respect to the conduct element, the requisite fault being intent to assist, consistent with the jurisprudence concerning accessorial liability.[39] The degree of fault necessary attaches to the result of the person killing themselves. Again, statutory construction principles applicable to construing criminal legislation indicate that fault should attach to the result given the express language of the provision and factors relating to the gravity of the offence.[40] Knowledge would, clearly, be sufficient. Namely, knowledge that the assistance was given for the person to kill themselves. The correlation with the jurisprudence on accessorial liability is discernible. It is based on knowledge of the "wrong" as regarded by the criminal law.[41] For accessorial liability, that wrong takes the form of the offence intended by the principal; for s 288, that wrong takes the form of the impugned conduct which

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was expressed at common law in a variety of ways, in addition to the usual "aid, abet, counsel or procure" – as for example, "helping", "maintaining", "commanding", "contriving", and "directing".

[31] Caruso et al, n 30, Ch 9.

[32] Compare s 148, which does provide an inclusive definition such that the common law also applies.

[33] There is one common law of Australia: *Lipohar v The Queen* (1999) 200 CLR 485; 109 A Crim R 207; [1999] HCA 65.

[34] Caruso et al, n 30, [9.6].

[35] Caruso et al, n 30, [9.14].

[36] Caruso et al, n 30, [9.16]; see also *R v Stokes* (1990) 51 A Crim R 25.

[37] See Caruso et al, n 30, Ch 2.

[38] The requirement for the result of actual death is strongly supported by the language of *Criminal Code Act Compilation Act 1913* (WA) s 288(2).

[39] *He Kaw Teh v The Queen* (1985) 157 CLR 523; 15 A Crim R 203; see also Caruso et al, n 30, Ch 2.

[40] *He Kaw Teh v The Queen* (1985) 157 CLR 523; 15 A Crim R 203.

[41] Caruso et al, n 30, Ch 1.

the law prohibits assisting, namely, assisting another to kill himself. In *Giorgianni v The Queen*,[42] the High Court of Australia considered whether reckless indifference was a sufficient degree of mens rea for accessorial liability. The Court concluded it was not. Justice Wilson, Justice Deane and Justice Dawson observed:

> Aiding, abetting, counselling or procuring the commission of an offence requires the intentional assistance or encouragement of the doing of those things which go to make up the offence. The necessary intent is absent if the person alleged to be a secondary participant lacks knowledge that the principal offender is doing something or is about to do something which amounts to an offence.[43]

In accordance with *Giorgianni*, there is no reason to think a lesser degree of mental participation than knowledge should be proved in respect of the s 288(3) offence. In accessorial liability, it is irrelevant to the guilt of the accessory as to whether the principal was successful in committing the crime (it may sound in sentencing but not in liability).[44] Liability under s 288 does, however, require the person to be successful in killing oneself for, absent that result, there is no completed offence. That is the difference arising from the direct rather than derivative liability occasioned by s 288.

Section 288(3) is among the most serious criminal offences on the criminal calendar, owing to the maximum penalty it carries of life imprisonment.[45] There is public interest in the prosecution of serious criminal offences.[46] The Office of the Director of Public Prosecutions is established and governed by the *Director of Public Prosecutions Act 1991* (WA). The prosecution of serious criminal offences in Western Australia is the exclusive remit of the Director of Public Prosecutions (DPP), under the Act.[47] All Offices of Directors across Australian jurisdictions publish and follow a policy and guidelines for prosecution. Clause 6 of the Western Australian Guidelines, the *Statement of Prosecution Policy and Guidelines 2018*,[48] indicates primary responsibility for investigating and charging offences is with the State's police force, Western Australia Police Force, but may seek the recommendation of the Director, pursuant to cl 7, and act in accordance with that recommendation. Clause 18 enumerates the four fundamental objectives of prosecution:

> The fundamental objectives of a criminal prosecution are:
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> (a) to bring to justice those who commit offences;
> (b) to punish those who deserve punishment for their offences;
> (c) to protect the community; and
> (d) to facilitate the provision of expeditious compensation and restitution to victims of crime.

The Guideline describes what constitutes a "prima facie" case. Clause 21 provides: "[a] prima facie case is established if the available material appears on its face or initial assessment to prove the offence which has been charged". If the prima facie case is not established, the prosecution should be discontinued.[49] If there is a prima facie case, "a prosecution should only proceed when it is in the public interest".[50] This all leads to the decisive basis on which prosecutions are sustained, namely, whether there is a reasonable prospect of conviction. The Western Australian Guidelines phrase this test in the negative as opposed to positive. That is, they do not say, "prosecutions will be brought in the public interest where there is a reasonable prospect of conviction". Rather, cl 25 provides that "[a] prosecution is not in the public

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[42] *Giorgianni v The Queen* (1985) 156 CLR 473; 16 A Crim R 163.

[43] *Giorgianni v The Queen* (1985) 156 CLR 473, [19]; 16 A Crim R 163.

[44] Caruso et al, n 30, [9.16].

[45] Although this is unlikely to be imposed. For a review of life sentences, see Caruso and Leader-Elliott, "The Rehabilitation Quotient", a forthcoming article.

[46] *R v Apostilides* (1984) 154 CLR 563; 15 A Crim R 88.

[47] *Director of Public Prosecutions Act 1991* (WA) s 11(1).

[48] Office of the Director of Public Prosecutions, *Statement of Prosecution Policy and Guidelines* (2018) <https://www.dpp.wa.gov.au/_files/publications/Statement-of-Prosecution-Policy-and-Guidelines.pdf>.

[49] Office of the Director of Public Prosecutions, n 48, cl 23.

[50] Office of the Director of Public Prosecutions, n 48, cl 24.

interest if it does not have reasonable prospects of conviction". Clause 26 indicates the relationship of a reasonable prospect of conviction to the strength of the case, providing:

> The requirement that a prosecution has reasonable prospects of conviction does not mean that only cases perceived as "strong" should be prosecuted. Generally, the resolution of disputed questions of fact is for the court and not the prosecutor. A case considered "weak" by some may not seem so to others. The assessment of prospects of conviction is not to be understood as usurpation of the role of the court but rather as an exercise of discretion in the public interest.

Clauses 27 to 33 of the Guidelines then set out an extensive set of the relevant and irrelevant considerations for determining the reasonable prospect of conviction. In particular, we emphasise cl 27, which provides that the "evaluation of prospects of conviction is a matter of dispassionate judgment", and cl 29, which lists "admissibility of the evidence available to the prosecution" as the first consideration in evaluating prospects of conviction. The Guidelines also provide for the approach to be taken to the views of the tribunal of fact who might determine the prosecution, namely the jury, as well as detailing matters that the evaluating prosecutor should regard as irrelevant. Clause 28 provides that "[a] preconception as to beliefs which may be held by a jury is not a material factor. Juries are presumed to act impartially". Further, cl 33 provides that the following matters "are irrelevant to the evaluation of the public interest", namely, "the possible political consequences of the exercise of the discretion"[51] and "the prosecutor's personal feelings concerning the prosecution".[52]

Returning to the passage of Goodall from Australia to Switzerland, the airline which transported him, together with the nurse that accompanied him, clearly intended the aid they gave Goodall; the airline intended to fly him and the nurse intended to assist him during that flight. That aid was rendered knowing that it was the first critical step towards Goodall killing himself. That knowledge is certain for the nurse. It is palpable for the airline from the media attention and, perhaps, was directly stated to airline staff by Goodall or others associated with him. It is not a reasonable inference to consider the airline was not aware of Goodall's intentions; such would be wilful blindness on its part. Goodall took the steps he said he would and killed himself. The s 288(3) offence is complete.

Does it matter that the death was not in Australia? Usually criminal liability attaches at the place the crime took place according to the criminal law of that place: *lex loci delicti*. For the purposes of s 288(3), the relevant place of the crime is where the aid was provided, not the death, because the aid is the requisite actus reus. Does transporting Goodall to France rather than the destination for his death offer an argument of insufficient proximity to the third party, particularly the airline? Could it be argued that their actions and mind was concerned only with transporting Goodall to France to see relatives and nothing after that? Indeed, could the airline argue that it has no knowledge of what people do or where they go, but that their knowledge is limited to transporting person X from A to B? We suggest the argument could be made, but it does not suggest that the prosecution's case would be unreasonable. Goodall was not a regular passenger. There was notoriety regarding his travel and purpose. His journey to France does not constitute a novus actus interveniens for the purposes of s 288(3). Passage to France was assistance rendered in the knowledge that a further journey would be taken to Switzerland. The futility of relying on passage to France in rebuttal of the prospects of criminal liability may be illustrated by a contrary, repugnant example. If a person writes to an airline, informs its staff or otherwise makes public knowledge, that the person wants to travel from Australia to Switzerland to commit acts of terrorism in Switzerland, perhaps bombings or other atrocities, can an airline agree to issue that person a ticket to go to France without opening itself to criminal interrogation?

Could other arguments be mounted against the *success* of the prosecution? Certainly. It could be argued that, given the public awareness of Goodall's purpose in travelling, law enforcement authorities should have prevented his departure if it gave rise to concern regarding criminal liability. In not doing so, they gave tacit approval to the conduct of the third parties. Such an argument is, quite obviously, problematic. A person cannot be given a prior dispensation from criminal action tacitly; any such authority requires

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[51] Office of the Director of Public Prosecutions, n 48, cl 33(b).

[52] Office of the Director of Public Prosecutions, n 48, cl 33(c).

significant express authorities (and, we are now having regard to organised law enforcement operations, not the circumstances being here considered). Another argument may be whether the payment that a third party receives means they are not providing "aid" but some other form of "service". That is a distinction which might succeed in contract law, but not criminal law. A person paid to get an unregistered firearm for an offence, is aiding: aid need not be given *gratis* – and rarely is given *gratis* in criminal enterprise. In any event, such arguments still ultimately take us to trial. Whether the prosecution will be *successful* is not the same as whether the prosecution was properly evaluated as having a reasonable *prospect* of success.

It is our conclusion that there is nothing, in law, which would proscribe the prosecution of the two third parties involved in transporting Goodall from Australia. We consider that the prosecution policy and guidelines in Western Australia indicate, and indeed may be regarded as supporting, the reasonable prospect of conviction. We pause again to emphasise that we do not consider prosecution should be, now or at any time, taken against the third parties discussed. Rather our point is that, given the legal position and the policy and guidelines, it must be concluded that the decision not to prosecute is one made in the exercise of discretion. We further consider that the only basis on which that discretion could be exercised not to prosecute, given the admissibility of evidence available and related attendant considerations, is that it is not in the public interest. We would agree in that result: the discretion not to prosecute is properly exercised and properly justified on the basis that it is not in the public interest. That leads, inescapably, to this fundamental question: what is the public interest in the prohibition of assisted suicide, such as s 288(3), as is currently maintained in Australia?

Section 288(1) of the *Criminal Code Act Compilation Act 1913* (WA) criminalises "procuring" suicide; s 288(2) criminalises "counselling" suicide which induces the result. These offences comprise active pressure and engagement to have another take their own life. Palpably different issues arise where a person takes such positive steps to have another kill themselves. Positive suggestion, even if indirect, for a person to kill themselves was specifically criminalised at the Australian federal level in 2005, when the *Criminal Code Act 1995* (Cth) included s 474.29A and 474.29B. These sections created new offences, carrying significant financial penalties, for the use of any carriage service to access, send or publish material that counsels or incites someone into committing suicide, or possession or control of such material for use through a carriage service.[53]

Section 288(3), however, does not have the same positive aspect. Assistance could constitute, as in the case of our *amicus* nurse, accompanying a person who seeks to end their life precisely because they are not in a position to act independently to any meaningful extent. We may, for example, consider particular situations: perhaps, unlike Goodall, a person who seeks to end their life who is not of sound mind. If that is the concern being guarded against, then that is how the provision should be directed. Section 288(3) is much broader in its ambit than required.

The United Kingdom adheres to a legal regime and policy position akin to that of Australia. On 1 February 2019, s 59 of the *Coroners Justice Act 2009* (UK) entered into force and consolidated offences relating to assisted or attempted assist of suicide under other legislation.[54] The reforms came about in the context of the decision in *R (on the application of Purdy) v DPP*,[55] which was the last judgment of the House of Lords prior to the apex court of the United Kingdom being reconstituted as the Supreme Court of the dominion.

Debbie Purdy was terminally ill, suffering from a diagnosis of multiple sclerosis. She wanted the opportunity to travel to Switzerland to end her life when the illness became unbearable. Her husband wanted to be travel with her to Switzerland in such circumstances. Mrs Purdy wanted information from the United Kingdom Office of the Director of Public Prosecutions as to the factors the DPP would consider in determining whether to prosecute her husband was such travel and circumstances of accompaniment and assistance to occur. A request was made to the office of the Director, which refused

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[53] *Criminal Code Act 1995* (Cth) s 474.29A and 474.29B.

[54] Namely, the *Suicide Act 1961* (UK) *Suicide Act 1961* (UK) 9 & 10 Eliz 2, c 60, and the *Criminal Attempts Act 1981* (UK).

[55] *R (on the application of Purdy) v DPP* [2009] UKHL 45.

to answer; the proceedings followed. The House of Lords held that the effect of Art 8 of the European Convention on Human Rights required the DPP to adopt and promulgate an offence-specific policy regarding prosecution for assisted dying offences under the *Suicide Act 1961* (UK). The *Policy for prosecutors in respect of cases of encouraging or assisting suicide* took effect for the Crown Prosecution Service (CPS) on 25 February 2010. As one would expect the policy provides that assisted suicide remains criminal in the United Kingdom and nothing in the policy can be taken as any assurance that a prosecution will not result if a person engaged in conduct that encourages or assists the suicide of another person.[56] The factors the policy takes into account in determining the public interest in prosecution are similar to those taken into account by other policies, such as that for general prosecution by the DPP in Western Australia.[57] Without reviewing the detail of, and debate about,[58] the factors considered, it can be concluded for present purposes that the CPS retains substantial discretion regarding prosecution of encouraging or assisting dying.[59] For the reasons we gave earlier, retention of discretion on such prosecutions is inconsistent with the substantive legal position that should embed the societal public interest.

In *Purdy*, the House of Lords considered a short article by Michael Hirst where he argued that it would not be unlawful for a person to do acts in the United Kingdom which assisted, aided or abetted the suicide of a person where that suicide lawfully took place in another jurisdiction, namely, Switzerland.[60] Lord Hope held that there was nonetheless a substantial risk of such prosecution, which we respectfully suggest accords with our earlier analysis regarding the basis for prosecution. We suggest that Hirst's application of the "terminatory principle"[61] ignores causality. As we earlier discussed, if causation is not interrupted, the fact that the "result" of death occurred in a foreign jurisdiction maintains connection with the aid rendered in the home jurisdiction. Hirst's argument may be questioned in the following way. While in the United Kingdom, X buys Y a ticket to another country and further informs Y that X will bring poison for Y to consume to kill themselves when they land in the other country. They travel, arrive, X gives the poison to Y which Y takes and dies. On Hirst's argument, X *cannot be prosecuted* in the United Kingdom. That seems an odd and undesirable result. Putting it another way, and borrowing from Lord Woolf CJ in *Smith (No 4)*,[62] if such were the case it would "lead to a wholly unsatisfactory situation in contemporary circumstances".[63]

In Switzerland, the Criminal Code,[64] at its Art 115, criminalises inciting and assisting suicide, but only when done with selfish motives.[65] It is thus legal to help someone commit suicide in Switzerland if one does not profit from it or is not animated by hatred or a desire for vengeance.[66] It is this precision that renders the activities of organisations such as Eternal Spirit, Exit or Dignitas legal in Switzerland: since they do not get paid for their services, they do not fall under the aforementioned legal provision. The

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[56] Crown Prosecution Service, *Suicide: Policy for Prosecutors in Respect of Cases of Encouraging or Assisting Suicide* (October 2014) [6].

[57] The CPS policy relates to the two tests in the Code for Crown Prosecutors which relate to, first, an evidential stage and, second, the public interest stage of considerations.

[58] See, eg, C O'Sullivan, "Mens Rea, Motive and Assisted Suicide: Does the DPP's Policy Go Too Far?" (2015) 35 *Legal Studies* 96, for discussion about the CPS policy regarding compassionate motive as a factor against prosecution, where motive is no part of the substantive criminal law.

[59] See J Rogers, "Prosecutorial Policies, Prosecutorial Systems and the *Purdy* Litigation" (2010) *Criminal Law Review* 543.

[60] Michael Hirst, "Suicide in Switzerland: Complicity in England" (2009) *Criminal Law Review* 335.

[61] See especially Hirst, n 60, 336–337.

[62] *R v Smith (Wallace Duncan) (No 4)* [2004] EWCA Crim 631, also referred to by Hirst, n 60, 337.

[63] *R v Smith (Wallace Duncan) (No 4)* [2004] EWCA Crim 631, [64].

[64] *Stafgesetzbuch* [Criminal Code] (Switzerland) 20 December 1937, SR 311.0, Art 115.

[65] "Any person who for selfish motives incites or assists another to commit or attempt to commit suicide is, if that other person thereafter commits or attempts to commit suicide, liable to a custodial sentence not exceeding five years or to a monetary penalty."

[66] J Hurtado Pozo and F Illanez, "Article 115" in A Macaluso, L Moreillon and N Queloz (eds), *Commentaire Romand, Code Pénal II* (Helbing Liechtenhahn Verlag, 2017) n 11.

legal framework in Switzerland is thus very liberal.[67] But most organisations procuring assisted suicide require supplementary conditions to be met before they will consider helping a client end their life. Typically, a client must have been a member of the organisation for some years before the request, be at least 18 years old, be in a sound mental state, and express a lasting wish to die: free from any external pressure.[68] Some organisations require their clients to be Swiss citizens or residents,[69] whereas others will procure their services to foreigners travelling to Switzerland for this specific purpose. All organisations also offer counselling to people who wish to die and explore alternatives with them upon request (medical and social support measures, palliative care, etc.).

Once they have decided to die, the client must usually give the organisation a written statement confirming their wish to end their life, written in their own hand or verified by a notary (the exact procedure varies from one organisation to the next). A number of recently prepared medical reports must be provided, confirming that the person is of sound mind, and detailing their state of physical health; several organisations require that such documents be provided by Swiss doctors exclusively (for Swiss residents, usually their family doctor).[70] Historically, assisted suicide was only possible if the client suffered from an incurable disease that was in its terminal phase. Over time, however, many assisted-suicide organisations have broadened their offer to clients who, without being in a terminal phase, have insufferable physical pains, a serious disability, or multiple disabling pathologies due to ageing. In very rare cases, it is possible to perform assisted suicide when one suffers from a mental illness but is somatically healthy, as long as the person has the capacity to understand the significance of suicide. In such cases, the person must have suffered under said mental illness for many years, been in therapy for a long time, and provide medical reports attesting to their capacity to make the decision to end their life. In the case of dementia, assisted suicide is not impossible in principle, but will only be carried out in the early stages of the illness.[71]

After the application is received by the organisation, and if the conditions outlined above are met, the client meets with a counsellor who ensures that the person in fact meets all such requirements. If this is the case, a Swiss doctor will be asked to write a prescription for the substance to allow a pharmacist to deliver it.[72] The substance will then be delivered to the organisation and stored by them until it is used. The day of the procedure will then be set, usually a couple of weeks after the first meeting; it can take place either in the home of the person or in a dedicated clinic, with or without relatives and friends present. On the day of the suicide, the person will once again confirm unequivocally to the end-of-life attendant[73] their wish to die;[74] at least one witness (other than the end-of-life attendant) must attend the

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[67] Theoretically, it would be legal in Switzerland to procure the death of a healthy and young person with assisted suicide.

[68] See, eg, "Accompanied Suicide", *Dignitas* <http://www.dignitas.ch/index.php?option=com_content&view=article&id=20&Itemid=60&lang=en; 'FAQ', EXIT (Web Page) https://exit.ch/en/faq/>.

[69] See, eg, "EXIT – Self-determined Living and Dying", *EXIT* <https://exit.ch/freitodbegleitung/bedingungen/>.

[70] This obligation to see Swiss doctors in effect means that a person coming from abroad will have to arrive in Switzerland several days before the planned day of suicide.

[71] "FAQ", *EXIT* <https://exit.ch/en/faq/>.

[72] This point was discussed in a Swiss case brought to the European Court of Human Rights in 2011: *Haas v Switzerland* [2011] I Eur Court HR 2422. Aged 52 years old, after having suffered from bipolar affective disorder for 20 years and attempted to kill himself twice, the applicant decided to buy sodium pentobarbital to end his life in a painless, safe and dignified manner. When he was unable to find a doctor who would give him a prescription for it, he petitioned federal and cantonal authorities to obtain the substance from a pharmacy directly. He argued that the European Convention on Human Right, at its Art 8, imposed on authorities a "positive obligation" to create the conditions for a painless suicide, without the risk of failure: [10]. The authorities refused, and the applicant lost his appeal to the Swiss Supreme Court. The European Court of Human Rights held that even though the applicant had a right to end his life, Switzerland imposed conditions on the procurement of lethal substances that had a legitimate aim, namely guarding people against hasty decisions, ensuring their free will with end-of-life decisions and preventing abuse. The appeal was dismissed.

[73] This person usually has a medical or social background, extensive experience with end-of-life counseling and support, and has received specific training for this purpose; importantly, they are not paid for their services.

[74] The procedure can be stopped at any time.

proceedings and remain on site until the end of the process. In order for the end-of-life attendant not to be accused of homicide at the request of the victim (Art 114 of the Swiss Criminal Code),[75] it is essential that the client commit the act themselves: they must be physically able either to drink from a glass containing the substance, or sip the liquid through a straw. If, given the medical condition of the client, the substance must be injected, the client must be able to push a lever or turn a small wheel that activates the injection. The person usually falls asleep within minutes and dies shortly afterwards. After death has occurred, Swiss police are notified, and a prosecutor or doctor, or both, will come to the place of death to ensure that there was compliance with the conditions set out by Swiss law.[76]

Before the publicity surrounding Goodall's case,[77] official statistics showed that roughly 1,000 people residing in Switzerland died every year through assisted suicide, or 1.2% of all deaths. The number of people dying through assisted suicide has increased steadily since 2003. A majority of clients are women, and only one out of eight are younger than 65 years old.[78] Not all people who apply for assisted suicide have their wish automatically granted. In 2018, the Swiss-German branch of the organisation Exit received 3,600 applications, but only pursued 1,206 cases with 905 resulting in an actual suicide.[79] In Switzerland, assisted suicide is widely accepted by the public on principle, even if certain aspects of the procedure are sometimes the object of political and public debate.[80] There are always more people who become members of assisted-suicide organisations, presumably because they want to have the option of assisted suicide once the time comes for themselves. In 2018, 120,000 people were members of Exit, being an increase of 13% compared to the previous year.[81] Still hotly debated in Switzerland, however, is the right to die in the absence of serious illness or pain, simply because one is tired of living.[82] Lately, the right to die of prisoners has also been discussed.[83]

An airline transported Goodall, a man who attested he was "ageing disgracefully" and did not want to continue anymore. A nurse accompanied him, so a 104-year-old person would not need to make the journey without support or a companion. Both the airline and the nurse could be the subject of criminal prosecution in Australia. They are, rightly in our view, not. The reason they are not is entirely the result of the exercise of discretion. The discretion is, rightly in our view, exercised because prosecution is not in the public interest. We contend the result for Australia should be a revision to its criminal law to embody in law what is currently left to discretion. We are not suggesting that all discretionary decision-

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[75] "Any person who, for commendable motives, and in particular out of compassion for the victim, causes the death of a person at that person's own genuine and insistent request is liable to a custodial sentence not exceeding three years or to a monetary penalty."

[76] An autopsy is not usually ordered in such cases.

[77] Since then, assisted-suicide organisations in Switzerland report having been overwhelmed with new membership applications and solicitations to commit suicide. See, eg, Andreas Maurer, "Sterbehilfe boomt: Doch wie viel Geld darf man für den assistierten Suizid verlangen?", *Aargauer Zeitung*, 12 May 2018 <https://www.aargauerzeitung.ch/schweiz/sterbehilfe-boomt-doch-wie-viel-geld-darf-man-fuer-den-assistierten-suizid-verlangen-132558483>.

[78] "Suicide assisté selon le sexe et l'âge 2003-2016", *Schweizerische Eidgenossenschaft* <https://www.bfs.admin.ch/bfs/en/home/statistics/catalogues-databases/tables.assetdetail.7008108.html>. EXIT reports an average age at the time of death of 78 years in 2018: EXIT – Self-determined Living and Dying, n 69.

[79] EXIT – Self-determined Living and Dying, n 69.

[80] For instance, a member of the legislative body in the canton of Neuchâtel recently raised the issue of a possible lack of support for family members after the suicide of their loved one, and how it could be improved. See "EXIT: Les Proches Disent", *Generations-Plus*, 9 April 2019 <http://www.hesav.ch/docs/default-source/recherche-et-developpement-docs/divers-docu/generations-magazine-proches_novembre-2017.pdf?sfvrsn=0>.

[81] Some of the new members probably do not join the organisation to use the services themselves, but rather to support an organisation that they see as fulfilling an important social role: "Suicide assisté: forte hausse du nombre d'appels à Exit, surtout en Suisse alémanique", *Le Temps*, 12 February 2019 <https://www.letemps.ch/suisse/suicide-assiste-forte-hausse-nombre-dappels-exit-surtout-suisse-alemanique>.

[82] See, eg, Céline Zünd, "Aide au suicide: où sont les limites?", *Le Temps*, 29 August 2018 <https://www.letemps.ch/suisse/aide-suicide-limites>.

[83] Like many other countries in the Western world, Switzerland has an ageing prison population who is also affected by end-of-life issues: Céline Zünd, "L'aide au suicide frappe aux portes des prisons", *Le Temps*, 31 July 2018 <https://www.letemps.ch/suisse/laide-suicide-frappe-aux-portes-prisons-0>.

making in law is to be avoided. Indeed, in certain circumstances, discretion is far superior to the mandates of legislation in affording justice. However, our view is that the potential for prosecution should be proscribed by law, not by discretion, in circumstances of assisted dying when the deceased was of sound mind. We base that conclusion on the very exercise of discretion that can be inferred from the absence of prosecution in the Goodall case. The exercise of discretion in Goodall's case demonstrates that discretion should not be the basis on which prosecutions for assisted dying are brought, as the discretion could only ever justifiably be exercised as it was by authorities in Western Australia.

III. GOODALL'S DECISIONS

Goodall decided to end his life. Within that ultimate decision is a matrix of facilitating decisions. We enumerated some of those in Part II, particularly as they depended on other people to achieve them. The circumstances of Goodall's death permit the following decisions to be discerned as an objective matrix of what he considered; by objective we mean that we are inferring from reports, rather than applying our intuition or understanding of what might have been involved.

In the following distillation of the decisions, sentences commencing with a number (eg, "1") denote a definite decision point which we shall term, "principal decisions". Sentences commencing with a letter (eg, "a") denote decisions which informed principal decisions, which we call "informing decisions". Text in italics are offered as notations on the decision. Principal decisions depend on informing decisions but informing decisions do not necessitate the principal decision; an informing decision could lead to a different principal decision. The principal decisions identified are those that Goodall took. We present them in chronological order as a matter of logic; although we do not assert such decision-making is necessarily linear. To avoid repetition, each sentence, whether introduced by number or letter, should be read as commencing with: "He (Goodall) decided".

(1) His quality of life had declined and would not improve. *In using the term "quality", we refer to a tripartite self-assessment of his mental, physical and emotional state: in Goodall's words, he said: "I'm not happy. I want to die. It's not sad particularly".*[84]
   (a) His quality of life had declined.
   (b) There would be no improvement from the declination.
   (c) The declination was such that life was not worth continuing.[85] *It may be thought 1c is a principal decision because he would leave to a decision to die, but without more, it does not; there are other reasons a person may choose to live even if they assess their quality of life as not demanding that conclusion.*

(2) His life was not worth continuing having regard to others.
   (a) He did not need to live because it would provide a benefit to another or others (such as family, friends or community).
   (b) There was no demand (as he adjudged) for him to continue living that outweighed his interest in dying. *Media reports suggests family, friends and other close associates of Goodall did not publically oppose his decision to die; many such persons were in attendance at the Perth Airport and later in Liestal. It is not known what conversation took place privately. It can be concluded that Goodall made the decision at 2b.*

(3) His life was not worth continuing having regard to any other reason or belief.
   (a) He was not bound, restricted or otherwise concerned by religious teaching or belief, or other teaching or belief, that should oblige him not to take his own life (Goodall was a known atheist).

(4) His life should end by suicide (or akin process of immediate death).
   (a) He did not want to allow or await a natural death.
   (b) He did not want to allow or await death by removal of palliative care.
   (c) He did not want to cause his own death other than by suicide or like process.

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[84] Birchall, n 11.

[85] These decisions were not made in a short space of time brought about by age post-100 years. David Goodall had been a member of Nitschke's Exit International assisted dying organisation for 20 years prior to his death: Birchall, n 11.

(d) He could not commit suicide independently. *Goodall was able bodied and various methods of independent suicide were open to him, which he tried. Goodall indicated that he had failed to kill himself on at least three attempts.*[86]
(e) He needed assistance to commit suicide.
(f) He did not want to ask another to kill him in Australia. *There is nothing in reports that suggests Goodall ever tried to commit suicide other than by himself. There is also nothing to suggest he would ask anyone to commit a crime, as he knew assisting suicide to be illegal in Australia. There is no evidence, from reports to which we have had access at least, that it was legality, rather than for example morality, which barred Goodall on his own assessment from asking another to kill him in Australia.*

(5) His life could not end by suicide in Australia. *He knew that assisted suicide was illegal in Western Australia and throughout Australia,*[87] *but as indicated above the legal versus moral dimension of Goodall's reasoning is not precisely discernible.*
(6) His life could be ended by assisted suicide in Switzerland.
(a) He could rely on the advice regarding assisted dying in Switzerland.[88]
(b) He met the criteria for assisted dying in Switzerland (eg, there was no requirement for a pre-existing or terminal illness).
(c) He was willing to travel out of Australia.
(d) He was able to travel out of Australia.
(e) He was willing to die in a country other than Australia. *Goodall preferred to die in Australia but accepted that was not possible as he was not able to kill himself independently and he decided against seeking someone else to assist him (perhaps that request was to avoid that person committing a crime in Australia; for the reasons we have argued in Part I, the process that was followed does not avoid possible liability under provisions criminalising assisted dying).*
(f) He was willing to die in Switzerland.

(7) His life should end in Switzerland.
(a) He could fund the cost of the travel and procedure.[89]
(b) It was acceptable if not all family and friends would be able to journey to Switzerland.[90]
(c) It was acceptable that death would take place in a foreign country in unfamiliar surrounds.
(d) It was acceptable that death would take place in a country where English was not a native or national language.[91]
(e) It was acceptable to die through the process administered by the Eternal Spirit Clinic and the arrangements made by Exit International and related bodies.

(8) His decision to end his life by assisted dying in Switzerland should be made public.
(a) The decisions comprised in 1–6 above should be made public.
(b) The media should be engaged to interview him and others involved in the process.
(c) He should tell the public that: that he wanted to die; that he would have preferred to die in Australia; that he could not die in Australia; that he needed to go to Switzerland to die; that he should be able to die in Australia as that was his wish; that anyone who wanted to die as he did should be able to do so in Australia.

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[86] David Goodall, 104, Spends His Last Day with Family in the Garden, n 11.

[87] With the limited exception of Victoria and its passage of the *Voluntary Assisted Dying Act 2017* (Vic).

[88] This advice was provided largely by Exit International, of which David Goodall had been a member for 20 years prior to his death.

[89] Crowd funding raised more than $20,000 for Goodall's travel, which allowed him to make the journey from Australia in business class: Philip Nitschke, "Help David Go to Switzerland", *Gofundme.com* <https://au.gofundme.com/helpdavidtoswitzerland>.

[90] Many persons die in comparatively isolated circumstances to the way their life was lived. The point is that that is infrequently the result of a deliberate and calculated decision made by the deceased.

[91] David Goodall was born in England and emigrated to Western Australia at age 34.

The cost associated with dying in Switzerland was significant, including cost of travel and the fees of the organisations involved in providing the assisted dying services. We infer, without direct evidence, that part of the decision to publicise his situation was to assist in raising money from public crowd sourcing for these costs. In noting this, we emphasise that we do not suggest the public reporting was for the purpose of raising capital; the reporting demonstrates the personal and philosophical message that Goodall clearly wished to present publically about the decisions he was required to take to die, legally, and with assistance in Switzerland.

(9) To submit to all procedures required to have the assisted dying in Switzerland.
   (a) To submit to a medical examination of his soundness of mind to decide to die.[92]

(10) To submit to the medical procedure that would cause his death.
   (a) To submit to the insertion of an intravenous drip which would deliver 15 grams of pentobarbital sodium[93] (more commonly called, Nembutal) to his blood stream.
   (b) To self-administer the operation of the IV for the delivery of the pentobarbital sodium (which can be activated by mere touch, so the procedure is accessible by persons suffering serious health issues). *He took the above decisions knowing, from information provided by medical staff, that the injection of the pentobarbital sodium would cause his death.*

The decisions enumerated above are objectively includable on an appraisal of the known steps involved in Goodall ending his life. There may be, and probably are, further decisions which could be inferred from the above. If there is error in not considering these, we accept the criticism because we submit objective analysis is preferable to speculation. The 10 principal decisions and informing decisions we have identified can fairly be inferred from review of reports and direct statements from Goodall himself. There is, however, a further decision process which must be noted, namely, the ongoing re-assessment of each of the principal decisions and informing decisions within the conclusory decision to die. We consider that even if Goodall was steadfast and immoveable in his decision to die once made, the effect of the decision on surviving family, friends and associates, would have provided discussion and points during the course of Goodall's final days of life to return to his conclusory decision. At times this would also likely require Goodall to defend the conclusion in the face of queries by family and friends, in addition to the medical questioning mandated by Swiss law and the protocols of the Eternal Spirit Clinic. Goodall departed Australia on 8 May and died on 10 May 2018. Even in this short period of time, it is inferable that multiple occasions arose between Perth and Liestal where familial and close relationship holders with Goodall would have questioned his decisions.[94] We consider the gravity of the decision being made by the person seeking to end their life is, axiomatically, the basis for that person and others like re-assessing the decisions as the process of death continues.

The inferred concern of close relatives and friends in the case of Goodall may also be inferred from the temporal shift in focus for Goodall. At the age of 102, Goodall remained an active Honorary Research Associate at Edith Cowan University in Western Australia.[95] He usually travelled to the university campus for on-site work four days per week. That work involved reviewing academic papers and assisting in supervision of doctoral candidates. In May 2017, however, the University decided to no longer offer Goodall an office on campus, instead it would assist in providing him a home office. Goodall was only to be permitted on the campus of the University for pre-arranged meetings, for which it was required that he be accompanied. It was reported that the University had made this decision after

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[92] Two Swiss doctors examined and certified David Goodall was eligible to continue with euthanasia: Charlotte Hamlyn, "David Goodall Ends His Life at 104 with a Final Powerful Statement on Euthanasia", *ABC News*, 11 May 2018 <https://www.abc.net.au/news/2018-05-10/david-goodall-ends-life-in-a-powerful-statement-on-euthanasia/9742528>.

[93] Pentobarbital sodium is an anaesthetic. 0.5 grams sedates an individual; 0.8 grams causes cardiac arrest; 2 grams is deadly: Therapeutic Goods Administration, "2.2 Pentobarbital", *Scheduling Medicines and Poisons*, 2 February 2017 <https://www.tga.gov.au/book-page/22-pentobarbital>.

[94] Cautious of becoming speculative, we observe that grandchildren of David Goodall (whom are adults themselves) gave accounts to media that expressed solidarity with the decision but not necessarily support (which is arguably unsurprising): David Goodall, 104, Spends His Last Day with Family in the Garden, n 11.

[95] Laura Gartry, "David Goodall: Australia's Oldest Working Scientist Fights to Stay at University", *ABC News*, 10 May 2017 <www.abc.net.au/news/2016-08-27/david-goodall:-australias-oldest-working-scientist/7788844>.

"numerous concerns were raised by staff and students about Dr Goodall's safety and wellbeing".[96] The University took actions it considered appropriate to safeguard Goodall, staff and students; we offer no comment on them as we do not know their basis other than the report we have cited. We focus on Goodall. We note a report that in 2015, age 100, he was able to take the Ghan Train journey. The Ghan travels the longitudinal length of the middle of the Australian mainland between the capital cities of Darwin and Adelaide. Goodall was quoted as saying, "[i]t was good to see it all again. It was [a] nice trip, but I would have preferred to have company, I was rather lonely".[97] The effect of loneliness on Goodall may be a further informing decision with respect to principal decision 1 as we identified. Studies examine correlations between loneliness and isolation, depression and suicide.[98] Our present concern is not to agree with, dissect or pass comment on this literature. Goodall's decision to die can most explicitly be linked with his statement, as recounted earlier, "I'm not happy".[99]

Principal decision 8, above, warrants particular comment. Goodall decided to publicise his decision to die and allow invasive questioning and interrogation of his decisions by the media and strangers to him. We identify that decision because, for Goodall, there may have been several reasons he did this. As we alluded to above, they include financial support and public discourse regarding Australian law and policy. We note that approximately 40 Australians have travelled from Australia to Switzerland to die in similar circumstances to that of Goodall.[100] Many are assisted by Exit International, founded by Nitschke in 1997. The founding philosophy of the organisation is "that it is a fundamental human right for every adult of sound mind, to be able to plan for the end of their life in a way that is reliable, peaceful and at a time of their choosing".[101] The organisation has a membership base of 20,000 globally. Exit International describes those it has assisted to die as follows: "[t]he average age of Exit members is 75 years. The vast majority of Exit members are the well elderly. A significant minority of members are seriously ill". Exit International attributes memorials for members who have died on its website.[102] The reason for, manner and place of death varies over the approximately 22 years the organisation has operated. The profiles kept by the organisation demonstrate many members shared the view of Goodall that voluntary euthanasia required debate and reform in Australia. We consider that the process of reasoning and decision-making by other Exit members may be aligned with Goodall, to certain degrees. The obvious difference between those persons and Goodall is that many other persons who chose to die suffered from an illness or disease which may have been serious or terminal. Their decision, however, to engage in public discourse is shared with Goodall, though usually not to the same extent as Goodall did. The decision to engage in public discourse which was as widespread as that for Goodall is atypical. A reason for that is, possibly, his health was sufficient to permit it.

IV. A Decisional Approach to Assisted Dying Regulation

Martine Fleming was an Exit International member who died on 20 December 2013. She was based in Ireland. Her partner, Tom Curran, is the coordinator of Exit International in Europe. Fleming, with respect, like Goodall, was an academic: she lectured in law at University College Dublin. In 1986, she was diagnosed with multiple sclerosis. At 59 years of age in 2013, she was physically unable to take her own life. Like Australia, and many nations, Ireland criminalises assisted suicide but not suicide itself. Fleming commenced proceedings in the High Court of Ireland in 2012 seeking legal authority for Curran to assist in her death. This was against Curran's position that he would assist Fleming to die at the time

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[96] Charlotte Hamlyn, "David Goodall, 102yo Scientist, Told to Leave Cowan University Post", *ABC News*, 21 August 2016 <https://www.abc.net.au/news/2016-08-21/102yo-researcher-told-to-leave-his-edith-cowan-university-job/7769422>.

[97] Gartry, n 95.

[98] See, eg, Ben Mijuskovic, "Loneliness and Suicide" (1980) 11(1) *Journal of Social Philosophy* 11.

[99] Hamlyn, n 20.

[100] Joseph and Magra, n 22; 'Exit Remembers', *Exit International* (Web Page), <https://exitinternational.net/about-exit/exit-remembers/≥.

[101] "About Us", *Exit International* <https://exitinternational.net/about-exit/history/>.

[102] "Exit Remembers", *Exit International* <https://exitinternational.net/about-exit/exit-remembers/>.

of her choosing regardless of whether he would be prosecuted or jailed. Fleming's decisions did not permit Curran to be put in that position.

The High Court dismissed the application of Fleming. She appealed to the Supreme Court which upheld the ruling of the High Court in April 2013. The Supreme Court held that when the Irish legislature, the Oireachtas, decriminalised suicide in 1993 and introduced a new offence criminalising assisted suicide, it had not created a constitutional right to take one's life or determine the time of one's own death.

In 2008, Fleming registered with Dignitas, which is an assisted dying clinic in Zurich, Switzerland. Fleming did not end her life at the clinic. She died at home in December 2013. Curran was reported as stating that Fleming "died the way she wanted to".[103]

Fleming gave evidence in the proceedings she instituted in 2013. In the High Court proceedings, Kearns P described Fleming as "the most remarkable witness which any member of this Court has ever been privileged to encounter".[104] In the Supreme Court, Denham CJ described the case as "very tragic".[105] The Supreme Court did not find the constitutional right which the case on behalf of Fleming advanced, but the Court said nothing in its ruling should imply that it would not be open to the State, in the event that the Oireachtas were satisfied that measures with appropriate safeguards could be introduced, to legislate to deal with a case such as that of Fleming.[106] In the High Court, Kearns P suggested the prosecution authority was likely to exercise discretion in a humane and sensitive fashion in deciding whether to prosecute if Curran were to assist Fleming commit suicide.[107] The remarks of the President and Chief Justice in Ireland indicate that the public interest is not served by prosecution of assisted suicide in the circumstances disclosed by Goodall and by Fleming, consistent with our observations in Part I.

Exit International seeks to reframe the normative position from which euthanasia is approached. The organisation says assisted dying is not a medical process; it contextualises the relevant issues from a normative position of rationality by the person choosing to die. The organisation states:

> Dying is not a medical process. As such, the dying process does not always (or ever) need to involve the medical profession.
>
> Exit's aim is to ensure that all rational adults who desire choice over their death have access to the best available information so that they may have absolute control over when and how they die.[108]

This emphasis on choice, which we support through a decisional paradigm, may also invoke the often argued, and entirely valid, position against legalising assisted dying, or "liberalising" circumstances in which assisted dying is legal. That position relates to undue pressure or influence on an individual, whether it be exerted by a third party or felt by the individual, to end their life. In 1984, Lord Lane observed in respect of retaining laws against assisting suicide:

> Parliament had in mind the potential scope for disaster and malpractice in circumstances where elderly, infirm and easily suggestible people are sometimes minded to wish themselves dead.[109]

The law should be concerned with the protection of vulnerable persons in society. But what is the character of the protection being afforded by criminalisation of assisted dying? In circumstances of assisted dying, as in Switzerland, the law is rigid and comprehensive in setting the schema and certifications required for the ending of a life. Those involved in such end-of-life procedures have overwhelmingly compelling reasons to be fastidious and meticulous in their approach to the legal regime

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[103] Connor Feehan, "'Right to Die' MS Sufferer Marie Fleming Has Passed Away", *Independent.ie*, 12 May 2019 <https://www.independent.ie/irish-news/right-to-die-ms-sufferer-marie-fleming-has-passed-away-29855136.html>.

[104] *Fleming v Ireland* [2013] IEHC 2, Summary of Judgment.

[105] *Fleming v Ireland* [2013] IEHC 2, [166].

[106] *Fleming v Ireland* [2013] IEHC 2, [108].

[107] *Fleming v Ireland* [2013] IEHC 2, [175].

[108] About Us, n 101.

[109] *R v Hough* (1984) 6 Cr App R (S) 406, 409.

lest they risk prosecution for murder. Criminalising assisted dying are criminal provisions that are, in practice, exclusively directed to persons who seek to assist others to die in entirely transparent processes, which are structured and required by law. The maintenance of those criminal provisions and the location of them to discretionary exercise of prosecutors is apt to place the assisting parties in invidious positions, place prosecutors in the position of determining societal policy rather than criminal justice policy and, ultimately, punish no one other than the person who wants to *decide* to die.

In *Purdy*, Baroness Hale discussed the object of protecting the vulnerable as against honouring and allowing the individual to *decide*. Her Ladyship observed:

> [T]he prime object must be to protect people who are vulnerable to all sorts of pressures, both subtle and not so subtle, to consider their own lives a worthless burden to others … But at the same time, the object must be to protect the right to exercise a genuinely autonomous choice.[110]

Her Ladyship lays importance to the autonomy of the individual as a legitimate object. We respectfully agree in such an observation where the matter at hand is that individual's decision to continue or cease their life. The CPS policy written and adopted in consequence of *Purdy* also demonstrates the importance of the person assisted to die having autonomy and choice. There are six factors in the policy which indicate prosecution is contrary to the public interest, and 16 which indicate otherwise. The six factors contrary to prosecution focus on the autonomy of the deceased. They consider whether "the victim had reached a voluntary, clear, settled, and informed decision to commit suicide".[111]

In our view, a decision-centric approach to assisted dying, focused on the person ending their life, is the obvious and necessary means to provide that person autonomy, dignity and decision-making power over their own life. The approach of Exit International is consistent with a normative position on euthanasia law and policy being based on rational decision-making, as opposed to medical prescription and certification. Clearly, medical views are important to the process; the process undertaken by Goodall, as outlined in Part II, demonstrates this. But, assisted dying policy should not be approached through a medical process–centric normative view. Medical process should be incidental to a rational decision-centric framework, which is central to the decision-making of the person seeking assistance to die.

The logical structure of this question, of personal decision, can be sketched as follows. There are three main elements to the overall decision architecture: decisions, decision consequences and preferences among decision consequences. Let us start by considering the first element: the possible ultimate (or, terminal) decisions. Two mutually exclusive and exhaustive decision options are available here: the first is actively ending life (suicide, assisted or otherwise) and the second is taking no measures to actively end life. Only one of the two decisions can be made and one of them *must* be made.

Both decisions lead to foreseeable consequences, representing the second element of the decision architecture. We may return to the decision consequences in Goodall's case for further consideration. Not committing suicide means to maintain the status quo. Committing suicide means to set a definite end to the status quo; a figurative and literal "escaping" of the status quo (assuming a reliable procedure to end life). Unlike much of every-day decision-making, end of life decision-making does *not* face uncertainties with respect to decision consequences. In particular, not committing suicide implies – for sure – to stay with the status quo condition, though fraught with possible further deterioration in quality. The consequence of committing suicide is "certain", too, in the sense of evading the status quo with certainty. However, it may involve consideration of uncertainty to the extent that it is not known what exactly the consequence of "death" represents. As Dr Greg Graffin, lecturer at Cornell University and lead singer of the band, *Bad Religion*, has lyricised:

> In the end you may find there's no guiding subtle light,
>
> No ancestors or friends, no judge of wrong or right

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[110] *R (on the application of Purdy) v DPP* [2009] EWCA Civ 92, [65].

[111] Crown Prosecution Service, *Suicide: Policy for Prosecutors in Respect of Cases of Encouraging or Assisting Suicide* (October 2014), [45].

Just eternal silence and dormancy

And a final everlasting peace.

One could argue that death may come in different forms and that these forms may be comparatively better or worse than the status quo (in terms of burden, as discussed below). We recognise, though, that this subdivision of death consequences is completely speculative: we simply do not know what exactly – if anything – comes after death. For this reason, we reduce the consequence of suicide more simply to only one outcome, defined as no longer being in the status quo of life on earth.

The third element of the decision architecture are preferences among decision consequences. In Goodall's case, the status quo of life on earth was considered as highly undesirable. In any case, it was considered *less* desirable than the consequence of suicide (whatever exactly is the consequence of suicide). We recognise that this is a vague assessment since one might question how to meaningfully express a value judgment for a decision consequence that is unspecific. Nonetheless, we can infer the apportionment of preference from the fact that he considered suicide as the better decision than the decision to stay alive.

The above rudimentary structure of the decision problem, in particular the decision outcomes and a person's individual preferences among decision outcomes which inform their decision-making, allows us to critically reflect on decision-making prerogatives and the position taken by the State's legal frameworks with regards to individual liberties. In particular, we can see that the immediate consequence of any decision must be borne by the individual. It might thus be thought that the individual should be given the opportunity to make a well-reflected decision such that the outcome is most desirable from the viewpoint of that individual. This is not what currently happens in Australia, nor the United Kingdom nor most developed nations. Australian legislation, through the most severe of its deterrents – criminalisation – deters individuals from the decision option of assisted dying. Current legislation imposes on individuals the decision to adopt the option of staying alive. Effectively, as in Goodall's case, this means: first, the individual is deprived of their right to decide freely about the end of their life; and second, the individual is forced to stay with an option that implies a consequence (ie, the status quo) which for that individual is *not* the most desirable outcome – it actually is the most undesirable outcome for that individual.

An alternative way to look at the problem and explain our disagreement with current Australian, and globally similar legislation and policy, is to argue that the consequence of staying alive is the overall *best* option. This may be, by equity of legislative position, the view of the State, nation and or society. But this would imply that the valuation of a decision consequence is imposed on the individual citizen. Hence, the individual is not only deprived from decision-making as argued above; they also see themselves having imposed on them the valuation of decision consequences. Imposing decisions on vulnerable persons is, in our view, antithetical to the approach law and policy should take with respect to vulnerable persons: which is to secure and permit them to make decisions for themselves.

The public circumstances of Goodall's death and his willingness to be questioned and explain his decision-making, in concluding it was time to end his life, reveals an empirically ascertained framework of principal and informing decisions taken by a person who ends their life. That framework should provide the normative foundation of regulation of assisted dying. The consideration of those decisions by the individual choosing to die should be the concern of the State; the confirmation by the individual of their sufficient consideration and decision on these matters should be the bases on which assistance to die is authorised. This maintains and vests the decisions and their consequences in the individual.

The public statements made by Goodall, around the time of his death in May 2018, reveal his emotional dissatisfaction, and unhappiness, at the loss of capacity. The loss of capacities, including deterioration of sensory faculties, led to increasing isolation of Goodall to his home (eg loss of driver's licence, loss of external office of work) and isolated existence (eg loss of cause to leave home, loss of task-oriented functions serving other than personal need, such as eating). The transition between attempting to maintain a professional existence, in seeking to retain his office at the University at age 102, and his insistence on the right to terminate his life, at age 104, took place over a less than two-year period. There

is no reported evidence of a serious deterioration of mental or physical capacity in that period. It is inferable that the loss of capacity was critical to his informing and principal decisions. For Goodall, his life had been characterised by capacity; its loss was severe for him. It may not have been as severe for others. But, rational decision-making should be the basis on which self-determination is evaluated and permitted by the State. A decisional approach to assisted dying is based on policy and regulation that requires rational decision-making and due consideration of relevant factors. That is the extent of the interrogation of the person wanting to die that is required. To do more is to usurp their dignity and their decisions with that of others.

V. CONCLUSION

Goodall's last words were "this is taking a long time".[112]

In the 104 years the professor lived, Australia was not able to settle a system of assisted dying for him to end his life in his adopted country of which he was an honoured citizen. Part I demonstrates that the public interest in Australia does not align with the prosecution of those who assist the wanted death of another. That should give cause for reconsideration of current provisions criminalising assisting dying and the appropriate use of legislation, rather than discretion, to evince the public interest. Part II demonstrates, without purporting to be conclusive, the considerable decision-making pathway that Goodall, and others in his position, must take to decide to die. Over Parts II and III we explained why euthanasia policy should be framed within a paradigm that places the decision-making of the person who wants to die at the centre of the regulatory regime. It is their decision. To the extent that someone else should "interfere",[113] namely the State, that interference should be predicated on confirmation of the decision process the individual seeking to die has taken. It should not be governed or centric to third-party medical evaluations which remove the decision and thereby the dignity from the individual.

We would advocate nations criminalising assisted dying, particularly Australia, encourage and support their legislatures to investigate the policy and framework adopted by Switzerland. To the extent such investigation has occurred, we would encourage it to be continued and more readily brought into public thinking and appraisal.

Switzerland is among the nicer places on Earth to conclude one's days, but so is Australia.

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[112] "Australian, 104, Dies by Assisted Suicide", *SBS*, 10 May 2018 <https://www.sbs.com.au/news/australian-104-dies-by-assisted-suicide>.

[113] Yonette Joseph, "Why David Goodall, 104, Renowned Australian Scientist, Wants to Die", *New York Times*, 3 May 2018 <https://www.nytimes.com/2018/05/03/world/australia/david-goodall-right-to-die.html>.