

9 November 2009

The Secretary
Community Affairs References Committee
Australian Senate

I, Edward Darrel Lyle Killen make the following submission to the Committee's **Inquiry into Suicide in Australia:**

1. The ACT Branch of Dying With Dignity, of which I am a member, made a submission on 23/10/09. It summarised recent legal decisions in Australia which point to need for legislation in the area of assisted suicide and referred to widespread discussion currently of this topic in Australian community affairs. I support this submission and would like as an individual to add explanation for members of the Committee of why widespread discussion is occurring, with particular focus on the Justins-Jenning case in the NSW Supreme Court last year. I hold degrees from the Universities of Sydney and Oxford and a Ph.D in political science from the University of Chicago. I have had personal experience of dementia and suicide by election.

2. The Senate referred to the Committee an investigation of suicide with the emphasis on high risk groups amongst indigenous youth and in rural communities. This is accepted as a serious problem: its reportage and the extent to which Prevention Strategies and programs already in place are effective merit investigation. As a problem however, it lies completely separate to the problem of the ageing and physically or mentally afflicted who *wish to commit* suicide and desire assistance to do so and the problems to which the courts have drawn attention of lack of legislative guidance in these areas. The two groups involved are distinct and whilst numbers involved are not known at present, one ventures to predict that it is numbers in the latter ageing group which are rising sharply.

3. For the Senate Committee on Community Affairs to report on *Suicide in Australia* with a focus on prevention of suicide amongst younger, as distinct from aged, Australians without reporting on the existence of a widespread movement towards suicide by choice on the part of older age groups would be gravely deficient in an intellectual and selective sense but also from the practical standpoint of need to deal with an issue affecting the lives of numerous so-called ordinary Australians. This can perhaps be illustrated in the Senate by referring for comparison to the problem of gambling in Australia.

4. There is no doubt that poker machine gambling is a serious social problem for the minority percentage of Australians who become addicted. Were Senator Xenophon for instance to propose report on ways to curtail poker machine gambling the Senate might be expected to refer for investigation the social evils of gambling. However reference would also include consideration of the positive features of, to use the popularly inclusive term, 'pokie clubs'. Submission on these could be anticipated from the \$12 billion annual turnover Licensed Clubs of Australia as well as from sociologists and research institutes funded at least in part from profits from poker machine operation. The value of donations from clubs to political parties themselves would no doubt also be a major consideration. It is safe to say that the case for banning or even significant restraint would struggle.

5. In the case of the suicide by choice movement in Australia there is generalised support from civil liberties and ageing organisations and there are two principal associations specifically in support: Dying With Dignity/Voluntary Euthanasia branches in the States and Territories and EXIT International. Both of these are funded by subscriptions/donations from their members, many, although certainly not all of whom, are elderly. Essentially DWD seeks

to change the law to permit and indeed promote suicide assistance for aged, infirm/incapable persons so that they may choose to suicide by peaceful and dignified means. EXIT seeks to promote the same objective but also holds meetings to provide information about effective and non-painful ways of suiciding to members over the age of 55. EXIT, partly because of the activities of Dr Philip Nitschke over the past 12 years here and abroad, receives a lot of publicity but the media generally is still deciding to what extent it will give backing to the cause of assisted suicide. Ranged in opposition to assisted suicide are the church movements which, though greatly diminished in their contact with the daily lives of Australians are still strong in funding and organization..

6. As mentioned in the DWD ACT Branch submission, the ABC Four Corners series ran a programme on 7/5/07 called *Final Call*. This featured a number of Australians of clearly superior standards of education, vocational achievement and financial circumstances. A number of them said forthrightly that they planned to suicide 'when the time came' rather than deteriorate into mental and physical incapacity. Similar views and the increasing support shown by public opinion polling had been aired in the SBS Insight series a short time earlier.

7. Throughout 2007-8 the preliminaries and then a long running hearing of the case of the Crown against Shirley Justins and Caren Jenning featured in the NSW Supreme Court's Criminal Division. It was reported daily by Australia's major newspapers and also to a limited, sensationalised extent on the electronic media. There was scant analysis of the evidence or of the verdict which went against the two women. Justins had been the partner and defacto wife for 20 years of Graeme Wylie, a former Qantas pilot who had become aware that he had Alzheimer's Disease and Diffuse Lewy body disease and wished to suicide.. Jenning had been a friend of Wylie's of some 30 years standing. Both women had eventually admitted assisting Wylie.

8. Members of the Committee are bound to have considerable knowledge of the case. After the jury verdict in which Justins was found guilty of manslaughter and Jenning of being an accessory to manslaughter, Jenning suicided at the age of 75 rather than face gaol and Justins was sentenced last November to periodic detention lasting until next year. The story of the two women was featured in two parts on the ABC series *Australian Story* on 16 and 23 March last and had a wide audience.

9. This was the first case in the world in which the law had to grapple directly with the effects of dementia on a person's capacity to suicide by election. It attracted great interest internationally but the result cannot be said to have advanced the state of case law significantly. This was partly because the jury decision, although a huge disappointment to supporters of voluntary euthanasia, was not clear cut and appeared influenced by factors other than legal principles. One is not aware as yet of any detailed law journal commentary and the media has been wary and uncertain of public reaction. The only in depth article seen is that by Fairfax journalist Fenella Souter entitled *His Life in Her Hands* published in the *Sydney Morning Herald* Good Weekend magazine of 2/8/08 and it's *The Age* counterpart.

10. This article summarised accurately evidence at the trial that Wylie wished to suicide and that he attempted to do so on three occasions before he was successful on 22/3/06: by cutting his wrists, by approaching the Dignitas organization in Switzerland which rejected him due to uncertain mental capacity (Dignitas, run by lawyer Ludwig Minelli, proceeds very carefully) and finally by trying to inhale lawnmower fumes in a closed shed. It also related that when Wylie was taken by Justins to make a new will only a week before his suicide he was able to speak and converse in ways which did not cause two trained professionals (Pam Favretto, a lawyer and her witness Fred Amor, a retired company accountant and secretary) to doubt his capacity or independent wishes. The article also recounted the testimony of Wylie's two

sisters who came from Tasmania to testify to Wylie's expressed desire to suicide. Perhaps most interestingly for a public fed with stories about changes to Wylie's will which benefited Justins, it was revealed that Wylie had some time previously recorded reasons for not wishing to leave any of his \$2.4 million estate to his daughters but that it was Shirley Justins who suggested he should leave them each \$100,000 or some suitable sum: she having already willed her own estate to them.

11. The article referred to contradictory and inconclusive medical evidence of Wylie's condition but did not express in legal terms the major weakness in the Crown Prosecutor's case. Whilst prepared to testify that they could not say that Wylie *had* the capacity to suicide, neither of the medical witnesses, Dr John Cullen, who had diagnosed Wylie's Alzheimer's in 2003 but had not seen him for some years, or Professor Carmel Peisah, who had inspected Wylie's brain post mortem but had not examined him in life, were prepared to testify that Wylie *would not* have had the capacity, as legally defined, to decide to end his life at the relevant time just before noon on 22/3/06.

12. Although one cannot find that Justice Roderick Howie specified this in his summing up to the jury, or referred to the legal significance of variability in Wylie's conduct shown by the evidence, he did repeat twice that reasonable doubt by the jury on Wylie's lack of capacity to suicide would remove the need to consider murder or manslaughter charges. His Honour then capped this a third time at T 115.9 by saying: '*If, at the end of the day, you do not know whether he had capacity or did not have capacity, then you must acquit the accused of all of the offences*'. (Refer Justins-Jenning Summing Up Transcript pp 114-115)

13. Directions such as these point to the need for an acquittal. Yet neither these nor the evidence was sufficient to alter the view of the jury that Justins was guilty, if not of murder, then of manslaughter, because she had poured out the barbiturate drug Nembutal and given in to Wylie without due regard to his mental condition and her duty of care. Conviction of Jenning as an accessory followed from this.

14. We have been brought up to prize our centuries old tradition of jury trial but there are many examples of miscarriage. Australians continue to recall the inaccurate blood sample evidence and media coverage which caused the jury to convict Lindy Chamberlain in 1982. . The earlier testimonies by the women to the effect that Wylie had died from natural causes (they explained these by their fear when a substantial segment of the NSW law enforcement forces descended on them in 2006, invading their homes, computers and personal records) – which they later had to admit were false and reverse – and the ability to exploit these mistakes by the Crown Prosecutor, undoubtedly helped turn the jury against them.

15. The jury itself may be regarded as having been unrepresentative. Although preservation of the principle of jury anonymity means that my evidence is in part anecdotal it is accurate. Of 8 male jurors none were elderly. 1 of the 4 female jurors was young and the other 3 appeared not beyond Fifty (as the gallant French say women of 'un certain age'). Juries today may be claimed to be selected by computerised random selection but there were *no elderly women*. It is elderly women who understand what is going on in Australian households, nursing homes, hostels and hospices, perhaps more realistically than learned counsel and judges.

16. The *Australian Story* post sentencing programme referred to in Para 8 above gave a biased account of the defence of Justins and Jenning. It was presented by the well known Caroline Jones whose conservative religious views are on record. It is not known whether these or the control of executive producer Deborah Fleming would have been responsible. The programme presented lengthy untested (by examination) statements by Wylie's two

daughters- to whom he was not close. It ignored the evidence of Wylie's two sisters, who were independent and reputable witnesses, and it failed to mention the evidence of the neutral professionals who saw him just prior to his death. It failed to mention also the evidence of Gordon Power, another retired Qantas pilot and friend who came forward to testify that he met Wylie by chance in early 2006 at Cammeray shops and had a normal conversation with him, during which Wylie told him 'my brain is fucked. I'm going to top myself'..'while I still know what's going on'. This was important evidence from a neutral witness despite Mr Power's recollection of the date being attacked by the prosecution.

17. The second of the *Australian Story* programmes went to air on 23 March. It at once brought forth a response to *Australian Story Guestbook* by email indicating that at least one elderly female juror had been selected by computer for the Justins-Jenning panel but, on her commenting to the judge: 'My husband died of Alzheimer's a few months ago. I would have killed him (myself) if I could' she was, predictably, excused from jury duty (despite surnames not being used sufficient other details were given to support authenticity).

18. In spite of the wariness shown, further publication of facts in support of the two women who helped Wylie suicide will take place. It is bound to be influential. Shirley Justins, who testified that she gently passed the Nembutal to her long time partner with the advice that if he drank it he would die and end his suffering, and who has spent much of her life in environmental causes working as a bush re-generator, will no doubt speak after serving out her sentence, apparently by next September. The deceased Caren Jennings (who obtained the Nembutal) is already honoured within the voluntary euthanasia movement and her own background is of unusual interest in that she escaped 1936 Berlin for Australia after her father, Jewish surgeon Peter Winter had already departed for England with her elder sister (who went on to become film star Dana Wynter). Despite Jennings having been denounced in sentencing hearings by Justice Howie in Iago-like terms as being more guilty than Justins, former Attorney General of the Commonwealth Kep Enderby, a supporter of voluntary euthanasia, said after her suicide was made public she was one of the finest people he had known.

19. Graham Wylie himself had achieved what many Australians would regard as a peak: captaincy of a Qantas aircraft. He had the misfortune to be afflicted with developing dementia whilst still in his Sixties. His reaction as recounted by his sisters to *Australian Story Guestbook* after the broadcast of the programme last March is drawn to the attention of members of the Committee as follows: 'He had personally told both of us as well as our now deceased elder brother, as well as close friends with whom we grew up in Tasmania, of his intention to take his own life when he considered he no longer had quality of life and whilst he was still able mentally and physically to do so. We both attested to this at the trial in the NSW Supreme Court, *however obviously none of this was taken into account* (emphasis added). He had often made mention of it in conversations over the following years and had never wavered from that decision'.

20. Wylie was a proud individual but it is submitted his reaction is likely to be shared by many others, if not a majority of those overcome by dementia. One of the disease's characteristics in at least some of its various forms, perhaps mercifully, is loss of awareness of incapacity. Yet with so many exceeding by many years the life spans of their parents and current predictions for a 370% increase in the incidence of dementia by 2050 the Australians involved who will choose suicide is bound to increase at a high rate.

21. Dementia clearly manifests itself in differing ways in differing situations. When the Justins-Jenning verdict was announced in November last year Associated Press reported it widely internationally, Dr Nitschke being quoted as saying: 'You can have significant

dementia, but still know in an overwhelming way that your one desire is (for) a peaceful death'. Close study supports this as being the kernel of the matter. Whilst there was some reference by medical evidence to 'islands of cognition' the case exposed a major failing in our legal system to deal with variability and the needs and rights of the individual. The two women who assisted a partner and friend to suicide suffered because of this.

22. The present position to which the submission by Dying With Dignity ACT has drawn attention is that in the absence of explicit legal provision for medical assistance with dying, not even a competent patient can request help from a medical professional with hope of the request being met (other than clandestinely). A large number of Australians are now being brought into contact with dementia as well as with other terminal forms of illness which demean as well as produce pain. They are apprehensive that dementia could overtake them before they have the means of suiciding to avoid it. This is why the subject is under widespread discussion.

23. As members of the Committee will know Australia has a proud record of socially progressive legislation in its past. We are presently lagging behind other progressive nations and even certain of the States in the often maligned USA in not legislating to meet the need for assisted suicide. It would be ironic if the great influence in our Parliament of the church movements, whose whole claim is to be exerting that influence for the good of humanity, should instead have the effect of causing individuals not yet suffering dementia or suffering only from Mild Cognitive Impairment to conclude that they must act to suicide early, and in crudely painful ways, before they become incapable of acting alone and risk the forces of law being unleashed on their carers, as happened in Justins-Jenning.

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