

5 March 2019

The Hon John Quigley MLA
Attorney General of Western Australia
Level 5, Dumas House
2 Havelock Street
WEST PERTH WA 6005

Dear Attorney General

ELECTRONIC REGISTER OF END OF LIFE CHOICES

The Law Society of Western Australia notes the recent comments of Mr Simon Millman MLA in the media (23 January 2019) in relation to his appointment as Chair of an expert panel investigating what might be done to improve the uptake and regulation of Advance Health Directives (AHDs) and in particular, after its review, to make recommendations about the establishment of an electronic register for AHDs.

The Law Society writes to draw to the attention of the Attorney General and the Panel Chair that a legislative provision establishing a register of AHDs already exists.

Amendment to the *Guardianship and Administration Act 1990 Act* (the GA Act) to establish a register of AHDs was recommended by a Standing Committee and accepted in 2007. The *Acts Amendment (Consent to Medical Treatment) Bill 2006* was debated and passed, relevantly inserting sections 110ZAA, 110ZAB and 110ZAC into the GA Act.

The *Acts Amendment (Consent to Medical Treatment) Act 2008* (the Amending Act) received assent on 19 June 2008. However, the amendments were conditional on section 11 of the Amending Act being proclaimed and that section has yet to be proclaimed¹.

Section 11 of the Amending Act relevantly provides:

“Division 4 — Miscellaneous matters

110ZAA. Register of advance health directives

- (1) A register of advance health directives must be established and maintained.

1

<http://www.parliament.wa.gov.au/parliament/bills.nsf/BillProgressPopup?openForm&ParentUNID=7EEFBB4FB4735FC8C825723B000286C9>

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- (2) The regulations may provide for any matter that is necessary or convenient for the registration of advance health directives, including the following —
- (a) who must establish and maintain the register;
 - (b) the form and manner in which the register must be established and maintained;
 - (c) the contents of the register, including proof of the contents;
 - (d) who may apply for registration;
 - (e) the procedure for registration, including the alteration and removal of entries in the register;
 - (f) who may have access to or obtain information from the register;
 - (g) the review by the State Administrative Tribunal of decisions allowing, or refusing to allow, people to have access to or obtain information from the register;
 - (h) the procedure for accessing or obtaining information from the register.
- (3) No fee or charge is payable in respect of any matter connected with the register or registration.

110ZAB. Disclosure of information obtained from register

- (1) In this section —
“**register**” means the register referred to in section 110ZAA.
- (2) A person who has access to the register must not disclose any information on the register unless the disclosure is authorised by subsection (4).
Penalty: \$5 000.
- (3) A person who obtains any information from the register must not disclose the information unless the disclosure is authorised by subsection (4).
Penalty: \$5 000.
- (4) For subsections (2) and (3), a disclosure is authorised if it is —
- (a) authorised by, or made for the purposes of, this Act; or
 - (b) made with the consent of the maker of the advance health directive to which the information relates; or
 - (c) made for a purpose, or in a circumstance, prescribed by the regulations; or
 - (d) otherwise authorised or required by law.

110ZAC. Regulations to facilitate national register

- (1) In this section —
- “advance health directive” means —
- (a) an advance health directive made under this Part; or
 - (b) an instrument created under the law of another State or a Territory that corresponds sufficiently, in form and effect, to an advance health directive made under this Part, whether or not the instrument is recognised under section 110ZA(1).
- (2) The regulations may make provision to facilitate —
- (a) the establishment of a national register of advance health directives; and
 - (b) if a national register is established — the registration of advance health directives on it.

110ZB. Common law preserved

This Part does not affect the common law relating to a person's entitlement to make treatment decisions in respect of the person's future treatment.”

Although s.110ZAA does not refer to the register being electronic, it would appear that further legislation is unnecessary as the terms of s.110ZAA would include an electronic register.

We would be grateful if you could draw the Chair's attention to these provisions.

Yours sincerely



Greg McIntyre SC
President

cc. Mr Simon Millman MLA
Simon.Millman.MLA@mp.wa.gov.au

(Extract from Simon Millman MLA's Facebook page 23 January 2019)

"In the first half of this year I'll be busy working away with an Expert Panel, discussing what ought to be done regarding Advance Health Directives.

As part of the 'My Life, My Choice' report last year, our committee recommended that the Attorney General convene this Expert Panel, and I am grateful that he has asked me to Chair the Panel.

Read more in [The West Australian](#) today, and listen in to [RTRFM 92.1](#) at 10.45 and [News Talk 6PR 882](#) at 11.15.

Health directives a way to preserve our wishes

■ Simon Millman

Imagine you have taken the time to expressly set out instructions to doctors in the event you are incapacitated by disease or injury. Then imagine that while incapacitated health professionals either don't bother to look for those instructions or, worse, ignore them.

Scenarios such as these were raised with the parliamentary committee that delivered the My Life, My Choice report last year.

There has been a great deal of debate and discussion about the committee's recommendation in favour of the introduction in WA of voluntary euthanasia or voluntary assisted dying.

Less attention has been paid to the other work undertaken by the committee, in particular the recommendations regarding palliative care and advance health directives.

It is a little known document, but the AHD deserves to be as widely used as enduring powers of attorney and enduring powers of guardianship.

Any person can complete an AHD which should set out in clear and unambiguous terms precisely what that person's wishes are as a patient.

This covers medical, surgical and dental treatments.

It can include directions to doctors about palliative care and life-sustaining treatments.

An AHD can be very specific. It involves identifying individual treatments and giving directives regarding those treatments.

The committee found:

1. A very low uptake of advance health care planning, for a variety of reasons including the complex and lengthy processes.
2. Community and health professionals do not understand advance care planning, particularly legally binding documents.
3. Some health providers are promoting non-binding "advance care plans" over legally binding AHDs.
4. Problems with use of the AHD template.
5. No central storage of AHDs for easy access by health professionals.

I find it astounding a person can have these wishes disregarded by health professionals.



A doctor comforts a patient.

It was profoundly concerning to hear that some health providers are failing to abide by the terms of legally binding AHDs.

As a lawyer, I find it astounding that a person can have these wishes simply disregarded by health professionals.

We must do more to protect the credibility of this mechanism so we can all have confidence that, at our most vulnerable, our wishes will be respected by our health providers.

Having seen the committee's recommendations, Attorney-General John Quigley has convened an expert panel that I am fortunate to chair to investigate what might be done to improve the uptake and regulation of AHDs.

The panel will review relevant law and health policy and practice to make recommendations about the establishment of an electronic register for AHDs.

This will ensure health professionals have 24/7 access to the register, and we will explore whether to introduce laws requiring professionals to search the register except in cases of emergency where it is not practicable to do so.

We will also explore potential amendments to the template to at least match the leading examples across Australia, and make these important documents more accessible.

The common law has long recognised the special relationship between doctor and patient.

It is time we brought our regulations up to date to reflect community attitudes and the importance of patients' wishes.

■ Simon Millman is Labor MP for Mt Lawley

23 January 2019