

Submission to the *Voluntary Assisted Dying Bill 2019* (VAD Bill)

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1. Background

- 1.1 The Law Society of Western Australia (the **Law Society**) is the peak professional association for lawyers in Western Australia. Established in 1927, the Law Society is a not-for-profit association dedicated to the representation of its members and the enhancement of the legal profession through being a respected leader and advocate on law reform, access to justice and the rule of law.
- 1.2 This submission is made in response to the *Voluntary Assisted Dying Bill 2019 (WA)* (the **VAD Bill**) introduced into the Western Australian Parliament on 7 August 2019 by the Hon. Roger Cook MLA, Minister for Health.
- 1.3 The VAD Bill follows two major Parliamentary reports that included significant consultation across Western Australia:
 - a) The Joint Select Committee report “*End of Life Choices - My Life, My Choice*” tabled on 23 August 2018; and
 - b) The Final Report of the Ministerial Expert Panel on Voluntary Assisted Dying chaired by Malcolm McCusker AC QC tabled on 27 June 2019.

2. Summary

- 2.1 The Law Society has considered the draft VAD Bill solely from the perspective of what is a proper form of the law proposed.
- 2.2 The Law Society has not addressed the VAD Bill from a moral, religious or policy viewpoint.
- 2.3 The Law Society’s Submission to the VAD Bill is divided into the discrete areas of law that arise in the VAD Bill.

3. Submission to the VAD Bill

3.1 Safeguarding Against Abuse and Coercion

- 3.1.1 Recommendation 14-1 of the Australian Law Reform Commission Report ‘*Elder Abuse—A National Legal Response*’ (**ALRC Report**), tabled on 14 June 2017, is:

Adult safeguarding laws should be enacted in each state and territory. These laws should give adult safeguarding agencies the role of safeguarding and supporting ‘at-risk adults’.
- 3.1.2 The ALRC Report shows that aged persons, and particularly those who are frail and suffering ill health, are subject to abuse. In this regard, the Law Society also refers to the Interim Report released by the Royal Commission into Aged Care Quality and Safety (**Royal Commission Report**).
- 3.1.3 The potential for elder abuse is recognised in the VAD Bill by the following express provisions:

- (a) a person exercising a power or performing a function under this Act must have regard to the principle, amongst others, that there is a need to protect persons who may be subject to abuse: cl.4(1)(i);
- (b) to be eligible for access to voluntary assisted dying, amongst other things, the person must be acting voluntarily and without coercion: cl.15(e);
- (c) if a coordinating practitioner or a consulting practitioner is unable to determine whether the patient is acting voluntarily and without coercion as required by clause 15(1)(e), they must refer the patient to another person who has appropriate skills and training to make a determination in relation to the matter: cl.25(3) and 36(3);
- (d) any written declaration must specify that a patient makes it voluntarily and without coercion, but does not need to be signed by the patient: cl. 41(3) and (4);
- (e) a final review form must contain a statement certifying whether or not the coordinating practitioner is satisfied that the patient in requesting access to voluntary assisted dying is acting voluntarily and without coercion: cl. 50(3)(e);
- (f) an administering practitioner for the patient is authorised, in the presence of a witness, to administer the prescribed substance to the patient if the administering practitioner is satisfied at the time of administration that the patient is acting voluntarily and without coercion, which must be certified: cl.58(5) and 60(2)(b);
- (g) decisions by a coordinating practitioner and consulting practitioner that the patient is or is not acting voluntarily and without coercion may be reviewed by the State Administrative Tribunal: cl.83 and 87;
- (h) a person commits a crime if the person, by dishonesty, undue influence or coercion, induces another person to access or request to access voluntary assisted dying or a prescribed substance: cl.99 and 100; and
- (i) The Chief Executive Officer of the Department may approve training identifying and assessing risk factors for abuse or coercion: cl.158(c).

3.1.4 The ALRC concluded (at paragraph 14.40) that:

No government agency in Australia has the clear statutory role of safeguarding and supporting adults who, despite having full decision-making ability, are nevertheless at risk of abuse. In the ALRC's view, this protection and support should be provided by state adult safeguarding agencies.

3.1.5 In contrast, the VAD Bill delegates the task of determining if a person is at risk of abuse, undue influence or coercion to medical practitioners (coordinating practitioners and consulting practitioners), with a self-determination that if they are unable to determine this, they must refer the patient to 'another person', who has appropriate skills and training to make a determination in relation to the matter.

3.1.6 The Law Society notes whether a person is subjected to abuse, undue influence or coercion, is not a medical issue. The ALRC Report states that ‘*adult safeguarding agencies*’, to be given a role in safeguarding at-risk adults, need not be new agencies. The safeguarding function could be given to existing state and territory agencies, such as public advocates, or government departments: paragraph 14.41. The Law Society submits that the ALRC Report recommendation in this regard should be adopted.

3.2 Capacity

3.2.1 At law a person is presumed to have decision-making capacity in relation to voluntary-assisted dying, unless the patient is shown not to have that capacity. Decision-making capacity’ is defined to include the understanding of various matters; the capacity to weigh up the factors; and the capacity to communicate a voluntary assisted dying decision (as defined) in some way: s. 6.

3.2.2 Clause 6 of the VAD Bill defines ‘*decision making capacity*’ which covers both understanding the information, advice and matters relating to voluntary assisted dying as well as weighing up the these matters for the purpose of making a voluntary assisted dying decision and communicating this decision.

3.2.3 Both the *Voluntary Assisted Dying Act 2017* (Vic) (**the Victorian Act**) and the VAD Bill set out a procedure over a period of time for the making of the voluntary assisted dying decision. Section 4(b) of the Victorian Act provides that a person only has decision making capacity if that person can retain that information ‘to the extent necessary to make the decision’.

3.2.4 There is no provision in the VAD Bill requiring the person to be able to ‘*retain*’ the information. Consideration should be given to including a provision similar to s 4(b) of the Victorian Act.

3.3 Provision of Information and Documentation

3.3.1 Section 8 of the Victorian Act provides as follows:

- (1) A [registered health practitioner](#) who provides [health services](#) or [professional care services](#) to a person must not, in the course of providing those services to the person—
 - (a) initiate discussion with that person that is in substance about [voluntary assisted dying](#); or
 - (b) in substance, suggest [voluntary assisted dying](#) to that person.
- (2) Nothing in subsection (1) prevents a [registered health practitioner](#) providing information about [voluntary assisted dying](#) to a person at that person's request.

(3) A contravention of subsection (1) is to be regarded as unprofessional conduct within the meaning and for the purposes of the Health Practitioner Regulation National Law.

3.3.2 Consideration should be given to including an equivalent clause in the VAD, safeguarding against the possibility of a patient interpreting a medical practitioner's provision of information as a suggestion that the patient access voluntary assisted dying.

3.3.3 The Law Society considers that clause 105 of the VAD could be drafted more simply. It creates a general prohibition on disclosure of information, then provides significant exemptions to confine its scope to personal information. The Law Society suggests that it would be easier to simply prohibit the recording, use and disclosure of personal information, other than as prescribed by Regulations.

3.3.4 The VAD Bill should also include a requirement that anonymous statistics be maintained for applications for assisted deaths, and grants of and refusals of consents for the 5 year period under review.

3.4 Qualifications and Competencies of Health Practitioner

3.4.1 Clause 10 of the Victorian Act provides that each coordinating and consulting medical practitioner must be a specialist or a vocationally registered general practitioner and either the coordinating medical practitioner or each consulting medical practitioner must have practised for at least 5 years after completing a fellowship or vocational registration and must also have relevant expertise or experience in the illness or medical condition expected to cause death.

3.4.2 The VAD Bill provides that a specialist must have only practised for one year as the holder of the specialist registration, while holder of general registration must have practised for 10 years. All must meet the requirements set down by the Chief Executive Officer of the Department of the Public Service for this paragraph. However, there is also provision in clause 16 (2) (c) of the VAD Bill for an overseas- trained specialist with limited or provisional registration who meets the requirements of the Chief Executive Officer to act as a coordinating or consulting practitioner. There are no practising requirements for an overseas-trained specialist.

3.4.3 The provisions of the VAD Bill with regard to the administering practitioner differ from the Victorian Act in that clause 53 provides that a nurse practitioner who has practised as a nurse practitioner (in any area of nursing) for at least two years and who meets requirements approved by the Chief Executive Officer and has completed approved training may act as an administering practitioner. The Law Society notes the distinction between the requirements for medical practitioners and nurse practitioners.

3.5. Cause of Death Certificate

3.5.1 The VAD Bill raises concerns regarding the appropriately qualified supervision of the completion of the cause of death on the death certificate. In Queensland (which is also a geographically large State with remote communities) it is proposed that a medical practitioner be present in all cases, whether or not the substance is self-administered or administered by a medical practitioner.

3.5.2 The Law Society notes that clause 81(4) and (6) of the VAD Bill state that:

(4) Subsections (5) and (6) apply if a medical practitioner who is required to give a cause of death certificate for a person knows or reasonably believes that the person was a patient who self-administered, or was administered, a voluntary assisted dying substance in accordance with this Act. ...

(6) The medical practitioner must not include any reference to voluntary assisted dying in the cause of death certificate for the person.

3.5.3 This does not appear to address what should or will be stated in the cause of death certificate. For example, is the legislature intending for the medical practitioners to refer only to the disease, illness or medical condition that was the grounds for the person to access voluntary assisted dying, or the prescribed substance which was the cause of death?

3.5.4 The Law Society acknowledges the intent of the legislature to protect a person's privacy after death, but queries:

- a) whether that privacy is achieved if the prescribed substance is listed as a cause of death, and indeed, whether this may lead to incorrect speculation; and
- b) the purpose of a cause of death certificate, if some refer to a disease, illness or medical condition which was not in fact the cause of death, without further explanation that this was the ground for the person accessing voluntary assisted dying.

There is no equivalent provision to s.81(6) in the Victorian Act.

3.5.5 Section 67 of the Victorian Act refers to notification by a medical practitioner of the disease, illness or medical condition that was the ground for the person to access voluntary assisted dying to the Registrar and Coroner, which applies in addition to s.37(1) of the *Victorian Births, Deaths and Marriages Registration Act 1996*, which says:

A doctor who was responsible for a person's medical care immediately before death, or who examines the body of a deceased person after death, must, within 48 hours after the death, notify the Registrar of the death and of the cause of the death in a form and manner approved by the Registrar and specifying any prescribed particulars.

3.5.6 The Joint Select Committee (WA) in its report on end of life choices 'My Life, my Choice' recommended that the voluntary assisted dying legislative framework should provide that when an assisted death takes place it must be noted on the death certificate.

3.5.7 The Ministerial Expert Panel Chair, Malcolm McCusker AC, recommended that the VAD Bill, contrary to the expressed views of the Joint Select Committee, should not show voluntary assisted dying as the cause of death. The Law Society of Western Australia submission to the Ministerial Expert Panel supported the view that voluntary assisted dying should be recorded on the death certificate as the cause of death.

3.5.8 The Second Reading Speech when explaining the provision of Part 4 of the VAD Bill makes no reference to clause 81 covering certification of death. The Explanatory Memorandum says that the purpose of clause 81 is *'to ensure that the Board is notified progressively of the person's participation of the voluntary assisted dying process'...* *'and to maintain complete and accurate statistics of voluntary assisted dying in Western Australia.'* It also states that the intention of clause 81(6) is to protect the privacy of the person.

3.6 Guardianship and Administration Act 1990 (WA)

3.6.1 Clause 168 of the VAD Bill inserts a new clause 3B into the *Guardianship and Administration Act 1990 (WA)* as an essential safeguard. It not only says Voluntary Assisted Dying cannot be accessed with an advance health directive, it also states that nothing in the *Guardianship and Administration Act 1990 (WA)* authorises a treatment decision in relation to voluntary assisted dying. A *"treatment decision"* in section 3 of the *Guardianship and Administration Act 1990 (WA)* is a decision to consent or refuse consent to the commencement or continuation of any treatment.

3.6.2 The Law Society supports the position that a directive relating to voluntary assisted dying should not be included in an Advance Health Directive. As noted in the Ministerial Expert Panel Final Report on Advance Health Directives (28 August 2019), a person's preference or otherwise to seek voluntary assisted dying is not a treatment decision, as it results in the proactive ending of life.

4. Criminal Law

4.1 Offences

4.1.1 The Society wishes to point out that, following recent amendments to the jurisdiction of the District Court, allowing it jurisdiction to deal with offences attracting a penalty of life imprisonment, the offences of unauthorised administration of a prescribed substance (clause 98) and inducing self-administration of a prescribed substance (clause 100) would be dealt with in the District Court, not the Supreme Court. This contrasts with the offences of wilful

murder, murder and manslaughter, which are not within the jurisdiction of the District Court and must be determined in the Supreme Court.

- 4.1.5 Arguably, the maximum sentence for clause 99(2)(b), which is substantially the same offence as clause 100, except that it may be committed in cases not involving self-administration, is inadequate, and should be the same as for clause 100.
- 4.1.6 Clause 103 of the VAD Bill provides for the cancellation of documents presented as a prescription by an authorised person but there is no timeframe for compliance. The Law Society considers that a timeframe for compliance need not be in the Bill, but should be prescribed by regulation.
- 4.1.7 The Society notes that sub-clauses 103(2), 104(1) and 104(2) of the Bill create obligations and then declare a penalty. They do not provide that a crime or offence is committed if a person acts in a particular way, as clauses 98, 99(2), 100 and 102 do. On the face of sub-clauses 103(2), 104(1) and 104(2) they prescribe a penalty for complying with the obligations stated in those sub-clauses. The Society assumes that it was probably intended that those provisions make it an offence to **not** comply with those obligations. If so, those provisions are required to be amended accordingly.

5. Guidelines

- 5.1 The Law Society supports the VAD Bill providing for the making of guidelines however it is of the view that the making of guidelines referred to in the VAD Bill should be subject to tabling in the Parliament and disallowance, as is the case for regulations.



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