

BRIEFING PAPER

END OF LIFE CHOICES

THE **ESSENTIAL** MEMBERSHIP FOR
THE LEGAL PROFESSION

Prepared by the Law Society of Western Australia

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END OF LIFE CHOICES

Issue

On 23 August 2017, the Parliament of Western Australia established a Joint Select Committee of the Legislative Assembly and Legislative Council to inquire on the need for laws in Western Australia to allow citizens to make informed decisions regarding their own end of life choices. In particular, the Joint Select Committee is to:

- a. assess the practices currently being utilised within the medical community to assist a person to exercise their preferences for the way they want to manage their end of life when experiencing chronic and/or terminal illnesses, including the role of palliative care;
- b. review the current framework of legislation, proposed legislation and other relevant reports and materials in other Australian States and Territories and overseas jurisdictions;
- c. consider what type of legislative change may be required, including an examination of any federal laws that may impact such legislation; and
- d. examine the role of advance health directives, enduring power of attorney and enduring power of guardianship laws and the implications for individuals covered by these instruments in any proposed legislation.¹

The Joint Select Committee is to report on the inquiry by 23 August 2018.

Background

The debate in respect to voluntary euthanasia – medical intervention to end a patient’s life at the patient’s request – has been raised in Parliament a number of times over the last two decades.²

Renewed debate in Western Australia, and the establishment of the Joint Select Committee, has followed developments in other States, particularly Victoria, which passed the *Voluntary Assisted Dying Act 2017* (Vic) in November 2017.³

Developing legislation in respect to voluntary euthanasia raises a number of issues including:

- complex and often personal questions of morality;
- human rights considerations relating to the right to life, freedom from cruel, inhuman or degrading treatment, the right to respect for private life, freedom of thought, conscience and religion and rights of persons with disabilities;⁴
- eligibility criteria (including age restrictions and the person’s medical circumstances);
- the appropriate test for assessing a person’s decision-making capacity;
- safeguards for ensuring that a person’s decision or request is voluntarily made and they are fully informed;
- the need to protect elderly persons from being unduly influenced in their decision making;
- the process for making a request;
- the process for assessing and approving a request;
- administering, storing and disposing of substances used or intended to be used to end a patient’s life (including any necessary changes to legislation relating to drugs);
- conscientious objections from medical practitioners who do not wish to participate in assisted dying;
- oversight, review and reporting of the administration of lethal substances under voluntary euthanasia legislation;
- consequences for failing to comply with requirements in the legislation (including consequences under the *Criminal Code* (WA)); and
- the implications of introducing voluntary euthanasia legislation for instruments that regulate the withholding or withdrawing of medical treatment (such as advance health directives and enduring powers of

guardianship made under the *Guardianship and Administration Act 1990* (WA)).

Policy position

Arguments for and against the legalisation of voluntary euthanasia

There are a number of advocacy groups that have made various arguments in respect to the introduction of legislation for voluntary euthanasia.⁵ Arguments for the legalisation of voluntary euthanasia include that a person experiencing intolerable pain and suffering ought to have the right to choose to end the person's life and to die with dignity. On the other hand, arguments against the legalisation of voluntary euthanasia include that there is a risk the legislation could be abused and could also have a 'slippery slope' effect leading to, for example, the practice of voluntary euthanasia in cases where a person is not suffering from a terminal illness or condition. It has also been argued that quality palliative care is a reasonable alternative which can relieve a person's pain and suffering and allow the person to die with dignity.

Australian Medical Association

Voluntary euthanasia also raises issues in relation to the role and ethical duties of medical practitioners. The Australian Medical Association's (AMA) position statement on euthanasia and physician assisted suicide acknowledges the ethical duties of doctors and the need for adequate resourcing of palliative care services and advance care planning. The AMA notes that:

- 3.1 *The AMA believes that doctors should not be involved in interventions that have as their primary intention the ending of a person's life. This does not include the discontinuation of treatments that are of no medical benefit to a dying patient.*
- 3.2 *The AMA recognises there are divergent views within the medical profession and the broader*

community in relation to euthanasia and physician assisted suicide.

- 3.3 *The AMA acknowledges that laws in relation to euthanasia and physician assisted suicide are ultimately a matter for society and government.*⁶

The Law Council of Australia and other law societies

The Law Council of Australia does not have a policy in relation to voluntary euthanasia and has noted in past submissions that "the Law Council makes no judgement about the rights or wrongs of euthanasia, on which the Council does not have a position".⁷

Similarly, the Law Institute of Victoria's (LIV) position statement on voluntary assisted dying states that:

- 1.2 *The LIV acknowledges disparate views on voluntary assisted dying within the legal profession, its member base and the broader community.*
- 1.3 *The LIV does not have a position on the moral arguments for or against voluntary assisted dying.*
- 1.4 *The LIV's engagement will focus on the development of the legislative framework for voluntary assisted dying, ensuring it is clear and workable.*⁸

The LIV's position focuses on the need for good quality end of life care and a framework for voluntary assisted dying that is clear, accessible and provides adequate protections for vulnerable patients and health practitioners who are acting within the law, including those who do not wish to participate in voluntary assisted dying.⁹

The Law Society of New South Wales' submissions in respect to the ultimately unsuccessful *Voluntary Assisted Dying Bill 2016* (NSW) noted that "the Law Society provides no comments on the merits or otherwise of the objectives of the Bill" and was confined to "technical elements and unintended

consequences arising from the operation of the Bill”, for example, issues relating to the need for clarity as to the meaning of the terms used in the Bill, consistency with other legislation and human rights considerations.¹⁰

The Law Society of Western Australia

The Law Society of Western Australia acknowledges the diverse views of its members and the broader community in respect to voluntary euthanasia and end of life choices.

The Law Society does not have a position on the moral arguments for or against voluntary euthanasia, or the merits or otherwise of legislating for voluntary euthanasia.

The Law Society will, however, engage with the issues raised by the end of life choices inquiry with a focus on whether any proposed legislative framework for voluntary euthanasia is drafted in a way that is clear, accessible and workable, having regard to the need for consistency with other legislation, appropriate safeguards and protections for patients and health practitioners and human rights considerations.

Key issues in developing legislation

A starting point for the development of legislation for voluntary euthanasia in Western Australia is the framework set out in the *Voluntary Assisted Dying Act 2017* (Vic) (the Act). Victoria is the only State or Territory in Australia that has enacted legislation in respect to voluntary euthanasia.¹¹

The following key issues arising from the Act ought to be considered if legislation for voluntary euthanasia is to be developed in Western Australia.

Eligibility

Section 9(1) of the Act provides that, for a person to be eligible for access to voluntary assisted dying:

- (a) *the person must be aged 18 years or more; and*
- (b) *the person must—*

- (i) *be an Australian citizen or permanent resident; and*
 - (ii) *be ordinarily resident in Victoria; and*
 - (iii) *at the time of making a first request [for access to voluntary assisted dying], have been ordinarily resident in Victoria for at least 12 months; and*
- (c) *the person must have decision-making capacity in relation to voluntary assisted dying; and*
 - (d) *the person must be diagnosed with a disease, illness or medical condition that—*
 - (i) *is incurable; and*
 - (ii) *is advanced, progressive and will cause death; and*
 - (iii) *is expected to cause death within weeks or months, not exceeding 6 months; and*
 - (iv) *is causing suffering to the person that cannot be relieved in a manner that the person considers tolerable.*

Notwithstanding subsection 9(1)(d)(iii), if the person is diagnosed with a disease, illness or medical condition that is neurodegenerative, that disease, illness or medical condition must be expected to cause death within weeks or months, not exceeding 12 months.¹²

The Law Society supports using clear, concise wording for eligibility criteria.

The Law Society also supports the inclusion of subsection 9(2) in the Act, which provides that “A person is not eligible for access to voluntary assisted dying only because the person is diagnosed with a mental illness”. Safeguards for people with mental illness are necessary so that access to voluntary assisted dying is not available unless a person has decision-making capacity and meets all of the other eligibility criteria.¹³

The Law Society acknowledges the importance of education and training for medical practitioners to properly assess a person’s eligibility for voluntary

assisted dying, including a person's decision-making capacity. Training ought to address dealing with people from culturally and linguistically diverse backgrounds.

Request and assessment process

The Victorian Act provides for a three-step request process involving two independent medical assessments. In summary:

- The first request must be made by the person seeking access to voluntary assisted dying to a registered medical practitioner (the co-ordinating medical practitioner). The co-ordinating medical practitioner must inform the person of, among other things, available treatment and palliative care options and assess the person's eligibility for access to voluntary assisted dying. After the assessment is complete, the request must be referred to another medical practitioner for a second assessment.
- The second request must be in the form of a written declaration signed by the person in the presence of two witnesses and the co-ordinating medical practitioner.
- The third and final request must be made to the co-ordinating medical practitioner who must conduct a final review. The final request must be made at least 9 days after the day on which the person made the first request, unless the person's death is likely to occur before that time.

The Law Society recognises the need for safeguards to ensure decisions are made freely and voluntarily, particularly in circumstances where a person may be vulnerable to undue influence and coercion or where language and cultural differences must be managed.

For example, the Law Society supports the requirement in the Act that the witnesses to the person's written declaration must be independent witnesses – they must be people who are not involved in providing health services or professional

care services to the person and who would not materially benefit from the person's death.¹⁴ This requirement also applies to an interpreter assisting a person to make a declaration.¹⁵

The Act provides for a 'successive model' for the process of requesting voluntary assisted dying where the co-ordinating medical practitioner must make an assessment and then refer it to another medical practitioner for a subsequent assessment. The Law Society considers that delays in the process could have the effect of reducing access to the assistance requested. A 'concurrent model', where the two practitioners conduct an assessment at or around the same time could reduce delays in the process.

The Law Society supports the LIV's recommendation that there should be a legislated time period between the first and final request to ensure that decisions are not made in haste and that the person making the request has adequate time to make an informed decision.¹⁶

Further, the Law Society considers that no health practitioner should be required to participate in voluntary euthanasia and that provisions for conscientious objections should be included in any legislation for voluntary euthanasia in Western Australia.

Oversight

The Victorian Act provides for the establishment of a Voluntary Assisted Dying Review Board to monitor compliance with the requirements of the Act and refer breaches to an appropriate authority, such as the Victoria Police, the Coroner or the Australian Health Practitioner Regulation Agency. The Board is also required to report on the operation of the Act and recommendations for improvement.¹⁷

The Law Society recommends that a similar board be established in Western Australia. The board ought to monitor and review all instances of voluntary assisted dying, including instances

where a request is denied, so that the board has sufficient information to assess the implementation of the legislation. The board could also act as a point of contact for health practitioners, patients and their families with concerns or queries in relation to voluntary euthanasia.¹⁸

Consequential amendments

Legislating for voluntary euthanasia in Western Australia will require consequential amendments to legislation such as, for example, the *Guardianship and Administration Act 1990* (WA) and the *Criminal Code* (WA).

NOTES

1. *Parliament of Western Australia, Inquiry into the need for laws in Western Australia to allow citizens to make informed decisions regarding their own end of life choices* (23 August 2017) <[http://www.parliament.wa.gov.au/Parliament/commit.nsf/\(EvidenceOnly\)/702507C2CB8742824825818700247E53?opendocument](http://www.parliament.wa.gov.au/Parliament/commit.nsf/(EvidenceOnly)/702507C2CB8742824825818700247E53?opendocument)>.
2. *Voluntary euthanasia bills were introduced in Western Australia but were not passed in 1997, 1998, 2000, 2002 and 2010: Parliament of Western Australia, Bills Search Results* <<http://www.parliament.wa.gov.au/parliament/bills.nsf/WebAllBills?SearchView&Query=euthanasia&start=1&count=10>>. See also Lindy Wilmott et al, '(Failed) Voluntary Euthanasia Law Reform in Australia: Two Decades of Trends, Models and Politics' (2016) 39(1) *University of New South Wales Law Journal* 1 <<https://eprints.qut.edu.au/95429/>>.
3. *Voluntary Assisted Dying Act 2017* (Vic) <[http://www.legislation.vic.gov.au/Domino/Web_Notes/LDMS/PubStatbook.nsf/f932b66241ecf1b7ca256e92000e23be/B320E209775D253CCA2581ED00114C60/\\$FILE/17-061aa%20authorised.pdf](http://www.legislation.vic.gov.au/Domino/Web_Notes/LDMS/PubStatbook.nsf/f932b66241ecf1b7ca256e92000e23be/B320E209775D253CCA2581ED00114C60/$FILE/17-061aa%20authorised.pdf)>.
4. *Australian Human Rights Commission, Euthanasia, Human Rights and the Law* (May 2016) <https://www.humanrights.gov.au/sites/default/files/document/publication/2016_AHRC_euthanasia_human_rights_law.pdf>.
5. See for example the submissions to the Joint Select Committee in support of voluntary euthanasia legislation from *Exit International and Civil Liberties Australia* and the submissions against such legislation from *Defend Life and the Right to Life Australia* <[http://www.parliament.wa.gov.au/Parliament/commit.nsf/\(EvidenceOnly\)/702507C2CB8742824825818700247E53?opendocument](http://www.parliament.wa.gov.au/Parliament/commit.nsf/(EvidenceOnly)/702507C2CB8742824825818700247E53?opendocument)>.
6. *Australian Medical Association, AMA Position Statement: Euthanasia and Physician Assisted Suicide* (2016) <<https://ama.com.au/system/tdf/documents/AMA%20Position%20Statement%20on%20Euthanasia%20and%20Physician%20Assisted%20Suicide%202016.pdf?file=1&type=node&id=45402>>.
7. *Law Council of Australia, Inquiry into the Rights of the Terminally Ill (Euthanasia Laws Repeal) Bill 2008* (April 2008) <https://www.aph.gov.au/binaries/senate/committee/legcon_ctte/terminally_ill/submissions/sub442.pdf>. This submission to the Senate Legal and Constitutional Affairs Committee concerned an ultimately unsuccessful proposal to repeal the *Euthanasia Law Act 1997* (Cth), which has the effect of taking away the power of the legislative assemblies of the Northern Territory, the Australian Capital Territory and Norfolk Island to make laws permitting euthanasia..
8. *Law Institute of Victoria, Voluntary Assisted Dying: LIV Position Statement 2017* <https://www.liv.asn.au/getattachment/Professional-Practice/Voluntary-Assisted-Dying-Bill/20170320_PositionPaper_LPALHR_VoluntaryAssistedDying_LIVPositionPaper_Council-Approved_Final.pdf.aspx>.
9. The LIV's April 2017 submission to the Victorian Government's Ministerial Advisor Panel on Voluntary Assisted Dying also shares this focus: *Law Institute of Victoria, Voluntary Assisted Dying Bill* (10 April 2017) <https://www.liv.asn.au/getattachment/fd94f2bb-815a-47fe-a59a-70f53db67d7d/20170405_SUB_Voluntary-Assisted-Dying-Bill-Consultation_Final.pdf.aspx>. See also *Parliament of Victoria, Legal and Social Issues Committee, Inquiry into End of Life Choices: Final Report* (June 2016) <https://www.parliament.vic.gov.au/file_uploads/LSIC_pF3XBb2L.pdf>.

Recommendation

The Law Society recommends that any draft legislation for voluntary euthanasia in Western Australia be provided to stakeholders for review and consultation.

10. Law Society of New South Wales, *Voluntary Assisted Dying Bill 2016* (5 August 2016) <<https://www.lawsociety.com.au/cs/groups/public/documents/internetpolicysubmissions/1194620.pdf>>.
11. The Northern Territory enacted the *Rights of the Terminally Ill Act 1995 (NT)* but this has no force or effect due to the operation of the *Euthanasia Laws Act 1997 (Cth)*.
12. *Voluntary Assisted Dying Act 2017 (Vic)* section 9(4).
13. See Department of Health and Human Services, Victoria State Government, *Minister Advisory Panel on Voluntary Assisted Dying: Final Report* (27 July 2017) 80-82 <<https://www2.health.vic.gov.au/about/publications/researchandreports/ministerial-advisory-panel-on-voluntary-assisted-dying-final-report>>.
14. *Voluntary Assisted Dying Act 2017 (Vic)* section 35.
15. *Voluntary Assisted Dying Act 2017 (Vic)* sections 34(5) and 115. The interpreter must also be accredited.
16. Law Institute of Victoria, *Voluntary Assisted Dying Bill* (10 April 2017) 8 <https://www.liv.asn.au/getattachment/fd94f2bb-815a-47fe-a59a-70f53db67d7d/20170405_SUB_Voluntary-Assisted-Dying-Bill-Consultation_Final.pdf.aspx>.
17. *Voluntary Assisted Dying Act 2017 (Vic)* part 9.
18. See Law Institute of Victoria, *Voluntary Assisted Dying Bill* (10 April 2017) 16-17 <https://www.liv.asn.au/getattachment/fd94f2bb-815a-47fe-a59a-70f53db67d7d/20170405_SUB_Voluntary-Assisted-Dying-Bill-Consultation_Final.pdf.aspx>.