Submission No 46

INQUIRY INTO PROVISIONS OF THE VOLUNTARY ASSISTED DYING BILL 2021

Organisation: Dying with Dignity WA

Date Received: 22 November 2021

SUBMISSION TO NEW SOUTH WALES PARLIAMENT ON

DRAFT VOLUNTARY ASSISTED DYING LEGISLATION

22 November 2021

1. This submission is brief. It is intended to be a targeted submission which identifies several issues considered to be key in the light of DWDWA's experiences, firstly in researching and advocating for voluntary assisted dying (VAD) legislation in Western Australia, and secondly with the implementation of the WA Act in July this year.

2. DWDWA made a detailed written submission to the WA Joint Select Committee which ultimately produced its comprehensive report *My Life, My Choice.* That submission can be made available. It made reference to legislation in other jurisdictions, including Victoria.

3. During the past year we have considered various consultation papers and drafts of VAD legislation introduced into, and then passed by, parliaments in the other states that have now followed in the path earlier trodden by Victoria and WA. The model Bill developed by Professors White and Willmott, with which you will be familiar, is referred to below at a number of points.

4. We note the observation in "Issues Backgrounder" Number 2, October 2021, prepared by the NSW Parliamentary Research Service, that in March Alex Greenwich MP flagged that the Bill would be largely based on the Western Australian model.

5. Our first point is that legislation similar to the WA Act is balanced and works well. It involves no risk of abuse or danger. In particular, it will not lead to more deaths, but will at long last permit those in the last stages of terminal illness to choose the manner and time of their death, should they meet strict criteria. It will not cheapen life or lead to more suicides. This is all clearly demonstrated in this state in the last 6 months.

6. Above all, such a model represents both compassion and choice: those who do not wish to have - or assist in - an assisted death will choose accordingly. And again, this works in practice.

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7. Against that background, the particular issues we wish to make comment upon are:

- Whether a permit from the proposed Board should be required before a person may choose a voluntary assisted death (there being no such requirement in the WA Act);
- Whether the review of certain decisions should be carried out by the Supreme Court or by a tribunal;
- The issue of the Commonwealth carriage service provisions and the desirability of including a provision similar to s 12 of the WA Act.;
- The use of a criterion requiring a set time before which the person is expected to die;
- The qualifications required to be a consulting or coordinating medical practitioner;
- Whether hospital or care facility operators should be permitted to decline to provide a VAD service;
- Practitioner administration and self-administration.

Permit

8. We recommend the removal of Division 4 of Part 4 from the draft Bill. Unlike the Victorian Act, the WA Act does not require any permit from the Department of Health. We are completely satisfied that the requirement in Victoria adds no safeguard and is unnecessary. As pointed out by White and Willmott, a permit would be granted by public servants who will have no direct knowledge of the patient. Such a requirement provides no benefit, but adds delay.

9. Further, while in the draft Bill the Board would not be called on or able to consider issues of eligibility, we note with concern that it *must* refuse to issue an authority if it merely *suspects* that *any* of the requirements of the Act have not been met. It is absurd not to at least provide the Board with a discretion, bearing in mind that we are speaking of *suspicion* alone, and that many requirements are not fundamental. This is a cumbersome mechanism that will cause problems and significant delays to people who are *in extremis.* It serves no good purpose and should be abandoned.

Review by Supreme Court

10. By Part 6, reviews of certain decisions are to be carried out by the NSW Supreme Court. In WA and Victoria, there are similar rights of review, which we support. The difference, however, is that in those states the reviews are to be carried out by tribunals. Those generalist tribunals are well regarded, and have a great deal of flexibility in their procedures. Their members have substantial relevant experience, such as in guardianship matters, and they are well suited to reviewing sensitive and urgent questions. Their jurisdictions mostly require reviews "on the merits", with no requirement for an error to be demonstrated in the decision under review. Supreme Courts, by contrast, seldom undertake such tasks.

11. It is our view that such tribunals are greatly to be preferred for these reasons.

Eligibility criterion making no reference to time to death

12. For the reasons stated by White and Willmott in the Explanatory Notes to their model Bill, we recommend that the Bill not include a criterion that the person is expected to die within a certain time.

Qualifications required for practitioners

13. In our view the requirement in Clause 18 that a doctor holding general registration must have so practised for 10 years – apparently adopted from WA – is excessive. It should be reduced to no more than 5 years – the criterion for a nurse practitioner to act as an administering practitioner. NSW, like Western Australia, is a large state with significant indigenous populations and others living in remote areas. Nurse practitioners may therefore be very useful.

14. The vague and general references to a practitioner having to meet "other requirements prescribed by the regulations for the purposes of this section" should be removed. Again, clearly it is borrowed from WA. Here, this mechanism has proved to be highly problematic. In our opinion it has been a significant contributing factor to the unsatisfactory number of practitioners who have been willing to undertake the training. This is because, without consultation, the bureaucracy promulgated vague and highly subjective requirements that in some cases discouraged practitioners from applying to do the mandatory training.

15. Not only that, but such a provision inappropriately reduces parliamentary oversight by leaving it open in effect to have bureaucrats specify standards without even any guidance being given by the parliament.

16. We support the non-adoption of the Victorian approach that at least one of the coordinating and consulting medical practitioners have "relevant expertise and experience" in the disease, illness or medical condition expected to cause the person's death. This has caused substantial problems in country Victoria and appears to have deprived many eligible people of their rights.

Conscientious objection

17. We believe that the right to conscientiously object to providing VAD services should be limited to individuals. We commend the terms of Section 9 of the WA Act in this regard (while accepting that it is not a "cure-all").

18. Our view is based both on principle and on practical considerations. The practical ramifications are considerable: significant parts of the Australian health care and aged care sectors are conducted by religiously-affiliated organisations, albeit that they rely heavily on taxpayer funding. Experience in Victoria, as well as in the United States and Canada, shows that some corporate entities claim the right to decide, for all of their staff that no VAD service, or only some such services, should be available on their premises. This affects all of their patients and residents, by depriving them of the right to choose to access VAD services in their palliative care facilities or places of residence.

19. In WA some entities have gone so far as to purport to prohibit visiting clinicians from providing VAD services *elsewhere and in ways not connected to that entity.* This amounts to an extraordinary and unacceptable attempt to use rights deriving from the religious and moral rights of the individual as a sword, not a shield, and as a result deprives significant numbers of people of their right to choose a VAD service.

20. Part 5 of the Bill makes detailed provision for access to VAD services in both residential facilities and health care establishments. The WA Act does not. The evolution of access "on the ground" in WA so far is concerning. Religiously-affiliated hospitals apparently are not prepared to allow either assessments or administrations to be carried out on their premises (which we consider to be unacceptable, particularly bearing in mind that they operate largely on the basis of taxpayer funding). The attitudes of religiously-affiliated care facilities are not yet clear, although in at least some cases they may accept that they have legal obligations to permit some degree of access.

Practitioner administration and self-administration

21. We agree with White and Willmott that self-administration should *not* be set as the default and primary method. The WA Act in our opinion provides a good mechanism (see s 56). The NSW "Issues Backgrounder" describes the WA Act as "preferencing" self-administration. While this argument may be open in theory, in reality the patient has virtually an open choice, as the coordinating practitioner is most unlikely not to agree with a patient who wishes to have practitioner administration. And the experience since July 1 bears this out: a very substantial majority of patients choose to have the substance administered to them. This is an echo of the Canadian experience.

22. Having said all that, the terms of Clause 57 probably are preferable. They leave no doubt that – as it should be – this is a decision entirely for the person concerned, albeit that it must be made in consultation with the coordinating practitioner.

23. We do *not* consider that VAD by self-administration should occur under medical supervision. The WA parliament did not impose such a requirement, essentially for the powerful reasons that White and Willmott acknowledge in their discussion, particularly access implications in rural and remote areas. In our opinion it is just unrealistic to expect that people living remotely will be able easily to procure a doctor to attend, especially at a time chosen by the patient.

Commonwealth "carriage service" provisions

24. We agree with the inclusion of a provision in the Bill stating that a voluntary assisted death is not a suicide. One reason is that it may be of assistance in demonstrating that actions taken by health practitioners in providing VAD services will not contravene the "carriage service provisions" of the Commonwealth *Crimes Act.*

25. Following careful legal analysis, we believe that those provisions inhibit *very few* communications between practitioners and patients, and that the advice adopted by the Victorian Department of Health is alarmist. Nevertheless, the fears held by many practitioners are already significantly impeding access to VAD rights. Proactive education of health professionals, and strong lobbying of the Commonwealth, should be undertaken.