Submission No 69

INQUIRY INTO PROVISIONS OF THE VOLUNTARY ASSISTED DYING BILL 2021

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The Hon Wes Fang MLC
Chair, Standing Committee on Law and Justice
Parliament of New South Wales

Via email - law@parliament.nsw.gov.au

Dear Chair

MIGA submission – NSW Voluntary Assisted Dying Bill

As a medical defence organisation and professional indemnity insurer, MIGA appreciates the chance to contribute to the Committee's inquiry into provisions of the Voluntary Assisted Dying Bill 2021 (**the VAD bill**).

Summary – MIGA's position

MIGA takes no position on the introduction of VAD. It is an issue for the New South Wales Parliament, healthcare profession and the community.

Reflecting its role and contributions in developing VAD regimes in other Australian states, MIGA's focus is on practical implications and regime functionality from medico-legal and regulatory perspectives.

MIGA seeks

- Removal of
  - 'Signalling' provisions suggesting potential disciplinary sanction for any VAD regime breach
  - Obligations on co-ordinating and consulting practitioners to inform their patients that certain conduct by other treating practitioners is illegal and warrants complaint
- Clarifying obligations on co-ordinating practitioners to explain clinical matters
- Reduction of maximum penalties for delays in providing information to the VAD Board, inclusion of a 'reasonable excuse' defence for such failures and adopting a graded compliance model for any breaches
- Consideration of whether the NSW Civil & Administrative Tribunal (**NCAT**) should function as the first point of call for disputes and other issues under the VAD regime
- Permitting disclosure of information by professionals and organisations in the context of seeking legal or other professional advice, and in non-judicial disciplinary or administrative matters
- Expanding protections available to doctors to psychologists
- Co-ordinated efforts by NSW and other state governments to clarify the legality of telehealth in clinically appropriate circumstances with the Federal Government.

Signalling disciplinary sanctions (section 11)

MIGA strongly opposes 'signalling' provisions such as s 11 of the VAD bill that would suggest potential findings of unprofessional conduct or professional misconduct under the NSW *Health Practitioner Regulation National Law* for any contraventions of the VAD regime. They are inappropriate and unnecessary.

Such signalling provisions for regime breaches generally do not feature in Victoria, Queensland or South Australia regimes. In Tasmania, they are limited to acts or omissions in bad faith or without reasonable care or skill. Their inclusion in the Western Australian regime was not recommended by its Ministerial Expert Panel.

The potential characterisation of any failure to take reasonable care leading to a breach of the regime as unsatisfactory professional conduct, let alone professional misconduct, is inappropriate under a complex

regulatory regime involving a broad range of requirements, many of which are open to a wide range of interpretations.

Use of the concept of professional misconduct under the National Law, which involves egregious conduct indicative of a practitioner not being a fit and proper person to hold registration, could only ever be relevant in the context of extremely serious breaches.

Whether such conduct has occurred should be left for determination by professional regulatory and disciplinary bodies. A body such as the Medical Council of NSW is well-placed to make its own determinations on the facts of an individual case, without need for 'signals', and should be permitted to do so without the undue influence of a signalling provision.

Inappropriate obligations on co-ordinating and consulting practitioners (sections 28 and 39)

MIGA considers it inappropriate under ss 28(1)(j) and 39 of the VAD bill to impose an obligation on co-ordinating and consulting practitioners to inform a person eligible for VAD that

- It is unlawful for a treating practitioner to withdraw from providing care to a patient because of their request for access to VAD
- If the treating practitioner withdraws care, this should be the subject of a complaint to the Health Care Complaints Commission.

It seeks removal of s 28(1)(j) from the final VAD Act.

MIGA does not endorse a withdrawal of providing healthcare to a patient on the grounds they are seeking VAD. However it is not necessarily "*unlawful*". Outside the context of an emergency, there can be wide scope for doctors and other health professional to withdraw from caring for a patient. Professional and ethical criticism of withdrawing from care in this context does not make it illegal, which itself is a different issue.

Section 28(1)(j) as currently drafted can be interpreted as suggesting any treating practitioner withdrawing from providing healthcare to a patient in the context of the patient seeking VAD would be inappropriate. There could be appropriate circumstances where this occurs, such as a person seeking VAD preferring the co-ordinating practitioner to take over their care generally from their existing treating practitioner.

Doctors should not be put in situations of being required to advise patients on the law and steps they should take to have others consider their rights and interests. Such suggestions are not necessarily helpful to a person going through a VAD process where they could cause significant additional distress, particularly given the physical and mental suffering they would already be experiencing.

In addition s 28(4) of the VAD Bill, requiring a co-ordinating practitioner to "*fully explain*" to a person eligible for VAD (and another with their consent) "*all relevant clinical guidelines*" is too broad an obligation.

"*Relevant clinical guidelines*" are not defined. The provision could be interpreted as requiring full, detailed and exhaustive explanations of a wide range of complex guidelines designed for clinicians, not the general public, and things which are irrelevant to a person seeking VAD.

The obligation under s 28(4) should be clarified to apply only to certain clinical issues relevant to a person's decision to access VAD, which is best determined by the profession.

Providing information to the VAD board

MIGA is concerned about the level of potential penalties for delays in providing required notifications / information to the VAD Board.

A significant number of reports are required of co-ordinating practitioners. There may be situations where it will be challenging for them to provide all required information within the stipulated period all of the time, particularly given

- The extensive nature of certain requirements
- Unexpected personal circumstances

- Potential IT failures
- Workloads involved in caring for other patients (such as seen during the COVID-19 pandemic).

A need for timely provision of information to the VAD Board is without question. But to impose up to 100 unit penalties for all failures to provide information is inappropriate. This is higher than under any other Australian VAD regime for such breaches.

MIGA proposes

- Reducing the maximum penalty to 60 units, in line with the Victorian regime
- Including a reasonable excuse provision for failures to provide information within stipulated timeframes
- Adopt a graded or 'pyramid' compliance model for such failures – e.g. education and counselling for a first time failure without reasonable excuse, and penalties only pursued for serious, repeated failures.

VAD decision reviews and disputes (part 6 and section 121)

It is unclear why the VAD bill excludes the NCAT Guardianship Division from dealing with disputes and other issues around VAD at first instance.

Similar tribunals fulfill this role under other Australian VAD regimes (or in Tasmania a VAD Commission). MIGA is not aware of any concerns about decision-making in VAD matters by Victorian or Western Australian tribunals.

MIGA is concerned that the Supreme Court having exclusive jurisdiction in VAD disputes could lead to undue complications and complexities, unnecessary costs and delays.

It suggests careful consideration be given to whether NCAT should have a review / disputes jurisdiction at first instance, with scope for review / appeal post-NCAT decision by the Supreme Court. It agrees the Supreme Court's inherent jurisdiction should remain unaffected.

In addition under s 121 of the VAD bill the preclusions on identifying co-ordinating and consulting practitioners should be extended to any other practitioners involved in a VAD process, e.g. those advising on capacity or eligibility. At present this preclusion would only extend to them if they appeared as a witness in court proceedings.

Appropriate scope for disclosing information (section 130)

The limitations in s 130 of the VAD bill around disclosure of information should be modified so they do not preclude doctors from

- Seeking legal or other professional advice, such as from a lawyer, professional indemnity insurer, professional college or professional association
- Providing information about their involvement in a VAD process to professional review processes or in professional disciplinary matters, such as those involving the Medical Council of NSW, Medicare or hospitals and professional colleges – at present they are precluded from doing so as these bodies do not exercise judicial functions.

Protections for psychologists (section 138)

Under s 138(2) of the VAD bill, the protections available for doctors should be extended to psychologists, given they may be involved in the process of assessing capacity.

Use of telehealth

MIGA is doubtful that Commonwealth prohibitions on inciting suicide via a carriage service would prevent use of telehealth under a state VAD regime.

The continuing uncertainty around this issue is unhelpful for doctors and the broader community, particularly in rural and remote areas.

For circumstances where telehealth is considered clinically appropriate, the NSW Government (in conjunction with other state governments) should encourage the Federal Government to clarify the legality of using telehealth for the voluntary assisted dying process, including through any necessary legislative change or Commonwealth Department of Public Prosecutions directive.

Yours faithfully

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