

Voluntary Assisted Dying Bill 2021

Submission to the New South Wales Legislative
Council's Standing Committee on Law and Justice

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Who we are

The Australian Lawyers Alliance (ALA) is a national association of lawyers, academics and other professionals dedicated to protecting and promoting justice, freedom and the rights of the individual.

We estimate that our 1,500 members represent up to 200,000 people each year in Australia. We promote access to justice and equality before the law for all individuals regardless of their wealth, position, gender, age, race or religious belief.

The ALA is represented in every state and territory in Australia. More information about us is available on our website.¹

The ALA office is located on the land of the Gadigal of the Eora Nation.

¹ www.lawyersalliance.com.au.

Introduction

1. The ALA welcomes the opportunity to have input into the inquiry by the New South Wales Legislative Council's Standing Committee on Law and Justice ('the Committee') into the *Voluntary Assisted Dying Bill 2021 (NSW)* ('VAD Bill').
2. Although the ALA broadly supports the introduction of a voluntary assisted dying ('VAD') scheme in New South Wales and welcomes the introduction of the VAD Bill, it considers that a number of amendments should be made to the proposed VAD Bill to increase the eligibility of persons who can access the scheme and to promote access to persons living in remote and regional parts of New South Wales.
3. New South Wales remains the only Australian state yet to pass VAD legislation after the Upper House failed to pass similar legislation in 2017. VAD has been accessible in Victoria since June 2019 and in Western Australia since July 2021.² South Australia, Tasmania and Queensland have also passed VAD schemes; however, these schemes will not be in operation until 2022 to 2023.³ The Northern Territory and the Australian Capital Territory do not have the power to pass VAD legislation following the introduction of the *Euthanasia Laws Act 1997 (Cth)*.

Initiating discussions

4. The ALA is of the view that it is important that in any VAD scheme, appropriately qualified medical and health practitioners are permitted to initiate conversations about VAD. This is because providing patients with information about all lawful end of life options, including VAD, is part of good clinical practice and should lead to optimal end of life care. It is also noteworthy that there are no prohibitions on medical and health practitioners from initiating discussions about any other lawful treatment options for other diseases, illnesses, or medical conditions in Australia.
5. Although section 10(1) of the VAD Bill prevents a health care worker from initiating discussions that is in substance about VAD, section 10(2) of the VAD Bill enables a medical practitioner to initiate such discussions provided that at the same time, they also give the person information

² *Voluntary Assisted Dying Act 2019 (WA)*; *Voluntary Assisted Dying Act 2017 (Vic)*.

³ *Voluntary Assisted Dying Act 2021 (SA)*; *End-of-Life Choices (Voluntary Assisted Dying) Act 2021 (Tas)*; *Voluntary Assisted Dying Act 2021 (Qld)*.

about the treatment options available to the person and the likely outcomes of the treatment, as well as about the palliative care and treatment options available to the person and the likely outcomes of that care and treatment. Health care workers are permitted to initiate discussions about VAD or suggest VAD provided that they also inform the person that the person has palliative care and treatment options available and that they should discuss the palliative care and treatment options with the person's medical practitioner.⁴ A 'health care worker' is defined in s 10(6) as meaning a registered health practitioner or another person who provides health services or professional care services. Both of those latter terms are defined in schedule 1 to the VAD Bill.

6. The VAD Bill is less restrictive than the Victorian and South Australian VAD schemes, which prevent registered health practitioners from initiating any discussions about VAD or suggesting VAD to a person.⁵ The ALA does not endorse a VAD scheme that includes a prohibition of this nature, as it would arguably limit access to VAD to those who are literate enough to 'initiate' a discussion about VAD. It would also place medical and health practitioners at increased risk of unprofessional conduct if it were ambiguous as to what language was sufficient for a patient to initiate a discussion about VAD and if there were penalties for contravention of the prohibition similar to those in Victoria and South Australia.⁶
7. The ability of health care workers to initiate discussions provided that they inform the person that a medical practitioner would be the most appropriate person with whom to discuss VAD with, is arguably the most permissible exception in all of the States, including Tasmania, which only extends to registered health practitioners.⁷ It should be carefully considered whether it would be appropriate for all health care workers to initiate such discussions.
8. If section 10(3) of the VAD Bill was removed, the NSW scheme would be more restrictive than the Western Australian and Queensland schemes, which allow both medical practitioners and nurse practitioners to initiate discussions so long as additional information regarding other treatment and care options is also provided.⁸ Allowing both medical practitioners and nurse

⁴ *Voluntary Assisted Dying Bill 2021 (NSW)* s 10(3).

⁵ *Voluntary Assisted Dying Act 2017 (Vic)* s 8(1)(a); *Voluntary Assisted Dying Act 2021 (SA)* s 12(1).

⁶ *Voluntary Assisted Dying Act 2017 (Vic)* s 8(3); *Voluntary Assisted Dying Act 2021 (SA)* s 12(3).

⁷ *End-of-Life Choices (Voluntary Assisted Dying) Act 2021 (Tas)* s 17(3).

⁸ *Voluntary Assisted Dying Act 2019 (WA)* s 10(1)-(2); *Voluntary Assisted Dying Act 2021 (Qld)* s 7(1)-(2)

practitioners to initiate discussions or suggest VAD to a person in these circumstances,⁹ provides persons who are suffering from illnesses, diseases or other medical conditions with greater opportunities to obtain information about their options before deciding what pathway best meets their needs. Given the vast geographical size of the State and in particular, to improve access and information to patients living rurally or regionally, the ALA considers that s 10(2) of the VAD Bill should be amended so that nurse practitioners are also permitted to initiate discussions and suggest VAD to a person provided that the additional information can also be provided by them.¹⁰

9. The ALA considers that there should be penalties for health care workers and registered health practitioners who contravene section 10 the VAD Bill, particularly if the contravention is intentional. Section 11 of the VAD Bill states that contravention of any provision of the Act by a registered health practitioner is capable of constituting unsatisfactory professional conduct or professional misconduct for the purposes of the *Health Practitioner Regulation National Law (NSW)*. This is similar to the Western Australian scheme.¹¹ However, a specific section is not included for health care workers who contravene section 10 of the VAD Bill. The ALA considers that it would be important that other safeguarding provisions in the VAD Bill, in particular s 124, capture contraventions of this nature.

VAD not suicide

10. Section 12 of the VAD Bill states that a person who dies as the result of the administration of a prescribed substance in accordance with the Act does not die by suicide. This section is consistent with the VAD schemes in Queensland, South Australia, Tasmania and Western Australia.¹² The ALA supports the inclusion of this provision, as it will ensure that access to a person's death insurance is not impacted by the introduction of a VAD scheme.

⁹ *Voluntary Assisted Dying Act 2019* (WA) s 10(3).

¹⁰ *Voluntary Assisted Dying Bill 2021* (Qld) s 83; *Ibid* 404 at 13.121.

¹¹ *Voluntary Assisted Dying Act 2019* (WA) s 10(5).

¹² *Voluntary assisted Dying Act 2021* (Qld) s 7; *Voluntary Assisted Dying Act 2021* (SA) s 6; *End-of-Life Choices (Voluntary Assisted Dying) Act 2021* (Tas) s 140; *Voluntary Assisted Dying Act 2019* (WA) s 13.

Eligibility for access to scheme

11. Similar to the VAD schemes in other Australian jurisdictions, the VAD Bill outlines a number of eligibility requirements for a person to access VAD.

Temporal connection to expected death

12. Section 16(1)(d) of the VAD Bill only allows persons to access VAD if they have been diagnosed with at least one disease, illness or medical condition that is advanced, progressive and will cause death within a period of 12 months for neurodegenerative conditions, or otherwise within a period of 6 months.¹³

13. This eligibility requirement is similar to the legislative requirements in the following Australian jurisdictions:

- (a) In Victoria, a person must be diagnosed with a disease, illness or medical condition that *“is expected to cause death within a period not exceeding 6 months”*.¹⁴ However, if the person suffers from a neurodegenerative condition, that period of time is extended to 12 months.¹⁵ In Victoria, prior to the passing of the state legislation, there was concern that persons suffering from neurodegenerative conditions could lose capacity before the application process was complete if their passing was expected to occur within a 6 month period.¹⁶

- (b) In Western Australia, one of the eligibility requirements is that the disease, illness or medical condition *“will, on the balance of probabilities, cause death within a period of 6 months or, in the case of a disease, illness or medical condition that is neurodegenerative, within a period of 12 months”*.¹⁷

- (c) In Tasmania, section 6(1)(c) of that state’s legislation means a disease, illness, injury, or medical condition that is expected to cause the death of the person within six months;¹⁸

¹³ *Voluntary Assisted Dying Bill 2021* (NSW) s 16(1)(d).

¹⁴ *Voluntary Assisted Dying Act 2017* (Vic) s 9(1)(d)(iii).

¹⁵ *Ibid* s 9(4).

¹⁶ Victoria, Parliamentary Debates, Legislative Council, 16 November 2017, 6098.

¹⁷ *Voluntary Assisted Dying Act 2019* (WA) s 16(1)(c)(ii).

¹⁸ *End-of-Life Choices (Voluntary Assisted Dying) Act 2021* (Tas) s 6(1)(c)(i).

or, if the disease is neurodegenerative, within 12 months.¹⁹ However, section 6(5) allows for the Voluntary Assisted Dying Commission, established by section 110 of the legislation, to find on the application of a person that they are exempt from this requirement. The Tasmanian Act includes the term “injury” and provides a possible avenue for exemption.

14. In Queensland, the Health, Communities, Disability Services and Domestic and Family Violence Prevention Committee’s VAD report (the ‘VAD report’) recommended that the Queensland scheme should not impose any precise timeframes for anticipated death due to the “*complex, subjective and unpredictable nature of the prognosis of terminal illness*”.²⁰ However, the legislative scheme ultimately included a timeframe of 12 months in all cases and did not distinguish between neurodegenerative diseases and other conditions.²¹
15. The ALA considers that there would be little utility in prognosticating whether a condition will cause death in 6 or 12 months, when one of the purposes of VAD is to ameliorate extended or unnecessary suffering prior to death, which is also one of the eligibility criteria in the VAD Bill.²²
16. The ALA is of the view that a specific timeframe should not be specified in which a person’s death is likely to occur. Rather than prescribing any temporal requirement, the ALA considers that an individual should be able to access VAD if they are experiencing grievous and irremediable suffering related to an advanced and progressive terminal, chronic or neurodegenerative disease, illness or condition that cannot be relieved in a manner tolerable to the person. This definition of medical condition emphasises the degree of suffering, the advanced or progressive nature of the condition, and the inability of suffering being ameliorated.
17. Section 16(1)(d) of the VAD Bill is self-limiting, in that a person can only access the scheme if she/he is suffering from a condition that “will cause death” and their suffering cannot be relieved in manner the person deems tolerable.

¹⁹ Ibid s 6(1)(c)(ii).

²⁰ Health, Communities, Disability Services and Domestic and Family Violence Prevention Committee, Parliament of Queensland, *Voluntary Assisted Dying* (Report No 34, March 2020), Recommendation 5.

²¹ *Voluntary Assisted Dying Act 2021* (Qld) s 10(1)(a)(ii).

²² *Voluntary Assisted Dying Bill 2021* (NSW) s 16(1)(d)(iii).

18. If a condition will cause death, the ALA considers that there should be no temporal requirement to when the person is expected to die from the disease, illness or medical condition in question. The ALA considers that including such a requirement complicates the process for the coordinating and consulting practitioner, given the *“complex, subjective and unpredictable nature of the prognosis of terminal illness”*.²³ The ALA also considers that a person should not be excluded from a VAD scheme because their disease, illness or medical condition, which causes them intolerable suffering, is expected to cause their death in a slower timeframe. This restricts those experiencing long-term suffering from accessing VAD.
19. If one of the eligibility requirements remains a temporal connection to the time of death, the ALA is of the view that there should be no differentiation between neurodegenerative diseases and other illnesses, diseases and medical conditions. The ALA is unaware of any evidence-based research, which confirms that persons with a neurodegenerative disease, illness or medical condition are more likely to lose decision-making capacity more than six months prior to their expected death compared to those persons suffering from other illnesses, diseases and medical conditions. Without a clear justification for the application of different timeframes for different conditions, the ALA considers that persons should be able to access the scheme if they suffer from a disease, illness or medical condition that will cause death within a period of 12 months.

Decision-making capacity

20. The ALA considers it is vital to any VAD scheme that the person has decision-making capacity and agrees that it should be a requirement as set out in section 16(1)(e)-(f) of the VAD Bill. Namely, that the person has decision-making capacity in relation to VAD and that the person is acting voluntarily.

Minimum age

21. The ALA accepts that it would be appropriate to limit eligibility to VAD to persons who are ‘adults’ or at least 18 years of age, as set out in section 16(1)(a) of the VAD Bill. However, the ALA considers that in due course, further consideration should be given as to why children, who otherwise meet the eligibility requirements, should be excluded from a VAD scheme if they have a disease, illness or medical condition that is causing them intolerable suffering.

²³ Ibid Recommendation 5 at page 120.

This issue should be considered even more so if one of the eligibility requirements of the VAD scheme is that the disease, illness or medical condition will cause the person's death. In this situation, the ALA considers that children who otherwise meet the eligibility requirements should be given the same end of life options as adults and not be subjected to undue suffering that is intolerable to them.

Citizenship and residency requirements

22. The ALA considers that the citizenship and residency requirements in section 16(1)(b)-(c) of the VAD Bill are appropriate to prevent international and domestic VAD 'tourism'. The ability for the board to grant an exemption under section 17 of the VAD Bill will enable flexibility with the New South Wales residency requirements. However, the ALA considers that this power should be extended so that the Board can provide an exemption to the Australian residency requirements in appropriate circumstances. This would be consistent with the Queensland VAD scheme.²⁴

Mental health conditions

23. The ALA agrees that section 16(2)(b) of the VAD Bill should prevent a person from accessing VAD if they have a mental health impairment within the meaning of the *Mental Health and Cognitive Impairment Forensic Provisions Act 2020* (NSW).

Process for accessing VAD

24. In New South Wales, the request and assessment process adopted in the VAD Bill is largely similar to the process contained in VAD legislation in Victoria, Western Australia, Queensland and Tasmania.

25. A person must undergo two eligibility assessments provided by separate and independent medical practitioners who themselves meet specific eligibility requirements.

²⁴ Voluntary Assisted Dying Act 2021 (Qld) s 12(a).

26. A person seeking access to VAD must initiate a request to a medical practitioner.²⁵ The medical practitioner then assesses the person's eligibility to access the VAD scheme.²⁶ If a medical practitioner cannot determine whether the person meets the eligibility criteria, they must be referred for further assessment.²⁷ If eligibility is confirmed, the person is then referred to another practitioner for a second assessment.²⁸
27. Once the person is deemed eligible to access VAD by two independent medical practitioners, they must then make a second request in writing in front of two independent witnesses.²⁹
28. Before access is granted a third request must be made, with a required 5-day period between the first and third request.³⁰ At any time during this process, a person may decide not to take further action to access VAD and is under no obligation to proceed.³¹
29. In relation to the administration of a VAD substance, a person may decide to self-administer or decide to be assisted by an administering practitioner.³²
30. The Australian VAD regimes have different eligibility requirements for coordinating, consulting and administering medical practitioners. While eligibility requirements for medical practitioners may be to ensure they have the necessary skill and expertise to participate in VAD,³³ in practice these requirements may deleteriously impact equitable access to the scheme for persons living in remote and regional communities.
31. In Tasmania and Victoria, at least one of the doctors involved must be a specialist with at least five years' experience, and one must specialise in the person's disease, illness or

²⁵ Voluntary Assisted Dying Bill 2021 (NSW) s 19.

²⁶ Voluntary Assisted Dying Bill 2021 (NSW) s 25.

²⁷ Voluntary Assisted Dying Bill 2021 (NSW) s 26.

²⁸ Voluntary Assisted Dying Bill 2021 (NSW) ss 31, 36.

²⁹ Voluntary Assisted Dying Bill 2021 (NSW) s 43.

³⁰ Voluntary Assisted Dying Bill 2021 (NSW) ss 48, 49.

³¹ Voluntary Assisted Dying Bill 2021 (NSW) ss 20, 54.

³² Voluntary Assisted Dying Bill 2021 (NSW) s 57(1).

³³ Queensland Law Reform Commission, 'A Legal Framework for Voluntary Assisted Dying', Report No 79, May 2021, 399.

medical condition.³⁴ In Queensland, it is sufficient for a coordinating and consulting practitioner to have general registration with five years' experience.³⁵ The South Australian legislation requires that the coordinating practitioner is a vocationally registered general practitioner.³⁶

32. In NSW, the VAD Bill requires coordinating and consulting practitioners with general registration require 10 years' experience.³⁷ The same level experience is required for coordinating and consulting practitioners in Western Australia.³⁸

33. The VAD bill should have regard to the ability to access experienced and appropriately trained medical practitioners in regional and remote areas. A requirement that a medical practitioner have 10 years' experience rather than 5 years' experience may act as a barrier to access. For example, the Queensland Law Reform Commission considered the impact that specialisation and qualification requirements could have on access for persons living in remote and regional communities where there are fewer practitioners.³⁹

34. The VAD Bill does not permit substituting a medical practitioner for a qualified nurse practitioner for the purpose of undertaking eligibility assessments. The ALA considers that where a first or second medical practitioner is unavailable, suitably qualified nurse practitioners should be permitted to participate in the VAD scheme's eligibility assessments to enable delivery of VAD services in rural and remote areas of New South Wales. The ALA views that it is reasonable to allow appropriately qualified and trained nurse practitioners to act as a 'coordinating practitioner' under the VAD scheme.

35. The VAD Bill does not include any requirement for persons wishing to access VAD to participate in mandatory counselling. The ALA does not consider that such a requirement

³⁴ *Voluntary Assisted Dying Act 2017* (Vic) s 10; *End-of-Life Choices (Voluntary Assisted Dying) Act 2021* (Tas) s 9.

³⁵ *Voluntary Assisted Dying Act 2021* (Qld) s 82(1)(a)(ii).

³⁶ *Voluntary Assisted Dying Act 2021* (SA) s 27(1)(b).

³⁷ *Voluntary Assisted Dying Bill 2021* (NSW) s 18(a)(ii).

³⁸ *Voluntary Assisted Dying Act 2019* (WA) s 17(2)(a)(ii).

³⁹ Queensland Law Reform Commission, 'A Legal Framework for Voluntary Assisted Dying', Report No 79, May 2021, 403.

would be appropriate given the requirement that the person has ‘decision-making capacity’ and the information that is required to be provided to the person considering VAD.

36. It could also be argued the VAD Bill does not sufficiently protect a person’s decision to proceed with VAD without undue interference or influence. In Queensland, it is an offence to induce a person to make request, or to revoke a request for VAD.⁴⁰ However, in NSW it is only an offence to induce someone to request or access VAD, but not an offence to induce them to revoke a request.⁴¹ The ALA supports robust safeguards against coercion in all forms at all stages during the VAD process.

37. At this stage, there does not appear to be strong evidence that VAD schemes would be subject to abuse. In Victoria, the VAD scheme has been in operation for more than three years. In accordance with the Victoria’s Voluntary Assisted Dying Review Board (June 2021) report, it stated that 836 people had been assessed for edibility to access VAD, with only 331 people taking the prescribed medications.⁴² The Review Board also found no evidence of the Scheme’s abuse with no cases being referred for investigation

Conscientious objections

38. The VAD Bill, like all other states that have legalised VAD, enables medical practitioners to refuse to participate in the VAD scheme if they hold a conscientious objection.⁴³ The ALA considers that medical practitioners should be allowed to conscientiously object to VAD and should not be forced to participate in any VAD scheme. The ALA recognises that there is a wide range of personal views and beliefs that will determine whether individuals support the introduction of a VAD scheme in New South Wales, including within the health profession. The ALA strongly believes that the personal beliefs and values held by medical practitioners

⁴⁰ *Voluntary Assisted Dying Act 2021* (Qld) s 141.

⁴¹ *Voluntary Assisted Dying Bill 2021* (NSW) s 124.

⁴² Victoria’s Voluntary Assisted Dying Review Board (June 2021) report, available at: <https://www.bettersaferecare.vic.gov.au/reports-and-publications/voluntary-assisted-dying-report-of-operations-january-to-june-2021>

⁴³ *Voluntary Assisted Dying Bill 2021* (NSW) ss 9, 21(2)(a), 32(2)(a).

should not be devalued by their forced participation in a VAD scheme. Inclusion of these clauses would also ensure consistency with medical codes of conduct.⁴⁴

39. However, the ALA also strongly supports the current requirements in the VAD Bill for medical practitioners to immediately advise a person of their conscientious objection.⁴⁵ The ALA also supports the requirement for medical practitioners who refuse to act as a coordinating practitioner following a person's first request, to provide the person with information as approved by the Health Secretary.⁴⁶ The ALA is of the view that the information provided should include information that assists the person to navigate referral services that are available to assist with VAD. This will promote the autonomy of persons to make their own decisions about their end of life options and to ensure that medical and health practitioners' personal views about VAD do not adversely impact on the care of their patients and prevent their access to a lawful end of life option.
40. The VAD Bill, like the legislation in Victoria, Tasmania and South Australia does not require a practitioner who conscientiously objects to VAD to refer the patient to another practitioner that is willing to engage with the scheme.⁴⁷ It should be noted that a requirement for practitioners to refer a person to another practitioner in these circumstances is consistent with concepts of good medical practice in codes of conduct and medical ethics.⁴⁸ The ALA supports legislation that ensures a person is not prevented from accessing information about VAD or that prevents access to the Scheme.

⁴⁴ Medical Board of Australia, *Good medical practice: A code of conduct for doctors in Australia* (at March 2014) rr 2.4.6-7.

⁴⁵ Voluntary Assisted Dying Bill 2021 (NSW) ss 21(5), 32(5).

⁴⁶ Voluntary Assisted Dying Bill 2021 (NSW) ss21(5)(b)

⁴⁷ *Voluntary Assisted Dying Act 2017* (Vic); *End-of-Life Choices (Voluntary Assisted Dying) Act 2021* (Tas); *Voluntary Assisted Dying Act 2021* (SA), but see *Voluntary Assisted Dying Act 2021* (Qld) 84(2); *Voluntary Assisted Dying Act 2019* (WA) s 20(2)(a), (4)(b), (5).

⁴⁸ Medical Board of Australia, *Good medical practice: A code of conduct for doctors in Australia* (at March 2014) r 2.4.6.

Conclusion

41. The Australian Lawyers Alliance (ALA) welcomes the opportunity to have input into the inquiry into the provisions of the Voluntary Assisted Dying Bill 2021. The ALA would also welcome the opportunity to appear before the Committee at the scheduled hearing for this inquiry.

A handwritten signature in black ink, appearing to read 'G. Droppert', is centered within a light gray rectangular box.

Graham Droppert SC

President

Australian Lawyers Alliance