



# Voluntary Assisted Dying Bill 2017

## *Summary for VHA members*

**27 September 2017**

### **Background**

In 2015 the Legislative Council's Legal and Social Issues Committee conducted an Inquiry into End of Life Choices, which, when completed, provided a range of policy directions for end of life care and included a recommendation to legalise assisted dying.

The Voluntary Assisted Dying Ministerial Advisory Panel (the Panel) was given the responsibility of developing a voluntary assisted dying (VAD) framework for Victoria.

The Panel conducted a broad community and sector consultation via discussion papers and roundtable forums, which resulted in an interim report that was delivered to the Minister for Health in May 2017.

The VHA's submission to this consultation process can be accessed [here](#).

The final report, published on Friday 21 July, provided the Victorian Government with 66 recommendations across five domains to introduce a VAD service in Victoria.

The VHA produced a Bulletin summarising the report and its recommendations which can be accessed [here](#).

On 21 September the Minister for Health, the Hon Jill Hennessy, gave the second reading speech of the Voluntary Assisted Dying Bill 2017 (the Bill). The Bill and its accompanying explanatory memorandum have been published on the Victorian Parliament's website and can be accessed [here](#).

### **Next steps**

Members of the Legislative Assembly will debate the Bill on 17 October 2017.

If the Bill successfully passes Parliament, there will be an 18 month period prior to the legislation commencing, during which time health services would be expected to decide their level of involvement in VAD and to work with the appropriate entities, including Safer Care Victoria, the Department of Health and Human Services (the department) and the Voluntary Assisted Dying Review Board (the board) to establish and refine various frameworks to guide the implementation of VAD.



## Eligibility criteria

The following criteria must be met before a person can access VAD, namely that a person must:

- be an adult, 18 years and over; and
- be an ordinary resident of Victoria and an Australian citizen or permanent resident; and
- have decision making capacity in relation to VAD; and
- be diagnosed with an incurable disease, illness or medical condition, that:
  - is advanced, progressive and will cause death; and
  - is expected to cause death within weeks or months, but no longer than 12 months; and
  - is causing suffering to the person that cannot be relieved in a manner the person deems tolerable.

Disability or a mental illness alone does not satisfy the criteria for access to VAD services, however, they do not exclude a person from accessing VAD.

## Decision making capacity

For the purpose of the Act, a person is considered to have decision making capacity in relation to VAD if the person is able to:

- understand the information relevant to the decision about accessing VAD and the effect of the decision; and
- retain that information for the extent necessary to make the decision; and
- use or weight that information as part of the process of making the decision; and
- communicate the decision and the person's views and needs in some way, including by speech, gestures or other means.

If the coordinating medical practitioner is unable to determine whether the person has decision making capacity in relation to VAD, they must refer the person to a registered health practitioner who has the appropriate skills and training.

## Conscientious objection

A registered health practitioner who has a conscientious objection to VAD has the right to refuse to do any of the following:

- a) to provide information about voluntary assisted dying;
- b) to participate in the request and assessment process;
- c) to apply for a voluntary assisted dying permit;
- d) to supply, prescribe or administer a voluntary assisted dying substance;
- e) to be present at the time of administration of a voluntary assisted dying substance;
- f) to dispense a prescription for a voluntary assisted dying substance.



There is an intentional semantic distinction when describing the process for health services in regards to their participation in VAD. Conscientious objection relates to the practitioner's professional obligations, whereas a health service is expected to assess which medical treatments it can safely provide, and make decisions, as an organisation, about whether to provide access to those treatments, including VAD.

## The request and assessment process

### Who can make a request for VAD

A request for access to VAD can only come from the person seeking VAD. No other person – doctor, family member or a carer, for example – can initiate a request.

Importantly, there is a clear distinction between a *request for access to* and a *discussion about* VAD. In both cases, a health practitioner with whom the person has a therapeutic relationship cannot initiate either a request for or a discussion about VAD.

The entire process remains voluntary and a person is able to withdraw from it at any stage. If they choose to withdraw from the process, they will have to commence the process from the beginning should they make a subsequent request for VAD.

People from CALD backgrounds and those with other barriers to verbal communication can be assisted by appropriately accredited interpreters in making verbal and written requests for VAD.

### Receiving a request for VAD

Two medical practitioners must undertake independent assessments of a person's eligibility for VAD, with their roles clearly defined as:

- the coordinating medical practitioner; and
- the consulting medical practitioner.

Both practitioners must hold a fellowship with a specialist medical college (or be vocationally registered) and:

- must have at least five years of post-fellowship practice experience; and
- at least one must have expertise in the person's disease, illness or medical condition.

Both practitioners must complete a specified assessment training before undertaking an assessment of a person's eligibility for access to VAD.

The Bill states that if the coordinating medical practitioner is unable to determine whether the person's illness, disease or medical condition meets the requirements of the eligibility criteria, the coordinating medical practitioner must refer the person to a specialist medical practitioner who has the appropriate skills and training in that disease, illness or medical condition.

### Making a request for VAD



A person must make three separate requests to access VAD, consisting of a first request, followed by a written declaration of enduring request, and then a final request.

The formal process of requesting VAD would proceed as follows:

1. The person makes their first request to a medical practitioner, who then accepts the role of coordinating medical practitioner.
2. The person undergoes a first eligibility assessment by the coordinating medical practitioner. If the coordinating medical practitioner is satisfied that the person meets all of the eligibility criteria, they must notify the person and, within seven days, complete the first assessment report form and give that to the board.
3. The coordinating medical practitioner then refers the person to a second registered medical practitioner. If the second medical practitioner accepts the referral, they then assume the role of consulting medical practitioner.

If they do not accept the role, the coordinating medical practitioner must refer the person to another registered medical practitioner who will decide whether or not to accept the role of consulting medical practitioner.

4. The person undergoes a second eligibility assessment by the consulting medical practitioner. If the consulting medical practitioner is satisfied that the person meets all of the eligibility criteria, they must notify the person of the outcome, and complete the requisite forms and provide them to the coordinating medical practitioner and the board.

If the consulting medical practitioner assesses the person and is not satisfied that they meet the eligibility criteria, the coordinating medical practitioner may refer the person to another registered medical practitioner for an assessment from another consulting medical practitioner.

5. If the person has been assessed as eligible by both the coordinating and the consulting medical practitioners, the person then makes a witnessed written declaration of enduring request to the coordinating medical practitioner.

The declaration must specify that the person makes the declaration voluntarily and without coercion, and understands the nature and the effect of the declaration. The signing must be witnessed by two people and the coordinating medical practitioner. Of the two witnesses, one must not be a family member. Both must be 18 years and over and cannot be:

- a person who would receive a financial or other material benefit resulting from the person's death; or
- an owner or operator of a health care facility in which the person resides; or
- directly involved in providing health or professional care services to the person.



6. The person makes a final request to the coordinating medical practitioner. This request can be made verbally, by gestures or other means of communication available to that person. The final request must be made at least nine days after the day on which the person made the first request, and at least one day after the consulting medical practitioner assessed the person as being eligible to access VAD.

The nine day period does not apply if the coordinating medical practitioner considers the person's death is likely to occur before the expiry of that period.

7. After making the final request, the person must appoint a contact person who will be responsible for returning any unused or remaining VAD substance to a pharmacist within one month of the person's death, or if the person makes a request to have the substance administered by the coordinating medical practitioner.
8. After receiving the final request, the coordinating medical practitioner must review all relevant forms, complete a final review form and certify whether the request and assessment processes have been completed as required by the Act. Copies of these forms must be given to the board within seven days.
9. If the coordinating medical practitioner certifies that the processes have been completed as required by the Act, they may then apply for a VAD permit for the person.
10. If the permit is issued, the VAD substance can be sourced from a pharmacy and administered in accordance with the authority set out in the relevant permit.

### Voluntary assisted dying permits

The coordinating medical practitioner may apply to the Secretary of the Department of Health and Human Services for a VAD permit (the permit).

There are two distinct permit types:

- A self-administration permit, which is issued to a person who intends to self-administer the VAD substance; or
- A practitioner administration permit, which is issued to a person who is physically incapable of the self-administration or digestion of the VAD substance.

Both permits are distinct from each other, in that a person who has been issued a self-administration permit may only use the VAD substance in accordance with the authority set out in that permit. A self-administration permit would not authorise the coordinating medical practitioner to administer the substance.

If, for example, a person who has been issued with a self-administration permit loses the ability to self-administer the VAD substance, they can make a personal request to their coordinating medical practitioner to apply for a practitioner administration permit, which would effectively replace the self-administration permit.



The Secretary may grant the permit, however, it is within the Secretary's powers to refuse to issue a permit if the Secretary is not satisfied the request and assessment process has been completed as required by the Act.

### **Completing the VAD process**

Once the request is confirmed by the coordinating medical practitioner, a number of formal protections and process requirements will apply, including:

- A requirement for any prescribed VAD substances to be stored in a locked box.
- Ensuring that health practitioners are not precluded from being present at the time of self-administration of the medication and that those who are present at this time are protected.
- Where self-administration is not possible and both the coordinating and consulting practitioners conscientiously object to administering the medication, there are provisions for a new consulting practitioner to be identified. Once the new practitioner has undertaken their own assessment, the formal role can be transferred to them.
- In either case, if the coordinating or consulting practitioner administers the lethal medication, an independent witness must be present and has to certify that the person's request appears to be voluntary and enduring.
- It will be mandatory for medical practitioners to report to the board within seven days of:
  - completing the first assessment (regardless of the outcome);
  - completing the second independent assessment (regardless of the outcome);
  - completing the certification for authorisation (which will incorporate the written declaration of enduring request and appointment of contact person forms); and
  - when the lethal dose of medication is administered by a medical practitioner.
- To ensure consistency of reporting by medical practitioners, all relevant forms will be set out in the Act.

## **Oversight**

### **Review by the Victorian Civil and Administrative Tribunal (VCAT)**

Eligible applicants may apply to VCAT for review of decisions relating to either the person's residency status or their decision-making capacity.

For the purpose of the Bill, an 'eligible applicant' means a person subject to a decision in relation to residency and decision making capacity, an agent of that person, or any person who VCAT is satisfied has a 'special interest' in the medical treatment or care of the person.

Once an application is made to VCAT, no further action may be taken in relation to the assessment or certification of the person's request for VAD, with two key exceptions: the authorisations granted under the self-administration permit to possess, store or use a VAD substance, or for the nominated contact person to return it to a pharmacist.



The practical effect is that any person who has progressed through the requisite stages of the review and assessment process and has been prescribed the VAD substance may self-administer the substance regardless of a VCAT application.

### **Monitoring the death**

Regulatory and oversight controls will be established and maintained. Key processes include:

- The death certificate of a person who has accessed VAD would identify the underlying disease, illness or medical condition as the cause of death.
- A medical practitioner who certifies death must notify the Registrar of Births, Deaths and Marriages if they are aware that the person had been prescribed a VAD substance, or if they are aware the person had self-administered a VAD substance.
- Both the Registrar of Births, Death and Marriages and the board will share information about VAD.
- Any deaths by means of VAD in accordance with legislative requirements would not be considered a reportable death for the purpose of the Coroners Act.

### **Voluntary Assisted Dying Review Board**

A Voluntary Assisted Dying Review Board will be established under statute. The board will review every case of VAD and report on the operation of VAD in Victoria.

The board's functions will include (but will not be limited to):

- Monitoring matters related to VAD
- Reviewing the exercise of any function or power under the Act
- Providing reports to each house of parliament on the operation of the Act and any recommendations for the improvement of VAD
- Promoting compliance with the requirements of the Act by the provision of information in respect of VAD to registered health practitioners and members of the community
- Referring any issue identified by the board in relation to VAD that is relevant to the following parties:
  - the Chief Commissioner of Police
  - the Registrar of Births, Deaths and Marriages
  - the Secretary of the Department of Health and Human Services
  - the State Coroner
  - the Australian Health Practitioner Registration Agency
- Promoting continuous improvement in the quality and safety of VAD
- Consulting and engaging with any of the following in relation to VAD:
  - the Victorian community
  - relevant groups or organisations
  - government departments and agencies
  - registered health practitioners who provide VAD services
- Providing advice to the Minister or Secretary in relation to the Act.



Members of the board would be appointed by the Minister for Health.

### **Monitoring of VAD and the Act**

The board will provide an annual report on the operation of the Act to the Parliament. In addition to its annual report process, the board will report on the operation of the Act every six months for the first two years of the implementation of the Act.

The VAD Act will be reviewed five years after its commencement.

### **Protections and obligations**

A range of protections have been specified in the Bill with direct application for both registered medical practitioners, members of the public and employers of registered medical practitioners, i.e. health services.

#### **Mandatory notification by a registered health practitioner**

A registered health practitioner (the **first health practitioner**) must notify AHPRA as soon as practicable after forming a belief on reasonable grounds, that another registered health practitioner (the **second health practitioner**) who provides health services or professional care services to a person, is either:

- initiating a discussion or attempting to initiate a discussion with the person about VAD
- in substance, suggesting or attempting to suggest VAD to the person
- offering to provide or attempting to provide access to VAD.

A failure by a first health practitioner to notify AHPRA will constitute unprofessional conduct.

#### **Mandatory notification by the employer, including health services**

Health services that employ registered health practitioners are required to report any contraventions of the Act (as described above) to AHPRA.

#### **Protection from liability for persons making notifications**

A person who makes a notification in good faith will not be personally liable for any loss, injury or damage suffered by another person merely because of the notification.

Making a notification will not constitute a contravention of professional etiquette or ethics or a departure from accepted standards of professional conduct.

There will be no liability for defamation incurred as a result of making a notification or giving information to support it.





### **Protection from criminal liability of a person who assists or facilitates the request for or access to VAD**

The Act protects a person who in good faith assists or facilitates any other person who they believe on reasonable grounds is requesting or accessing VAD, even if that act would constitute an offence at common law or under any other enactment.

Further to this protection, a registered health practitioner who, in good faith and in reasonable belief that they are acting in accordance with the Act, will not be:

- guilty of an offence; or
- liable for unprofessional conduct or professional misconduct; or
- liable in any civil proceeding; or
- liable for contravention of any code of conduct.

### **Protection for registered health practitioners or ambulance paramedic present after a person has administered a VAD substance**

A registered health practitioner or ambulance paramedic who, in good faith, does not provide life-saving or life sustaining medical treatment to a person they believe on reasonable grounds to have self-administered a VAD substance will not be:

- guilty of an offence; or
- liable for unprofessional conduct or professional misconduct; or
- liable in any civil proceeding; or
- liable for contravention of any code of conduct.

These protections do not preclude the provision of medical treatments for the purpose of the person's comfort.

Section 463B of the Crimes Act 1958<sup>1</sup> does not apply to a person who knows or believes on reasonable grounds that a person is accessing VAD in accordance with the Act.

## **Offences**

A number of offences will apply for contravention of the Act.

### **Not-complying with a practitioner administration permit**

A coordinating medical practitioner who does not comply with the requirements of the practitioner administration permit can face a level one imprisonment (life sentence).

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<sup>1</sup> *Crimes Act 1958 (Vic)* S 463B: Every person is justified in using such force as may reasonably be necessary to prevent the commission of suicide or of any act which he believes on reasonable grounds would, if committed, amount to suicide. [http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/vic/consol\\_act/ca195882/s463b.html](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/vic/consol_act/ca195882/s463b.html)



An example of a circumstance where this might apply includes when a person to whom a practitioner administration permit has been issued loses the ability to make an administration request, no longer has decision making capacity or is under influence or coercion from another person – any of which would render the person ineligible to continue with the VAD process – and their coordinating medical practitioner continues to administer the VAD substance with the intent to cause the person's death.

#### **Administering a VAD substance to another person**

A person who knowingly administers a VAD substance to another person faces a level one imprisonment (life sentence). This offence does not apply to a coordinating medical practitioner who is acting within the authority granted by a practitioner administration permit.

#### **Inducing another person to request VAD**

A person who, by dishonesty or undue influence, induces another person to make a request for VAD faces a level six imprisonment (five years maximum sentence) or 600 penalty units or both. For the purpose of this offence, 'request' is taken to mean any of the formal request points set out in the VAD access process.

#### **Inducing a person to self-administer a VAD substance**

A person who, by dishonesty or undue influence, induces another person to self-administer a VAD substance faces a level six imprisonment (five years maximum sentence) or 600 penalty units or both.

#### **Criminal liability of officers of bodies corporate – failure to exercise due diligence**

If a body corporate commits an offence (e.g. those set out above, except those relating to non-compliance with a practitioner administration permit or administering a VAD substance to another person), an officer of the body corporate also commits an offence if the officer failed to exercise due diligence to prevent the commission of the offence.

**Note:** it is unclear at this stage whether the definition of 'body corporate' applies to public hospitals, public health services and multipurpose services. The VHA is seeking advice and will update this resource once further information is available.

### **Contact**

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