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Health, aged care and retirement living briefing

Voluntary assisted dying in South Australia: issues for the aged care, retirement and disability sectors

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South Australians will be able to access voluntary assisted dying from **31 January 2023**.

If you are a person or an organisation who might have a conscientious objection to participating in aspects of voluntary assisted dying then now is the time to consider your position on this issue.

Regardless of whether you or your organisation conscientiously object to participation in voluntary assisted dying, you and your organisation may still be impacted by the new laws. Your organisation should consider whether it has appropriate policies and procedures in place.

Who can conscientiously object?

Under the *Voluntary Assisted Dying Act 2021* (SA), the persons and organisations who can conscientiously object to participating in aspects of voluntary assisted dying include:

- registered health practitioners;
- operators of private facilities where people do not reside (referred to as "health service establishments"), namely:
    - operators of private hospitals;
    - operators of private facilities operated or designed to provide diagnosis or treatment;
    - operators of private facilities operated or designed to provide nursing, rehabilitative, palliative, convalescent or preventative care;
- operators of, and providers at, private facilities where people do reside (referred to as "prescribed residential premises"), namely:
    - operators of nursing homes, hostels or other facilities at which accommodation, nursing or personal care are provided to persons on a residential basis who, because of infirmity, illness, disease, incapacity or disability, have a need for nursing or personal care (and we say that this definition will include supported residential facilities);
    - operators of residential aged care facilities;
    - operators of retirement villages;
    - home care providers, to the extent that they provide care in retirement villages or supported residential facilities (or similar);
    - NDIS providers, to the extent that they provide care in retirement villages, supported residential facilities (or similar) and residential aged care facilities;
    - other professional providers of disability services, special or personal care or support or assistance, to the extent that they provide care in retirement villages, supported residential facilities (or similar) or residential aged care facilities.

Stages of the voluntary assisted dying process

As a general summary, we have broken up the voluntary assisted dying process into the following stages:

(a) a person might access information about voluntary assisted dying;

(b) *first request*: A person can make a request to a first medical practitioner for access to voluntary assisted dying. A health practitioner must not, in the course of providing professional services, initiate a discussion about voluntary assisted dying;

(c) the first medical practitioner accepts (or refuses) the request;

(d) *first assessment*: that first medical practitioner, now known as the coordinating medical practitioner, must assess whether the person is eligible. This might include obtaining an opinion from another specialist medical practitioner;

(e) if the person is eligible, the coordinating medical practitioner must provide the person with information;

(f) the coordinating medical practitioner must notify the person (and the Voluntary Assisted Dying Review Board) of the outcome of the first assessment;

(g) the coordinating medical practitioner refers to the person to a second medical practitioner;

(h) the second medical practitioner accepts (or refuses) the request;

(i) *consulting assessment*: that second medical practitioner, now known as the consulting medical practitioner, must assess whether the person is eligible. This might include obtaining an opinion from another specialist medical practitioner;

(j) if the person is eligible, the consulting medical practitioner must provide the person with information;

(k) the consulting medical practitioner must notify the person (and the coordinating medical practitioner and the Voluntary Assisted Dying Review Board) of the outcome of the consulting assessment;

(l) *written declaration*: if assessed as eligible by both the coordinating and consulting medical practitioners, the person may make a written declaration requesting access to voluntary assisted dying. Making such a declaration requires the presence of witnesses and the coordinating medical practitioner;

(m) *final request*: the person makes a final request for access to voluntary assisted dying to the consulting medical practitioner. Minimum periods of time must have elapsed since the first request and since the consulting assessment;

(n) a contact person who is appointed by the person, whose role will involve returning unused voluntary assisted dying substances to the pharmacy after the person's death;

(o) *final review*: the coordinating medical practitioner must review the documents, certify whether the process has been correctly followed and then provide documents to the Voluntary Assisted Dying Review Board;

(p) *application for a permit*: the coordinating medical practitioner may apply for a self-administration permit (if the person is capable of administering the voluntary assisted dying substance to themself) or a practitioner-administration permit;

(q) the Chief Executive of the Department for Health and Wellbeing decides whether to issue the permit;

(r) *prescription and dispensing*: the coordinating medical practitioner and dispensing pharmacist provide information upon prescribing and dispensing, respectively, a voluntary assisted dying substance;

(s) *administration of a substance*: if the permit is a self-administration permit then the person can administer the substance to themselves;

(t) if the permit is a practitioner-administration permit, the person can request (in front of a witness) that the practitioner administer the substance, which then occurs.

After the person's death, there are then further steps involving paperwork and returning unused substances to the pharmacy.

Conscientious objections by health practitioners

A health practitioner who has a conscientious objection has the right[1] 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.

Health practitioners should be aware that they may be ethically obliged (with professional conduct consequences if they do not comply with those obligations) to disclose their conscientious objection to patients and to not impede access to voluntary assisted dying.[2] The proper approach for a practitioner who has a conscientious objection may be to suggest that the patient sees a different practitioner.

Conscientious objections involving private facilities where people do not reside ("health service establishments") – eg, private hospitals and private clinics

An operator of a health service establishment has the right to refuse to authorise or permit the carrying out, at such an establishment, any part of the voluntary assisted dying process in relation to any patient at the establishment.[3] This includes any requests and assessments as part of the process.

The operator may include in its terms and conditions of accepting a patient into the establishment that the patient:

- understands and accepts that the operator will not permit the establishment to be used for the purposes of, or incidental to, voluntary assisted dying; and
- agrees, as a condition of entry, that they will not seek or demand access to voluntary assisted dying at the establishment.

If a patient at an establishment (where the operator does have a conscientious objection) advises staff that they do wish to access voluntary assisted dying then:

- the patient must be advised of the operator's refusal to authorise or permit the carrying out of any part of the voluntary assisted dying process at the establishment;
- the operator must have arrangements in place where the patient may be transferred to another

[1] Under section 10 of the *Voluntary Assisted Dying Act 2021*.
[2] See, for example, *Good medical practice: a code of conduct for doctors in Australia* at section 3.4 (Decisions about access to medical care), as published by the Medical Board of Australia.
[3] See section 11 of the *Voluntary Assisted Dying Act 2021*.

establishment where there is likely to be a health practitioner (who does not have a conscientious objection) who can participate in the voluntary assisted dying process with the patient; and

- the operator must take reasonable steps to transfer the patient to the other facility, if the patient requests this.

These conscientious objection provisions do not apply to patients accepted into the establishment prior to the commencement date (31 January 2023).

Conscientious objections involving private facilities where people do reside ("prescribed residential premises") – eg, retirement villages, residential aged care facilities and supported residential facilities

An operator or provider who does not provide services associated with voluntary assisted dying at a facility[4] must publish information about the fact that it does not provide such services.[5] The operator or provider must publish the information in a way in which it is likely that the residents who receive its services, or who may receive its services in the future, become aware of that fact.

Accordingly, we consider that an operator or provider that conscientiously objects should provide notices personally to current residents (by the time the law comes into operation on 31 January 2023) that it will not provide services associated with voluntary assisted dying. Future residents might be notified by way of notice in their contracts. If an operator simply puts notices up within its facility, or publishes a notice on its website, it might be difficult to establish that those notices will likely have come to the attention of all residents.

The wording of the *Voluntary Assisted Dying Act 2021* also imposes these same obligations on external care providers that provide personal care services in retirement villages, supported residential care facilities, hostels, nursing homes and residential aged care facilities.[6]

Generally, residents have the right to participate in the voluntary assisted dying process and operators and providers either need to not impede this or, in some circumstances, need to take steps to assist the residents.[7] Such assistance might be outside of the ordinary scope of the relationship (eg, retirement village operators needing to arrange for residents to be transported to medical appointments). There are some differences depending upon whether the resident is a permanent one or a temporary one. In some circumstances where the resident is temporary then steps can be taken to temporarily transfer the resident outside of the facility for that step.

[4] The definition of facility includes a retirement village – see section 15 of the *Voluntary Assisted Dying Act 2021*.
[5] See section 25 of the *Voluntary Assisted Dying Act 2021*.
[6] Under sections 3, 15 and 25 of the *Voluntary Assisted Dying Act 2021*.
[7] See sections 15 to 24 of the *Voluntary Assisted Dying Act 2021*.

Other obligations on practitioners, operators and providers

It is worth noting that there are various obligations on practitioners, operators and providers associated with voluntary assisted dying, which you or your organisation might be caught by even if you are conscientious objectors.

If a first health practitioner initiates a discussion with a person about voluntary assisted dying (or suggests voluntary assisted dying), that is unprofessional conduct.[8] It must always be the person (ie, patient) who initiates the discussion. There are also mandatory notification provisions associated with this. If a second health practitioner forms a belief on reasonable grounds that the first health practitioner has initiated a discussion (or suggested voluntary assisted dying), then that second health practitioner must notify AHPRA as soon as practicable or else that second practitioner is also engaging in unprofessional conduct.[9] The employer of the first health practitioner is similarly required to report that health practitioner to AHPRA if it forms a belief on reasonable grounds that the first health practitioner has initiated a discussion (or suggested voluntary assisted dying).[10]

Practitioners, operators and providers who have any involvement in voluntary assisted dying should be aware that there are various offence provisions in the *Voluntary Assisted Dying Act 2021*, from failing to properly deal with paperwork to illegally administering a substance, with penalties ranging up to imprisonment for life.[11] If a corporate body has committed an offence, its directors, secretaries and other persons who have capacity or influence on the directors, as well as its managers, can also be liable if they have failed to exercise due diligence to prevent the commission of the offence by the body corporate.[12]

Accordingly, we recommend that organisations involved in voluntary assisted dying put policies and procedures in place, to ensure that due diligence is being exercise, prior to the law coming into operation (on 31 January 2023). However, there is currently uncertainty whether distributing, or making available, such policies and procedures to patients or residents on an unsolicited basis might constitute unprofessional conduct by any health practitioner involved.

We also note that there is a confidentiality provision which restricts the disclosure of information obtained in the course of the administration or operation of the *Voluntary Assisted Dying Act 2021*.[13] This is consistent with voluntary assisted dying being a private health matter. It is also an offence to victimise someone who provides information under the *Voluntary Assisted Dying Act 2021*, and a person or organisation engaging in such victimisation can also be sued.[14]

[8] Under section 12 of the *Voluntary Assisted Dying Act 2021*.
[9] See section 90 of the *Voluntary Assisted Dying Act 2021*.
[10] See section 91 of the *Voluntary Assisted Dying Act 2021*.
[11] See Part 9 of the *Voluntary Assisted Dying Act 2021*.
[12] See section 106 of the *Voluntary Assisted Dying Act 2021*.
[13] See section 125 of the *Voluntary Assisted Dying Act 2021*.
[14] See section 126 of the *Voluntary Assisted Dying Act 2021*.

An organisation's policies and procedures should also consider the practical aspects of process. What will happen if the organisation supports voluntary assisted dying but a particular staff member objects to being involved? What will happen if a staff member is asked to be a witness or otherwise participate in the process? What involvement will the organisation have in the storage of the substance? What obligation will the organisation place on the person to communicate what is happening (so, for example, staff do not attempt to resuscitate a person who has self-administered the substance)? What support will be in place for family, friends, other patients or residents and staff? Is the organisation's position consistent with other mandatory requirements (eg, the requirement of residential aged care facilities to provide assistance to residents in obtaining health practitioner services)? How should staff respond to questions, noting the impact on the relationships between staff and patients or residents if staff are directed to answer "we are not allowed to discuss that".

Conclusion

We recommend that organisations consider their position in relation to whether they conscientiously object to involvement in voluntary assisted dying.

If an organisation will become involved in voluntary assisted dying (whether by its own choice, or by being drawn into it by a person who it provides services to), it should review its policies and processes to ensure that appropriate safeguards are in place to protect the organisation, its officers and staff.

Whilst SA Health has published some helpful guidance on this issue, we are always happy to assist aged care, retirement and disability organisations in ensuring that their governance is appropriate.

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