

Voluntary assisted dying in Western Australia

Frequently Asked Questions – Section 106 of the *Voluntary Assisted Dying Act 2019* and clinical documentation

Section 106 of the *Voluntary Assisted Dying Act 2019* (the Act) states 'A person must not, directly or indirectly, record, use or disclose information obtained by the person because of a function that the person has, or at any time had, under this Act'. The penalty for an offence under this subsection is imprisonment for 12 months. It is important that healthcare services, health practitioners and other people involved in the provision of Voluntary Assisted Dying (VAD) assessment and administration understand their responsibilities under the Act, and are aware of when disclosures of information are permitted and prohibited.

Key points

- A person fulfilling a role under the Act could be considered broader than only the coordinating, consulting or administering practitioner.
- Disclosures are permitted under section 106(2)(a) of the Act where a person is fulfilling a role under the Act. This may sometimes be unclear.
- Disclosures are also allowed under section 106(2)(f) of the Act when they have been specifically consented to by the patient or the administrator/executor of their estate.
- All health services are recommended to create standardised patient consent documents considering the aspects of care they provide and where disclosures of personal information may be necessary.
- The Act includes protections from civil and criminal liability for a person who in good faith, and with reasonable care and skill, does a thing in accordance with the Act, or believes the thing is done in accordance with the Act.

1. Who could be considered a person fulfilling a role under the Act?

While the coordinating, consulting or administering practitioner are clearly fulfilling a role under the Act, other people may also meet this threshold. Specifically, any person who is providing substantial assistance to a coordinating, consulting or administering practitioner as they fulfil their role could be seen as fulfilling a role under the Act. This could include people who are working in administrative roles, such as a Hospital Voluntary Assisted Dying Coordinator or a Care Navigator.

2. What can be entered in patient notes regarding the VAD process?

The Act requires certain components of the voluntary assisted dying process to be documented in patient notes – namely the first request, consulting assessment, written declaration, final request and administration decision. In principle, it is acceptable to document standard clinical information surrounding these patient interactions including evidence of the conversation that transpired and other ancillary notes. Documentation of a first assessment is not required under the Act, however it is at the discretion of the coordinating practitioner to record information around this component.

3. Can I document a comprehensive clinical summary in patient notes?

The determination of patient eligibility for voluntary assisted dying is a core function of the coordinating and consulting practitioner. Where more comprehensive information is documented, such as a clinical summary or comprehensive rationale for eligibility, it should be clear that this entry relates to the determination of eligibility as required under the Act.

4. What if I'm not a VAD practitioner? Can I mention it on the Goals of Patient Care form?

Health practitioners should be conscious of when they may be fulfilling a role under the Act (see question 1). For example, a practitioner who has declined a first request may still be considered to fit this description, and therefore section 106 of the Act may apply to them. This means the practitioner is not permitted to disclose information relating to the first request without explicit patient consent. It is the responsibility of health practitioners, health services and other people involved in the provision of voluntary assisted dying to understand what scenarios may occur within their workplaces and consider discussing these with affected patients to facilitate informed patient consent.

5. What communication is permitted with other treating teams looking after an individual patient?

A practitioner is permitted under section 106(2)(a) to disclose patient information for the purposes of fulfilling a role under the Act. This may include the coordinating practitioner consulting or advising treating teams around planned administration of a voluntary assisted dying substance to best coordinate the patient's healthcare. Where a disclosure is not for the purposes of a person fulfilling a role under the Act, disclosure may not be appropriate. It is recommended that health practitioners and health services consider when these situations may arise, and discuss with the patient ahead of time to facilitate informed patient consent about communicating with other treating teams.

6. What can I write in a discharge summary?

A discharge summary forms part of the medical record, however it may be more likely to be subject to unintended review outside of a hospital (for example by administrative staff within a GP practice). Disclosure of information relating to a patient participating in the voluntary assisted dying process during a hospital stay may be permitted if the practitioner or person involved is doing so to fulfil a role under the Act. This may be difficult to determine when completing a discharge summary as it will depend on each situation. It is recommended that health services and health practitioners undertake specific discussions with patients who participate in the voluntary assisted dying process during their hospital stay, to facilitate informed patient consent. It is recommended specific discussions be had to enable informed consent to external reviews of a patient's discharge summary.

7. What can I write in a referral?

Referrals are required under the Act to a consulting practitioner, as well as being possible when further assessment is required. These referrals are permitted disclosures under section 106(2)(a) of the Act. However, consideration should be taken about whether these referrals may be viewable by other people for administrative or other purposes. It is recommended that where practitioners will provide referrals under the Act, specific discussion is had to enable informed consent.

8. What about after death? Can these cases be discussed in Morbidity and Mortality meetings?

People may not disclose information that they obtain while fulfilling a role under the Act unless permitted under section 106. This protection to patient confidentiality continues after death. Mortality and Morbidity (M&M) meetings form an important component of patient safety and quality processes, and in line with expected deaths in patients undergoing palliative care, patients who die following voluntary assisted dying substance administration should still be considered for inclusion. However, it is recommended that specific informed consent be sought for this type of disclosure (see question 5).

9. Can I record a patient accessed voluntary assisted dying in our departmental database?

A record of that type contains personal information and best practice includes obtaining patient consent for the recording and use of such information. People who are fulfilling a role under the Act should be particularly conscious of this to avoid breaching section 106. This is due to access of departmental databases potentially being less controlled than medical records. It is suggested that people and health services consider where information could be stored outside of the medical record, and seek specific consent for these situations.

10. Is information about a patient's voluntary assisted dying process subject to the Freedom of Information Act 1982?

The Freedom of Information Act 1982 applies to all information collected under the Act. However, it should be noted that situations may arise where information pertaining to the voluntary assisted dying process may be considered an exempt matter (see *Freedom of Information Act 1992* – Schedule 1). It is recommended that specific advice be sought should a freedom of information request be received.

11. Are there other legal obligations to be aware of?

There are some requirements that may apply to disclosures over a carriage service such as phone, email, internet or video conference etc by virtue of the *Commonwealth Criminal Code Act 1995* (Commonwealth Criminal Code). Further guidance about this is set out in the *Western Australian Voluntary Assisted Dying Guidelines*.

Disclaimer

The information presented in this document is provided in good faith by the Department of Health to provide general guidance to health services and health practitioners on aspects of the *Voluntary Assisted Dying Act 2019*, the *Freedom of Information Act 1982* and the *Commonwealth Criminal Code Act 1995*.

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