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FOR THE AUSTRALIAN CAPITAL TERRITORY

SELECT COMMITTEE ON END OF LIFE CHOICES IN THE ACT

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Submission Cover Sheet

End of Life Choices in the ACT

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Mr Andrew Snedden
Secretary
Select Committee on End of Life Choices in the ACT
Legislative Assembly for the ACT

By email: LACommitteeEOLC@parliament.act.gov.au

Dear Mr Snedden

Submission to the Inquiry into End of Life Choices in the ACT

The ACT Human Rights Commission welcomes the opportunity to provide a submission to this inquiry into End of Life Choices in the ACT.

Our submission focuses on the effect of the *Human Rights Act 2004* (HR Act) in relation to end of life choices in the ACT and in particular, the human rights issues that may arise in relation to voluntary assisted dying legislation in the ACT and how these may be addressed. We have provided an outline of these issues, noting that these will need to be explored in further detail if the Commonwealth legislative impediment to the ACT legislature enacting laws in relation to voluntary assisted dying is removed and an ACT legislative proposal is progressed.

The *Human Rights Act 2004*

The HR Act protects a range of human rights drawn from international human rights law, primarily from the International Covenant on Civil and Political Rights. Rights relevant to end of life choices in the ACT include the right to recognition and equality before the law (s 8), the right to life (s 9), the right to liberty and security of person (s 18) the right to protection from torture and cruel, inhuman or degrading treatment (s 10), the right to privacy (s 12), the right to freedom of thought, conscience, religion and belief (s 14) and the right to take part in public life (s 17). The Act provides that international law and the judgments of foreign and international courts and tribunals may be considered in interpreting human rights (s 31).

These rights are enforced through a number of mechanisms including an obligation on the ACT Attorney-General to prepare and table a statement with each Government bill stating whether the bill is compatible with human rights (s 37). The Supreme Court of the ACT may issue a declaration of incompatibility if it concludes that an existing provision of ACT law cannot be interpreted to be compatible with human rights (s 32). A declaration does not invalidate the provision in question but must be tabled in the Legislative Assembly by the Attorney-General, and a response to the declaration must be prepared and tabled within six months (s 33). The Act also imposes a direct duty on public authorities to act compatibly with human rights and to give proper consideration to relevant human rights in decision making (s 40B).

Limitation on ACT legislative power regarding voluntary assisted dying

In the ACT s 16 of the *Crimes Act 1900* provides that it is not an offence for a person to attempt to commit suicide, however under s 17 a person who aids or abets the suicide or attempted suicide of another person is guilty of a criminal offence punishable by 10 years imprisonment.

The ACT Legislative Assembly is currently prevented by Commonwealth law from enacting voluntary assisted dying legislation that would have the effect of modifying the operation of s 17 of the *Crimes Act*. As a result of the Commonwealth *Euthanasia Laws Act 1997* the *Australian Capital Territory (Self Government) Act 1988* (Cth) was amended to provide in s 23 that:

(1A) The Assembly has no power to make laws permitting or having the effect of permitting (whether subject to conditions or not) the form of intentional killing of another called euthanasia (which includes mercy killing) or the assisting of a person to terminate his or her life.

(1B) The Assembly does have power to make laws with respect to:

- (a) the withdrawal or withholding of medical or surgical measures for prolonging the life of a patient but not so as to permit the intentional killing of the patient; and
- (b) medical treatment in the provision of palliative care to a dying patient, but not so as to permit the intentional killing of the patient; and
- (c) the appointment of an agent by a patient who is authorised to make decisions about the withdrawal or withholding of treatment; and
- (d) the repealing of legal sanctions against attempted suicide.

The effect of s 23 (1A) is that people living in the ACT do not have the ability to seek changes, through their elected representatives, to ACT laws that affect them, to permit voluntary assisted dying, as has occurred in Victoria, and has been debated in NSW. This legislative impediment is of itself a limitation on the human rights of citizens in the ACT to take part in public life. This right has been recognised by the UN Human Rights Committee to relate to the exercise of political power, in particular the exercise of legislative, executive and administrative powers. This right covers all aspects of public administration, and the formulation and implementation of policy at international, national, regional and local levels.¹

Human rights implications of voluntary assisted dying legislation

If the current restriction on the powers of the ACT Legislative Assembly is repealed, it will be necessary to carefully consider human rights issues in relation to voluntary assisted dying, to address current limitations on human rights and to ensure that any proposal for reform is compatible with human rights protected under the HR Act.

¹ UN Human Rights Committee General Comment 25.

Rights limited by a prohibition on assisted suicide

It is arguable that the complete prohibition on assisted suicide in s 17 of the *Crimes Act* amounts to an unreasonable limitation on the right to privacy and potentially of the right to life, right to liberty and security of person and the right to be free from inhuman and degrading treatment.

It is recognised that the right to privacy and private life includes the right of an individual to have control over how and when to end their own life, provided that the person has the capacity to make that decision, and this is reflected in the decriminalisation of attempted suicide in many jurisdictions including the ACT. It has been acknowledged in a line of international cases that a prohibition on assisted suicide limits the right to privacy. As summarised by the UK High Court in *Conway v Secretary of State for Justice*:

[The respondent] accepts that the prohibition against assisting suicide set out in section 2 represents an interference with Mr Conway's right to respect for his private life in Article 8(1). This is now clearly established by authority: see *Pretty v United Kingdom* (2002) 35 EHRR 1, para. 67; *Hass v Switzerland* (2011) 53 EHRR 33, para. 51; *Purdy*; and *Nicklinson*. As stated in *Hass*: "... the right of an individual to decide how and when to end his life, provided the said individual is in a position to make up his own mind in that respect and to take the appropriate action, is one aspect of the right to respect for private life within the meaning of Article 8 of the Convention."²

These cases have recognised that the prohibition creates particular difficulties for people suffering from progressive illness who may lose the ability to action their decision to end their own life at a time of their choosing.

The absence of a voluntary assisted dying regime can also result in a limitation on the right to life where it compels people in situations of terminal illness to take their own life at an earlier stage than they might otherwise choose to, while they retain the ability to take this action for themselves. It may potentially limit the right to be free from cruel, inhuman and degrading treatment where people experience ongoing suffering at end of life stage which is not able to be effectively relieved by palliative care or feel compelled to take painful and protracted measures such as self-starvation to end their lives where they are not able to exercise other choices.

The case law in this area is evolving, and the European Court of Human Rights has not yet gone so far as to find a prohibition on assisted suicide to be an unreasonable limitation on human rights, given that these laws are aimed at protecting the rights of vulnerable people, and the margin of appreciation given to member states. However, the Canadian Supreme Court in *Carter v Canada* has found a blanket prohibition on assisted suicide to be a disproportionate limitation on the right to life, liberty and security of person, as the Court considered that it is possible to provide a regime to allow people to have access to physician assisted dying in limited circumstances, while including sufficient properly designed and administered safeguards capable of protecting vulnerable people from abuse and error. The Court stated that:

The prohibition on physician-assisted dying infringes the right to life, liberty and security of the person in a manner that is not in accordance with the principles of fundamental justice. The object of the prohibition is not, broadly, to preserve life whatever the circumstances, but more specifically to protect vulnerable persons from being induced to commit suicide at a time of weakness. Since a total ban on assisted suicide clearly helps achieve this object, individuals' rights are not deprived arbitrarily. However, the prohibition catches

² [2017] EWHC 2447 (Admin)

people outside the class of protected persons. It follows that the limitation on their rights is in at least some cases not connected to the objective and that the prohibition is thus overbroad.³

Accordingly, if the Commonwealth restriction on ACT legislative power is removed, the limitation in s 17 of the *Crimes Act* may be open to challenge as being incompatible with the HR Act.

Rights that may be limited by voluntary assisted dying legislation and appropriate safeguards

While voluntary assisted dying legislation may better protect the right to privacy in the ACT, and give greater choice and agency to people at the end of life, such laws also have the potential to be incompatible with other rights protected in the HR Act including the right to life and the right to equality. Many people have expressed legitimate fears about the prospect of assisted suicide laws devaluing human life, and the potential for such laws to be abused to encourage people who experience serious illness, or have a disability, to prematurely end their lives. It is critical that any law in this area is strictly confined and includes robust safeguards to ensure that vulnerable people are protected from abuse and error, and that medical practitioners are not required to provide assistance to patients to die where this is contrary to their conscience or religious beliefs. It will be necessary for the Attorney-General to provide a statement regarding compatibility with human rights of any legislative proposal for voluntary assisted dying developed in the ACT.

The Victorian Parliament gave careful consideration to these issues in the process of developing the Victorian voluntary assisted dying legislation, as Victoria, like the ACT has a legislative Charter of human rights which mirrors relevant rights protected here. Human rights issues were considered in detail by the Victorian Parliament's Legal and Social Issues Committee in their Inquiry into End of Life Choices and by the Ministerial Panel on Voluntary Assisted Dying. A compatibility statement was provided with the Voluntary Assisted Dying Bill, and the Scrutiny of Bills Committee also considered these issues in detail.⁴

The final legislation passed by the Victorian Parliament reflects the in-depth consultation process and detailed consideration of human rights, and contains a range of robust safeguards to prevent unreasonable limitation of human rights. In particular these safeguards include:

- Limitation on eligibility to people who are 18 years or older; who have decision making capacity; who have been diagnosed with a disease, illness or medical condition that is incurable, advanced, progressive and will cause death, and is expected to cause death within less than six months (but within 12 months if suffering from a neurodegenerative disease); and who are experiencing suffering that cannot be relived in a manner that the person considers tolerable.
- A person is not eligible for access to voluntary assisted dying if they have a mental illness only, or if they have a disability only. Those with a mental illness and/or a disability, however, are not precluded from taking part if they also fulfil the eligibility criteria above.

³ Carter v. Canada (Attorney General), 2015 SCC 5, [2015]

⁴ Alert digests 14 and 15.

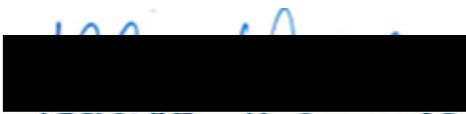
- A person must make the request for access to voluntary assisted dying themselves, and a medical treatment decision-maker, such as a power of attorney, cannot make the decision for the person.
- A health practitioner must not initiate a discussion about voluntary assisted dying nor suggest it to a patient. A person must make a clear and unambiguous request to a medical practitioner to access voluntary assisted dying and may withdraw this request at any time.
- Health practitioners are not required to take part in the process and provision is made for those health practitioners who wish to conscientiously object to voluntary assisted dying.
- A detailed assessment process must be followed, involving two independent medical practitioners, who must give the person a range of relevant information about treatment and palliative care options, and both practitioners must be satisfied that the person understands the information, that they are acting voluntarily and without coercion, and that their request is enduring.
- Both practitioners must notify the Voluntary Assisted Dying Review Board of the outcome of their assessments within seven days of completing them.
- If assessed as eligible, the person may make a written declaration which must be witnessed by two people who are not involved in providing health services or professional care services to the person, and who would not materially benefit from the person's death, and signed in the presence of the coordinating medical practitioner.
- The person must then make a final request, and there must be a delay of at least nine days from the time when the first request was made unless the coordinating medical practitioner is of the view that the person will die before the expiry of that time period.
- A contact person must be appointed to monitor the safekeeping of the voluntary assisted dying substance prescribed and to return any substance that is not used.
- A permit is required for self-administration or practitioner-administration of the voluntary assisted dying substance, and this may only be issued if the Secretary of the Department of Health and Human Services is satisfied that the request and assessment process has been complied with. The permit will only authorise administration through the method specified.
- All deaths under the scheme must be reported to and reviewed by the Voluntary Assisted Dying Review Board.

The narrow eligibility criteria and range of restrictions included in the Victorian legislation in themselves impose limitations on human rights, including the right to equality, as it excludes people under 18, and people experiencing suffering that cannot be relieved but who are not assessed as expected to die within six months (or 12 months if the person has a neurodegenerative disease). However, these limitations are likely to be considered to be reasonable to ensure that the rights of vulnerable people are not abused.

While the Victorian model, and the process that led to the development of this legislation provides helpful guidance about human rights implications of voluntary assisted dying legislation, any legislative proposal in the ACT should reflect the experiences, needs and wishes of this community. It is important that there be widespread consultation in the ACT before any legislative proposal is progressed.

If you have any questions or would like more detailed information on any of the issues raised in this submission, please do not hesitate to contact us on (02) 6205 2222.

Yours sincerely

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Dr Helen Watchirs OAM
President and
Human Rights Commissioner

26 March 2018