LEGISLATIVE ASSEMBLY
FOR THE AUSTRALIAN CAPITAL TERRITORY

SELECT COMMITTEE ON VOLUNTARY ASSISTED DYING BILL
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Submission Cover Sheet

Inquiry into the Voluntary Assisted Dying Bill 2023

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ACT Legislative Assembly Select Committee on Voluntary Assisted Dying Bill 2023

Public Submission: Inquiry into Voluntary Assisted Dying Bill 2023

Thank you for the opportunity to make a submission to the Select Committee Inquiry into the Voluntary Assisted Dying Bill 2023 in the ACT which started on 31 October 2023.

As per the terms of reference, the Select Committee on the Voluntary Assisted Dying Bill 2023 has been appointed by the Assembly to examine the Bill and any other related matters.

I. BACKGROUND

I am an Associate Professor in criminal law and procedure based at the University of Southern Queensland. My research focuses on criminal law and procedure and how it relates to vulnerability, including in the context of voluntary assisted dying ('VAD'). I am the author of several articles in Australian and international journals, which ponder different aspects of VAD.[1]

[1] Kerstin Braun, 'Looking Back to Look Forward—the History of VAD Laws in Australia and Future Law Reform in the Australian Territories' *Medical Law Review* (2023) https://academic.oup.com/medlaw/advance-article/doi/10.1093/medlaw/fwad030/7268822?utm_source=advanceaccess&utm_campaign=medlaw&utm_medium=email&login=true; Anthony Gray and Kerstin Braun, 'Voluntary Assisted Dying, the Conscientious Objector Who Refuses to Facilitate it and Discrimination Law' (2022) 29(4) *Journal of Law and Medicine* 1128; Kerstin Braun, 'Self-Administration or Practitioner Administration? The Scope of Future German Assisted Dying Legislation' (2022) 31(1) *Medical Law Review* 141; Kerstin Braun, 'When Ill Is Not ill Enough — Timeframe Until Expected Death Restrictions in Australian Voluntary Assisted Dying Laws and Human Rights Compatibility' (2022) 28(1) *Australian Journal of Human Rights* 21; Kerstin Braun, 'The Right to Assisted Dying: Constitutional Jurisprudence and Its Impact in Canada, Germany and Austria' (2021) 15(3) *Vienna Journal on*

I have a particular interest in eligibility criteria and modes of administration. Much of my submission below relates to these aspects and I hope that my ideas and comments can be useful for the Select Committee in its Inquiry.

II. No 'Timeframe Until Death' Requirement

One of the main differences between the ACT Voluntary Assisted Dying Bill 2023 ('ACT Bill') and the VAD laws enacted in all Australian States[2] is the absence of a so-called 'timeframe until death' access restriction from the ACT Bill.

To access VAD in Australian States, a person must be diagnosed with a disease, illness or medical condition, which is advanced, progressive and is expected to cause death[3] within six months unless suffering from a neurodegenerative disease, in which case it is no more than 12 months until expected death in Victoria, Western Australia, Tasmania, South Australia and New South Wales.[4] In Queensland death must be expected to occur within 12 months regardless of the nature of the illness, disease or condition.[5]

According to the ACT Bill, to access assisted dying a person must be diagnosed with a condition that, either on its own or in combination with 1 or more other diagnosed conditions, is advanced, progressive and expected to cause death,[6] and the person must suffer intolerably in relation to the relevant conditions.[7] A timeframe until expected death is not required under the ACT Bill.

This approach seems justified for three reasons:

1. There are serious doubts as to whether a timeframe until death restriction would be compatible with the human rights of those wishing to access VAD but not likely to die within the required timeframe. Human rights enshrined in the *Human Rights Act 2004* (ACT) potentially impacted by such a restriction include the right to life, the right to liberty and security and the right to equality. This type of access restriction arguably limits human rights in a way that does not appear reasonable.[8]

International Constitutional Law 291; Kerstin Braun, 'Voluntary Assisted Dying and the Merits of Offence-Specific Prosecutorial Guidelines in Australia' (2021) 45(2) *Criminal Law Journal* 81.

[2] *Voluntary Assisted Dying Act 2017* (Vic) ('Vic VAD Act'); *Voluntary Assisted Dying Act 2019* (WA) ('WA VAD Act'); *Voluntary Assisted Dying Act 2021* (SA) ('SA VAD Act'); *End-of-Life Choices (Voluntary Assisted Dying) Act 2021* (Tas) ('Tas VAD Act'); *Voluntary Assisted Dying Act 2021* (Qld) ('Qld VAD Act'); *Voluntary Assisted Dying Act 2022* (NSW) (NSW VAD Act).

[3] Vic VAD Act s 9(1)(d); WA VAD Act s 16(1)(c); Tas VAD Act s 6(1); SA VAD Act Voluntary Assisted Dying Act 2021 (SA) s 26(1)(d); NSW VAD Act s 16(1)(d)(ii)(B). In Victoria, Tasmania and South Australia the illness, disease or condition must be incurable. In Western Australia and New South Wales it is required that the disease will, on the balance of probabilities, cause death. In Queensland the disease does not have to be incurable but must cause death, Qld VAD Act s 10(1)(a)(i).

[4] Vic VAD Act ss 9(1)(d)(iii), 9(4); WA VAD Act s 16(1)(c)(ii); Tas VAD Act s 6(1)(c); SA VAD Act ss 26(1)(d)(iii), 26 (4); NSW VAD Act s 16(1)(d).

[5] Qld VAD Act s 10(1)(a)(ii).

[6] Voluntary Assisted Dying Bill 2023 (ACT) cl 11(1)(b).

[7] Voluntary Assisted Dying Bill 2023 (ACT) cl 11(1)(c).

[8] For analysis on human rights compliance of timeframe until death access restrictions in the Queensland context see: Kerstin Braun, 'When Ill Is Not Ill Enough—Timeframe Until Expected Death Restrictions in Australian

2. The timeframes until expected death (between 6 and 12 months) enshrined in Australian VAD laws have been selected arbitrarily and are not based on any factors relevant in the Australian context. The six months timeframe which features in most Australian VAD laws is modelled on the *Death with Dignity Act* (Oregon), which, in 1997, was one of the first acts to allow assistance in dying.[9] In Oregon, the six months timeframe was introduced because of access restrictions to funded hospice care. Such access restrictions, however, do not exist in Australia.[10]

3. While not containing a specific timeframe until death restriction, the ACT Bill still requires a person to have an advanced illness or medical condition and be in the last stages of life in order to access VAD. As per clause 11(4) ACT Bill, an individual's relevant conditions are considered advanced if:

> (a) the individual's functioning and quality of life have declined; and
> (b) any treatments that are available and acceptable to the individual lose any beneficial impact; and
> (c) the individual is in the last stages of their life.

Consequently, persons in the ACT, comparable to all other Australian States, can only access VAD if they are in the final stages of their life, even if this is not further restricted by a specific timeframe until expected death. Due to the requirement that the terminal illness must be advanced it does not appear that the ACT Bill protects vulnerable individuals to a lesser degree than VAD laws in other Australian jurisdictions. Yet, by removing the timeframe until death restriction the Bill prevents individuals who meet all other access requirements but for dying within a particular timeframe from suffering intolerably until they meet an arbitrary timeframe.

III. Process For VAD

In comparison to all other Australian VAD laws,[11] the ACT Bill does not require a person to wait a particular number of days between the first and final VAD request. As the assessment process of each request already takes a certain amount of time it seems superfluous to include a specific number of days a person must wait between requests in the ACT VAD law.

IV. Modes of Administration

Choice between Self Administration and Practitioner Administration

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Voluntary Assisted Dying Laws and Human Rights Compatibility' (2022) 28(1) *Australian Journal of Human Rights* 21.

[9] *Death with Dignity Act 1997* (Oregon) 127.800 §1.01(12).

[10] Victorian Ministerial Advisory Panel on Voluntary Assisted Dying, Final Report (Victoria, 2017) 72 https://www2.health.vic.gov.au/about/publications/researchandreports/ministerial-advisory-panel-on-voluntary-assisted-dying-final-report.

[11] Vic VAD Act s 38 (generally 9 days); WA VAD Act s 48(1) (generally 9 days); Tas VAD Act s 53(2) (generally not within 48 hours of the person having made a second request); SA VAD Act s 56 (generally 9 days); Qld VAD Act s 43 (generally 9 days); NSW VAD Act s 49 (generally 5 days).

The ACT Bill in clause 42(1)(a)-(b) contains a true choice between self and practitioner administration. Affording persons wishing to die with assistance this choice upholds a person's agency and autonomy at the end of life.

While a true choice between methods of administration is not available in most Australian States allowing VAD,[12] it has been enshrined in the NSW VAD Act, which commenced operation in November 2023.[13]

In addition, persons wanting to die with assistance in Canada and the Netherlands can choose between self and practitioner administration.[14] The experience in Canada and the Netherlands shows that where given the choice between self and practitioner administration, most persons appear to elect practitioner administration. In 2022, in Canada 13,241 cases of medical assistance in dying were reported[15] with less than 7 cases being self-administration.[16] The situation is similar in the Netherlands where in 2022, 8,720 cases of assisted dying were reported to the Euthanasia Review Committee.[17] Comparable to Canada, the majority of persons in the Netherlands elected for the termination of their life by a practitioner (8,501individuals) while self-administration only occurred in 186 cases and 33 cases comprised a combination of the two forms.[18]

V. The Role of Health Practitioners

In contrast to all other Australian jurisdictions, the ACT Bill enshrines that VAD eligibility assessments can be made by health professionals which includes nurse practitioners under certain circumstances. According to clause 92(3) ACT Bill the coordinating practitioner and the consulting practitioner for an individual must not both be nurse practitioners.

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[12] See Vic VAD Act ss 45, 47; SA VAD Act s 63; WA VAD Act s 56(2); Tas VAD Act s 86(5); Qld VAD Act s 50(2).

[13] See NSW VAD Act s 57.

[14] See *Criminal Code Canada* s 241.1 definition 'medical assistance in dying'; *Termination of Life on Request and Assisted Suicide (Review Procedures) Act 2001* (the Netherlands); Kerstin Braun, 'Self-Administration or Practitioner Administration? The Scope of Future German Assisted Dying Legislation' (2022) 31(1) *Medical Law Review* 141.

[15] Health Canada, Fourth Annual Report on Medical Assistance in Dying in Canada 2022 (2023) 20 https://www.canada.ca/content/dam/hc-sc/documents/services/medical-assistance-dying/annual-report-2022/annual-report-2022.pdf.

[16] Health Canada, Fourth Annual Report on Medical Assistance in Dying in Canada 2022 (2023) 21 https://www.canada.ca/content/dam/hc-sc/documents/services/medical-assistance-dying/annual-report-2022/annual-report-2022.pdf.

[17] Regional Euthanasia Review Committee, Regional Euthanasia Review Committees RTE Annual Report 2022 (2023) 9 https://english.euthanasiecommissie.nl/the-committees/documents/publications/annual-reports/2002/annual-reports/annual-reports.

[18] Regional Euthanasia Review Committee, Regional Euthanasia Review Committees RTE Annual Report 2022 (2023) 9 https://english.euthanasiecommissie.nl/the-committees/documents/publications/annual-reports/2002/annual-reports/annual-reports. In contrast, in Victoria, where only persons who are incapable of self-administering or digesting are eligible for practitioner administration, out of 306 deaths, which occurred under the VAD scheme between 1 July 2022 and 30 June 2023, 257 cases were self-administration while in 49 cases the medication was administered by a medical practitioner. See: Voluntary Assisted Dying Review Board Victoria, Annual Report (July 2022 to June 2023) (Safe Care Victoria, 2023) 5 https://www.safercare.vic.gov.au/sites/default/files/2023-08/VADRB%20Annual%20Report%202022-23.pdf.

While to date nurse practitioners cannot make VAD eligibility assessments in Australian jurisdictions permitting VAD, nurses have been allowed to act as assisted dying assessors and providers in Canada since the introduction of MAiD in 2016. The 2022 Fourth Annual Report on Medical Assistance in Dying in Canada shows that 95.0% of all MAID practitioners were physicians, while 5.0% were nurse practitioners.[19] Yet, nurse practitioners were providing an increasing share of MAID provisions amounting to 9.4% of all MAID procedures.[20]

Hewitt et al argue in the Australian context that nurse practitioners 'already manage complete episodes of care, including assessment, diagnosis, and prescribing treatment' which is why they concluded that VAD assessments are within their 'scope of practice'.[21]

With presumably smaller numbers of medical practitioners in the ACT than in other Australian jurisdictions permitting VAD, enabling nurse practitioners to act as VAD assessors and providers appears a solution for the ACT to ensure equitable access to health practitioners willing to provide assistance in dying.

VI. The Role of Health Services and Facilities

The ACT Bill does not force any facilities to participate in VAD. Yet, it ensures that facilities cannot hinder access. Clause 99 enshrines that if an induvial tells a facility[22] they want information about or access to VAD the facility operator must give the individual, in writing, the contact details for the approved care navigator service.[23]

In addition, unless not reasonably practicable to do so, the facility operator must, with the consent of the individual, allow a relevant person to have reasonable access to the individual at the facility to provide the individual information about voluntary assisted dying or access voluntary assisted dying.[24] Where access is found to be not reasonably practical the facility operator must facilitate the transfer of the individual if this is reasonable in the circumstances and the individual consents to the transfer.[25] Where it is not reasonably practicable for a relevant person to have access to an individual at a facility and the facility operator does not transfer the individual because the individual's deciding practitioner decides that the transfer

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[19] Health Canada, Fourth Annual Report on Medical Assistance in Dying in Canada 2022 (2023) 6 https://www.canada.ca/content/dam/hc-sc/documents/services/medical-assistance-dying/annual-report-2022/annual-report-2022.pdf.

[20] Health Canada, Fourth Annual Report on Medical Assistance in Dying in Canada 2022 (2023) 39 https://www.canada.ca/content/dam/hc-sc/documents/services/medical-assistance-dying/annual-report-2022/annual-report-2022.pdf.

[21] Jayne Hewitt, Laurie Grealish, and Ann Bonner, 'Voluntary assisted dying in Australia and New Zealand: Exploring the potential for nurse practitioners to assess eligibility' (2023) 30(1) *Collegian* 198, 205.

[22] Defined according to cl 96 as 'a place (other than an individual's private residence) where a care service is provided to a resident of the facility, including—
(a) a hospital; and
(b) a hospice; and
(c) a nursing home, hostel, respite facility or other facility where accommodation, nursing or personal care is provided to individuals who, because of infirmity, illness, disease, incapacity or disability, have a need for accommodation, nursing or personal care; and
(d) a residential aged care facility'.

[23] ACT VAD Bill cl 99 (2).

[24] ACT VAD Bill cl 100.

[25] ACT VAD Bill cl 101(4).

is unreasonable in the circumstances, the facility operator must take 'reasonable steps to make it reasonably practicable for the relevant person to have access to the individual at the facility'.[26]

The regulations enshrined in the ACT Bill ensure broad access to VAD no matter where individuals reside and whether they are fit to travel at the time they wish to die with assistance.[27] As the ACT Bill does not differentiate between permanent and non-permanent residents and health and other facilities it appears simpler and more broadly applicable than the laws in Queensland, South Australia and New South Wales.[28]

VII. Final Remarks

I hope my submission is useful and will inform the Select Committee in their Inquiry into Voluntary Assisted Dying Bill 2023.

Sincerely

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[26] ACT VAD Bill cl 102 (2).

[27] This approach differs greatly to Victoria, Western Australia and Tasmania, which are currently under no legal obligation to provide, allow the provision of on their premises, and facilitate services associated with VAD. See discussion in Anthony Gray and Kerstin Braun, 'Voluntary Assisted Dying, the Conscientious Objector Who Refuses to Facilitate it and Discrimination Law' (2022) 29(4) *Journal of Law and Medicine* 1128.

[28] For differentiation concerning permanent and non-permanent residents see Qld VAD Act s 98; SA VAD Act ss 25, 11(4); NSW VAD ACT ss 98(2), 107. For differentiation regarding different service providers see: SA VAD ACT s 11 health service establishments and s 15 residential facilities including: nursing homes, hostels or other facility, residential aged care facility and retirement villages; Qld VAD Act s 86 facilities include: a private hospital, a hospice; a public sector hospital, nursing homes, hostels or other facility at which accommodation, nursing or personal care is provided and residential aged care facilities; NSW VAD Act s 88 health facilities include private health facilities and public hospitals providing a personal care service and residential facilities including residential aged care services.