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

Submission Number: 027

Date Authorised for Publication: 14 December 2023

SUBMISSION TO THE AUSTRALIAN CAPITAL TERRITORY INQUIRY INTO THE VOLUNTARY ASSISTED DYING BILL 2023

We are members of the Australian Centre for Health Law Research (ACHLR), a specialist research centre within the Queensland University of Technology's Faculty of Business and Law. ACHLR undertakes empirical, theoretical and doctrinal research into complex problems and emerging challenges in the fields of health law, ethics, technology, governance and public policy.

We have been conducting research into the law, policy and practice of end-of-life decision-making for 20 years. We have published over 150 publications on end-of-life decision-making and received almost $50 million for our end-of-life research and training programs.

Our research on voluntary assisted dying (VAD) includes a body of work on comparative and legal analysis of the various international assisted dying regimes.[1] We also developed a Model Voluntary Assisted Dying Bill which, along with our research, has been influential in law reform for VAD across Australia, including in the ACT.[2]

Our current work includes a four-year project 'Optimal Regulation of Voluntary Assisted Dying' which includes research into VAD systems in Australia, Canada and Belgium: https://research.qut.edu.au/voluntary-assisted-dying-regulation/. This project will make recommendations about how best to safely regulate VAD.

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[1] Katherine Waller et al, Voluntary assisted dying in Australia: A comparative and critical analysis of state laws (2023) 46(4) *University of New South Wales Law Journal* 1; White, Ben, Close, Eliana, Willmott, Lindy, Del Villar, Katrine, Downie, Jocelyn, Cameron, James, et al. (2021) Comparative and critical analysis of key eligibility criteria for voluntary assisted dying under five legal frameworks. University of New South Wales Law Journal, 44(4), 1663; White, Ben, Willmott, Lindy, Del Villar, Katrine, Hewitt, Jayne, Close, Eliana, Ley Greaves, Laura, et al. (2022) Who is eligible for voluntary assisted dying? Nine medical conditions assessed against five legal frameworks. *University of New South Wales Law Journal*, 45(1), 401.

[2] White, Ben & Willmott, Lindy (2019) A Model Voluntary Assisted Dying Bill. *Griffith Journal of Law and Human Dignity*, 7(2), 1. The ACT Minister for Human Rights Tara Cheyne referred to our research in the introductory speech for the VAD Bill. The Minister referred to research which "found that removing the prognosis time frame is unlikely to result in more individuals being eligible for voluntary assisted dying. Instead, individuals will likely become eligible earlier in their disease progression, reducing an individual's intolerable suffering as well as the stress and difficulty of having to request voluntary assisted dying very close to death." Daily Hansard, Proof, P3497-8. This reference is to research produced by members of the Australian Centre for Health Law Research, namely: White, Ben, Close, Eliana, Willmott, Lindy, Del Villar, Katrine, Downie, Jocelyn, Cameron, James, et al. (2021) Comparative and critical analysis of key eligibility criteria for voluntary assisted dying under five legal frameworks. *University of New South Wales Law Journal*, 44(4), 1663; White, Ben, Willmott, Lindy, Del Villar, Katrine, Hewitt, Jayne, Close, Eliana, Ley Greaves, Laura, et al. (2022) Who is eligible for voluntary assisted dying? Nine medical conditions assessed against five legal frameworks. *University of New South Wales Law Journal*, 45(1), 401.

We were also commissioned by the state governments of Victoria, Western Australia and Queensland to design and deliver the legislatively-mandated training for practitioners wishing to provide VAD. One of us, Lindy Willmott, is a member of the VAD Review Board in Queensland, while the other, Ben White, is a member of the relevant review tribunal, the Queensland Civil and Administrative Tribunal. (We note, however, that we make this submission only in our capacity as academics.)

In terms of law reform, we have been consulted and participated in various VAD law reform exercises in Australia and overseas. We also edited the book *International Perspectives on End-of-Life Law Reform: Politics, Persuasion and Persistence* (Cambridge University Press, 2021). This is a collection of ten case studies from six jurisdictions (the United Kingdom, the United States, Canada, Australia, Belgium and the Netherlands) analysing different aspects of end-of-life law reform.

More background information is available here:
https://www.qut.edu.au/about/our-people/academic-profiles/bp.white
https://www.qut.edu.au/about/our-people/academic-profiles/l.willmott

We note that this submission represents our views but does not necessarily represent the views of other members of ACHLR. For this reason, we request that any mention of this submission refers to us as authors and not ACHLR, the Faculty of Business and Law or QUT as entities.

Thank you for the opportunity to contribute to this inquiry.

Yours sincerely

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GENERAL CONSIDERATIONS FOR THE VOLUNTARY ASSISTED DYING BILL 2023 (ACT)

Avoid incoherent law by ad hoc addition of safeguards

We urge the ACT to avoid the situation that other states have experienced where safeguards are awkwardly added to an already sound VAD bill in an ad hoc way. This leads to the VAD law being incoherent or inconsistent in important ways.

Our research has shown that the Victorian VAD law fails to meet its own stated policy goals in important respects, sometimes because of later ad hoc additions that occurred during the law-making process.[3]

An example of this is eligibility for VAD depending on a variable time period – 6 or 12 months until expected death – depending on the nature of a patient's illness. This change in timing was a political compromise in Victoria which has since been uncritically adopted and replicated in all other states in Australia except Queensland. Yet this was only a last-minute addition to the Victorian Bill as a result of political compromise. As outlined below, we support that the Voluntary Assisted Dying Bill 2023 (ACT) (VAD Bill) does not include a timeframe until death as an eligibility requirement.

We argue that it is important for the operation of safeguards to be seen collectively as a whole:

> *'When thinking about the politics of reform, it can be tempting to only consider each safeguard or process individually. Each may have merit and advance a particular policy goal. It may also be difficult politically to argue that a specific safeguard is not needed, particularly if it appears to achieve at least some useful purpose. However, when the safeguards are aggregated, the VAD system as a whole can become very complex and unwieldly, and slowly take the legislation away from its policy goals. This "policy drift by a thousand cuts" – the incremental loss of policy focus through accumulation of individual safeguards without reference to the whole – is a key issue for other states to consider when evaluating their proposed VAD reforms. It is suggested that each part of the law be evaluated both on its own, and also for its impact on the functioning of the overall system. This is needed to enable VAD laws to meet their policy goals, in particular, the two key goals at the core of the design of the VAD Act: safeguarding the vulnerable while respecting the autonomy of eligible persons who wish to access VAD."*[4]

We have also written on this point in 'Comparative and Critical Analysis of Key Eligibility Criteria for Voluntary Assisted Dying Under Five Legal Frameworks':

> *'Taking a holistic view is also an important consideration more generally when designing VAD regulation. While it may be politically attractive to add*

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[3] Ben White et al, 'Does the Voluntary Assisted Dying Act 2017 (Vic) Reflect Its Stated Policy Goals?' (2020) 43(2) *University of New South Wales Law Journal* 417.

[4] Ben White et al, 'Does the Voluntary Assisted Dying Act 2017 (Vic) Reflect Its Stated Policy Goals?' (2020) 43(2) *University of New South Wales Law Journal* 417, 451.

> *numerous safeguards to VAD legislation, including in the eligibility criteria, there is a risk of what we have called elsewhere 'policy drift by a thousand cuts' if the cumulative effect of these individual safeguards is not properly considered. For example, it is possible that a series of provisions designed to make VAD legislation safe, when aggregated, can in fact make access to VAD cumbersome or even unworkable."*[5]

Implementation should be considered early

We believe that it is important to ensure that the system which is established to facilitate access to VAD works as simply as possible for health practitioners, individuals and families who engage with it. Early research from Victoria suggests that system issues and an initial overly bureaucratic approach can cause delays and impede access for eligible individuals who seek VAD. System design should ensure, again to the extent that is possible, that complexity is 'inward facing'[6] and the experience of health practitioners, persons seeking access to VAD and their families is as simple as is possible. As such, if the VAD Bill is passed into law, consideration should be given to designing a framework that is facilitative of the legislation.[7]

The ACT should not just copy other jurisdictions such as Victoria

The people of the ACT should expect that its Parliament pass the best law possible for the territory, even if that means some differences from other Australian states. The fact that Victoria happened to be the first does not make it the best model. Indeed, we now have experience and evidence about some challenges in the Victorian system that ACT has the opportunity to address. Though the Victorian system is working safely, our research suggests there have been challenges in practice for patients trying to access VAD (discussed below).

Our Model VAD Bill, referred to above, was developed after articulating the relevant principles that we believe should guide law reform in this area.[8] Importantly, we did not assume that the Victorian law was the best law possible and use it as our starting point. Instead, we began by identifying the principles that should guide reform in this area and developed our approach based on those principles.

This is an important point because arguments can sometimes be advanced that if the ACT Bill is different from Victoria (or other states), then this, in and of itself, is cause for alarm. But such claims cannot be sustained. First, the Victorian, Western Australian, Tasmanian, South Australian, Queensland and New South Wales VAD laws are all different from each other. It is true that they are all based on the same

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[5] Ben White et al, 'Comparative and Critical Analysis of Key Eligibility Criteria for Voluntary Assisted Dying Under Five Legal Frameworks' (2021) 44(4) *University of New South Wales Law Journal* 1663, 1699.

[6] Ben White, Lindy Willmott and Eliana Close, 'Victoria's voluntary assisted dying law: clinical implementation as the next challenge' (2019) 210(5) *Medical Journal of Australia* 207-209.e1.

[7] Lindy Willmott et al, 'Participating Doctors' Perspectives in the Regulation of VAD in Victoria: A Qualitative Study' (2021) 215(3) *Medical Journal of Australia* 125; Ben White et al, 'Prospective approval of assisted dying: a qualitative study of doctors' perspectives in Victoria, Australia' (2021) *BMJ Supportive and Palliative Care* (early online).

[8] Lindy Willmott and Ben White, 'Assisted Dying in Australia: A Values-based Model for Reform' in Ian Freckelton and Kerry Peterson, *Tensions and Traumas in Health Law* (Federation Press, 2017).

broad model, but each of the State Parliaments coming after Victoria have exercised their own judgment about what law should be passed in light of what is best for those states. As a result, there is already variation across the country and it is reasonable and appropriate to expect more.

Law-making on voluntary assisted dying must be evidence-based

A further point in relation to developing the best possible VAD legislation for the ACT is to repeat our call for evidence-based law-making in this area.[9] There is a large body of reliable evidence about how VAD systems operate internationally. There is also emerging evidence about how the Victorian system is operating in practice, including that which suggests there are challenges with the Victorian model.

A policy briefing

A final matter to mention before providing our views on the VAD Bill is that to inform parliamentary debates in Australia, we produced a policy briefing in August 2021 which summarised the key findings from our research about VAD over a period of almost two decades.[10] The briefing is reproduced in full below and may also be accessed at the following link: https://research.qut.edu.au/voluntary-assisted-dying-regulation/other-resources/. Also available at that website is the research that underpins this policy briefing (see the PDFs extracted into five volumes).

[9] Ben White and Lindy Willmott, 'Evidence-based Law Making on Voluntary Assisted Dying' (2020) 44(4) *Australian Health Review* 544-546.
[10] White, Ben & Willmott, Lindy (2021) Voluntary assisted dying research: a policy briefing. Australian Centre for Health Law Research, Queensland University of Technology.

QUT Australian Centre for Health Law Research

Voluntary assisted dying research: a policy briefing

This briefing summarises research about voluntary assisted dying (VAD) conducted by Professors Ben White and Lindy Willmott (with colleagues).

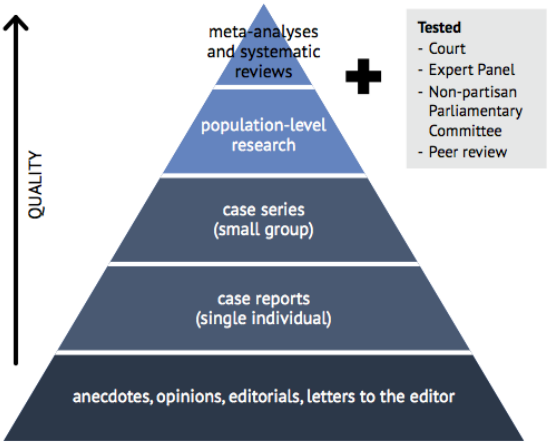
1 Australia should have VAD laws: they are ethical and VAD can be safely regulated

- There is a strong ethical case for allowing a limited cohort of patients, who are already dying, to choose VAD.
- Reliable evidence about VAD systems internationally and now in Australia shows that VAD can be safely regulated.
- Politically, legalising VAD has been challenging. Only narrow and conservative VAD models have passed in Australia.

2 VAD laws must be evidence-based and consistent with intended policy goals

- Law reform must be based on reliable evidence (see the "reliability pyramid").
- VAD laws must be designed to meet their intended policy goals.

Higher up pyramid + tested = greater reliability



3 There is now a broad "Australian VAD model" but each jurisdiction should pass a law most appropriate for its circumstances

- Although based on the same model, Victoria, Western Australia, Tasmania and South Australia have all taken slightly different approaches to regulating VAD.
- Jurisdictions should learn from how existing laws work in practice and design a law that is most appropriate for its circumstances (e.g. unique geography and population distribution).

4 Designing VAD laws requires seeing how the entire legal framework operates

- Evaluating a VAD law must be based on how it will work as a whole, and not by considering individual provisions in isolation.
- For example, numerous eligibility criteria for accessing VAD work together in these laws. Concern about one criterion when considered in isolation may resolve if all criteria are considered as a whole.
- The process of designing VAD laws should include testing how eligibility criteria affect who can access VAD and for what medical conditions.

5 "Piling on" ad hoc safeguards to already sound VAD laws does not make laws safer and can make them worse

- Ad hoc safeguards have been added during parliamentary processes to already sound proposals for VAD laws.
- This led to inconsistency and incoherence in those laws without improving patient or community safety.

6 VAD systems must be workable so eligible patients can access VAD

» The complex Victorian VAD law and system make patient access to VAD challenging.

» Key problems include:

- doctors are not allowed to raise the topic of VAD with patients
- the need to obtain a government permit to access VAD, and
- the complexity of the administrative process when applying for VAD.

7 The Commonwealth Criminal Code must be changed: it is an unjust barrier for patients seeking VAD and their doctors

» The Code makes illegal using a "carriage service" (e.g. email, telephone, fax, telehealth) in relation to "suicide". This creates risk for doctors and others who are otherwise acting legally under State VAD systems.

» This means some steps in the VAD process must be done face-to-face. This is causing hardship and delay for patients and doctors.

» For constitutional law reasons, States cannot resolve this issue.

» The Commonwealth Government should amend this law so it will not apply to lawful VAD systems.

8 Institutions should not have power to prevent their patients or permanent residents from accessing VAD

» There is some limited evidence that institutions are blocking access to VAD in Victoria. Some institutions in other States have also indicated they will block access.

» Legislation should permit an institution to not participate but must ensure eligible patients and permanent residents can still access VAD.

9 Effective implementation of VAD is challenging but very important

» How a VAD system operates depends not only on the law, but also system design, including factors such as IT, navigation and support services.

» Sufficient time and resources are needed to effectively implement VAD laws. And once implemented, VAD systems should be kept under constant review.

» VAD laws are complex so implementation should aim to make the patient, family and doctor experience as smooth and simple as possible.

» Effective training for practitioners involved in VAD (and others) is critical as is a user-friendly IT system.

A compilation of the 37 research papers this policy briefing is based on is available here:
https://research.qut.edu.au/voluntary-assisted-dying-regulation/other-resources

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August 2021

SPECIFIC CONSIDERATIONS FOR THE VOLUNTARY ASSISTED DYING BILL 2023 (ACT) (VAD Bill)

No timeframe until death as an eligibility requirement

We support a specific time frame until death not being included as an eligibility requirement in cl 11(1) (or elsewhere) in the VAD Bill.

Our view is that not including a timeframe until death is desirable for several reasons including:

- our research suggests that when all eligibility criteria are considered together, not including a timeframe until death is unlikely to make a difference in practice regarding who is eligible to access VAD,[11] and
- it avoids difficulties for health practitioners who assess the person's eligibility for VAD having to determine whether a person is likely to die within a specified time period.

Eligibility requirement that an individual must be in the last stages of their life

Pursuant to cl 11(1) of the VAD Bill, an individual must have been diagnosed with a condition that is *advanced* as well as progressive and expected to cause death. In cl 11(4)(c) of the VAD Bill, for a condition to be 'advanced' the individual must be in the 'last stages of their life'. We strongly urge the committee to consider removing this additional requirement in cl 11(4)(c).

We consider the requirement that the person is in the 'last stages of their life' to be problematic. Firstly, it will cause confusion and uncertainty for health practitioners who must assess the individual's eligibility for VAD. Different health practitioners will interpret this phrase differently. Some may interpret this provision to mean that a person must be dying very soon, for example, within 6 months or less. Others might interpret the phrase to mean in the final weeks or even days before death. It is undesirable for a bill to contain a provision which health practitioners, though attempting to operate within the lawful bounds of the bill, are unable to interpret with certainty.

Secondly, and importantly, the inclusion of the requirement that the person be in the 'last stages of their life' is likely to defeat the potential benefit of removing a timeframe until death. The 'Listening Report' published by the ACT government articulates some of these benefits. This report reflects views expressed by stakeholders and other individuals in the ACT's public consultation process for VAD, many of whom expressed their views on the benefits of not including a timeframe until death eligibility requirement. The perspectives extracted below related to the benefits of removing the timeframe until death requirement.

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[11] Ben P White et al, 'Comparative and Critical Analysis of Key Eligibility Criteria for Voluntary Assisted Dying Under Five Legal Frameworks' (2021) 44(4) *University of New South Wales Law Journal* 1663, 1699; Ben White et al, 'Who is Eligible for Voluntary Assisted Dying? Nine Medical Conditions Assessed against Five Legal Frameworks' (2022) 45(1) *University of New South Wales Law Journal* 401.

> *"Most contributors with views on this matter felt that voluntary assisted dying in the ACT should not be restricted by a similar timeframe to death. We heard that such timeframes can unnecessarily limit access to voluntary assisted dying for people who would like to have it as an option, especially because it can become increasingly difficult for people to navigate the voluntary assisted dying process as they become more unwell near the end of their lives. We also heard evidence, both academic and anecdotal, that it is challenging for health professionals to accurately assess six to 12 month life expectancy, which can contribute to unpredictable and unfair outcomes."*[12]

As expressed above, we applaud removing a timeframe until death as part of the eligibility criteria. However, introducing a requirement for the person to be in the last stages of their life (that is, introducing an express requirement of proximity to death) potentially removes the benefit of this innovation. As mentioned above, including this requirement might result in assessing practitioners introducing their own criteria regarding when a person is in their last stages of life e.g. requiring the person to have a prognosis of death within 6 months, or even a shorter period. This would have the potential for the criteria to be interpreted even more narrowly than the 6 month to death requirement currently an eligibility criterion in most state laws. It also has the potential for the criteria to be applied inconsistently between practitioners.

We urge the Committee to remove the requirement in cl 11(4)(c).

Involvement of nurse practitioners in assessing patient eligibility

We support the inclusion of nurse practitioners in the request and assessment process for access to VAD established in the VAD Bill. The 'Summary of the ACT's framework for voluntary assisted dying' document states that one assessing practitioner, that is, either the coordinating practitioner or the consulting practitioner, could be a nurse practitioner with relevant experience of at least one year post-nurse practitioner endorsement.[13]

The experience in Victoria, which was the first state to legalise VAD in Australia, is that it has been difficult to find enough practitioners who are willing and trained to assist patients who wish to access VAD.[14]

We support this feature of the VAD Bill because it:

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[12] ACT Government, 'Voluntary assisted dying in the ACT - Report on what we heard: June 2023' (2023) available at: https://hdp-au-prod-app-act-yoursay-files.s3.ap-southeast-2.amazonaws.com/5016/8791/2515/FINAL_Listening_Report_VAD_for_publication_on_YourSay_-_27.06.23.pdf

[13] ACT Government, 'Summary of the ACT's framework for voluntary assisted dying' (ACT Government Justice and Community Safety Directorate, 2023) available at: https://www.justice.act.gov.au/justice-programs-and-initiatives/voluntary-assisted-dying-laws-in-the-act#:~:text=The%20Bill%20provides%20a%20framework%20for%20qualified%20doctors,with%20their%20end-of-life%20options%2C%20and%20comply%20with%20safeguards.

[14] White, Ben, Jeanneret, Ruthie, Close, Eliana, & Willmott, Lindy (2023) Access to voluntary assisted dying in Victoria: a qualitative study of family caregivers' perceptions of barriers and facilitators. *Medical Journal of Australia*, 219(5), pp. 211-217.

- increases the number of authorised health practitioners who are able to provide services to patients who wish to access VAD, especially in light of the ACT's small workforce,[15] and
- does not compromise the safety of the VAD process. This is because nurse practitioners are highly trained, are required to meet the requirements established in the VAD Bill and the relevant regulations, and must refer the patient to another practitioner if they are uncertain about whether the person meets the eligibility requirements (in the same way that a medical practitioner is required to refer if uncertain about whether the person meets the eligibility requirements).[16]

In Western Australia, nurse practitioners are currently not permitted to act as assessing practitioners. However, in the Western Australian Voluntary Assisted Dying Board's most recent (2022-23) Annual Report, the Board calls for greater involvement of nurse practitioners in the VAD request and assessment process. Such a change would enhance patient access and improve practitioners' ability to participate in VAD (by helping to prevent practitioner burnout and fatigue):

> *"Ongoing effort will be required to ensure that a sufficient practitioner pool is available to respond to the level of requests from the community and avoid practitioner burnout and fatigue. Amending the Act to permit nurse practitioners to fulfil more roles in the process could assist in meeting this need and improve the experience of practitioners and patients through the process."*[17]

The Bill does not include a formal 'cooling off' period

We support that the Bill does not include a formal 'cooling off' or 'waiting' period as most other Australian VAD systems do. For example, the Victorian VAD legislation provides that at least 9 days must pass between the person making a first and final request for VAD.[18]

We favour not having a cooling off period noting the following:

- The request and assessment process for VAD requires ongoing engagement and assessment, so naturally takes some time. For this reason, a specified waiting or cooling off period may not be necessary to include in the law. For example, though the WA VAD law has a waiting period of 9 days between the first and final request, the Western Australian Voluntary Assisted Dying

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[15] White, Ben, & Willmott, Lindy (2023) 'Voluntary assisted dying is finally being considered in the ACT. How would it differ from state laws?' The Conversation, 1 November 2023, available at: https://theconversation.com/voluntary-assisted-dying-is-finally-being-considered-in-the-act-how-would-it-differ-from-state-laws-216733

[16] 'How do the ACT's new euthanasia laws compare to NSW?' Broadcast, Sydney Drive, 2 November 2023, available at: https://www.abc.net.au/listen/programs/sydney-drive/euthansia-laws-act-nsw/103058398

[17] Voluntary Assisted Dying Board Western Australia, 'Annual Report 2022-23', 4, available at: https://www.health.wa.gov.au/~/media/Corp/Documents/Health-for/Voluntary-assisted-dying/VAD-Board-Annual-Report-2022-23.pdf

[18] *Voluntary Assisted Dying Act* 2017 (Vic) s 38(1).

Board's most recent report states that the median number of days between the first and final request for VAD was 13 days.[19]

- Even in the other Australian jurisdictions with designated periods, those periods can be shortened if the person is expected to die within that timeframe. So the waiting periods are not hard and fast requirements to be observed in all cases.

Institutional objection

We are pleased that the VAD Bill seeks to regulate institutional objection to VAD. We have argued elsewhere that, with respect to this issue, regulation through legislation is more effective than through policy as has occurred in some other jurisdictions.[20]

There is now emerging evidence that institutional objection can cause harm to patients and their caregivers. Research participants have described delays, emotional suffering and reduced patient choice that can result from institutional objection.[21] It is important therefore that (a) regulation, preferably in the form of legislation, is created to address these issues and (b) this regulation minimises the chance of such harm occurring.

We also support, as a matter of principle, regulation that does not distinguish between permanent and non-permanent residents, as in the proposed VAD Bill. Imposing the same obligations on all care facilities contributes to simplicity of the VAD system.

However, we do have concerns about the current framing of the obligations imposed on facilities by the proposed VAD Bill, particularly as they would apply to permanent residents of a facility.

Facility operator can subjectively decide it is not reasonably practicable to [provide access]
As we interpret the VAD Bill, if a person seeks information about VAD or seeks to access VAD in a facility, the facility is not obliged to provide access to a 'relevant person' if it (the facility operator) 'decides that it is not reasonably practicable to do so' (cl 100(2)). It is the facility operator that makes this decision. The VAD Bill does not contain guidance regarding what circumstances would make providing access 'not reasonably practicable'. The Explanatory Notes provide some detail, though concrete examples are not provided:

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[19] Voluntary Assisted Dying Board Western Australia, 'Annual Report 2022-23', 27, available at: https://www.health.wa.gov.au/~/media/Corp/Documents/Health-for/Voluntary-assisted-dying/VAD-Board-Annual-Report-2022-23.pdf

[20] Ben P White et al, 'Legislative Options to Address Institutional Objections to Voluntary Assisted Dying in Australia' [2021] *University of New South Wales Jaw Journal Forum* 1.

[21] Ben White et al, 'Harms to patients caused by institutions objecting to voluntary assisted dying', Research Briefing (2023); Ben White et al, 'The impact on patients of objections by institutions to assisted dying: a qualitative study of family caregivers' perceptions' (2023) 24 *BMC Medical Ethics*, Article number: 22.

> *"Reasonably practicable' is a legal concept that is context dependent and depends on all the circumstances. Deciding whether something is reasonably practicable requires consideration of:*
>
> - *what can be done – that is, what is possible in the circumstances to allow access; and*
> - *whether it is reasonable in the circumstances to do all that is possible."*[22]

The circumstances in which it would be regarded as 'not reasonably practicable' to allow a relevant person to access the facility is therefore unclear, and amenable to a subjective assessment by the facility operator. This means that it is possible that an institution that has an objection to VAD may make this assessment differently to an institution that does not hold objections to VAD. This subjectivity is undesirable.

Onus shifting to the individual seeking access to transfer out of the facility
If a facility operator decides that it is not reasonably practicable to allow access to a relevant person, the only avenue for the individual to obtain access to VAD is that outlined in cl 101, namely that person must 'ask to be transferred to and from a place to see the relevant person'. We believe it is undesirable to require an individual approaching the end of their life, who has indicated they want to access VAD, to be required to request a transfer out of the facility. This is particularly undesirable and unfair if the facility is the person's permanent place of residence.

Where a person requests a transfer to the relevant person to purse their VAD request, we note that the facility operator must ask the individual's deciding practitioner to decide whether the transfer is reasonable in the circumstances. We further note that if the practitioner assesses the transfer to be reasonable, the facility operator must, as soon as reasonably practicable, facilitate the transfer. However, our argument is that a terminally-ill person should not be required to undertake a transfer to access what would be a lawful medical service, even if the transfer does not cause harm or delay or any of the other factors listed in cl 101(3).

Process if practitioner assesses transfer to be unreasonable for individual
We also note the obligation imposed on the facility operator in cl 102. If the facility operator decides it is not reasonably practicable to allow access to a relevant person, and the individual's practitioner assesses a patient transfer as unreasonable in the circumstances, then the onus shifts to the facility operator to take 'reasonable steps' to give the relevant person access to the facility. It is unclear to us why the facility operator would not be required to take these 'reasonable steps' to allow access to the relevant person in the first place when the individual makes a request to access VAD.

Recommend consideration of the Queensland legislative model that governs permanent residents
We believe a preferable approach for the regulation of institutional objection, at least for permanent residents living in facilities in the ACT, can be found in the *Voluntary Assisted Dying Act 2021* (Qld), Part 6 Division 2. Division 2 governs both permanent

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[22] The Legislative Assembly for the Australian Capital Territory, 'Voluntary Assisted Dying Bill 2023 Explanatory Statement and Human Rights Compatibility Statement' presented by Tara Cheyne MLA, 84.

residents and non-permanent residents, and we recommend consideration of those provisions that regulate permanent residents.

In Queensland, if the person is a permanent resident, a facility must allow reasonable access to that person by the relevant health practitioner (e.g. a doctor being requested to undertake an eligibility assessment). It is only if the relevant health practitioner is not available to attend that the entity must take reasonable steps to facilitate the transfer of the person. While the entity cannot be required to provide VAD services, it is required to allow access to health practitioners to enable the resident to obtain the services from others. Unlike the ACT proposal, the facility operator is not provided with a right to decide that it is not reasonably practicable to provide access to a health practitioner.

We believe this legislative model strikes a better balance between an institution that objects to VAD and an individual who seeks access to VAD.

APPENDIX – PUBLISHED RESEARCH REFERRED TO ABOVE

The below list of publications is presented in the order in which they are first cited above.

- Katherine Waller et al, Voluntary assisted dying in Australia: A comparative and critical analysis of state laws (2023) 46(4) *University of New South Wales Law Journal* 1.
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