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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Australian Nursing & Midwifery Federation
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Australian Nursing and Midwifery Federation – ACT Branch

Submission to the ACT Legislative Assembly Inquiry into the *Voluntary Assisted Dying Bill 2023*

Introduction

The Australian Nursing and Midwifery Federation – ACT Branch (ANMF) recognises Voluntary Assisted Dying (VAD) as a complex social and health issue. Nurses, midwives and doctors; those seeking to end their lives due to pain and illness; advocates for voluntary assisted dying; ethicists; disability advocates; religious organisations; and the broader community are keenly invested in the future of VAD in the ACT.

The ANMF also recognises the prerogative of the ACT Government to consider the legalisation and regulation of VAD in the ACT.

For the avoidance of doubt, the ANMF supports legislative reform to provide eligible persons with the right to make informed voluntary decisions as to their end-of-life care, including VAD.

On review, the ANMF considers the *Voluntary Assisted Dying Bill 2023* ('the Bill') to be relatively consistent with the approach of other Australian jurisdictions, including in relation to the eligibility criteria, process, and other related matters. Further, where minor variations exist, such as the removal of the timeframe to death requirement, the ANMF generally considers these to be appropriate.

However, the ANMF is concerned the Bill may not provide adequate legislative protection for healthcare professionals in regard to their participation – or abstention – in VAD. The ANMF outlines its reasoning in this submission.

Definitions

The ANMF notes that the Bill does not purport to expressly define VAD. However, guidance can be taken from the explanatory statement to the Bill, which refers to VAD as 'a medical process that gives an eligible individual the option to end their suffering by choosing to die through the administration of an approved substance'.

For the purposes of this submission, and consistent with the Federal ANMF Position Statement on VAD (see: https://www.anmf.org.au/media/e12p10vl/ps_assisted_dying.pdf), the ANMF considers Voluntary Assisted Dying to be defined as follows:

> *A regulated intervention by an authorised health practitioner, either providing the person with the means to end their life or (if the person is unable to do so) ending the person's life with the primary intent of relieving pain and/or suffering, at the person's voluntary, repeated, and fully informed request.*

Legislative Framework

The ANMF understands that legislation has been enacted to legalise VAD (subject to conditions) in all Australian states:

- **Victoria:** *Voluntary Assisted Dying Act 2017* (Vic)
- **Western Australia:** *Voluntary Assisted Dying Act 2019* (WA)
- **Tasmania:** *End-of-Life Choices (Voluntary Assisted Dying) Act 2021* (Tas)
- **Queensland:** *Voluntary Assisted Dying Act 2021* (Qld)
- **South Australia:** *Voluntary Assisted Dying Act 2021* (SA)
- **New South Wales:** *Voluntary Assisted Dying Act 2022* (NSW)

As of November 2023, VAD is not legal or accessible in the ACT and the Northern Territory. The ANMF understands this is largely due to the legislative prohibition introduced by Federal Parliament in 1997 to prevent the territories from enacting laws relating to VAD,[1] which was only repealed (in respect of the ACT and the NT) in December 2022.[2] The ANMF further understands that both jurisdictions are undertaking consultative processes with a view to legalise VAD.

Current ACT Legislative Framework

In the ACT, the voluntary ending of one's own life constitutes suicide. Further, any individual who assists another individual to voluntarily end their life in the ACT may be charged with an offence of aiding or abetting suicide (including attempted suicide),[3] manslaughter,[4] or murder.[5] The ANMF notes these offences apply irrespective of whether the individual who has died requested assistance and the relationship between the individual and the individual who has died.

The ANMF also understands that the ACT Director of Public Prosecutions has, at times, exercised its discretion to not pursue such charges.[6] Nonetheless, the ANMF submits that express legal protection against prosecution for those assisting in the provision of VAD (as defined) need be included. The ANMF notes such protections are provided for in Part 9 of the Bill. Subject to any concerns addressed below, the ANMF considers that these sections provide adequate legal protection.

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[1] *Euthanasia Laws Act 1997* (Cth)
[2] *Restoring Territory Rights Act 2022* (Cth)
[3] *Crimes Act 1900* s 17.
[4] Ibid s 15.
[5] Ibid s 12.
[6] *Police v O* CC2019/3260.

Potential concerns

Strict liability offences

Pursuant to the explanatory statement, the ANMF understands that the intention of the ACT Government in introducing strict liability offences is to 'support an effective regulatory scheme and deter unauthorised behaviour'.

However, having regard to the current nature of the ACT health workforce, the ANMF considers that the introduction of 34 strict liability offences may be excessive and may have direct ramifications in respect of accessibility to VAD in the ACT.

First, the ANMF understands that non-compliance with certain administrative requirements attracts penalties in every jurisdiction, albeit to varying extents. However, the ANMF further understands the Bill can be differentiated from other jurisdictions, in that it creates strict liability offences. As such, a healthcare practitioner could be found liable for a criminal offence absent proof of knowledge or intent.

For the avoidance of doubt, the ANMF recognises the importance of thorough regulation with respect to matters relating to VAD. However, the ANMF submits that the legislation ought to distinguish between healthcare practitioners acting in good faith and those acting with malicious intent, which the ANMF considers the Bill may fail to do.

Second, the ANMF notes the vast majority of the proposed strict liability offences arise where a health practitioner fails to undertake an obligation within 2 working days.

Importantly, the ANMF notes the nursing and midwifery workforces (among other health professions) in the ACT continue to grapple with severe staffing issues. As such, the ANMF considers it to be not unforeseeable that nursing and midwifery workers (or other healthcare practitioners) would be unable to complete the relevant obligation within two working days, due to circumstances beyond their control.

Thus, having regard to the current recognised workforce issues arising across the ACT Healthcare sector, the ANMF considers the implementation of strict liability offences, particularly those with such short timeframes, to *potentially* be excessive.

Further, the ANMF has concerns the potential exposure to criminal liability may act as a deterrent to health practitioners seeking authorisation to act as an administering practitioner, consulting practitioner, and/or coordinating practitioner, noting the onus already falls upon the health practitioner to proactively seek out authorisation and meet eligibility requirements.

Having regard to the size of the ACT jurisdiction, the ANMF considers the introduction of strict liability offences may be contrary to the public interest as it has the potential to render health professionals unwilling to obtain authorisation, impeding access to VAD in the ACT.

Finally, the ANMF notes a number of the strict liability offences appear to arise from obligations in relation to a healthcare practitioner's professional conduct. As such, the ANMF submits that deeper exploration and consideration be given to the interaction between the proposed legislation and existing Health Practitioner regulatory framework (i.e., the Health Practitioner National Law (ACT)), in particular, whether certain matters may be more appropriately regulated by the Australian Health Practitioners Regulation Agency (and relevant Health Professional Board).

Conscientious objection

Conscientious objection refers to the right of healthcare professionals to refuse to provide, or assist in the provision of, certain health care services on religious or other conscientious grounds.

The ANMF notes the right of healthcare professionals to conscientiously object to voluntary assisted dying is legislatively protected in all Australian states. However, the obligations that pertain to those exercising their right vary between jurisdictions.

On review, the Bill is largely inconsistent with the approach taken by other Australian jurisdictions, in that it opens those exercising a conscientious objection to liability for an offence.

In Victoria, South Australia, and NSW, the legislation provides for a complete right to non-participation, meaning a health professional objecting on conscientious grounds has no obligation to provide information about VAD or participate in the process in any manner.

In Western Australia, medical practitioners who conscientiously object must immediately inform a person who makes a first request that they refuse the request, and must provide a person who makes a first request with approved information.

Tasmania and Queensland take a similar approach to WA, however the information medical professionals with a conscientious objection are required to provide a person who makes a first request is the contact details of relevant services and/or health practitioners who may be able to assist.

The relevant sections of the ACT Bill considering conscientious objections by health practitioners are ss 94 and 95.

The right to conscientiously object is set out in section 94(1) of the Bill and extends to all healthcare practitioners. However, the section proceeds to define a set of circumstances to which a healthcare professional with a conscientious objection may object. Pursuant to the Bill, these circumstances include refusing to:

(a) act as a coordinating practitioner, consulting practitioner or administering practitioner for an individual;
(b) provide advice to a coordinating practitioner in relation to a referral made under section 17;
(c) provide advice to a consulting practitioner in relation to a referral made under section 24;
(d) supply an approved substance;
(e) be present when an approved substance is administered by or to an individual.

The ANMF notes it is unclear on the wording of the Bill whether the conscientious objection extends to include, or alternatively, seeks to exclude circumstances not mentioned.

As such, the ANMF submits the Bill would benefit from an express statement or subsection to the effect that section 94(1) either does not intend to provide an exhaustive list or, in the alternative, limits the things or circumstances to which a healthcare professional may object on conscientious grounds.

Further, the ANMF notes section 95 intends to create a strict liability offence where a health practitioner exercising a conscientious objection refuses to do a thing mentioned in s 94 in relation to an individual and fails to provide that individual with contact details for the approved care navigator service within 2 working days.

The ANMF notes a number of concerns arise on the wording of section 95.

First, it is unclear under which circumstances and to whom a health practitioner is required to provide the relevant contact details. For example, it is unclear whether a health practitioner exercising a conscientious objection to do a thing mentioned in ss 94(1)(b) and (c) is required to provide the contact details in writing, and if so, to whom, noting the practitioner may refuse to do those things absent any contact with the individual seeking VAD.

Further, on a strict reading of section 95, the ANMF notes it appears that a health practitioner who refuses to be present at the time an approved substance is administered will be found liable for an offence (given it is a strict liability offence) if, within 2 working days after the day the health practitioner is not present for substance administration, does not give the relevant individual the contact details for an approved care navigator service.

In short, the current drafting, in this respect, appears to lead to absurdity.

Finally, the ANMF notes it is unclear on the current wording what constitutes a refusal for the purpose of enlivening a strict liability offence.

Conclusion

The ANMF supports the legalisation of VAD in the ACT to allow eligible individuals the autonomy to make free and informed decisions in relation to their end-of-life care. However, the ANMF submits the realisation of VAD as an available option for end-of-life care cannot occur but for the hard work of the nursing and midwifery workforce, and other health practitioners, in the ACT. As such, the ANMF submits that the matters outlined in this submission be genuinely considered and addressed by the Assembly, in particular those that can provide clearer and better protection for health practitioners.