Submission into the Voluntary Assisted Dying Bill 2021

Submission No.:	906
Submitted by:	Ben White
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Position:	I/We support the Voluntary Assisted Dying Bill but recommend some changes to it.
Comments in relation to:	Eligibility criteria* ,The request and assessment process,Administration of the substance,Safeguards,Conscientious objection by either individuals or entities,Other
Attachments:	See attachment
Submitter Comments:	

Submission to Health and Environment Committee in relation to *Voluntary Assisted Dying Bill 2021 (Qld)* June 2021

Committee Secretary
Health and Environment Committee
Parliament House
Brisbane QLD 4000

By email: HEC@parliament.qld.gov.au

Dear Committee members

EXECUTIVE SUMMARY

- Queensland should aim to enact the best voluntary assisted dying (VAD) legislation possible, rather than copying other States. The design of the Queensland legislation should also be evidence-based.
- The *Voluntary Assisted Dying Bill 2021* (Qld) is a sensible and measured Bill that will provide choice for terminally-ill patients while operating safely, including protecting the vulnerable in our community. While there is scope for some minor amendments to improve the Bill, the Committee should recommend the Bill be passed.
- The eligibility criterion of a 12-month time limit until expected death is to be preferred to the usual 6-month period in other Australian States (12 months for neurodegenerative conditions). For example, this allows more time to navigate the complex VAD process which has shown to be challenging in Victoria.
- It would be helpful for the Bill to explicitly state that the eligibility criteria are to be interpreted in light of the existing right to refuse medical treatment.
- Our final preliminary observation is to support the legislative proposal for dealing with entities that hold a conscientious objection to VAD. In our view, the Bill appropriately balances views held by entities about VAD with the ability of a terminally-ill patient or resident to access VAD.

BACKGROUND

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 field 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. A particular area of research focus is voluntary assisted dying (VAD), and we are currently working on a 4-year Australian Research Council study into 'Optimal Regulation of Voluntary Assisted Dying'. We have been invited to participate in the VAD reforms that have occurred in Australia in recent years. This Committee's predecessor recommended in 2020 that our Model Voluntary Assisted Dying Bill be the basis for reforming the law in Queensland. We have also been involved in implementation, including through designing and developing, on behalf of the Victorian and Western Australian Governments, the legislatively-mandated training that clinicians must undertake.

OUR MODEL VOLUNTARY ASSISTED DYING BILL AND OUR APPROACH TO THIS SUBMISSION

Our preferred approach to law reform in relation to VAD is reflected in what the Queensland Law Reform Commission (Commission) referred to as the White and Willmott Model.[1] It was developed after articulating the relevant principles that should guide law reform in this area and then designing a Bill to give effect to them.[2] This Model was recommended by this Committee's predecessor to be the basis for law reform in Queensland (Recommendation 1).

We continue to consider that the White and Willmott Model generally represents optimal law reform (with some minor amendments in light of experience in Victoria and subsequent legislation passing in Western Australia, Tasmania and South Australia). Those minor amendments are generally reflected in our previous submission to the Commission (except for South Australian aspects as their law was not passed at that time).[3] To this we would also add that we prefer the proposed clauses in the Bill before the Queensland Parliament that regulate institutional objection.

Having made this general point, we note that there is a different Bill before this Committee which has been tabled in Parliament. Much of the new Bill reflects our views and we note that the Commission drew heavily on the White and Willmott Model in developing the Bill. Because this is now the proposed Bill for Queensland, we will generally confine our present submission to commenting on its provisions.

[1] This Bill has been published in Ben White and Lindy Willmott, 'A Model Voluntary Assisted Dying Bill' (2019) 7(2) *Griffith Journal of Law and Human Dignity* 1.
[2] 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).
[3] Ben White and Lindy Willmott, 'Submission to the Queensland Law Reform Commission for its Voluntary Assisted Dying Review' (2020) available at https://eprints.qut.edu.au/206191/.

This means that we will generally take as our departure point for this submission the current Bill before the Parliament, and only mention the White and Willmott Model for issues that we consider are critical. We make this observation to avoid the inference that in not returning to the White and Willmott Model in this submission that we have departed from those views or otherwise do not think they are optimal.

Finally, we note that we have not addressed all clauses of the Bill. For example, some clauses clearly reflect now established law in Victoria, Western Australia, Tasmania and South Australia. We would be pleased to provide further thoughts on specific provisions if requested, but have tended to focus on particular issues that are new in this Bill or where there is a case to specifically comment on a particular provision.[4]

BEST VOLUNTARY ASSISTED DYING LEGISLATION FOR QUEENSLAND

Queensland should not just copy other jurisdictions such as Victoria

Before turning to the Queensland Bill, we want to state our position that the aim of any VAD reform exercise should be to produce the best possible legislation for Queensland. This is reflected in the process we described above for developing the White and Willmott Model. 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 Model based on those principles. This was a key point we made in our submission to the Commission.[5] We note that this is reflected in the Commission's approach to its review and its stated intent was to design 'the best legal framework for a voluntary assisted dying scheme in Queensland' and that it was not to be 'constrained by similar laws in other Australian states'.[6]

This is an important point because arguments can sometimes be advanced that if the Queensland 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 and South Australian VAD laws are all different from each other. It is true that they are all based on the same broad model – which Queensland has also adopted. But the parliaments of Western Australia, Tasmania and South Australia, 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.

Secondly, Queenslanders should expect that its Parliament pass the best law possible for Queensland, even if that means some differences from other Australian states. The fact that Victoria happened to be the first does not make it better. Indeed, we now have experience and evidence about some challenges in the Victorian

[4] As a result, not commenting on a provision should not be taken as endorsement of it.
[5] Ben White and Lindy Willmott, 'Submission to the Queensland Law Reform Commission for its Voluntary Assisted Dying Review' (2020) available at https://eprints.qut.edu.au/206191/.
[6] Queensland Law Reform Commission, *A Legal Framework for Voluntary Assisted Dying*, Report No 79 (2021), p4.

system that Queensland has the opportunity to address. We discuss some of these challenges further below but in short, the Victorian system is working safely but there have been challenges in practice for patients trying to access VAD.

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

A final point in relation to developing the best possible VAD legislation for Queensland is to repeat our call for evidence-based law-making in this area. There is a large body of reliable evidence about how VAD systems operate internationally (which we know the predecessor to this Committee considered in detail). There is also emerging evidence about how the Victorian system is operating in practice, including that which suggests there are challenges with that model. Our call for evidence-based law-making in relation to VAD laws is set out here: Ben White and Lindy Willmott, 'Evidence-based law making on voluntary assisted dying' (2020) 44(4) *Australian Health Review* 544-546.

Avoid incoherent law by ad hoc addition of safeguards

As mentioned above, the Queensland Bill is a safe and measured law that has been written in a logical and coherent way by experts. We urge the Queensland Parliament to avoid the situation that other states have experienced where safeguards are awkwardly added to already sound law in an ad hoc way. This leads to the VAD law being incoherent or inconsistent in important ways.

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 other states in Australia. Yet this was only a last-minute addition to the Victorian Bill as a result of political compromise.

Our research has shown that the Victorian VAD law fails to meet its own stated policy goals in important respects, sometimes because of these later ad hoc additions during the law-making process: Ben White, Katrine Del Villar, Eliana Close and Lindy Willmott, 'Does the Voluntary Assisted Dying Act 2017 (Vic) Reflect Its Stated Policy Goals?' (2020) 43(2) *University of New South Wales Law Journal* 417.

For this reason, we argue that any proposed changes to the Bill must be carefully scrutinised in light of the Bill as a whole:[7]

> '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"

[7] Ben White, Katrine Del Villar, Eliana Close and Lindy Willmott, 'Does the Voluntary Assisted Dying Act 2017 (Vic) Reflect Its Stated Policy Goals?' (2020) 43(2) *University of New South Wales Law Journal* 417 at p451.

> – 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 to VAD.'

We have also written on this point in 'Comparative and Critical Analysis of Key Eligibility Criteria for Voluntary Assisted Dying Under Five Legal Frameworks':[8]

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

Some of the ways in which the Victorian system has been shown to be cumbersome or very challenging to navigate as a result of the aggregation of safeguards is discussed further below.

SUBMISSION ON *VOLUNTARY ASSISTED DYING BILL 2021* (QLD)

Our overall position

We welcome the tabling in Parliament of the *Voluntary Assisted Dying Bill 2021* (Qld). Our assessment of the Bill is that it is a sensible and measured Bill that will provide choice for terminally-ill patients while operating safely, including protecting the vulnerable in our community. While there is scope for some minor amendments to improve the Bill, our submission is that the Committee should recommend the Bill be passed.

Eligibility criteria

We comment below on particular aspects of the Bill's eligibility criteria.

<u>Expected to cause death within 12 months – Clause 10(1)(ii)</u>

We prefer no time limit; it is sufficient that death is expected

The Bill includes as part of its eligibility criteria that the person's disease, illness or medical condition is 'expected to cause death within 12 months'. As a preliminary

[8] Ben P White, Eliana Close, Lindy Willmott, 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* (forthcoming), p53.

point, we note that our preferred view is that requiring a specific timeframe until death is not appropriate and so the White and Willmott Model does not impose such a requirement. Part of our reasoning is that we argue that a timeframe makes little difference in practice to who is eligible to access VAD when the eligibility criteria are viewed holistically. As we wrote in an article 'Comparative and Critical Analysis of Key Eligibility Criteria for Voluntary Assisted Dying Under Five Legal Frameworks':[9]

> 'A third design point to make is that a system of regulation operates holistically. This means that looking at a single aspect of the eligibility criteria without understanding its role in the wider framework can be misleading. That is, it is important to examine eligibility criteria cumulatively and in context. This is the intention of the legislators in constructing the criteria in this way and this has significant implications for who can access VAD. As described above, the model Bill provides a good example of this: if the focus is restricted to the fact that the Bill does not impose a time limit until death, it may seem to be very broadly drafted. But when aggregated with the requirement for a medical condition that is incurable, advanced and progressive, the scope for access to VAD is considerably narrowed.'

This was confirmed when we analysed eligibility to access VAD in relation to nine medical conditions across a range of legal frameworks. In the paper 'Who is Eligible for Voluntary Assisted Dying? Nine Medical Conditions Assessed against Five Legal Frameworks', we concluded that the absence of a time limit under the White and Willmott Model did not affect access.[10] In other words, access to VAD was possible for the same medical conditions under the Victorian VAD law (primarily a 6-month time limit) as under the White and Willmott Model (no time limit).

Importantly, a practical (implementation) benefit of not having a temporal requirement is that the difficult task of prognostication about time to death is avoided.

If a time limit is needed, 12 months is preferrable to 6 months

The above point also supports the proposition that if a time limit is to be included, 12 months is preferrable to 6 months.

Additionally, there are a number of advantages to preferring the Queensland Bill's 12-month time limit over the approach taken in other Australian states, namely 6 months or 12 months if the condition is neurodegenerative. One obvious point is that it is very hard to justify having different time limits to access VAD depending on the nature of your illness.

But a second argument in favour of this slightly longer eligibility period is that it allows a person who is diagnosed with a medical condition more time to apply for VAD. The Victorian experience shows that the process of seeking assistance can be

[9] Ben P White, Eliana Close, Lindy Willmott, 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* (forthcoming), p53.
[10] Ben P White, Lindy Willmott, Katrine Del Villar, 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* (forthcoming), p52-53.

demanding for terminally-ill patients and takes time. We have undertaken research involving interviews with 32 doctors who have provided VAD to patients under the Victorian system in its first review of operation. That work has been published as:

- Ben White, Lindy Willmott, Marcus Sellars and Patsy Yates, 'Prospective approval of assisted dying: a qualitative study of doctors' perspectives in Victoria, Australia' (2021) *BMJ Supportive and Palliative Care* (early online)
- Lindy Willmott, Ben White, Marcus Sellars, Patsy Yates, 'Participating doctors' perspectives in the regulation of VAD in Victoria: a qualitative study' (2021) *Medical Journal of Australia* (early online)

While we acknowledge that the Victorian VAD system is different from what is proposed under the Queensland Bill, findings from this work included that doctors reported delays throughout the VAD process. This included from the oversight provided by the VAD Review Board's secretariat, the permit approval process from the Government, and the process of accessing the medication via the Statewide Pharmacy Service. This time taken resulted in challenges for access to VAD by patients, including some doctors reporting that patients died during the process of seeking access to VAD.

Allowing a 12-month period, instead of the default 6-month period in Victoria, may allow patients to start the process of seeking VAD a little earlier, and reduce the likelihood that they may die or lose decision-making capacity before accessing VAD. This doesn't mean that people will necessarily take the VAD medication earlier; just that they can be approved as eligible in that longer time frame.

Make clear that eligibility criteria are interpreted in light of the right to refuse medical treatment

The Bill does not expressly deal with how treatment refusals would be considered when interpreting the eligibility criteria, in particular those criteria requiring that the person's medical condition would cause death and that that death would be expected to occur within 12 months. The Commission's report appears to endorse the proposition that existing rights to refuse treatment should be taken into account when determining the meaning of the eligibility criteria.[11] We consider this position should be made clear in the Bill.[12] The White and Willmott Model makes this explicit in relation to causing death (time limits are not part of this model and so are not addressed) stating that whether a medical condition will cause death 'is to be determined by reference to available medical treatment that is acceptable to the person'.[13] We proposed that a similar clause should be inserted in the Queensland Bill to make this clear.

[11] Queensland Law Reform Commission, *A Legal Framework for Voluntary Assisted Dying*, Report No 79 (2021), p100, 112.
[12] For a discussion of treatment refusals and VAD eligibility criteria, see Ben P White, Eliana Close, Lindy Willmott, 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* (forthcoming), p45-47.
[13] Clause 10(2) of the Model Bill in Ben White and Lindy Willmott, 'A Model Voluntary Assisted Dying Bill' (2019) 7(2) *Griffith Journal of Law and Human Dignity* 1.

Residency requirements – Clause 10(1)(e) and (f)

We note that the Bill includes a different formulation of the two citizenship/residency requirements, and these initiatives are an improvement on the Acts in the other four states (Victoria, Western Australia, Tasmania and South Australia).

There is emerging evidence from Victoria that there can be difficulties in terminally-ill patients or their families gathering sufficient documentary evidence to prove that the person is an Australian citizen or permanent resident, or that the person has been ordinarily resident in the relevant state for 12 months prior to the request. Evidence of this is set out in: Lindy Willmott, Ben White, Marcus Sellars, Patsy Yates, 'Participating doctors' perspectives in the regulation of VAD in Victoria: a qualitative study' (2021) *Medical Journal of Australia*.

The recommendation of sub-clauses 10(1)(e)(iii) and (iv) and sub-clause 10(1)(f)(ii) may make this administrative task of gathering evidence to satisfy these two separate requirements more achievable, or otherwise allow a just outcome to be achieved. We support this aspect of the Bill.

We also endorse the Commission's eminently sensible remarks that statutory declarations about residence may be a desirable way to establish residence requirements in appropriate circumstances.

However, with South Australia having passed its VAD laws, four out of six Australian states have passed VAD legislation. If Queensland passes the law, VAD will be lawful in five out of six states. As such, VAD tourism becomes less of an issue. In the current climate of legislative reform, we also suggest that the Committee consider abolishing the Queensland residency requirement. We note that this suggestion is consistent with the Commission's recommendation to revisit residency requirements in the likely event that all States pass VAD laws.

Recommendations
We recommend that the Queensland residency requirement in clause 10(1)(f) be abolished.

We also recommend that in clause 12 dealing with residency exemptions, given the state of health of the patient seeking an exemption, the chief executive should be required to make a determination within a prescribed period. In this regard, we would suggest that this period should be within 3 business days of receiving the application.

Process

Administration decision – Clause 50

Clause 50 of the Bill creates a default in favour of self-administration. We prefer that people be given a free choice as to method and this is one of the very few issues where we return to the position expressed in the White and Willmott Model. We believe giving a person the choice of administration options better promotes the

principle of 'autonomy, including autonomy in relation to end of life choices' which is one of the principles that underpins the QLRC Bill (clause 5(c)).

Nevertheless, we consider that clause 50 (which reflects the Western Australian approach) is superior to the Victorian model where practitioner administration is permitted only where self-administration is not possible. The wider criteria are an improvement but we still believe there is no basis for a legislative default for self-administration.

We note the three criteria listed in clause 50(2) as reasons for self-administration being inappropriate. While sub-clause (a) and (b) are self-explanatory, we are of the view that sub-clause (c) is less clear. Subclause (c) refers to self-administration being inappropriate having regard to 'the method for administering the substance that is suitable for the person'. We presume that 'inappropriateness' here would be due to clinical issues relevant to the person that made practitioner administration preferable to self-administration. However, we thought that it might be clearer if the legislation contained examples of when this might be the case.

Recommendation: We suggest that it would enhance clarity of the provision if examples relevant to clause 50(2)(c) were inserted in the Bill immediately after this sub-clause.

Request and assessment process

Clause 16 – Medical practitioner to accept or refuse first request

We endorse the recommended process where a first request is made and a medical practitioner refuses the request on conscientious objection grounds (or is otherwise unwilling to act). The ability of a conscientious objector to refuse the request, but the requirement for the objector to inform the person of other providers or services who might be able to assist or details of a VAD navigator service immediately after the request is made achieves an appropriate balancing of rights. It respects the rights of those who choose not to participate in VAD without hindering access to someone who seeks VAD.

Clause 38 – Eligibility to witness the signing of second request

We make a technical drafting point here. We note that a person is excluded from being a witness to the second request if they are an owner or manager of a 'health facility'. (A similar exclusion applies to being an interpreter in clause 157.) The term 'health facility' did not appear to be defined in the Bill, and we raise the question of whether this term is broad enough to extend to all possible facilities where the patient is treated or resides.

Absence of a requirement to seek and be granted (or refused) a permit

We support the Bill not involving a system that requires a medical practitioner to apply to a departmental executive for a permit for either self-administration or practitioner administration. As we have argued in previous submissions to the Committee's predecessor and articulated in published work, we believe that the

requirement for a permit does not promote the principles that should underpin VAD laws, in particular the principle of reducing suffering. For example, this is outlined in Ben White, Katrine Del Villar, Eliana Close and Lindy Willmott, 'Does the Voluntary Assisted Dying Act 2017 (Vic) Reflect Its Stated Policy Goals?' (2020) 43(2) *University of New South Wales Law Journal* 417.

Implementation issue in relation to VAD process

Finally, we make an observation which relates more to the implementation of any legislation that is ultimately passed, rather than the content of the legislation itself. To the extent that it is possible, it is important to ensure that the system which is established to facilitate access to VAD works as simply as possible for health professionals and individuals and families who engage with it. Emerging research from Victoria suggests that system issues and an 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'[14] and the experience of the health professionals, persons seeking access to VAD and their families are as simple as is possible. We have written about these issues in two recent publications:

- Lindy Willmott, Ben White, Marcus Sellars, Patsy Yates, 'Participating doctors' perspectives in the regulation of VAD in Victoria: a qualitative study' (2021) *Medical Journal of Australia* (early online)
- Ben White, Lindy Willmott, Marcus Sellars and Patsy Yates, 'Prospective approval of assisted dying: a qualitative study of doctors' perspectives in Victoria, Australia' (2021) *BMJ Supportive and Palliative Care* (early online)

<u>Other</u>

Clause 7 – Health care worker not to initiate discussion about VAD

This provision is an improvement on the blanket prohibition on medical practitioners initiating conversations which exists in Victoria (section 8 of their legislation). The Victorian prohibition raises concerns about whether persons are able to make an informed choice without being aware of all available treatment options including VAD. We have explored this in several publications including:

- Lindy Willmott, Ben White, Marcus Sellars, Patsy Yates, 'Participating doctors' perspectives in the regulation of VAD in Victoria: a qualitative study' (2021) *Medical Journal of Australia* (early online)
- Lindy Willmott, Ben White, Danielle Ko, James Downar and Luc Deliens, 'Restricting conversations about voluntary assisted dying: implications for clinical practice' (2020) 10(1) *BMJ Supportive and Palliative Care* 105

However, we are concerned about the possible implications of the proposed clause 7 in this Bill. There is potential for this provision to be misunderstood by, and confusing for, 'health care workers' who are subject to the provision. The provision is relatively complex as the prohibitions imposed by the provision affect different workers in

[14] 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.

different ways. The concern is that this confusion may lead to health professionals taking a conservative approach of not raising VAD (although they are permitted to do so) even if they think a patient may wish to consider it, for fear of being in breach of a legislative prohibition.

Clause 82 – Eligibility to act as coordinating practitioner or consulting practitioner

We support the Bill's approach to the minimum requirements to act as coordinating and consulting practitioners. Under the proposed clause 82, inexperienced medical practitioners will not be able to act in these roles. The Commission noted in its report that if Queensland adopted the restrictive eligibility provisions that apply in Victoria, that could constitute a barrier to access for individuals seeking VAD given the vast expanse of rural and remote areas in Queensland. In this regard, we also note that there are clauses in the Bill which require the medical practitioner who is unable to determine eligibility criteria to refer the patient to another health practitioner with appropriate skills and training. Accordingly, there are sufficient safeguards to ensure that only patients who satisfy the requirements under the legislation will be assessed to be eligible.

Clause 83 – Eligibility to act as administering practitioner

We also support the Bill's approach to extending the health professionals eligible to act as administering practitioners. The availability of participating health professionals may act as a barrier to access for individuals seeking to access VAD, particularly in a geographically vast state such as Queensland. This provision may assist with ensuring availability of administering practitioners for eligible persons.

Clause 84 – Registered health practitioner with conscientious objection

This is a technical drafting issue that we raise for the Committee's attention. We note the tension between the right of a registered health practitioner to refuse to provide information to another person about VAD under clause 84(1)(a) and the obligation of a medical practitioner, who has refused a first request, to still provide information to the person making the request under clause 16(4). While we imagine that the obligation under clause 16(4) would prevail over the right to refuse under clause 84(1)(a) under the usual statutory interpretation principles, we wonder whether this should be clarified.

Recommendation: We recommend that the right to refuse to provide information in clause 84(1)(a) should be made subject to any obligation imposed by clause 16(4).

Clause 85 – Speech pathologist with conscientious objection

This is potentially a drafting point as well. We note that clause 85(2)(c) provides that a speech pathologist must not 'intentionally impede the person's access to speech pathology services in relation to VAD'. It is not clear why the term 'intentionally' is included when an equivalent word does not appear e.g. in clause 97(2)(b) which relates to facilitating access of a person in a residential facility to VAD medication. In that clause, the obligation is not to 'hinder access by the person to a VAD substance'. There is no requirement about intentionality. By inserting this

requirement in clause 85(2)(c), it could be argued that the bar is higher as there is the requirement to prove a state of mind.

We also wonder why the term 'impede' is used in relation to speech pathologists rather than 'hinder' which is used in other conscientious objection provisions.

Recommendation: We recommend that clause 85(2)(c) be amended by deleting the word 'intentionally' and altering 'impede' to 'hinder' to be consistent with the wording used in clauses 90 and 97.

Institutional Objection

We commend the Commission for the comprehensive and considered manner in which it has considered the issue of institutional objection, and note that they devoted a lengthy chapter of its report to this issue. In our submission to the Commission, we highlighted the need to balance the ability of entities not to provide VAD with the need to ensure a person has access to VAD if they so choose. We explore this issue further in Ben White, Lindy Willmott, Eliana Close and Jocelyn Downie, 'Legislative options to address institutional objections to voluntary assisted dying in Australia' (2021) *University of New South Wales Law Journal Forum* 1.

As the Commission explains in its report, it is important to find a middle path to accommodate both institutional and individual interests where possible, but if both cannot be accommodated in a particular case, then the interests of the individual who is seeking VAD should be prioritised as it is the individual who is potentially terminally ill and enduring intolerable suffering. We consider that the Bill strikes the appropriate balance on this issue.

While we endorse the recommendations of the Commission and the provisions contained in the Bill, we make some minor suggestions below for consideration by the Committee.

Clause 90 – Access to information about VAD

Under this clause, there is only a passive duty on institutions to allow access to information if requested by a person. We suggest there should be a positive obligation on an entity to provide information upon a person's request akin to the obligation imposed on a health professional who refuses a patient's first request by clause 16(4)(b).

Clause 97 – Administration of VAD substance

If a person is a permanent resident of a facility and has made a self-administration decision, clause 97(2)(b) prohibits that entity from hindering access by the person to the VAD substance. In light of media reports in Victoria that a pharmacist from the Statewide Pharmacy Service has been denied access to a facility to provide the medication, we would suggest that the provision should specifically allow access by a pharmacist or other person authorised to carry the medication. We offer the below alternative clause 97(2)(b) for the Committee's consideration (this reflects changes made to the equivalent provision in South Australian legislation – section s24(2)(b)):

> ‘(b) if the person has made a self-administration decision—
> (i) allow reasonable access to the person at the facility by a person lawfully delivering a voluntary assisted dying substance to the person, and any other person lawfully participating in the person's request for access to voluntary assisted dying; and
> (ii) not otherwise hinder access by the person to a voluntary assisted dying substance.’

Clause 97 Administration of VAD substance

In deciding whether it is ‘reasonable’ to transfer a patient for the purpose of a first or consulting assessment or making an administration decision, there are five criteria that the deciding practitioner must consider: serious harm; affecting access; undue delay and suffering; an alternative place; and financial cost. However, only three criteria are to be considered in determining reasonableness of transfer in the context of the actual administration of the substance: serious harm; affecting access; and an alternative place. It is not entirely clear to us why the other two criteria are not included as relevant considerations in clause 97(4). The two missing criteria are:

> (c) whether the transfer would cause undue delay and prolonged suffering in accessing VAD; and
> (e) whether the transfer would incur financial loss or costs because of the transfer.

In terms of (c) above, it is foreseeable that requiring a person to transfer out for the purpose of administration could possibly result in delay in administering the substance. For a person who is close to death, even a day’s delay to facilitate the transfer may be undesirable.

In terms of (e) above, it is unclear why the cost of the transfer would be irrelevant for the actual administration while being relevant to assessments and the administration decision.

Recommendation: We therefore believe it would be desirable for clause 97(4) to contain the same 5 criteria that appear in the other provisions (clauses 94(4), 95(4) and 96(4)).

Clauses 94-97

We refer to the obligation imposed on entities to ‘take reasonable steps to facilitate the transfer of the person’ for the various purposes which is imposed by these provisions. We note that while there is an obligation to take ‘reasonable’ steps, there is no express requirement for those steps to be taken in a timely manner. While it might be argued that unless steps are taken in a timely fashion, those steps will not be ‘reasonable’, we invite the Committee to consider whether this be expressly added to relevant provisions.

Recommendation: We suggest that the words 'in a timely fashion' be inserted after the words 'take reasonable steps' in clauses 94(3)(a), 95(3)(a), 96(3)(a) and 97(3)(a).

Implementation

We recognise that the focus of the Committee's inquiry is on the Bill. However, we did wish to make the following brief observations about implementation (in addition to those raised earlier).

- Clauses 82 and 83 deal with eligibility of practitioners to undertake roles in the VAD system. Both clauses make reference to approved practitioner requirements, the content of which will no doubt be determined during the implementation process. We first observe that it would be ideal if such requirements were included in the Bill (certainly all requirements of substance are best located in the Bill). However, if they are not to be in the Bill, such requirements should not be onerous and discourage otherwise eligible practitioners from becoming involved. We do not support the Western Australian approach in their equivalent requirements to require the names of two referees who can attest to the practitioner's suitability to act under their law.

- We support the legislative reference to an 'official voluntary assisted dying care navigator service'. This is appropriate to have legislative recognition of this role given its significance.

- We repeat our earlier calls for the Commonwealth Government to amend the Commonwealth Criminal Code prohibition relating to 'suicide' and a carriage service. Our views on how the Code could be very simply amended to avoiding the risk of criminalising otherwise lawful activity authorised under state VAD legislation are set out in this article: Katrine Del Villar, Eliana Close, Rachel Hews, Lindy Willmott, Ben White, 'Voluntary assisted dying and the legality of using a telephone or internet service: The impact of Commonwealth "Carriage Service" offences' (2021) *Monash University Law Review* (forthcoming). We recognise this is not a matter that the state of Queensland can resolve as this is Commonwealth law but urge continued advocacy from the state government during the implementation period.

In conclusion, 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 Law Faculty or QUT as entities.

Thank you for the opportunity to contribute to this Inquiry.

Yours sincerely

Professor Lindy Willmott
Australian Centre for Health Law Research
[redacted]

Professor Ben White
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[redacted]

APPENDIX – PUBLISHED RESEARCH REFERRED TO ABOVE

The below list of publications is presented in the order in which they are cited but we have also bolded new research that the Committee will not have yet seen.

- Ben White and Lindy Willmott, 'A Model Voluntary Assisted Dying Bill' (2019) 7(2) *Griffith Journal of Law and Human Dignity* 1.
- 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).
- Ben White and Lindy Willmott, 'Evidence-based law making on voluntary assisted dying' (2020) 44(4) *Australian Health Review* 544.
- Ben White, Katrine Del Villar, Eliana Close and Lindy Willmott, 'Does the Voluntary Assisted Dying Act 2017 (Vic) Reflect Its Stated Policy Goals?' (2020) 43(2) *University of New South Wales Law Journal* 417.
- **Ben White, Eliana Close, Lindy Willmott, 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* (forthcoming).**
- **Ben White, Lindy Willmott, Katrine Del Villar, 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* (forthcoming).**
- **Ben White, Lindy Willmott, Marcus Sellars and Patsy Yates, 'Prospective approval of assisted dying: a qualitative study of doctors' perspectives in Victoria, Australia' (2021) *BMJ Supportive and Palliative Care* (early online).**
- **Lindy Willmott, Ben White, Marcus Sellars, Patsy Yates, 'Participating doctors' perspectives in the regulation of VAD in Victoria: a qualitative study' (2021) *Medical Journal of Australia* (early online).**
- 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.
- **Ben White, Lindy Willmott, Eliana Close and Jocelyn Downie, 'Legislative options to address institutional objections to voluntary assisted dying in Australia' (2021) *University of New South Wales Law Journal Forum* 1.**
- **Katrine Del Villar, Eliana Close, Rachel Hews, Lindy Willmott, Ben White, 'Voluntary assisted dying and the legality of using a telephone or internet service: The impact of Commonwealth "Carriage Service" offences' (2021) *Monash University Law Review* (forthcoming).**