QUEENSLAND COUNCIL FOR CIVIL LIBERTIES
Protecting Queenslanders' individual rights and liberties since 1967

Health and Environment Committee

Parliament House

QLD 4000

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Dear Sir/Madam,

Thank you for the opportunity to make a submission in relation to the Voluntary Assisted Dying Bill 2021 (Qld) ('the Bill').

The Queensland Council for Civil Liberties is an organisation of volunteers founded over 50 years ago to protect the individual rights and liberties of Queenslanders.

In our submission to this Committee's predecessor on this topic we asked whether it is possible to construct a system of voluntary assisted dying which a well-informed person could not reasonably reject[1]. This was not to deny a role for religious views on this or any other public issue:

> because it is reasonable—or at least not unreasonable—for a non-religious person to disagree with religious people over whether there is a God, and a fortiori over the particular form of religion in question, she can therefore reasonably disagree with them over the sanctity of life view which is derived from religious faith. In order for the sanctity of life view to be persuasive to all, it has to be grounded on terms that all could in principle accept, or on grounds of public reasons[2].

No doubt, a system of voluntary assisted dying which had no structures for ensuring so far as is practicable that the vulnerable were adequately protected, could reasonably be rejected. On the other hand, people suffering unbearable and unavoidable pain can reasonably reject a total ban on voluntary assisted dying.

We asked if a rigorous system designed to prevent abuse of the right to assisted dying were effectively implemented could:

> A very "kind" or "considerate" patient who does not want to burden his family and who pretends to be entirely willing to choose PAS[3], reasonably reject the legalisation of PAS? I would think not, because her decision is, at least to some extent, voluntary, and hence she is responsible for her own opting for PAS[4]

In other words having regard to the unbearable pain and suffering of those with terminal or incurable illnesses a well-informed person could not reasonably reject VAD so long as it was only permitted in circumstances where all reasonable steps had been taken to protect the interests of the vulnerable.

It is our view that in general terms the Bill provides for a system that meets this test. This submission will address discrete issues within the Bill relating to, among other things, the eligibility criteria, the

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[1] Brian Barry *Justice as Impartiality* OUP 1995 67-72

[2] Hon-Lam Li *What We Owe to Terminally Ill Patients: The Option of Physician-Assisted Suicide* (2016) 8 Asian Bioethics Review 224 at 231

[3] Physician Assisted Suicide

[4] Li supra at 240

process of accessing voluntary assisted dying ('VAD), the review process and the liability of persons administering the regime.

Eligibility

The Bill limits eligibility to people diagnosed with a medical condition that:

1. Is expected to cause death within 12 months and

2. Is causing what the persons considers to be intolerable suffering

We would prefer to have a wider range of people eligible to take advantage of the scheme:

1. First, the bill limits the right to only individuals who are expected to die within 12 months.[5] In our view, the right should be extended to people who are experiencing unbearable pain and suffering, with no prospect of improvement. There are many illnesses which cause terrible suffering, but are not terminal nor will cause death.

2. Secondly, the right should be extended to individuals suffering from mental illnesses or psychiatric conditions. There are many individuals suffering from psychiatric conditions who have the same capacity as those who are not suffering from such conditions. Instead, a distinction should exist between the persons who, notwithstanding their psychiatric condition, are able to make informed decisions and have capacity, and, persons who do not have capacity as a consequence of the nature of their psychiatric illness.

3. Thirdly, the right should be extended to minors under the age of 18 who are *Gillick* competent.[6] Minors who have sufficient understanding and intelligence to understand fully the consequences[7] of VAD should not be denied the right to access it.[8] Although it has been argued that care is required not to equate the capacity to consent and the capacity to withhold life-saving treatment, such an argument fails to respect the personal autonomy of individuals who have capacity to make their own medical decisions.[9]

However, we do not press these issues here, preferring to see this Bill pass as an important first step in the process. We will instead concentrate on aspects of the Bill, which in our view need amendment.

Process of accessing VAD

There are three issues discussed below relating to the process of accessing VAD in Queensland.

It is our submission that the process should be initiated entirely by the applicant contrary to the position under subclause 7(2) of the Bill. Any initiation by the practitioner should be prohibited, which is consistent with the approach taken in New Zealand[10].

The power imbalance that exists between a patient and medical practitioner gives rise to an increased possibility of coercion. Furthermore, if a medical practitioner initiates the discussion about accessing

[5] Voluntary Assisted Dying Bill 2021 (Qld) subclause 10(1)(a)(ii).
[6] cf Voluntary Assisted Dying Bill 2021 (Qld) cl 10(1)(d).
[7] *Department of Health and Community Services v JWB and SMB ('Marion's Case')* (1992) 175 CLR 218, 237; *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112, 189.
[8] Hugh Platt, 'The Voluntary Assisted Dying Law in Victoria – A Good First Step but Many Problems Remain' (2020) 27 *Journal of Law and Medicine* 535, 543-4.
[9] *Re T* [1992] 4 All ER 649 at 652-3 (Lord Donaldson MR).
[10] *End of Life Choice Act 2019* (NZ) s 10(1).

VAD, a patient may view such advice as meaning that his or her condition will never improve. A medical practitioner's authority can act as an impediment to a patient's ability to make informed decisions.[11]

Secondly, whether a person's suffering is intolerable under subclause 10(1)(a)(ii) should not be entirely a subjective assessment determined by the person. Instead, it should import an objective standard by requiring that the patient and his or her treating doctor agree that the suffering is intolerable and cannot be relieved. This requirement will ensure that palliative care is properly considered by the patient and administered by the treating doctor. Such a requirement has proven effective in the Netherlands, where two-thirds of requests for VAD have been reversed as a result of palliative care.

Review process

There are two issues relating to the review process established by the Bill.

First, subclause 101(e) of the Bill provides that Part 3 of the *Queensland Civil and Administrative Tribunal Act* 2009 (Qld) ('QCAT Act') does not apply to the Bill. The Bill does so because it was considered that the completed assessment record form, which contains both the assessing practitioner's decisions and supporting documents,[12] was a sufficient statement of reasons.[13] It is the Council's submission that this position is inadequate as a person is entitled to the reasons of the tribunal's decision. The normal process under Chapter 3 of the QCAT Act would not unfairly impede or delay the process, but instead promote principles of natural justice.

Although there is no general rule of common law that requires reasons to be given for administrative decisions,[14] the circumstances of a review under this Bill require it due to the significant nature of the decision and its effects on the person seeking review. As Deane J observed in *Public Service Board of New South Wales v Osmond* at 676:

> "On the other hand, it is trite law that the common law rules of natural justice or procedural fair play are neither standardised nor immutable. The procedural consequences of their application depend upon the particular statutory framework within which they apply and upon the exigencies of the particular case. Their content may vary with changes in contemporary practice and standards.
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> That being so, the statutory developments referred to in the judgments of Kirby P. and Priestley J.A. in the Court of Appeal in the present case are conducive to an environment within which the courts should be less reluctant than they would have been in times past to discern in statutory provisions a legislative intent that the particular decision-maker should be under a duty to give reasons or to accept that special circumstances might arise in which contemporary standards of natural justice or procedural fair play demand that an administrative decision-maker provide reasons for a decision to a person whose property, rights or legitimate expectations are adversely affected by it.
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> Where such circumstances exist, statutory provisions conferring the relevant decision-making power should, in the absence of a clear intent to the contrary, be construed so as to impose upon the decision-maker an implied statutory duty to provide such reasons. As has been said however, the circumstances in which natural justice or procedural fair play requires that an administrative decision-maker give reasons for his decision are special, that is to say, exceptional."[15]

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[11] Queensland Health, 'Queensland Health Guide to Informed Decision-making in Health Care' (2nd edn, 2017), 65 [5.3.3] <www.health.qld.gov.au/_data/assets/pdf_file/0019/143074/ic-guide.pdf>.
[12] Voluntary Assisted Dying Bill 2021 (Qld) cl 35.
[13] Queensland Law Reform Commission, *A legal framework for voluntary assisted dying* (Report No 79, May 2021) 521 [16.100]-[16.101].
[14] *Public Service Board of NSW v Osmond* (1986) 159 CLR 656, 662 (Gibbs CJ)
[15] Ibid 676 (Deane J).

The Council submits that there are special circumstances that arise from the effect of the tribunal's decision which require that a written statement of reasons be provided. However, the Council recognises that the reasons should be kept private from the public and should only be provided to persons affected by the decision.

Subclause 103(1) of the Bill requires that the application for review be made within five business days after the relevant day. The Council submits that the default time limit of 28 days under ss 33(3) and (4) of the *QCAT Act* should instead apply.

Alternatively, and at the very least, a longer period of ten business days should apply. This would enable a party to properly decide whether he or she would like to bring a review application, which is a decision that requires delicate consideration. This is all the more so given that a "relevant day" under subclause 103(2)[16] is the day the eligible person making the application becomes aware of the reviewable decision. The receipt of such information make cause some shock to the eligible person. It is insufficient that the tribunal retains its power to extend the time limit[17] as the process unfairly burdens the applicant with the obligation to bring an additional application to extend the time limit.

Liability

The Council's position in relation to Part 10 of the Bill, which outlines the protection provided to persons assisting access to VAD, is that a person who wishes to take advantage of the statutory immunity should be required to report their actions to the Voluntary Assisted Dying Board.[18] If the supervisory board assesses that the person has complied with the requirements of the legislation, then he or she would be immune from prosecution in the absence of evidence of dishonesty.

This is consistent with the position in the Netherlands, where the supervisory board reviews each death[19] and is able to provide useful statistics and annual reports to the public and Parliament about the regime.[20] It improves transparency and oversight,[21] and allows the regime to be accurately evaluated. This requirement would also enhance the public's confidence in the scheme by demonstrating that the persons involved in administering the scheme are operating as they should.

Advance Health Directives

The Council notes that the Bill fails to address its position on advance health directives under the *Powers of Attorney Act 1998* (Qld).[22] The Council's position is that a person who made the decision to access VAD services prior to their loss of capacity should be eligible to access VAD. This position is supported by the common law as stated by Lord Donaldson MR in *Re T*:

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[16] Voluntary Assisted Dying Bill 2021 (Qld) subclauses 103(2)(a)(ii), (2)(b)(ii) and (2)(c)(ii).

[17] *Queensland Civil and Administrative Tribunal Act 2009* (Qld) ss 61(1)(a)-(b), (3), (4), (5).

[18] Voluntary Assisted Dying Bill 2021 (Qld) pt 8.

[19] *The Netherlands Termination of Life on Request and Assisted Suicide (Review Procedures) Act 2001* s 108.

[20] Bergje Onwuteaka-Philipsen, Lindy Willmott & Ben White, 'Regulating voluntary assisted dying in Australia: some insights from the Netherlands" (2019) 211(1) Medical Journal of Australia 438. 439.

[21] Jocelyn Downie, 'Medical Assistance in Dying: Lessons for Australia from Canada' (2017) 17(1) *QUT Law Review* 127, 143-4.

[22] *Powers of Attorney Act 1988* (Qld) ch 3, pt 3.

> "An adult who… suffers from no mental incapacity has an absolute right to choose whether to consent to medical treatment, to refuse it or to choose one rather than another of the treatments being offered… The right of choice is not limited to decisions which others might regard as sensible. It exists notwithstanding that the reasons for making the choice are rational, irrational, unknown or even non-existent."[23]

The respect for personal autonomy and self-determination are also the underlying principles of the legislation enabling persons to create advance health directives. In the Second Reading Speech for the WA equivalent of the *Guardianship and Administration Act 2000* (Qld), the Honourable Mr. Jim McGinty MLA said:

> "The principle of personal autonomy is central to the bill. The bill establishes a simple, flexible scheme whereby persons can ensure that, in the event that they become mentally incompetent and require medical treatment for any condition, including a terminal illness, their consent, or otherwise, to specified treatment can be made clear in an advance health directive and or alternatively treatment decisions can be made by an enduring guardian chosen by them."[24]

The Council recognises that there are significant difficulties in framing such a scheme due to issues including who should be responsible for deciding when the subjective criteria provided by the patient is fulfilled and the increased likelihood of coercion or undue influence in the drafting of advance health directives. These concerns, among others, are noted by the Queensland Law Reform Commission in their report.[25] However, the position that such patients are ineligible to access VAD is inconsistent with the prevailing position, which is that the law respects the decisions of persons who submit to an advance health directive. Such persons are taken to have had capacity to create an advance health directive and to have understood its effects. Furthermore, there are sufficient parallels between the decision to administer palliative care and the decision to administer VAD that the onus of determining when VAD should be administered should lie on the statutory health attorney.

The Council submits that the approach in Belgium, Luxembourg and the Netherlands should be followed, where a person is permitted to access VAD if they had, at an earlier time when they were competent, made an advance health directive.[26] It seems to that the system in Luxembourg could be a useful model. In that country the oversight body is required to confirm the patient's wishes once every five years from the date the advance health directive was enacted. Any treating doctor involved at the end of the patient's life is obliged to obtain information from the oversight body as to whether end-of-life provisions have been registered in the name of the patient.[27] In the Netherlands, doctors are able to administer VAD services if at least two other independent doctors agree it is in the best interests of the patient.[28] A combination of similar safeguards should be imposed due to the particular vulnerability

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[23] *Re T* [1992] 4 All ER 649 at 652-3 (per Lord Donaldson MR)

[24] Western Australia, *Parliamentary Debates*, Legislative Council, 15 March 2000 (the Hon Jim McGinty).

[25] Queensland Law Reform Commission, *A legal framework for voluntary assisted dying* (Report No 79, May 2021) 139-142 [7.307]-[7.318].

[26] *Belgian Euthanasia Act* 2002 art 4; *Luxembourg Law on Euthanasia and Suicide 2009* art 4.

[27] Ministere de la Sante, 'Euthanasia and assisted suicide', *Questions/answers on the Law of 16 March 2009 on euthanasia and assisted suicide,* (Information Paper, 16 March 2009) <euthanasie-assistance-suicide-questions-en.pdf (public.lu)>.

[28] Combined Pensioners & Superannuants Association, 'Dutch High Court euthanasia decision highlights Advance Care Directive conundrum', *Article* (Web Page, 25 May 2020) <Dutch High Court euthanasia decision highlights Advance Care Directive conundrum - CPSA>.

of the patients. Such a process could provide patients and their families with the comfort of the knowledge that their wishes are being acted upon.[29]

We thank QCCL intern Gabrielle Ong for her assistance in the preparation of this submission.

We trust this is of assistance to you in your deliberations.

Yours faithfully

Michael Cope
President
For and on behalf of the
Queensland Council for Civil Liberties
30 June 2021

[29] Hugh Platt, 'The Voluntary Assisted Dying Law in Victoria – A Good First Step but Many Problems Remain' (2020) 27 *Journal of Law and Medicine* 535, 549.