Queensland Law Society

Law Society House, 179 Ann Street, Brisbane Qld 4000, Australia
[redacted]
Office of the President

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Our ref: BT – MC

Health and Environment Committee
Parliament House
George Street
BRISBANE QLD 4000

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

Dear Health and Environment Committee

Inquiry into the *Voluntary Assisted Dying Bill 2021*

Thank you for the opportunity to provide feedback on the Health and Environment Committee's (**Committee's**) *Inquiry into the Voluntary Assisted Dying Bill 2021* (the **Inquiry**). The Queensland Law Society (**QLS**) appreciates being consulted on this important issue.

This response has been compiled with the assistance of the QLS Health and Disability Law Committee, whose members have substantial expertise in this area. QLS also convened a specialist working group to respond to the Inquiry, comprising members who practice across a number of related areas of law including human rights and public law, elder law, occupational discipline law, succession law and criminal law.

As you may be aware, QLS provided a submission in response to the Queensland Law Reform Commission's *Inquiry into a legal framework for voluntary assisted dying*[1] (the **QLRC Inquiry**). A copy of that submission is **enclosed** for your reference.

Executive summary

QLS considers that the *Voluntary Assisted Dying Bill 2021* (the **Bill**) achieves a reasonable balance in legislation which engages a number of important and fundamental human rights, but makes the following recommendations:

- Section 5 of the Bill should include a requirement that any person exercising a power or performing a function under the Bill must have regard to the principles set out in s 5.
- An extra principle should be added to s 5 stating every person in Queensland enjoys all relevant human rights, including those legislated in the *Human rights Act 2019* (Qld). Coupled with the recommendation that the principles must be considered by those exercising a power or performing a function under the Bill, relevant human rights would be considered by both public and private entities.

[1] Queensland Law Reform Commission, *A legal framework for voluntary assisted dying* (Report No 79, May 2021).

- The Committee should consider deleting s 11(1)(b), as capacity and voluntariness are distinct legal issues and the requirement that the person is acting voluntarily and without coercion is included in s 10(1)(c).
- Consideration should be given to whether the coordinating practitioner should also be present at and witness the second request (in addition to the two eligible witnesses), or another appropriately qualified medical or nurse practitioner (where, for example, the coordinating practitioner is unable to attend the making of the second request).
- Interaction between the VAD legislation and advance health directives/enduring powers of attorney should be clear, via a provision that expressly invalidates a desire to access VAD in an advance health directive/enduring power of attorney or similar.
- Queensland's Statement of Choices documents should be updated to expressly state that no directive for VAD will be considered under such documents.
- Section 50 should provide that a person can make a practitioner administration decision even where the coordinating practitioner has not advised the person that self-administration is inappropriate under s 50(2).
- Consideration should be given to the eligibility requirements to act as coordinating practitioner or consulting practitioner under s 81 of the Bill, to ensure equal access to the scheme for all Queenslanders, including those who live in regional and remote locations where availability and accessibility of medical practitioners who meet the eligibility requirements may be limited.
- Sections 94(4), 95(4), 96(4) and 97(4) of the Bill should also include in the list of matters that the deciding practitioner must have regard to when determining whether transfer is reasonable:
    - whether the transfer will cause additional undue stress and trauma due to separation from loved ones; and
    - the distance between the facility and the place the person is being transferred to, and the time that the transfer will take.
- The matters a deciding practitioner must have regard to under ss 94(4), 95(4) and 96(4) should not change in relation to the administration of the VAD substance under s 97.
- The deciding practitioner should have particular regard to whether the transfer will cause additional undue stress and trauma due to separation from loved ones in relation to the administration of the VAD substance under s 97.
- Section 100(c) should be amended to define an eligible person as "*any other person who has a direct, personal and relevant interest in the rights and interests of a person mentioned in paragraph (a) in relation to voluntary assisted dying.*"
- QCAT should be required to hear an application made in relation to Pt 7 of the Bill, and make a decision, within 5 business days of the application being made under s 103 of the Bill.
- QCAT should be provided with the additional funding and resources that are needed to ensure the effective operation of its recommended new jurisdiction under the Bill.
- The introduction of the Bill should not detract from the Queensland Government's responsibility to ensure high-quality palliative care is available, not only for those who are deciding whether to access the voluntary assisted dying (**VAD**) scheme, but also for those who are ineligible to access VAD.

Section 5 – principles

The provision of end-of-life care and access to the VAD scheme engages a number of important and fundamental human rights, and requires a careful balancing within the legislation to support and uphold, as well as safeguard, the rights of individuals. The significance of ensuring that fundamental human rights are protected by the VAD legislation cannot be overstated.

QLS supports the inclusion of the principles set out in s 5 of the Bill and considers the principles to be appropriate to describe the legislation's intentions. However, QLS is concerned that the Bill does not specifically require a person to have regard to the principles when exercising a power or performing a function under the legislation. This is a notable divergence from the Victorian[2] and Western Australian[3] equivalent legislation, both of which expressly require a person to have regard to the principles when exercising a power or performing a function under the legislation.

The QLRC recommends against requiring every person who exercises a power or performs a function under the Bill to have regard to the principles, on the basis that to do so is 'likely to cause confusion and uncertainty, and impede, rather than improve, the operation of the draft Bill.'[4] Rather, the QLRC considers that guidance on decisions and practices is 'best given in the context of a specific decision or practice' by way of accompanying guidelines developed for the exercise of a particular power or function.[5]

Some other overseas jurisdictions which have enacted VAD legislation do not contain a statement of principles, however those jurisdictions generally have stand-alone constitutionally embedded human rights protections.[6] Australia has no such constitutionally embedded human rights protections. Although Queensland recently became the third Australian jurisdiction to enact human rights legislation via the *Human Rights Act 2019* (**HRA**), the HRA applies only to courts and tribunals, the Queensland Parliament, and "public entities".[7] Section 48 of the HRA requires all legislation to be interpreted compatibly with human rights, including provisions of the Bill. In instances where the Supreme Court is unable to interpret the legislation compatibly with human rights, then the primary remedy the HRA offers is identification of the inconsistency to the Queensland Parliament.

The Australian Medical Board's most recent code of conduct, *Good Medical Practice: A Code of Conduct for Doctors in Australia*[8] (**Code of Conduct**) speaks to end-of-life treatment,[9] but does not specifically touch on VAD.[10] The Code of Conduct does not appear to be inconsistent with the principles set out in s 5 of the Bill. However, the Code of Conduct expressly provides that it 'is not a substitute for the provisions of legislation and case law' and where there is any conflict between the Code of Conduct and the law, 'the law takes precedence.'[11] As the Code

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[2] *Voluntary Assisted Dying Act 2017* (Vic) s 5.
[3] *Voluntary Assisted Dying Act 2019* (WA) s 4.
[4] Queensland Law Reform Commission, *A legal framework for voluntary assisted dying* (Report No 79, May 2021) 56 [5.88].
[5] Queensland Law Reform Commission, *A legal framework for voluntary assisted dying* (Report No 79, May 2021) 56 [5.89].
[6] For example, *Canadian Charter of Rights and Freedoms*, s 7, Part 1 of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK) c 11. Also, New Zealand's *End of Life Choice Act 2019* (NZ) does not provide a statement of principles, but New Zealand has the *New Zealand Bill of Rights Act 1990* (NZ) (**BORA**). However, s 3 of the BORA provides that it only applies to the legislative, executive, or judicial branches of the Government of New Zealand, or by any person or body in the performance of any public function, power or duty conferred or imposed on that person or body by or pursuant to law.
[7] *Human Rights Act 2019* (Qld) s 5(2).
[8] Medical Board, Australian Health Practitioner Regulation Agency, *Good Medical Practice: A Code of Conduct for Doctors in Australia* (October 2020) <https://www.medicalboard.gov.au/Codes-Guidelines-Policies/Code-of-conduct.aspx>.
[9] Ibid 12 [4.13].
[10] Presumably because VAD legislation has not yet been enacted nation-wide.
[11] Medical Board, Australian Health Practitioner Regulation Agency, *Good Medical Practice: A Code of Conduct for Doctors in Australia* (October 2020), 4 [1.3].

of Conduct provides direction to medical practitioners nationally (where VAD laws have been implemented in certain States and Territories only), QLS considers it important to expressly require a person to have regard to the principles set out in s 5 of the Bill.

QLS does not consider that requiring a person to have regard to the principles underpinning the legislation would cause confusion and uncertainty. Currently, the *Queensland Capacity Assessment Guidelines 2020*[12] (**Capacity Guidelines**) provide a list of capacity assessment principles that must be applied in making an assessment of an adult's capacity. These guidelines were prepared under s 250 of the *Guardianship and Administration Act 2000* 'to assist people required to make assessments about the capacity of adults to make decisions about matters under Queensland's guardianship legislation.'[13] Additionally, the *Mental Health Act 2016* requires the application of 30 principles by those performing functions under that legislation.[14] These principles also refer specifically to particular cohorts of rights holders (e.g., people with mental illness).

QLS is of the view that a requirement to have regard to the principles set out in s 5 of the Bill would provide additional clarity rather than cause confusion.

QLS also submits that such fundamental principles should not be subject to changing ministerial discretion, government policy or accompanying professional guidelines. These are fundamental principles which underpin the VAD legislation and ensure the rights of both those who access the VAD scheme, and those who provide access to the VAD scheme. Accordingly, it is QLS' view that the requirement to have regard to such fundamental principles when exercising a power or performing a function under the legislation should be explicitly stated in the Bill.

Further, many individuals and entities making decisions under the Bill will not necessarily be public entities for the purposes of the HRA. Therefore, while it may risk lengthening the principles, an extra principle could be added noting that every person in Queensland enjoys all relevant human rights, including those legislated in the HRA. In this way, coupled with the recommendation that the principles must be considered by those exercising a power or performing a function under the Bill, relevant human rights would be considered by both private and public entities.

QLS recommendations:

1. Current s 5 to be s 5(1), with words to the effect: *A person exercising a power or performing a function under this Act must have regard to the following principles –*

2. Add new s 5(2): *In subsection (1), the reference to a person exercising a power or performing a function under this Act includes QCAT exercising its review jurisdiction in relation to a decision made under this Act.*

3. Add a new s 5(1)(i), with words to the effect: *Every person in Queensland enjoys all human rights, including those legislation in the Human Rights Act 2019* (Qld).

Sections 10 and 11 – eligibility and decision-making capacity

[12] Queensland Government, *Queensland Capacity Assessment Guidelines 2020* (effective from 7 April 2021) 9.
[13] Queensland Government, *Queensland Capacity Assessment Guidelines 2020* (effective from 7 April 2021) 2.
[14] *Mental Health Act 2016* (Qld) ss 5-7.

QLS highlights that s 11 of the Bill defines "decision-making capacity" consistently with the definition of "capacity" in Queensland's guardianship legislation.[15] This definition requires the person to be capable of 'freely and voluntarily making decisions about access to voluntary assisted dying'.[16] The Capacity Guidelines explain that '[i]t must be clear that the adult is making the decision and is not being pressured or coerced into making the decision.'[17] The Capacity Guidelines also highlight a number of risk factors for practitioners to be aware of that may indicate pressure or coercion.

The express requirement for a person to be capable of freely and voluntarily making decisions about voluntary assisted dying is not included in the definition of decision-making capacity in other Australian jurisdictions.[18] In Western Australia, the requirement that the person be acting voluntarily and without coercion is contained in the eligibility criteria,[19] and in Victoria, it is not included in the eligibility criteria however the relevant medical practitioners must be satisfied that the person is acting voluntarily and without coercion.[20]

The eligibility criteria under s 10 of the Bill requires (amongst other criteria) that a person must have decision-making capacity in relation to voluntary assisted dying (which includes the requirement that the person be capable of freely and voluntarily making decisions about access to voluntary assisted dying) and that the person is acting voluntarily and without coercion.

Questions of legal capacity and questions of the voluntariness of a decision should be kept separate as they are distinct legal issues. For example, it is possible for a person to have capacity to make a decision that they are nonetheless coerced into making. The QLRC acknowledges this overlap and reasons that:

> *the requirement that, to have decision-making capacity, a person must be capable of freely and voluntarily making a decision is expressed in terms of the person's capacity to make decisions freely and voluntarily. The separate eligibility criterion specifically requires that, in making decisions about accessing the scheme, the person is acting voluntarily and without coercion. These requirements, operating together, are important safeguards.*[21]

In any event, s 10(c) of the Bill treats voluntariness and absence of coercion as a separate eligibility requirement. QLS recommends that the Committee consider whether, for this reason, voluntariness should not be included as an element of the capacity requirement.

QLS recommendation:

4. The Committee should consider deleting s 11(1)(b), as capacity and voluntariness are distinct legal issues and the requirement that the person is acting voluntarily and without coercion is included in s 10(1)(c).

[15] *Guardianship and Administration Act 2000* (Qld) sch 4 (definition of "capacity"); *Powers of Attorney Act 1998* (Qld) sch 3 (definition of "capacity").
[16] *Voluntary Assisted Dying Bill 2021* (Qld) s 11(1)(b).
[17] Queensland Government, *Queensland Capacity Assessment Guidelines 2020* (effective from 7 April 2021) 17.
[18] *Voluntary Assisted Dying Act 2017* (Vic) s 4; *Voluntary Assisted Dying Act* (WA) s 6.
[19] *Voluntary Assisted Dying Act 2019* (WA) s 16(1)(e).
[20] *Voluntary Assisted Dying Act 2017* (Vic) ss 20 and 29.
[21] Queensland Law Reform Commission, *A legal framework for voluntary assisted dying* (Report No 79, May 2021) 207 [7.264].

Section 37 – the requirement for 2 witnesses to witness the making of the second request

QLS previously supported the requirement proposed by the draft bill developed by Professors Lindy Willmott and Ben White (the **W&W Model**), that the second request be made in the presence of two eligible witnesses, as well as the coordinating practitioner.[22] The QLRC is of the view that the requirement for the coordinating practitioner to also be present at the making of the second request would make the process 'unduly burdensome'.[23]

The Western Australian VAD legislation requires that two eligible witnesses *and* the coordinating practitioner witness the person's written declaration requesting access to VAD.[24] However, in Victoria, only two eligible witnesses are required to witness the person's written declaration.[25]

There are divergent views among our members as to whether the coordinating practitioner should be present at the making of the second request, in addition to the two eligible witnesses. However, QLS highlights reports of eligible Victorians struggling to access VAD,[26] due to the limited number of doctors able to provide VAD and the extensive administrative requirements of the scheme.[27] In this respect, academics have stressed that '[w]hile safety is undoubtedly ethically important, we caution against an overemphasis on safeguarding in voluntary assisted dying legislation given the implications for equal access.'[28]

QLS acknowledges that the VAD scheme should not prove too administratively difficult such that it hinders access for eligible participants. QLS also considers that the eligibility requirements in relation to the witnessing of a second request under s 38 of the Bill are sufficiently robust to safeguard, as far as is practically possible, against a person making a second request involuntarily or with coercion. However, QLS suggests that the Committee give consideration to whether the coordinating practitioner should also be present and witness the second request (in addition to the two eligible witnesses), or another appropriately qualified medical or nurse practitioner (where, for example, the coordinating practitioner is unable to attend the making of the second request).

QLS recommendation:

5. Consideration should be given to whether the coordinating practitioner should also be present at and witness the second request (in addition to the two eligible witnesses), or another appropriately qualified medical or nurse practitioner (where, for example, the coordinating practitioner is unable to attend the making of the second request).

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[22] Queensland Law Society, Submission to Queensland Law Reform Commission, *A legal framework for voluntary assisted dying* (17 December 2020) 4.
[23] Queensland Law Reform Commission, *A legal framework for voluntary assisted dying* (Report No 79, May 2021) 229 [8.334].
[24] *Voluntary Assisted Dying Act 2019* (WA) s 34(2)(b).
[25] *Voluntary Assisted Ding Act* (Vic) s 42(3)(b).
[26] Kristian Silva, 'Voluntary euthanasia patients in Victoria caught in red tape bottleneck', *ABC News* (online, 18 July 2019) <https://www.abc.net.au/news/2019-07-18/voluntary-euthanasia-patients-caught-in-red-tape-bottleneck/11320626>; Melissa Cunningham, 'Patients "too tired, unwell" to clear assisted dying's red tape hurdle', *The Age* (online, 25 September 2019) <https://www.theage.com.au/national/victoria/patients-too-tired-unwell-to-clear-assisted-dying-s-red-tape-hurdle-20190812-p52g63.html>; Noel Towell and Melissa Cunningham, 'First assisted dying permit issued to terminally ill Victorian', *The Age* (online, 23 July 2019) <https://www.theage.com.au/national/victoria/first-assisted-dying-permit-issued-to-terminally-ill-victorian-20190723-p52a1e.html>.
[27] Rosalind McDougall and Bridge Pratt, *Too much safety? Safeguards and equal access in the context of voluntary assisted dying legislation* (2020) 21 *BMC Medical Ethics* 1.
[28] Rosalind McDougall and Bridge Pratt, *Too much safety? Safeguards and equal access in the context of voluntary assisted dying legislation* (2020) 21 *BMC Medical Ethics* 1.

Enduring decision-making capacity and advance health directives

QLS supports the Bill's approach to requiring the person to have decision-making capacity at all stages of the VAD process. QLS acknowledges that requiring the person to demonstrate capacity repeatedly throughout the process will likely result in the exclusion of some persons, for example those with a degenerative medical condition that gradually causes diminution of capacity. These persons may meet all other eligibility criteria, but as a result of the degenerative medical condition, they may be unable to demonstrate decision-making capacity by the end of the process.

QLS recognises that this exclusion may be deeply distressing for some individuals who may wish to determine advance care planning, including access to VAD, by way of making an advance health directive at a time when decision-making capacity can still be demonstrated. However, QLS agrees with the QLRC's recommendation that the Bill should not provide for the use of an advance health directive to include provision for accessing VAD.[29] QLS recommends, however, that this be revisited during the first review of the legislative framework following commencement. The interaction between voluntary assisted dying and other advance directives (including advance health directives, enduring powers of attorney, and statements of choice) must be clear, and QLS recommends that consideration be given to whether a provision similar to that of s 33 of the *End of Life Choice Act 2019* (NZ) be included in the Bill, which provides:

> *33 Advance directive, etc, may not provide for assisted dying*
>
> *(1) A person who wishes to request to exercise the option of receiving assisted dying under this Act must sign and date the approved form … and to the extent that any provision expressing such a wish is included by the person in an advance written or oral directive, will, contract, or other document, that provision is invalid.*

QLS supports the 12 month timeframe included in the legislation (under s 10(1)(a)(ii)) as a means to provide access to some people who experience an unexpected, or (in the case of those with degenerative conditions) expected, deterioration in their condition.

QLS also supports the flexibility in s 43 of the Bill, which allows for the designated period to be shortened before the person makes their the final request if, in the opinion of the coordinating practitioner, the person is likely to die, or to lose decision-making capacity in relation to voluntary assisted dying.

QLS considers that both of these measures provide a compassionate and balanced measure for people wishing to access the VAD scheme, while ensuring that access to the scheme is limited to those with decision-making capacity.

[29] Queensland Law Reform Commission, *A legal framework for voluntary assisted dying* (Report No 79, May 2021) 135-42 [7.284-7.318]; 169-79 [7.513-7.594].

QLS recommendation:

6. Interaction between the VAD legislation and advance health directives/enduring powers of attorney should be clear, via a provision that expressly invalidates a desire to access VAD in an advance health directive/enduring power of attorney or similar.
7. Queensland's Statement of Choices documents should be updated to expressly state that no directive for VAD will be considered under such documents.

Section 50 – Administration decision

QLS reiterates the statements made in our previous submission, that the legislation should not contain a default position with respect to self-administration of the substance, or practitioner administration. The most appropriate method should be determined in the context of the individual, their family, support persons and healthcare practitioners. In this respect, QLS agrees with the QLRC's view that '[a] person should be able to make an informed decision about the method of administration (self-administration or practitioner administration) best suited to them.'[30]

While some jurisdictions provide for self-administration as the default method of administration,[31] the peer-reviewed empirical evidence from other jurisdictions is also clear that practitioner administration is not intrinsically more open to abuse than self-administration.[32] In a study of the literature from 1947 to 2016, it was concluded that '[i]n no jurisdiction was there evidence that vulnerable patients have been receiving euthanasia or physician-assisted suicide at rates higher than those in the general population.'[33]

QLS acknowledges, however, that there are arguments in favour of restricting practitioner administration of a VAD substance:

- The act of self-administration is itself the final indication that the person is acting voluntarily. This option maximises the person's autonomy to control the timing and circumstances of their death.
- Having the person self-administer the VAD substance provides an additional safeguard over practitioner administration; if patients have to administer the dose themselves, they might be more likely to discontinue the process if there are any residual doubts at the crucial moment (however, it is not clear that empirical studies can capture this).
- There might be a public policy argument against a more expansive right to practitioner-administration, based on the fact that practitioner-administration involves one person killing another person. By contrast, self-administration does not require any third party to kill another person. Instead, there is only one person voluntarily choosing to end their life. For this reason, a default administration method

[30] Queensland Law Reform Commission, *A legal framework for voluntary assisted dying* (Report No 79, May 2021) 289 [10.57].
[31] For example, Victoria and the United States of America.
[32] See for example, Emanuel et al, 'Attitudes and Practices of Euthanasia and Physician-Assisted Suicide in the United States, Canada, and Europe' (2016) 316(1) *Journal of the American Medical Association* 79.
[33] Emanuel et al, 'Attitudes and Practices of Euthanasia and Physician-Assisted Suicide in the United States, Canada, and Europe' (2016) 316(1) *Journal of the American Medical Association* 79.

of self-administration may be preferable (unless otherwise deemed to be inappropriate upon consideration of the factors listed under s 50(2)).

Notwithstanding these arguments, QLS considers that a person should not be deprived of the choice to make a practitioner administration decision. The QLRC states that 'the person should be able to decide to have the substance administered to them if self-administration is inappropriate.'[34] However, the drafting of s 50 is clear that the person must self-administer unless the coordinating practitioner considers self-administration inappropriate. QLS recommends that s 50 provide that a person can make a practitioner administration decision even where the coordinating practitioner has not advised the person that self-administration is inappropriate.

QLS recommendation:

8. Section 50 should provide that a person can make a practitioner administration decision even where the coordinating practitioner has not advised the person that self-administration is inappropriate under s 50(2).

Part 5 – eligibility requirements for health practitioners

QLS supports the eligibility requirements for persons to act as an administering practitioner under s 83 of the Bill, including the provision for a nurse practitioner or nurse with the requisite experience to act as administering practitioner. QLS generally supports the eligibility requirements set out in s 82 for eligibility to act as coordinating practitioner or consulting practitioner. However, there are reports of patients in Victoria being unable to find a doctor with the requisite training to assist them to access the VAD scheme.[35] Additionally, Queensland's size and geographically dispersed location may impede access to the scheme for persons in regional and remote locations.

QLS submits that consideration should be given to the eligibility requirements to act as coordinating practitioner or consulting practitioner under s 81 of the Bill, to ensure equal access to the scheme for all Queenslanders.

QLS recommendation:

9. Consideration should be given to the eligibility requirements to act as coordinating practitioner or consulting practitioner under s 81 of the Bill, to ensure equal access to the scheme for all Queenslanders, including those who live in regional and remote locations where availability and accessibility of medical practitioners who meet the eligibility requirements may be limited.

[34] Queensland Law Reform Commission, *A legal framework for voluntary assisted dying* (Report No 79, May 2021) 289 [10.59].
[35] Kristian Silva, 'Voluntary euthanasia patients in Victoria caught in red tape bottleneck', *ABC News* (online, 18 July 2019) <https://www.abc.net.au/news/2019-07-18/voluntary-euthanasia-patients-caught-in-red-tape-bottleneck/11320626>.

Part 6 – participation

Conscientious objection

QLS considers that the provisions relating to registered health practitioners with a conscientious objection and speech pathologists with a conscientious objection are sufficient. QLS agrees that there should be no requirement to transfer care from a practitioner with a conscientious objection, where the existing legal and ethical duties should be sufficient, and the requirement for the practitioner to give the person the information required under s 84(2)(b) is maintained.

QLS also agrees there should be no penalty for failure to comply with the requirements associated with the conscientious objection provisions in the Bill, where potential referral to the Office of the Health Ombudsman or Australian Medical Board is sufficient.

Participation by entities

The issue of whether an entity should be allowed to refuse access to VAD within its facility is complex. Both the Victorian and Western Australian legislative equivalents are silent on the issue of institutional objections to VAD, and anecdotal evidence suggests that some patients are being denied access to VAD due to institutional objections.[36] Academics highlight that '[a]llowing institutional objections to VAD can sometimes result in patients being transferred seamlessly and painlessly to another institution, community space, or home for assessments and provision of VAD.'[37] However, some Canadian experiences with VAD illustrate how allowing institutional objections can also result in indignity, extreme pain, and loss of access.[38]

At the heart of the issue of institutional objection is how best to weigh the individual's right to access VAD against an institution's desire not to permit VAD within its facility. Academics have highlighted that legislation is the optimal regulatory response to institutional objections.[39]

It is QLS' view that the Bill strikes the right balance between the ability of an entity to reject VAD if it considers the practice to be in conflict with its established doctrine or tenets, and the right of an individual to access healthcare in accordance with established common law principles, including autonomy, equality, self-determination, and reducing suffering.

QLS supports the mechanisms for an entity to facilitate access to VAD where the person is a "permanent resident at the facility". QLS also supports the requirement of an entity to facilitate the transfer of a person to and from a place for the purpose of assessments and administration decisions where the person is a non-permanent resident at the facility as a first option, unless the deciding practitioner is of the opinion that the transfer is not reasonable. However, QLS submits that the Bill should include guidance as to when a transfer may not be reasonable that takes account of the large, decentralised nature of Queensland, so that access to VAD is not impeded for those Queenslanders who live in rural and remote areas, where transfers might need to occur over significant distances.

Accordingly, QLS recommends that the Bill also include in the list of matters that the deciding practitioner must have regard to when determining whether transfer is reasonable:

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[36] See for example, White et al, 'Legislative Options to Address Institutional Objections to Voluntary Assisted Dying in Australia' [2021] 3 *UNSW Law Journal Forum* 1, 8-10.
[37] White et al, 'Legislative Options to Address Institutional Objections to Voluntary Assisted Dying in Australia' [2021] 3 *UNSW Law Journal Forum* 1, 12.
[38] White et al, 'Legislative Options to Address Institutional Objections to Voluntary Assisted Dying in Australia' [2021] 3 *UNSW Law Journal Forum* 1, 12-13.
[39] White et al, 'Legislative Options to Address Institutional Objections to Voluntary Assisted Dying in Australia' [2021] 3 *UNSW Law Journal Forum* 1, 13.

- whether the transfer will cause additional undue stress and trauma due to separation from loved ones; and
- the distance between the facility and the place the person is being transferred to, and the time that the transfer will take.

QLS also considers that the matters a deciding practitioner must have regard to under ss 94(4), 95(4) and 96(4) should not change in relation to the administration of the VAD substance under s 97. Presently, s 97(4) does not require a deciding practitioner to have regard to the following when deciding whether the transfer of the person would be unreasonable:

- whether the transfer would cause undue delay and prolonged suffering in accessing voluntary assisted dying; and
- whether the person would incur financial loss or costs because of the transfer.

QLS considers that the deciding practitioner should have particular regard to whether the transfer will cause additional undue stress and trauma due to separation from loved ones in relation to the administration of the VAD substance under s 97.

A decision by an entity to refuse access to VAD, or to transfer a patient to and from a facility that does allow access to VAD, may limit the rights of individuals enshrined under the HRA.[40] Entities do not have rights under the HRA, although individuals who work in such entities will enjoy this protection. Actions taken under Pt 6, Div 2 of the Bill may engage a number of rights under the HRA, including: the right to health services without discrimination;[41] the right to equality;[42] the right to privacy;[43] the right to family;[44] cultural rights of Aboriginal peoples and Torres Strait Islander peoples;[45] and, in severe cases, the right to not be subject to cruel, inhumane or degrading treatment.[46]

It is uncertain whether an entity's decision to disallow access to VAD within its facility, necessitating that an eligible person (where they are a "non-permanent resident at the facility") undertake painful, traumatic or difficult travel to an alternative facility that allows access, will be compatible with the HRA. Ultimately, this will depend on the specific circumstances. QLS considers, however, that access to VAD should be equitable irrespective of an eligible person's condition, location or accommodation.

[40] Although this is unlikely to be relevant in private settings because the HRA applies to "public entities", there is an argument to be made that an entity could be bound by the HRA if it receives state funding.
[41] *Human Rights Act 2019* (Qld) s 37.
[42] *Human Rights Act 2019* (Qld) s 15.
[43] *Human Rights Act 2019* (Qld) s 25.
[44] *Human Rights Act 2019* (Qld) s 26.
[45] *Human Rights Act 2019* (Qld) s 28.
[46] *Human Rights Act 2019* (Qld) s 17(b).

QLS recommendation:

10. Sections 94(4), 95(4), 96(4) and 97(4) of the Bill also include in the list of matters that the deciding practitioner must have regard to when determining whether transfer is reasonable:
    a. whether the transfer will cause additional undue stress and trauma due to separation from loved ones; and
    b. the distance between the facility and the place the person is being transferred to, and the time that the transfer will take.
11. The matters a deciding practitioner must have regard to under ss 94(4), 95(4) and 96(4) should not change in relation to the administration of the VAD substance under s 97.
12. The deciding practitioner should have particular regard to whether the transfer will cause additional undue stress and trauma due to separation from loved ones in relation to the administration of the VAD substance under s 97.

Part 7 – review by QCAT

QLS supports the review mechanism included in Pt 7 of the Bill, and considers that the Queensland Civil and Administrative Tribunal (**QCAT**) is best suited to provide the review mechanism because its procedures are sufficiently flexible to accommodate the nature of applications that may be made in relation to the VAD scheme. It may, for example, deal with matters on the papers or by remote conferencing,[47] and is required to deal with matters in a way that is 'accessible, fair, just, economical, informal and quick.'[48]

Section 99 – reviewable decisions

The Bill anticipates that QCAT will be responsible for reviewing decisions classified as "reviewable decisions" under s 99. QLS agrees that it is neither necessary nor desirable for the QCAT review mechanism to apply to clinical decisions of a coordinating or consulting practitioner, or to decisions of an administering practitioner, and supports the reviewable decisions set out in s 99 of the Bill.

Section 100 – who is an *eligible person*

QLS supports the restriction of the class of persons who may apply to QCAT for a review of a reviewable decision. With the exception of applications brought by the eligible applicant, a cautionary approach should be adopted to determine who will have standing to make an application for review. This is necessary to ensure that the process is not improperly used by parties unreasonably or vexatiously. This issue has been the cause of recent litigation in Canada, which involved suggestions that an object of the litigation was to delay access to VAD until the person lost capacity and became ineligible.[49]

While QLS appreciates that it may be appropriate in some circumstances for a person who has a "special interest" to make an application on behalf of an applicant, QLS submits that the person should be required to have a direct, personal and relevant interest with the VAD applicant. Accordingly, QLS recommends that s 100(c) be amended to define an eligible

[47] *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 32.
[48] *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 3(b). See also s 4, ch 2 pt 2, pt 6 div 1.
[49] *Sorenson v Swinemar*, 2020 NSCA 62.

person as "*any other person who has a direct, personal and relevant interest in the rights and interests of a person mentioned in paragraph (a) in relation to voluntary assisted dying.*"

The need for timely review of decisions under the Bill

The enactment of the Bill is likely to increase the number of complex cases lodged with QCAT, with serious implications for the Tribunal's ongoing workload. It is imperative that QCAT deal with applications in relation to the VAD legislation in a timely manner that is cognisant of the purpose of the VAD scheme: to give persons who are suffering and dying, and who meet the eligibility criteria, the option of requesting medical assistance to end their lives.

Our members raise concerns about the current resourcing and capacity of the Tribunal, which will only increase when the Bill is enacted. According to QCAT's Annual Report for 2019-20, cases lodged with QCAT are increasing in both number and complexity.[50] Despite its significant workload, QLS understands that QCAT faces funding and systems challenges which affects the Tribunal's ability to deliver its services in a timely and effective way. In particular, QCAT has documented a significant increase in guardianship and administration applications flowing from the rollout of the National Disability Insurance Scheme.[51] Our members have advised that, for guardianship applications, they often wait six months from the date an application is lodged for an initial hearing. We acknowledge that additional funding was provided to QCAT in the recent State Budget, however QLS considers that this will only assist QCAT to meet its current workload, and is insufficient to cover the increase in workload anticipated in this Bill as well as the increase over time with an aging population.

Review applications under the legislation are likely to be made in relation to people who are in significant pain and suffering, where expedient decisions about their access to the VAD scheme involve fundamental human rights. In particular, s 104 of the Bill provides that, when an application is made under s 103 of the Bill, no further step in the VAD process can be taken until the application for review is finalised. Accordingly, QLS recommends that QCAT be required to hear an application made in relation to Pt 7 of the Bill within 5 business days of the application being made under s 103 of the Bill.

QLS also agrees with the QLRC that QCAT *must* be 'given the additional resources that are needed to ensure the effective operation of the recommended new jurisdiction under the draft Bill'.[52] QCAT must be properly funded and supported to ensure the timely determination of applications under the Bill, without creating further delays in other divisions of the Tribunal.

[50] Queensland Civil and Administrative Tribunal, *Annual Report 2019-20*, 6.
[51] Queensland Civil and Administrative Tribunal, *Annual Report 2018-19*, 26-27.
[52] Queensland Law Reform Commission, *A legal framework for voluntary assisted dying* (Report No 79, May 2021) 518 [16.72].

QLS recommendation:

13. Section 100(c) be amended to define an eligible person as "*any other person who has a direct, personal and relevant interest in the rights and interests of a person mentioned in paragraph (a) in relation to voluntary assisted dying.*"
14. QCAT should be required to hear an application made in relation to Pt 7 of the Bill, and make a decision, within 5 business days of the application being made under s 103 of the Bill.
15. QCAT should be provided with the additional funding and resources that are needed to ensure the effective operation of its recommended new jurisdiction under the Bill.

The necessity for high-quality end-of-life and palliative care

The QLRC Inquiry arose in relation to an earlier, larger inquiry into aged care, end-of-life and palliative care and voluntary assisted dying (the **Parliamentary Inquiry**). Evidence provided to the Parliamentary Inquiry emphasised the importance of choice between voluntary assisted dying and high-quality palliative care.[53] The Parliamentary Inquiry rightly recognised that palliative care 'needs to be adequately resourced and supported irrespective of whether voluntary assisted dying legislation is introduced' and, 'if it is introduced, it is imperative that people have the full range of options available to them so that they can make an informed choice.'[54] People may also opt to receive palliative care for a period of time before they access voluntary assisted dying, and one should not be provided to the detriment of the other.

QLS submits that access to high-quality palliative care is of utmost importance, not only for those who are deciding whether to access the VAD scheme, but also for those who are ineligible to access VAD. Accordingly, QLS reiterates the QLRC's recommendation that the Queensland Government must ensure the VAD scheme complements, not detracts from, the provision of high-quality and accessible palliative care.

Thank you for the opportunity to comment. If you have any queries regarding the contents of this letter, please do not hesitate to contact our Policy Solicitor Brooke Thompson at [redacted] or by phone on [redacted]

Yours faithfully

Elizabeth Shearer
President

[53] Health, Communities, Disability Services and Domestic and Family Violence Prevention Committee, *Aged care, end-of-life care and palliative care* (Report No. 33, March 2020) 419.
[54] Health, Communities, Disability Services and Domestic and Family Violence Prevention Committee, *Aged care, end-of-life care and palliative care* (Report No. 34, 2020) 106-8.