2 July 2021

To the Chair and Members,
Health and Environment Committee
Parliament House
George Street
Brisbane QLD 4000

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

Dear Chair and Members,

Voluntary Assisted Dying Bill 2021

The Bar Association of Queensland (**the Association**) welcomes the opportunity to make a submission in relation to the *Voluntary Assisted Dying Bill 2021* (**the Bill**), introduced into Parliament on 25 May 2021.

At the outset, the Association congratulates the Queensland Law Reform Commission (**the QLRC**), chaired by the Honourable Justice Applegarth, for the report it has produced on this topic[1]. The report shows inquiries of immense sensitivity and depth, and it arrives at considered recommendations which have, understandably, closely informed the drafting of the Bill in its existing form. The report highlights the important contribution the QLRC makes to legislative initiatives in this State.

We note that the Committee requests that submissions refrain from dwelling on the broader policy debate around Voluntary Assisted Dying (**VAD**) and, instead, consider the particular path to implementation evinced by the Bill. The Association notes that there is a diversity of views about VAD amongst its members (often strongly held) but, of course, it heeds the Committee's request. Where particular clauses in the Bill are examined, the Association has endeavoured to confine itself to considering whether those provisions are faithful to the stated objects of the Bill.

This submission is divided into two discrete parts. Part A addresses the eligibility criteria for access to VAD, together with relevant safeguards, whilst Part B addresses the Bill's compatibility with the *Human Rights Act 2019*.

PART A

1. Eligibility

The Association generally (and respectfully) endorses the legislative design of the "*eligibility criteria*" for access to VAD proposed in section 10 of the Bill.

[1] QLRC, 'A legal framework for voluntary assisted dying', Report No 79, May 2021.

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The Association notes that in section 10(1), the Bill adopts five criteria, as recommended by the QLRC,[2] namely that a candidate must (1) have an eligible disease, illness or medical condition; (2) have decision-making capacity; (3) be acting voluntarily and without coercion; (4) be aged at least 18 years; and (5) fulfil the residency requirement. The Association addresses certain aspects of the eligibility criteria below.

2. An eligible disease, illness or medical condition

The criteria for the person's disease, illness or medical condition, as drafted in section 10(1)(a), requires that the person have been (1) "*diagnosed"* with a condition that is (2) "*advanced, progressive and will cause death*", (3) is "*expected to cause death*" within 12 months, and (4) is causing "*suffering*" that the person considers to be "*intolerable'*.

Disease, illness or medical condition

The Association notes and accepts that the VAD scheme will not be accessible for a condition associated with decline as the result of ageing or frailty, and that having a mental illness or disability, with nothing more, will not satisfy the eligibility criteria.

Incurability

The draft Bill does not require as a criterion of eligibility that, in addition to being "*advanced, progressive and will cause death*", the condition be "*incurable*" (contrast the Victorian legislation[3]). A reason frequently cited for omitting "*incurability*" as a criterion is that its inclusion undermines the principle of patient autonomy by potentially requiring a patient to undergo treatment options against their wishes.[4] Certainly, the QLRC called on that principle in support of its view that "*incurability*" should be excluded as a criterion of eligibility.[5] It also cited the importance of certainty in the application of the eligibility criteria. In particular, it referred to the potential for confusion as to whether or not a person had exhausted all available treatment options if incurability was included as a criterion.

The QLRC's view on this issue appears to be faithful to a position the QLRC takes in reconciling the principles of personal autonomy with the fundamental value of human life. Specifically, it seems to be consistent with a position that, in the area of end-of-life decisions, personal autonomy is a value that may outrank all others. It will be appreciated that this position may not be shared by all our members.

It is noted that another way to strike the balance between personal autonomy and the value of human life might be to include "*incurability*" as an eligibility criterion, accompanied by a definitional provision stipulating that a person's condition need only be incurable according to:

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[2] QLRC, note 1, ch 7 summary, p87.

[3] *Voluntary Assisted Dying Act 2017* (Vic), s9(1)(d)(i).

[4] Cf Western Australian *Parliamentary Debates*, Legislative Assembly, 5 September 2019, 6586.

[5] QLRC, note 1, para 7.74, p100.

(a) the "*co-ordinating practitioner*" who conducts the first assessment (see s19) and the "*consulting practitioner*" who conducts the consulting assessment (see, s30); or

(b) if a higher standard is thought more appropriate, according to widely-accepted professional opinion that is held by a respected practitioner in the field, regardless of the fact that there may be contrary opinions held by a significant number of other respected practitioners in the field.[6]

The inclusion of the definition would mean that satisfaction of "*incurability*" as a criterion would not necessarily depend in an individual case on whether the patient was willing to undergo medical treatment that was unacceptable to them. It would, however, exclude access to VAD by a patient whose condition, according to relevant medical opinion, was curable, whilst permitting of the possibility that access would be allowed at a more advanced stage (whether the person had undergone treatment or not).

Timeframe until death

The Bar Association notes that eligibility for access to VAD is limited to those diagnosed with a life-limiting condition and that there is a requirement for a person's death to be expected within a specific timeframe. It is acknowledged that the inclusion of a specific timeframe introduces a degree of arbitrariness, especially as the end-of-life clinical trajectory for different conditions varies. The inclusion of a timeframe, however, underscores the principle that access to the regime is limited to those who are at the end of life. It also introduces an essential degree of clarity and guidance with regard to the eligibility criterion that the condition "*will cause death*" (as provided in s10(1)(a)(i)), without which that criterion may be applied inconsistently and in unintended ways.

The Association concurs with the QLRC that adopting different timeframes for different diseases, illnesses or medical conditions is undesirable. In this regard, the Association acknowledges the force of the QLRC's observation that it is difficult to see why a person at the end of life and experiencing intolerable suffering as a consequence of a chronic lung or heart disease should have to wait longer to qualify for access than a patient who is also dying and experiencing intolerable suffering from, say, a motor neurone disease.[7] In short, the Association does not oppose the 12 month time-frame proposed.

Anticipated or expected suffering

There is a question as to whether, as a matter of overarching policy, access to VAD should be limited to actual suffering or extend to cases involving the expectation or anticipation of suffering. The QLRC refers to the Victorian guidance[8] on this issue,

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[6] Cf *Civil Liability Act 2003*, s22.

[7] QLRC, note 1, para 7.150, p112.

[8] QLRC, note 1, para 7.163, p113.

being that suffering is a state of distress associated with events that "*threaten*" the "*intactness of the individual'*. The QLRC refers also to the provision of the Tasmanian Act that expressly addresses the point by providing that relevant suffering includes "*anticipation of the suffering, or expectation … of the suffering*".[9]

The Association notes that the Bill extends to a relevant illness, disease or medical condition that "*is causing*" relevant suffering. The use of the present continuous verb tense, *prima facie*, seems to indicate that the parliamentary drafter intends as a matter of policy that anticipated or expected suffering will not satisfy the eligibility criterion of "*suffering*" in section 10(2) of the Bill. A question arises as to whether the operation of the eligibility criterion of "*suffering*" in s 10(2) is sufficiently clear. Put shortly, consideration might be given to whether or not it should be put beyond doubt that the anticipation of physical suffering is not itself sufficient to satisfy the criterion.

While reasonable minds will differ, the Association recommends that the definition in sub-section10(2) clarifies the status of anticipated or expected suffering.

Mental or "non-physical" suffering

The Association notes that the definition of "*suffering*" in sub-s 10(2) of the Bill expressly includes "*mental suffering*" that is causally linked to a relevant disease, illness or medical condition. The Bill does not include as an additional requirement that the mental suffering be reasonably foreseeable on the application of an objective standard such as a person of "*ordinary fortitude*" or "*normal fortitude*".[10] Accordingly, it would appear that the Bill contemplates that access to VAD be available to the "*peculiarly susceptible*" (and perhaps in the absence of physical suffering) as long as the remaining eligibility criteria are satisfied. Most relevantly, that would include that the person has relevant decision-making capacity and that the person is expected to die (from organic causes) in any case within twelve months.

It is the view of the Association that, as a question of whether the drafting reflects the policy that underpins the Act, this matter might warrant closer consideration.

Proof of a causative relationship

The Association apprehends that the intention is to limit access to the VAD scheme to those who are both dying and suffering, and that the criterion of suffering would be satisfied only where the suffering is causally linked to a relevant disease, illness or medical condition.

The Association understands that what the parliamentary drafter has in mind is a simple factual causation requirement, without bringing a normative requirement or notions of remoteness or foreseeability into play. If the intention of the drafter was otherwise, then the Association considers that the point might be clarified.

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[9] *End-of-Life Choices (Voluntary Assisted Dying) Act 2021* (Tas), s14(b)(iv).

[10] Cf *Tame v New South Wales* (2002) 211 CLR 317, [62], [87]-[95], [197]-[201],[273]-[283].

Level of suffering

It may be accepted that the eligibility criteria should exclude merely transient suffering. There is a question as to how this is best achieved, specifically, whether the criterion of suffering should be qualified by including an additional requirement that the suffering should be constant or continue over a specified timeframe, whether the exclusion of transient suffering is better achieved by an additional requirement that the suffering cannot be relieved in a manner or to an extent that the person considers tolerable, or whether other mechanisms are available with a view to achieving the chosen result.

The Association notes the view of the QLRC[11] that the eligibility criteria should not include a requirement that the suffering be constant. It is the view of the QLRC that the inclusion of such a requirement would offend the principle of compassion.[12] The Association also notes the QLRC's view[13] that the eligibility criteria should not include a requirement that the suffering cannot be appropriately relieved as this would offend against the value of personal autonomy as suffering is a subjective determination best left for the person concerned.[14] Those views are reflected in the Bill.

The Association acknowledges that the Tasmanian, Victorian and the Western Australian Acts[15] include a requirement that the suffering cannot be relieved in a manner or to an extent that the person considers tolerable and that, as such, the Queensland parliamentary draftsman and the QLRC propose an approach that departs from that adopted in other States to date. While the Association is strongly of the view that consistency of approach at State level is desirable, most particularly where access to a scheme is in question, the Association is also of the opinion that the risk of any form of "medical tourism" emerging as an unwanted consequence of differences between the States is reduced by the inclusion in section 10(f) of the Bill of a residency requirement in the eligibility criteria. As such, the Association acknowledges that the difference in approach with regard to this particular aspect of the Bill does not undermine the value of consistency in a critical respect.

The Association further notes the view of the QLRC that it is unnecessary to address concerns about transient suffering in the eligibility criteria. The QLRC considers that transient suffering is excluded by the person satisfying the eligibility criteria in accordance with the "*request and assessment process*", since the "*designated [minimum] period*" of nine days between the first request and the final request for access to VAD as provided in s 43 of the Bill is a period of sufficient length to exclude merely transient suffering.

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[11] QLRC, note 1, para 7.198 and 7.199, p118.

[12] See Bill, s5(b) (Principles).

[13] QLRC, note 1, para 7.198 and 7.199, p118.

[14] QLRC, note 1, para 7.195, 7.197, 7.198, p118.

[15] *End-of-Life Choices (Voluntary Assisted Dying) Act 2021* (Tas), s10(1)(e); *Voluntary Assisted Dying Act 2017* (Vic), s9(d)(iv); and *Voluntary Assisted Dying Act 2019* (WA), s16(1)(c)(iii).

Views will differ as to whether a period of "*at least nine days*" is a period of sufficient length to exclude "*transient suffering*" from the scheme. While acknowledging the difficulty of prescribing an indicium of suffering that will fulfill the underlying policy objectives in every case, the Association considers that the eligibility criterion of "*suffering*" in sub-s10(1)(a)(iii) might include as an additional requirement that a relevant condition cause suffering that is "*not temporary*" (as well as the requirement that it is suffering "*that the person considers to be intolerable*"). In any event, the Association considers that the assumptions about how the eligibility criteria work in this area might benefit from further attention.

The Association notes that the Bill in its current form does not expressly provide that the criterion of suffering will be satisfied only if the suffering is continuous during the "*request and assessment process*", that is, in the period between the date of the first assessment and the date of the consulting assessment or between the date of the first request and the date of the final request. Accordingly, if the request and assessment process is to operate in the way that the QLRC evidently intends (and thereby exclude merely transient suffering), there may be a gap in the scheme: it would seem that suffering in a particular case could satisfy the eligibility criteria even though the suffering was transitory as long as it was intolerable as at the date of the first assessment (as to which, see s19) and as at the date of the consulting assessment (see s 30).[16]

If the request and assessment process is to do the work envisaged by the QLRC and the parliamentary draftsman, then the apparent gap in the scheme might be closed by including as an additional eligibility criterion in s10 that the suffering should be continuous during the request and assessment process. Alternatively, there could be an additional requirement of the consulting assessment in s34 that a person will not meet satisfy the assessment unless the consulting practitioner is satisfied that the suffering was continuous throughout the request and assessment process.

Filling the gap so that the scheme works in the manner that the QLRC and the parliamentary draftsman evidently intend will have the effect that the eligibility criterion of suffering will involve a subjective determination (whether the condition causing suffering was intolerable) and a clinical determination or potentially a determination of a mixed clinical and subjective nature (whether the condition has continued over the specified period). That course would not, it seems, undermine the QLRC's favoured "*person-centred approach to care*", because it simply confirms how the Bill is intended to work.[17]

Decision-making capacity

The Association concurs with the views of the QLRC[18] that access to VAD should be limited to people who have "*decision-making capacity*" and that the term "*decision-making capacity*" should be defined consistently with the definition of "*capacity*" in

[16] See ss19 and 30 of the Bill.

[17] QLRC, note 1, para 7.195, p118.

[18] QLRC, note 1, para 7.253, p129 and 7.257, p129.

the *Guardianship and Administration Act 2000* and the *Powers of Attorney Act 1998* (Qld).

Advance care directives

The Bill does not explicitly state that access to the scheme is confined to people who have decision-making capacity at all stages throughout the VAD process, although it is the view of the QLRC that access should be limited to such people.[19] It is the opinion of the Association that the use of the present continuous verb tense in the text of the eligibility criterion in section 10(1)(b) that the person "*has decision-making capacity in relation to voluntary assisted dying*" lacks precision and that the evident objective of the draft might be better attained by expressly providing that it is a requirement that the person has relevant capacity in relation to VAD "*as at the time of*" making the first, second and final requests to a medical practitioner for access to the scheme in accordance with ss 14, 37 and 42.

3. Safeguards

The legislative design of the Bill incorporates safeguards of a procedural and substantive nature that are designed to protect and enhance the fundamental principles informing the scheme, including the fundamental value of life and personal autonomy.

The safeguards focus on ensuring that any person who is eligible to access the VAD scheme under the legislation has decision-making capacity, makes their decisions voluntarily and without coercion, makes choices that are informed about other end of life options (including further treatment and palliative care) and shows that any choice to access VAD is enduring (so that VAD may be requested on more than one occassion).

The Association generally considers that the safeguards stipulated are appropriate.

Qualified prohibition on "health care workers" initiating a discussion about VAD

The Association notes that section 7 of the Bill adopts the approach of proscribing a "*health care worker*" (a suitably broadly defined term) from initiating a discussion about VAD, while allowing a medical practitioner and nurse practitioner to do so in the context of a wider conversation about treatment and palliative care options.

The mischief at which section 7 is directed evidently includes the potential for VAD to be raised with a client by a person in a "*therapeutic relationship*" or in the context of delivering health professional care services (eg., bathing, showering, or feeding a client under a home care package) who may not be clinically skilled or appropriately qualified to properly raise end-of-life treatment options and outcomes, including VAD, with a client or patient.[20]

[19] See QLRC, note 1, para 7.307, pp139-40.

[20] See QLRC, 'A legal framework for voluntary assisted dying', Report No 79, May 2021, para 6.124, p79.

The prohibition is evidently limited by the requirement for a temporal nexus to be established between the initiation of a proscribed discussion and the delivery of a health service or personal care service ("*in the course of*") before the prohibition is engaged. The Association suggests that if limited in the way suggested, the prohibition would arguably not extend or apply to a health care worker who was not actually delivering a health service or personal care service to a client at the time they initiated a discussion about VAD.

The Association considers that, if the matter raised above is of concern, then a modified section 7 might read as follows:

7 Health care worker not to initiate discussion about voluntary assisted dying

(1) A health care worker who provides a health service or personal care service to a person must not

(a) initiate discussion with the person that is in substance about voluntary assisted dying; or
(b) in substance, suggest voluntary assisted dying to the person.

The effect of the change, it will be appreciated, is that there is no longer a temporal nexus required between the delivering of services and the provision of advice.

As to the safeguard that a candidate must make three requests for VAD, the Association understands the need to have a thorough procedure to ensure the decision is freely made by the patient without any undue influence. The process taken as a whole, however, can be daunting for someone who meets the suffering requirements. In addition there will be no register of practitioners willing to assist with VAD. The Association is of the view that it will be important that appropriate material be made available, containing a step by step guide. It is possible that large hospitals will develop their own material but it will assist a patient or family to have available standardised material, together with a point of contact independent of hospitals and their own medical practitioner. Provision for this should be considered as part of the implementation process.

PART B

The Association now addresses the question of compatibility with the *Human Rights Act 2019 (Qld)*

1. Overview of the Human Rights Act 2019 (Qld)

The *Human Rights Act 2019* (Qld) (***Qld HR Act***) is one of three human rights acts in Australia, the other two being the *Human Rights Act 2004* (ACT) and the Charter of *Human Rights and Responsibilities Act 2006* (VIC) (***Vic HR Act***).

The right to life is one of the twenty-three protected human rights:

> *Every person has the right to life and has the right not to be arbitrarily deprived of life.* [21]

One of the three main objects of the *Qld HR Act* is:

> *to help build a culture in the Queensland public sector that respects and promotes human rights …*[22]

The main objects are primarily achieved through ten mechanisms, including:

> *(a) requiring public entities to act and make decisions in a way compatible with human rights; and*
>
> *(b) requiring statements of compatibility with human rights to be tabled in the Legislative Assembly for all Bills introduced in the Assembly …*[23]

Public entities include medical professionals who work in the public health system.[24]

It is unlawful for a public entity to:

> *(a) to act or make a decision in a way that is not compatible with human rights; or*
>
> *(b) in making a decision, to fail to give proper consideration to a human right relevant to the decision …*[25]

An act, decision or statutory provision is compatible with human rights if it:

> *(a) does not limit a human right; or*
>
> *(b) limits a human right only to the extent that is reasonable and demonstrably justifiable in accordance with section 13.* [26]

Section 13 of the *Qld HR Act* provides for a proportionality test, involving a balancing act, and lists several factors which may be considered.

When interpreting statutory provisions with a view to determining their compatibility with human rights, international law and the judgments of domestic, foreign and international courts and tribunals relevant to a human right may be considered.[27]

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[21] *Human Rights Act 2019* (Qld) s 16.

[22] Ibid s 3(b).

[23] Ibid s 4(a)-(b).

[24] Ibid s 9(1)(a)-(c).

[25] Ibid s 58(1)(a)-(b).

[26] Ibid s 8(a)-(b).

[27] Ibid s 48(3).

2. Overview of International Sources of Law

Article 38(1) of the *Statute of the International Court of Justice* is widely regarded as identifying the sources of international law as being:

(a) international treaties;

(b) international custom;

(c) general principals of law; and

(d) judicial decisions and the writings of eminent academic experts.[28]

The formal sources of law, which are legally binding, are contained in arts 38(1)(a)-(c). There is no formal hierarchy.[29] Article 38(1)(d) sources are merely a "*subsidiary means for the determination of the rules of law*" and not sources of law.[30] These subsidiary sources delineate the breadth of the legal obligations created by the formal sources.

Repeated and consistent state practice (*usus*) and its acceptance as law by states (*opinio juris*) are the two elements of customary international law. Security Council and General Assembly resolutions, and formal texts adopted by the United Nations ('UN') are non-binding instruments that are referred to as "*soft law*". They provide evidence of emergent state practice and *opinio juris*, thus pointing to the *lex ferenda* (future development of the law) as opposed to the *lex lata* (the law as it exists).[31]

Jus cogens norms of international law place constraints on the freedom of states to determine the law that binds them.[32] Such norms are peremptory and non-derogable, so that they cannot be compromised.[33]

3. Compatibility of the *Voluntary Assisted Dying Bill 2021*

The Queensland and Victorian human rights statutes contain comparable provisions and are similar in scope. Hence, regard can be had to Victorian jurisprudence. Given that the Victorian statute commenced fifteen years ago, there is a wealth of experience for Queensland to utilise in interpreting the *Qld HR Act*.

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[28] Stephen Hall, *Principles of International Law* (LexisNexis Butterworths, 3rd ed, 2011) 30; *Statute of the International Court of Justice* art 38(1).

[29] Hall (n 8) 31.

[30] Ibid; *Statute of the International Court of Justice* art 38(1)(d).

[31] Hall (n 8) 72.

[32] Gillian D Triggs, *International Law: Contemporary Principles and Practices* (LexisNexis Butterworths, 2nd ed, 2010) 45.

[33] *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) art 2(1)(a).

Both the Queensland and Victorian statutes are based on similar legislation in the United Kingdom (**UK**),[34] and on the *International Covenant on Civil and Political Rights* (***ICCPR***). Specifically, the Explanatory Notes, *Human Rights Bill 2018 (Qld)* declare that the Bill is primarily providing protection for the human right to life as drawn from art 6(1) of the *ICCPR*,[35] and "*broadly consistent with the Victorian Charter*".[36]

The *ICCPR* refers to a right to life in similar terms as the *Qld HR Act*:

> "*Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life*."[37]

Australia is a party to the *ICCPR*, which is "*the most juridically significant of all the human rights instruments in the United Nations system*".[38] The Human Rights Committee is established by art 28 of the *ICCPR*. All state parties are required to submit reports to the Human Rights Committee, upon its request, "*on measures they have adopted which give effect to the rights recognized [in the ICCPR] and on the progress made in the enjoyment of those rights*".[39] Australia has declared that it recognises the competence of the Human Rights Committee to receive and consider communications from other States parties claiming that it is not fulfilling its obligations under the *ICCPR*.[40]

State parties to the *ICCPR* undertake specific obligations with respect to the rights established or recognised in the Covenant. Article 2(1) of the *ICCPR* requires that parties must "*respect and to ensure*" the rights under the *ICCPR* to all persons within their territories and subject to their jurisdiction. Further, art 2(2) requires State parties to "*adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant*."

The Human Rights Committee issues "*General Comments*" on the interpretation and application of the *ICCPR*.[41] These instruments are not legally binding but are treated by States as authoritative interpretations of the *ICCPR*'s requirements to articulate "*the jurisprudence for national and international tribunals and administrative bodies in setting guidelines for normative standards*."[42]

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[34] *Human Rights Act 1998* (UK).

[35] Explanatory Notes, Human Rights Bill 2018 (Qld) 3 cl 16.

[36] Ibid 11.

[37] *International Covenant on Civil and Political Rights*, opened for signature on 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 6(1) ('*ICCPR*').

[38] Hall (n 8) 542.

[39] *ICCPR* art 40(1).

[40] Ibid art 41.

[41] Ibid art 40(4).

[42] Triggs (n 12) 1014.

The most recent report submitted by Australia was in 2016,[43] wherein it discussed the enactment of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth), appointment of the Human Rights Commissioner in 2014, enactment of the human rights statutes in Victoria and the ACT, domestic implementation of the *ICCPR*, consistency of terrorism legislation with international obligations, and safeguards in relation to torture, amongst other matters. For its next report it will need to discuss the new voluntary assisted dying legislation in various states, discussed below.

The Human Rights Committee's most recent General Comment on the right to life was published in 2019. Of most relevance to the issue of voluntary assisted dying is the following:

> *I. General remarks*
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> …
>
> *3. The right to life is a right that should not be interpreted narrowly. It concerns the entitlement of individuals to be free from acts and omissions that are intended or may be expected to cause their unnatural or premature death, as well as to enjoy a life with dignity.*
>
> …
>
> *9. While acknowledging the central importance to human dignity of personal autonomy, States should take adequate measures, without violating their other Covenant obligations, to prevent suicides, especially among individuals in particularly vulnerable situations … States parties that allow medical professionals to provide medical treatment or the medical means to facilitate the termination of life of afflicted adults, such as the terminally ill, who experience severe physical or mental pain and suffering and wish to die with dignity, must ensure the existence of robust legal and institutional safeguards to verify that medical professionals are complying with the free, informed, explicit and unambiguous decision of their patients, with a view to protecting patients from pressure and abuse.*[44]

The right to life (contained in art 6(1) of the *ICCPR*) is a fundamental right. It is a *jus cogens* norm, namely a "*supreme*" non-derogable right, which "*should not be interpreted narrowly*".[45] "*Moreover … the protection of this right requires that States adopt positive measures*".[46] "*The same right to life is enshrined in art 3 of the*

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[43] Human Rights Committee, *Consideration of reports submitted by States parties under article 40 of the Covenant, Sixth periodic reports of States parties due in 2013 : Australia*, 121st sess, UN Doc CCPR/C/AUS/6 (2 June 2016).

[44] Human Rights Committee, *CCPR General Comment No. 36: Article 6 (Right to Life)*, UN Doc CCPR/C/GC/36, (3 September 2019) 1 [3], 2 [9].

[45] Human Rights Committee, *CCPR General Comment No. 6: Article 6 (Right to Life)*, 16th sess (30 April 1982) 1 [1].

[46] Ibid 1 [5].

Universal Declaration of Human Rights adopted by the General Assembly of the UN on 10 December 1948. It is basic to all human rights."[47]

The Judicial College of Victoria publishes a Charter of Human Rights Bench Book which provides helpful commentary on the Victorian jurisprudence in relation to various human rights. Section 6.3 deals with the right to life, which confirms that the right to life "*comprises both a negative duty on States to refrain from arbitrarily depriving people from life, and also gives rise to a positive obligation on States to enact laws which will protect the lives of those within their jurisdiction*".[48] Despite the *Vic HR Act* being in force for 15 years, and the voluntary assisted dying legislation for 4 years,[49] "*the scope of [the right to life] has not been thoroughly examined by the Victorian Courts or VCAT*".[50] This paucity of jurisprudence can bring some comfort that the *Voluntary Assisted Dying Act 2017* (Vic) (***Vic VAD Act***) is drafted robustly and contains sufficient safeguards to ensure that those who wish to die in that manner are doing so of their own free will.

In respect of the view held in Victoria regarding vulnerable persons, such as the frail and elderly, Sarala Fitzgerald, Barrister-at-Law and human rights expert, explained that the reason for the requirement to afford additional protection to vulnerable groups is "*to safeguard their other rights, such as the right to equality, liberty and security … the right to equality … recognises that where people are particularly vulnerable, they need more protection in order to experience equality*."[51]

Western Australia and Tasmania are the other states in Australia where voluntary assisted dying legislation is enacted, namely the *Voluntary Assisted Dying Act 2019* (WA) (***WA VAD Act***) and the *End-of-Life Choices (Voluntary Assisted Dying) Act 2021* (Tas) (***Tas VAD Act***) respectively. These states do not have their own human rights acts; hence particular attention should be paid to ensuring that the new Queensland legislation is consistent with its Victorian counterpart to a greater extent than the other two states, where differences exist.

Overseas, the most relevant jurisdiction is the UK, given that the *Qld HR Act* is based on its UK counterpart. Assisted suicide is illegal pursuant to section 2 of the *Suicide Act 1961* (UK). In recent years there have been legal challenges to this prohibition based on the act being incompatible with human rights. To date, all such challenges have proved unsuccessful. However, in the decision of *R (Purdy) v Director of Public Prosecutions*,[52] the Appellate Committee of the House of Lords acknowledged that it was not its "*function to change the law in order to decriminalise assisted suicide*",

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[47] Human Rights Committee, *CCPR General Comment No. 14: Article 6 (Right to Life) Nuclear Weapons and the Right to Life*, 23rd sess, (9 November 1984) 1 [1].

[48] Judicial College of Victoria, *Charter of Human Rights Bench Book* (Introduction) 6.3.1 [4] <https://www.judicialcollege.vic.edu.au/eManuals/CHRBB/index.htm#57319.htm>.

[49] *Voluntary Assisted Dying Act 2017* (Vic) ('*Vic VAD Act*').

[50] Judicial College (n 28) 6.3.1 [2].

[51] Evidence to Investigative Hearing: Operation Impala, Crime and Corruption Commission (Qld), Fortitude Valley, 19 November 2019, 14 [3]-[4] (Sarala Fitzgerald).

[52] [2009] UKHL 45.

which was "*a matter for Parliament*";[53] however, it required the DPP "*to clarify what his position is as to the factors that he regards as relevant for and against prosecution"*[54] in cases of encouraging and assisting suicide. The DPP subsequently published guidelines in February 2010, which contain a description of the "*public interest factors tending against prosecution*".[55]

It is considered that the corresponding provision in s 311 of the *Criminal Code 1899* (Qld), namely "*aiding suicide*", might be amended when the *Qld VAD Act* is enacted to provide for a defence if the assistance was authorised, justified or excused by law. Prior to such amendment, the DPP should publish prosecutorial charging guidelines akin to the UK guidelines.

4. Comparison of Australian Voluntary Assisted Dying Legislation and Recommendations for Queensland

From a human rights compatibility perspective (and having regard to the discussion above as to the value of human life), the following changes to the proposed VAD legislation might be considered:

(a) Eligibility

Cl 10(1)(a): add (iv) "*is incurable"*. As noted earlier, this addition is consistent with other jurisdictions (see section 9(1)(d)(i) of the *Vic VAD Act* and section 5(1) of the *Tas VAD Act*).

Clause 10(1)(a)(iii): amend to include the content in square brackets: "*is causing suffering to the person [that cannot be relieved] in a manner that the person considers tolerable …*" This is consistent with section 9(1)(d)(iv) of the *Vic VAD Act*, section 16(1)(c)(iii) of the *WA VAD Act* and section 13(c) of the *Tas VAD Act*.

The reasoning for these inclusions is to avoid a person being pressured into not receiving treatment in order to affect an earlier death by those who seek to gain a benefit.

(b) Eligibility - cl 10(1)(e)(iv) and cl 10(1)(f)(ii): remove the residency exemption

None of the three other Australian jurisdictions afford the ability to persons to access the VAD legislation via exemption. The exemption process risks the medical practitioners making their eligibility assessments, pursuant to cl 10(1)(a), being unable to properly diagnose due to a lack of medical record history if the person is flown in from interstate or overseas a short time prior to the request being made. It is noted that these assessments are complex in nature and the best

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[53] Ibid [26].

[54] Ibid [55].

[55] Director of Public Prosecutions, 'Suicide: Policy for Prosecutors in Respect of Cases of Encouraging or Assisting Suicide' (*CPS*) (Legal Guidance, October 2014) [45]-[48] <https://www.cps.gov.uk/legal-guidance/suicide-policy-prosecutors-respect-cases-encouraging-or-assisting-suicide>.

safeguard to misdiagnosis is for the practitioner to have as much medical history as possible before her or him when making the determination.

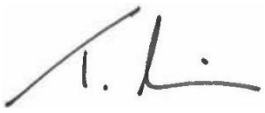
(c) **Medical practitioner qualifications - cl 82**

The Victorian provision might be added, requiring either the consulting or coordinating medical practitioner to "***have relevant expertise and experience in the disease, illness or medical condition expected to cause the death of the person being assessed***".[56]

Despite cl 21 ("*referral for determination*") providing some reassurance of a correct diagnosis, the strength of the combined Victorian provisions should be preferred, which also provides for such referral,[57] in addition to the above requirement to avoid misdiagnosis of what is often a complex medical assessment.

The Association would be pleased to provide further feedback or answer any questions you may have in relation to the submission.

Yours faithfully



Tom Sullivan QC
President

[56] *Vic VAD Act* s 10(3).

[57] *Vic VAD Act* s 18.