

Voluntary Assisted Dying Bill 2023 (ACT)

Submission to the Select Committee on the Voluntary
Assisted Dying Bill 2023, ACT Legislative Assembly

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Who we are

The Australian Lawyers Alliance (ALA) is a national association of lawyers, academics and other professionals dedicated to protecting and promoting justice, freedom and the rights of the individual.

We estimate that our 1,500 members represent up to 200,000 people each year in Australia. We promote access to justice and equality before the law for all individuals regardless of their wealth, position, gender, age, race or religious belief.

The ALA is represented in every state and territory in Australia. More information about us is available on our website.¹

The ALA office is located on the land of the Gadigal people of the Eora Nation.

¹ www.lawyersalliance.com.au.

Introduction

1. The ALA welcomes the opportunity to have input to this inquiry into the Voluntary Assisted Dying Bill 2023 (ACT) ('Bill'), being conducted by the Select Committee on the Voluntary Assisted Dying Bill 2023 ('Select Committee').
2. We support the introduction of voluntary assisted dying in the Australian Capital Territory (ACT) and commend the ACT Government and the ACT Legislative Assembly for consulting on voluntary assisted dying, drafting legislation for this reform, and referring the Bill for inquiry – all within a year of the passage of the Restoring Territory Rights Bill 2022 (Cth).
3. The ALA's submission addresses the following matters:
 - a. Commencement of the ACT's voluntary assisted dying scheme;
 - b. Voluntary assisted dying not considered suicide;
 - c. The eligibility requirements for accessing voluntary assisted dying in the ACT;
 - d. The requirements for coordinating practitioners, consulting practitioners and administering practitioners;
 - e. The provisions regarding accessing voluntary assisted dying and death;
 - f. Timeframes throughout the voluntary assisted dying process;
 - g. Accessibility considerations; and
 - h. Future reviews of the ACT's voluntary assisted dying legislation.

Commencement

4. The ALA notes that VAD will become legal and accessible in the ACT 18 months after the Bill's notification day. As detailed in the Explanatory Statement:²

The 18 month period between notification and commencement is to enable research, development and delivery of functions to support the effective and safeguarded implementation of the Bill.

5. The ALA encourages the ACT to use this time to offer specific VAD training to practitioners, to ensure that a large enough group of health practitioners are adequately trained to meet demand when voluntary assisted dying first becomes accessible in the ACT.
 - a. The ALA refers the Select Committee to issues that arose in Tasmania where only a small group of practitioners had completed the training by the time voluntary assisted dying became accessible in Tasmania.³ The delays in completion of training resulted in longer wait times and accessibility issues for Tasmanians seeking to access Tasmania's voluntary assisted dying scheme.⁴

Voluntary assisted dying not considered suicide

6. The Bill details that:⁵

... an individual who dies as the result of the administration of an approved substance by or to the individual in accordance with this Act—

(a) does not die by suicide; and

(b) is taken to have died from the condition mentioned in 11(1)(b)

7. The ALA supports this provision, as voluntary assisted dying is not suicide. This concept is reflected in legislation in other jurisdictions in Australia.⁶

² Explanatory Statement, Voluntary Assisted Dying Bill 2023 (ACT) 47.

³ Meg Whitfield, 'Voluntary assisted dying is now legal in Tasmania but for some, the wait remains', *ABC News* (online, 28 November 2022) .

⁴ *Ibid.*

⁵ Voluntary Assisted Dying Bill 2023 (ACT) cl 8.

⁶ See, egs, *Voluntary Assisted Dying Act 2019* (WA) s 12; *Voluntary Assisted Dying Act 2021* (Qld) s 8; *Voluntary Assisted Dying Act 2021* (SA) s 6.

Eligibility requirements

8. The following section of the ALA’s submission will address the eligibility requirements detailed in clauses 11 and 12 of the Bill.

Clause 11(1)(a): Age for accessing voluntary assisted dying

9. The ALA considers that it is appropriate to limit eligibility to voluntary assisted dying to persons who are 18 years of age and older.

Clause 11(1)(b): Diagnosis, “advanced, progressive and expected to cause death” and the definition of “last stages of their life”

10. The major difference between this Bill and voluntary assisted dying laws in other jurisdictions is that there is not a proscribed temporal connection to the time of death.
 - a. The ALA has always considered that there is little utility in prognosticating whether a condition will cause death in six or 12 months, when one of the primary purposes of voluntary assisted dying is to ameliorate extended or unnecessary suffering prior to death.
 - b. The ALA notes that in Victoria,⁷ New South Wales,⁸ South Australia,⁹ Tasmania,¹⁰ and Western Australia,¹¹ an individual is eligible if their condition is expected to cause death within 6 months, or for a neurodegenerative condition, within 12 months.
 - c. The Queensland legislation is broader and there is no separation between neurodegenerative conditions and other conditions and individuals are eligible if the death is expected to occur within 12 months.¹²

⁷ *Voluntary Assisted Dying Act 2017* (VIC) s 9(1)(d)(iii).

⁸ *Voluntary Assisted Dying Act 2022* (NSW) s 16(1)(d)(ii).

⁹ *Voluntary Assisted Dying Act 2021* (SA) s 26(1)(d)(iii) and s 26(4).

¹⁰ *End-of-Life Choices (Voluntary Assisted Dying) Act 2021* (Tas) s 6(1)(c).

¹¹ *Voluntary Assisted Dying Act 2019* (WA) s 16©(ii).

¹² *Voluntary Assisted Dying Act 2021* (Qld) s 10.

11. In this Bill, however, the condition must be “advanced, progressive and expected to cause death”.¹³ Further, clause 11(4) of the Bill details that the relevant conditions are “advanced” if “the individual is in the last stages of their life”.¹⁴

- a. The ALA submits that what is meant by “the last stages of their life” could significantly affect access to voluntary assisted dying in the ACT, depending on what is meant by the “the last stages of their life”. This criterion may promote greater access to voluntary assisted dying in the ACT, or it may restrict access. That all depends on what the phrase “the last stages of their life” means.
- b. The ALA contends that more guidance around what “the last stages of their life” means is essential for understanding who will be eligible for voluntary assisted dying in the ACT. This clarity will benefit everyone involved in the ACT’s voluntary assisted dying scheme, including health practitioners and those requesting to access voluntary assisted dying.
- c. The ALA maintains our position that there should not be a temporal connection to death. Certainly, in circumstances where the condition is or the conditions are “advanced, progressive and expected to cause death”,¹⁵ and where the individual is suffering intolerably in relation to the condition or condition(s), the ALA would submit that individuals should not be made to suffer for a longer period of time simply because their death is not expected to occur within a defined period or they are not classed as being in “the last stages of their life”.¹⁶

Clause 11(1)(c): “suffering intolerably in relation to the relevant conditions”

12. The ALA considers that this is an appropriate requirement, in recognition of the intolerable suffering experienced by those who have sought voluntary assisted dying in other jurisdictions and by those seeking to access it in the ACT (once legalised).

¹³ Voluntary Assisted Dying Bill 2023 (ACT) cl 11(1)(b).

¹⁴ Ibid cl 11(4).

¹⁵ As per Ibid cl 11(1)(b).

¹⁶ As per Ibid cl 11(4).

Clause 11(1)(d): Decision-making capacity

13. The ALA submits that the meaning of decision-making capacity in this Bill is more proscriptive than the Queensland legislation with respect to the type of information that the person seeking to access voluntary assisted dying must understand; however, the provision in this Bill is generally consistent with the other states.¹⁷

a. The ALA notes that section 11(1)(a) of the *Voluntary Assisted Dying Act 2021* (Qld) says that a person has decision-making capacity in relation to voluntary assisted dying if the person is capable of “understanding the nature and effect of decisions about access to voluntary assisted dying”. This is consistent with the definition of capacity in Queensland’s guardianship legislation.

b. The other states set out the type of information that must be understood, which is similar to the ACT Bill.

14. The Bill is silent about voluntariness in the definition of “decision-making capacity”,¹⁸ which is articulated in the Queensland legislation.¹⁹ The ALA, therefore, contends that it is vital that the element of voluntariness in clause 11(1)(e) remains an eligibility requirement when the Bill is finalised.

15. The ACT Bill says that an individual must be able to “communicate the decision in whatever way they can”.²⁰ The ALA supports this provision, since it is sufficiently broad to capture non-verbal methods of communication, and we note that the other voluntary assisted dying models require that a person must have capacity to communicate a VAD decision in some way.²¹

¹⁷ *Voluntary Assisted Dying Act 2022* (NSW), s 6; *Voluntary Assisted Dying Act 2021* (SA), s 4(1); *End-of-Life Choices (Voluntary Assisted Dying) Act 2021* (Tas), s 12(1); *Voluntary Assisted Dying Act 2017* (Vic), s 4(1); *Voluntary Assisted Dying Act 2019* (WA) s 6(2).

¹⁸ See: *Voluntary Assisted Dying Bill 2023* (ACT) cl 12.

¹⁹ *Voluntary Assisted Dying Act 2021* (Qld) 11(1)(b).

²⁰ *Voluntary Assisted Dying Bill 2023* (ACT) cl 12(1)(f).

²¹ *Voluntary Assisted Dying Act 2022* (NSW) s 6(1)(f); *Voluntary Assisted Dying Act 2021* (Qld) s 11(1)(c); *Voluntary Assisted Dying Act 2021* (SA) s 4(1); *End-of-Life Choices (Voluntary Assisted Dying) Act 2021* (TAS) s 12(1)(d); *Voluntary Assisted Dying Act 2019* (WA) s 6(2); *Voluntary Assisted Dying Act 2017* (VIC) s 4(1)(d).

Clause 11(1)(e): “voluntarily and without coercion”

16. The ALA submits that it is an important safeguard to include a provision to ensure that those accessing voluntary assisted dying are doing so “voluntarily and without coercion”,²² especially since the Bill does not include voluntariness in the definition of decision-making capacity (as above).

Clause 11(1)(f): A requirement to live in the ACT and the exemption under section 151

17. This Bill requires that a person seeking to access voluntary assisted dying in the ACT must have “lived in the ACT for at least the previous 12 months” or “been granted an exemption under section 151”.²³
18. The ALA submits that a residency requirement is less critical at this point in time, as all six states also offer voluntary assisted dying. As such, domestic tourism is less of a concern. However, the ALA appreciates that there are considerations regarding ensuring that resources provided for and funded by the ACT Government are available first and foremost to ACT residents, and that international tourism for voluntary assisted dying should be discouraged.
19. The ALA recommends that the “exemption section 151”, however, should be reframed as part of the broader eligibility criteria for accessing voluntary assisted dying in the ACT – rather than requiring terminally-ill people to go through the process of applying for this exemption.

Requirements for coordinating practitioners, consulting practitioners and administering practitioners

20. The ALA notes the following from the Bill:²⁴

A health practitioner is eligible for authorisation as an authorised administering practitioner, authorised coordinating practitioner or authorised consulting practitioner if the health practitioner meets the requirements prescribed by regulation.

²² Voluntary Assisted Dying Bill 2023 (ACT) cl 11(1)(e).

²³ Ibid 11(1)(f).

²⁴ Ibid cl 84.

21. The ALA calls for this initial regulation to be made public and for stakeholders to be afforded the opportunity to have input, since this will shape a significant part of the ACT's voluntary assisted dying scheme.
22. We refer the Select Committee to the ALA's recommendations for minimum qualifications for health professionals in the ACT's voluntary assisted dying scheme, recommendations which we made during the ACT's initial consultation on voluntary assisted dying earlier this year:²⁵

Participation by health professionals in any voluntary assisted dying scheme should be limited to those who are appropriately qualified and experienced, in addition to having also completed a minimum level of training regarding the voluntary assisted dying scheme. ...

The ALA recommends that health professionals, especially those who would be coordinating health professionals or consulting health professionals in the ACT's voluntary assisted dying scheme, should be required to have general registration with five years' experience.

While eligibility requirements for health professionals may be to ensure they have the necessary skill and expertise to participate in a voluntary assisted dying scheme, in practice requirements that are too specific or narrow jeopardise equitable access to the scheme, especially for persons living in smaller jurisdictions and/or remote and regional communities where access to a range of doctors with specific qualifications can be very limited.

The ALA notes our support of the involvement of suitably qualified nurse practitioners to participate in the ACT's voluntary assisted dying scheme, if they otherwise meet any training or other requirements and especially if that would enable access to the scheme for persons living in rural and remote areas.

Accessing voluntary assisted dying and death

23. The ALA contends that the processes outlined in the Bill for accessing voluntary assisted dying and death,²⁶ including administering the medicine, are overall sound – including in relation to the person choosing whether to self-administer or to opt for practitioner administration (which contrasts to the Victorian scheme, which only allows for practitioner administration); the ability to revoke administration; and the contact person provisions, which seem appropriate.
24. The ALA submits that these processes are clearly trying to balance the risks involved, including the risk of medications circulating among the general public. We note storage requirements

²⁵ Australian Lawyers Alliance, Submission to the ACT Government, *Consultation: Voluntary Assisted Dying* (5 April 2023) 15–16. <www.lawyersalliance.com.au/documents/item/2458>.

²⁶ Voluntary Assisted Dying Bill 2023 (ACT) cl 41–80.

will be prescribed by regulation,²⁷ which will need to be implemented to coincide with the start of the ACT's voluntary assisted dying scheme. The ALA calls for these regulations to be made public and for stakeholders to be afforded the opportunity to have input.

Timeframes throughout the voluntary assisted dying process

25. In multiple provisions,²⁸ this Bill offers two working days for health practitioners (including those who conscientiously object to voluntary assisted dying) to accept or refuse a request for voluntary assisted dying, and two working days for facility operators to provide the contact details for the approved care navigator service to individuals who have requested information about or access to voluntary assisted dying.
26. The ALA notes that the legislation underpinning Queensland's voluntary assisted dying requires, for example, health practitioners who refuse a person's request for voluntary assisted dying on conscientious objection grounds to provide the details of other health practitioners or services "at the time of informing the person of the practitioner's decision".²⁹ The ALA supports this as the preferred timeframe to ensure that the person requesting access to voluntary assisted dying can proceed with arranging other consultations in a timely manner.
27. The ALA also submits that facility operators should also be required to act at the time of the request to provide information about voluntary assisted dying or how to access voluntary assisted dying.
28. The ALA recommends that, in the 18 months between the Bill's notification day and voluntary assisted dying becoming legal in the ACT, the ACT Government ensures that all health practitioners and facilities have the requisite information, details and referral options on hand to provide to people who make voluntary assisted dying requests, and to provide all of that information at the time those requests are made.

²⁷ Ibid cl 69.

²⁸ See, egs, Voluntary Assisted Dying Bill 2023 (ACT) cl 14(1) and cl 99(2).

²⁹ *Voluntary Assisted Dying Act 2021* (Qld) s 16(4).

Accessibility considerations

29. The ALA notes requirements throughout the Bill that records be kept in writing and communication with those applying for voluntary assisted dying must be in writing.

- a. The ALA submits that this raises serious accessibility issues.
- b. We note there are some provisions in the Bill where an agent can act on behalf of the person applying for voluntary assisted dying.³⁰
- c. However, the ALA submits consideration must be made to how some people seeking to access voluntary assisted dying in the ACT can apply if they cannot fulfil an application in writing and/or if they cannot comprehend their written records throughout the voluntary assisted dying process.

30. The matter of interpreters is raised in clause 153 of the Bill:

- a. The ALA submits that the importance of interpreters being available in this instance underscores the urgency for the ACT Government to put more resources generally into training and remunerating interpreters, in order to ensure they are available for any and all aspects of the ACT's health and justice processes – including for the ACT's voluntary assisted dying scheme.

Review of the ACT's voluntary assisted dying legislation

31. The ALA supports specifically-state timeframes for review of this legislation, as well as the additional matters listed for review.³¹

³⁰ See, eg, Voluntary Assisted Dying Bill 2023 (ACT) cl 27(4).

³¹ Voluntary Assisted Dying Bill 2023 (ACT) cl 159.

Conclusion

32. The Australian Lawyers Alliance (ALA) welcomes the opportunity to have input into the Select Committee on the Voluntary Assisted Dying Bill 2023's inquiry into the Voluntary Assisted Dying Bill 2023 (ACT).
33. The ALA is available to provide further assistance to the Select Committee and to the ACT Legislative Assembly on the issues raised in this submission.



Ngaire Watson

Chair, Medical Law Special Interest Group

Australian Lawyers Alliance