

# A framework for Voluntary Assisted Dying in the Northern Territory

Submission to the Expert Advisory Panel,  
Department of Chief Minister and Cabinet,  
Northern Territory Government

**16 February 2024**



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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.<sup>1</sup>

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

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<sup>1</sup> [www.lawyersalliance.com.au](http://www.lawyersalliance.com.au)

## Introduction

1. The ALA welcomes the opportunity to have input to the Honourable Vicki O’Halloran AO CVO, Duncan McConnel SC and all Members of the Expert Advisory Panel on developing a framework for Voluntary Assisted Dying in the Northern Territory.
2. In 2022, the ALA advocated in support of – and welcomed the eventual passage of – the Restoring Territory Rights Bill 2022 (Cth), which we believe resolved an historical injustice and the unjustifiable imbalance for both the Northern Territory and the Australian Capital Territory (ACT) in relation to the ability to legislate on Voluntary Assisted Dying.<sup>2</sup>
3. Our submission responds to the five Discussion Guides released by the Expert Advisory Panel as part of this consultation.<sup>3</sup> The ALA’s submission will address the issues raised and questions posted in those five Discussion Guides, as well as raising additional matters for the Expert Advisory Panel’s consideration, including: the importance of consultation with Aboriginal and Torres Strait Islander peoples in the Northern Territory, and reforms needed to The Commonwealth Criminal Code.

## Consultation with Aboriginal and Torres Strait Islander Territorians

4. We welcome the Expert Advisory Panel’s commitment to extending its consultation process to regional and remote areas of the Northern Territory, and that the Expert Advisory Panel’s “priority is to ensure consultation takes into account the perspectives of Aboriginal Territorians”.<sup>4</sup>
5. **The ALA submits that any process and framework for Voluntary Assisted Dying in the Northern Territory must only be developed and finalised *after* comprehensive and meaningful consultation with Aboriginal and Torres Strait Islander Elders, communities and organisations from across the Northern Territory.** Sophie Lewis, Lindy Willmott, Ben P. White, Camille La Brooy and Paul Komesaroff underscore why consultation with Aboriginal and Torres

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<sup>2</sup> See: Australian Lawyers Alliance, ‘Passing of Restoring Territory Rights Bill welcome: an injustice resolved’ (Media Release, 2 December 2022) <<https://www.lawyersalliance.com.au/news/passing-of-restoring-territory-rights-bill-welcome-an-injustice-resolved>>.

<sup>3</sup> Northern Territory Government, *Voluntary assisted dying (VAD) in the Northern Territory* (Web Page, 9 November 2023) <<https://haveyoursay.nt.gov.au/vad>>.

<sup>4</sup> Northern Territory Government, *Guide 1: What is voluntary assisted dying and how you can have your say?* (2023) 1.

Strait Islander peoples is crucial when developing Voluntary Assisted Dying frameworks and laws:<sup>5</sup>

First Nations perspectives are critical to include in law reform processes about VAD. Reforms are likely to have significant implications for Indigenous peoples at the end of life, their families and the health professionals who provide care for them. Issues that are particularly important to consider include: access to culturally appropriate palliative care; information about VAD; and access to health professionals willing to assist in VAD. Given historical and contemporary intergenerational injustices linked to colonisation and oppression, it is necessary for reform processes to be understood in relation to Indigenous knowledges, values, traditions, and practices about end of life, dying and death. In thinking through these issues, it is also important to consider the plurality of experiences within Indigenous communities, and the dynamics within (and outside) communities that shape these experiences. While the experiences of First Nations peoples, like all Australians, are complex and varied, they are shaped in particular and important ways by such things as familial relations, postcolonial disconnection, spirituality, sense of belonging and connectedness with the land/country.

6. The ALA notes that when the Federal Parliament was debating the Restoring Territory Rights Bill 2022 (Cth) in 2022, concerns were raised that Voluntary Assisted Dying conflicts with how Aboriginal and Torres Strait Islander communities approach dying and death, and also that there would be not be sufficient consultation with Aboriginal and Torres Strait Islander communities to ensure their safety during the development of Voluntary Assisted Dying frameworks and beyond, especially in the Northern Territory.<sup>6</sup>
7. The ALA thus further recommends that enshrined within the Northern Territory's Voluntary Assisted Dying framework and scheme is an official and free-of-charge support system through which Aboriginal and Torres Strait Islander health professionals and/or other suitably qualified Aboriginal and Torres Strait Islander peoples (including interpreters for those for whom English is not their first language) provide culturally safe and accessible support to Aboriginal and Torres Strait Islander peoples and communities about navigating the Northern Territory's future Voluntary Assisted Dying scheme.
8. We also submit that the Northern Territory's Voluntary Assisted Dying scheme must include processes which ensure Aboriginal and Torres Strait Islander peoples can access the Northern Territory's Voluntary Assisted Dying scheme in culturally safe ways with regard to traditional

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<sup>5</sup> Sophie Lewis et al, 'First Nations Perspectives in Law-Making About Voluntary Assisted Dying' (2022) 29 *Journal of Law and Medicine* 1168, 1170.

<sup>6</sup> Tom Zaunmayr, 'Dodson slams 'hateful' Australian Christian Lobby for invoking him on First Nations euthanasia stance', *National Indigenous Times* (online, 9 September 2022) <<https://nit.com.au/09-09-2022/3842/dodson-slams-hateful-australian-christian-lobby-for-invoking-him-on-first-nations-euthanasia-stance>>.

practices around dying and death. For example, processes to ensure that Aboriginal and Torres Strait Islander peoples can consult with health professionals about Voluntary Assisted Dying while remaining on Country and that they can also ultimately remain on Country when accessing the final stages of the Voluntary Assisted Dying process.

## **Discussion Guide 1: What can the Northern Territory learn from the Voluntary Assisted Dying experience in other jurisdictions, including overseas?**

9. The ALA notes that all six states have Voluntary Assisted Dying schemes,<sup>7</sup> and the Australian Capital Territory (ACT) is in the process of legislating its own scheme.<sup>8</sup>
10. There are, therefore, many lessons which the Northern Territory can learn from the experience of those jurisdictions about developing frameworks for Voluntary Assisted Dying and with regard to implementing the resulting Voluntary Assisted Dying schemes. Throughout our submission, the ALA will refer to the experiences of all seven jurisdictions.

## **Discussion Guide 2: Who should have access to Voluntary Assisted Dying?**

11. The following section of the ALA's submission addresses possible eligibility requirements for accessing a Voluntary Assisted Dying scheme in the Northern Territory.

### **Decision-making capacity**

12. The ALA considers it is vital to any Voluntary Assisted Dying scheme that the person has decision-making capacity, namely that the person has decision-making capacity in relation to understanding, communicating about and evaluating Voluntary Assisted Dying, as well as that the person is acting voluntarily.

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<sup>7</sup> See: *Voluntary Assisted Dying Act 2017* (VIC); *Voluntary Assisted Dying Act 2019* (WA); *Voluntary Assisted Dying Act 2021* (Qld); *Voluntary Assisted Dying Act 2021* (SA); *End-of-Life Choices (Voluntary Assisted Dying) Act 2021* (Tas); *Voluntary Assisted Dying Act 2022* (NSW).

<sup>8</sup> See: *Voluntary Assisted Dying Bill 2023* (ACT).

13. **The ALA refers the Expert Advisory Panel to the criteria in the legislation underpinning the Voluntary Assisted Dying schemes in New South Wales (NSW) and Queensland as two examples of models which include appropriate criteria regarding decision-making capacity.**<sup>9</sup>
14. Additionally, the ALA submits that the definition of ‘decision-making capacity’ included in any future Northern Territory legislation should be consistent with the definition of ‘decision-making capacity’ or ‘capacity’ in other Northern Territory legislation and as per Northern Territory entities which make determinations about capacity, such as the Northern Territory Civil and Administrative Tribunal.
15. The ALA also submits that a person should be ineligible from accessing Voluntary Assisted Dying if they have a mental health impairment, as defined by the relevant legislation.<sup>10</sup>

## **Diagnosis and temporal connection to expected death**

16. The ALA notes the following eligibility requirements within the six state jurisdictions’ respective legislation on Voluntary Assisted Dying:
- In Victoria, a person must be diagnosed with a disease, illness or medical condition that “is expected to cause death within a period not exceeding 6 months”.<sup>11</sup> However, if the person suffers from a neurodegenerative condition, that period of time is extended to 12 months.<sup>12</sup> In Victoria, prior to the passing of that state’s legislation, there was concern that persons suffering from neurodegenerative conditions could lose capacity before the application process was complete if their passing was expected to occur within a six-month period;<sup>13</sup>
  - In Western Australia, one of the eligibility requirements is that the disease, illness or medical condition “will, on the balance of probabilities, cause death within a period of 6 months” or “in the case of a disease, illness or medical condition that is neurodegenerative, within a period of 12 months”;<sup>14</sup>

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<sup>9</sup> *Voluntary Assisted Dying Act 2021* (Qld) s 11; *Voluntary Assisted Dying Act 2022* (NSW) s 6.

<sup>10</sup> See, eg, *Voluntary Assisted Dying Act 2021* (Qld) s 13, as defined in the *Mental Health Act 2016* (Qld) s 10.

<sup>11</sup> *Voluntary Assisted Dying Act 2017* (Vic) s 9(1)(d)(iii).

<sup>12</sup> *Ibid* s 9(4).

<sup>13</sup> Victoria, *Parliamentary Debates*, Legislative Council, 16 November 2017, 6098.

<sup>14</sup> *Voluntary Assisted Dying Act 2019* (WA) s 16(1)(c)(ii).

- In Tasmania, section 6(1)(c) of that state’s legislation requires a disease, illness, injury, or medical condition that is expected to cause the death of the person within six months,<sup>15</sup> or, if the disease is neurodegenerative, within 12 months.<sup>16</sup> However, section 6(5) allows for the Voluntary Assisted Dying Commission, established by section 110 of the legislation, to find on the application of a person that they are exempt from this requirement. Tasmania’s legislation includes the term “injury” and provides a possible avenue for exemption;
- In Queensland, the Health, Communities, Disability Services and Domestic and Family Violence Prevention Committee recommended in its March 2020 report arising from an inquiry into aged care, end-of-life and palliative care and Voluntary Assisted Dying that the Queensland scheme should not impose any precise timeframes for anticipated death due to the “complex, subjective and unpredictable nature of the prognosis of terminal illness”.<sup>17</sup> However, the legislative scheme ultimately included a timeframe of 12 months in all cases and did not distinguish between neurodegenerative diseases and other conditions;<sup>18</sup>
- South Australia’s legislative scheme requires that “the person must be diagnosed with a disease, illness or medical condition” that “is incurable” and “is advanced, progressive and will cause death” and “is expected to cause death within weeks or months, not exceeding 6 months” and is causing suffering to the person that cannot be relieved in a manner that the person considers tolerable”;<sup>19</sup> and
- In NSW, section 16 of the *Voluntary Assisted Dying Act 2022* (NSW) requires a person is diagnosed with at least one disease, illness or medical condition that “is advanced, progressive and will cause death”, and “will, on the balance of probabilities, cause death” either within 12 months “for a disease, illness or medical condition that is neurodegenerative”, or within six months for other conditions, and “is causing suffering to the person that cannot be relieved in a way the person considers tolerable”.<sup>20</sup>

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<sup>15</sup> *End-of-Life Choices (Voluntary Assisted Dying) Act 2021* (Tas) s 6(1)(c)(i).

<sup>16</sup> *Ibid* s 6(1)(c)(ii).

<sup>17</sup> Health, Communities, Disability Services and Domestic and Family Violence Prevention Committee, Parliament of Queensland, *Voluntary Assisted Dying* (Report No 34, March 2020) 120, Recommendation 5.

<sup>18</sup> *Voluntary Assisted Dying Act 2021* (Qld) s 10(1)(a)(ii).

<sup>19</sup> *Voluntary Assisted Dying Act 2021* (SA) s 26(1)(d)(i)-(iv).

<sup>20</sup> *Voluntary Assisted Dying Act 2022* (NSW) s 16(d)(i)-(iii).

17. There is not a proscribed temporal connection to the time of death in the ACT's proposed Voluntary Assisted Dying legislation. However, the ACT's proposed legislation does require that the condition of a person seeking to access Voluntary Assisted Dying must be "advanced, progressive and expected to cause death".<sup>21</sup>

a. 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".<sup>22</sup> 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. The ALA has called on the ACT Government to provide guidance on what is meant by the phrase "the last stages of their life".

b. **The ALA thus recommends that any terminology or expressions used in the Northern Territory's Voluntary Assisted Dying legislation are clear and, where needed, definitions are provided.**

18. The ALA is of the view that a specific timeframe should not be specified in which a person's death is likely to occur. The ALA considers 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. In addition, many illnesses and medical conditions are likely to result in a person losing capacity as their illness and/or medical condition progresses, which may have the effect of limiting their access to a Voluntary Assisted Dying scheme.

19. Analysis has been undertaken on whether patients with cancer, motor neurone disease, chronic obstructive pulmonary disease, chronic kidney disease, Alzheimer's disease, anorexia, frailty, spinal cord injury and Huntington's disease would be eligible to access Voluntary Assisted Dying under the Victorian, Western Australian, Oregon and Canadian schemes, as well as a model bill that was recommended by the Queensland Parliamentary Inquiry.<sup>23</sup> That analysis has suggested that access to Voluntary Assisted Dying would be very unlikely under

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<sup>21</sup> Voluntary Assisted Dying Bill 2023 (ACT) cl 11(1)(b).

<sup>22</sup> Ibid cl 11(4).

<sup>23</sup> Ben P. White, et al, 'Who is Eligible for Voluntary Assisted Dying? Nine Medical Conditions Assessed Against Five Legal Frameworks', 45(2) *UNSW Law Journal* 401.

the schemes in most of those jurisdictions for patients suffering from Alzheimer’s Disease and Huntington’s Disease because they would be unlikely to have decision-making capacity at the end-of-life.<sup>24</sup>

20. **Rather than prescribing any temporal requirement, the ALA considers that an individual should be able to access Voluntary Assisted Dying if they are experiencing grievous and irremediable suffering related to an advanced and progressive terminal, chronic or neurodegenerative disease, illness or condition that cannot be relieved in a manner tolerable to the person.** This definition of medical condition emphasises the degree of suffering, the advanced or progressive nature of the condition, and the inability of suffering being ameliorated.

- a. The ALA refers the Expert Advisory Panel to one of the ACT’s proposed eligibility requirements that the person must be ““suffering intolerably in relation to the relevant conditions”.”<sup>25</sup> The ALA considers that this is an appropriate requirement, in recognition of the intolerable suffering experienced by those who seek Voluntary Assisted Dying.

21. **If a condition will cause death, the ALA considers that there should be no temporal requirement to when the person is expected to die from the disease, illness or medical condition in question.** The ALA considers that including such a requirement complicates the process for the coordinating and consulting practitioner, given the “complex, subjective and unpredictable nature of the prognosis of terminal illness”.”<sup>26</sup>

22. The ALA submits that a person should not be excluded from a Voluntary Assisted Dying scheme because their death is expected to occur over a more protracted timeframe, even though their disease, illness or medical condition is causing them intolerable suffering. This restricts those experiencing long-term pain and suffering from accessing Voluntary Assisted Dying.

23. **If the Expert Advisory Panel and the Northern Territory Government determines that one of the eligibility requirements for the Northern Territory’s future Voluntary Assisted Dying scheme should include a temporal connection to the time of death, the ALA is of the view**

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<sup>24</sup> Ibid.

<sup>25</sup> Voluntary Assisted Dying Bill 2023 (ACT) cl 11(1)(c).

<sup>26</sup> Health, Communities, Disability Services and Domestic and Family Violence Prevention Committee, Parliament of Queensland, *Voluntary Assisted Dying* (Report No 34, March 2020) 120, Recommendation 5.

**that there should be no differentiation between neurodegenerative diseases and other illnesses, diseases, and medical conditions.** The ALA is unaware of any evidence-based research, which confirms that persons with a neurodegenerative disease, illness or medical condition are more likely to lose decision-making capacity more than six months prior to their expected death compared to those persons suffering from other illnesses, diseases, and medical conditions. In addition, there is no justification for patients to potentially suffer for longer periods of time because they have an illness or medical condition that is not neurodegenerative.

24. **Without a clear justification for the application of different timeframes for different conditions, the ALA considers that persons should be able to access the scheme if they suffer from a disease, illness or medical condition that will cause death within a period of 12 months.**

### **Age for accessing Voluntary Assisted Dying**

25. The ALA considers that it is appropriate to limit eligibility to Voluntary Assisted Dying to persons who are 18 years of age and older.
26. We note that the ACT Government has proposed that the first review of the ACT's Voluntary Assisted Dying scheme (three years after the ACT's scheme commences) should discuss "whether an individual should be allowed access to voluntary assisted dying under this Act if the individual ... is a child with decision-making capacity in relation to voluntary assisted dying".<sup>27</sup>

### **Residency requirement**

27. The ALA submits that any residency requirement for accessing the Northern Territory's future Voluntary Assisted Dying scheme is less critical now, as all six states each have a Voluntary Assisted Dying scheme and the ACT Government is currently finalising its own scheme. As such, domestic tourism is less of a concern.

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<sup>27</sup> Voluntary Assisted Dying Bill 2023 (ACT) cl 159.

28. However, the ALA appreciates that there are considerations regarding ensuring that resources provided for and funded by the Northern Territory Government are available first and foremost to residents of the Northern Territory, and that international tourism for Voluntary Assisted Dying should be discouraged.
29. If a residency requirement is included in the Northern Territory's Voluntary Assisted Dying scheme, the ALA recommends that there should be a process in place for granting exemptions in special circumstances.

### **Discussion Guide 3: What process should a person follow to access Voluntary Assisted Dying in the Northern Territory?**

30. This section of the ALA's submission addresses what process should be in place for accessing Voluntary Assisted Dying in the Northern Territory, as addressed in Discussion Guide 3.
31. The ALA supports request and assessment processes for accessing Voluntary Assisted Dying in the Northern Territory that are consistent with the processes in the schemes in other jurisdictions.

#### **Core recommended processes and considerations**

32. The ALA supports the following core processes as part of a functional and accessible Voluntary Assisted Dying scheme in the Northern Territory:
  - a. A person must undergo two eligibility assessments provided by separate and independent health professionals who themselves meet specific eligibility requirements;
  - b. A person seeking access to Voluntary Assisted Dying must formally initiate a request to a health professional;
  - c. The health professional then assesses the person's eligibility to access the Voluntary Assisted Dying scheme;
  - d. If a health professional cannot determine whether the person meets the eligibility criteria, they must refer that person for further assessment;

- e. If eligibility is confirmed, the person seeking access to Voluntary Assisted Dying is then referred to another health professional for a second assessment;
  - f. Once the person is deemed eligible to access Voluntary Assisted Dying by two independent health professionals, that person must then make a second request in writing in front of two independent witnesses;
  - g. Before access is granted a third request must be made, with a required period (for example, five days) between the first and third request;
  - h. At any time during this process, a person may decide not to take further action to access Voluntary Assisted Dying; and
  - i. In relation to the administration of a Voluntary Assisted Dying substance, a person may decide to self-administer or decide to be assisted by an administering practitioner.
33. The ALA submits that the type and availability of healthcare in the Northern Territory, especially in regional and remote parts of the Northern Territory, must be considered in the development of the Northern Territory's Voluntary Assisted Dying framework.
34. The ALA also submits that more limited access to medical practitioners, including specialists, in the Northern Territory must be considered in the development of the Northern Territory's Voluntary Assisted Dying framework.
35. Further, the ALA submits that any regulations and guidelines concerning Voluntary Assisted Dying must be made public for stakeholder consultation, in conjunction with consultation on future proposed legislation, *before* the Northern Territory's Voluntary Assisted Dying scheme is finalised.

### Counselling services

36. **The ALA supports the availability of counselling services on a case-by-case basis and undertaken voluntarily for persons wishing to access Voluntary Assisted Dying.**
37. The ALA does not consider that it should be a mandatory requirement for health professionals to offer access to counselling services or to compel a person's participation in counselling

before they can access Voluntary Assisted Dying. This is consistent with the approach in other jurisdictions, including Queensland and NSW.

38. Overall, the ALA contends that a requirement for counselling could also delay the Voluntary Assisted Dying process and cause additional distress and suffering to the person seeking to access Voluntary Assisted Dying.
39. Another reason underlying the ALA's position is that it is anticipated that there would be a component of counselling provided during the assessment by the two health professionals involved in the aforementioned Voluntary Assisted Dying process.
40. Further, the requirement to participate in counselling sessions could also prevent persons living in regional, rural and remote areas from accessing Voluntary Assisted Dying entirely due to the difficulty of accessing counselling services. Those approaching the end of their life may also be too unwell to travel to and participate in counselling services.

## **Reform needed to allow for Telehealth consultations**

41. The ALA is of the view that for an effective Voluntary Assisted Dying scheme to be implemented in the Northern Territory, the *Criminal Code Act 1995* (Cth) – which contains The Criminal Code ('the Code') – requires amendment.
42. The impacts of the Code's "carriage service" provisions on the operation of Voluntary Assisted Dying schemes in state jurisdictions (especially access for individuals who are housebound and/or those who live in rural, regional or remote areas) and the urgent need for legislative change have been publicly and widely identified.<sup>28</sup>
43. Currently, health professionals and others who are involved in providing Voluntary Assisted Dying services and who communicate with patients through a "carriage service" risk contravening the Code's provisions, which prohibit the use of a "carriage service" for

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<sup>28</sup> See, egs: Voluntary Assisted Dying Review Board, Safer Care Victoria, *Report of operations: July 2021 to June 2022* (Report, June 2022) 2 <<https://www.safercare.vic.gov.au/reports-and-publications/voluntary-assisted-dying-report-of-operations-july-2021-to-june-2022>>; Comments from then-Queensland Attorney-General Shannon Fentiman about the impact of Commonwealth laws on the Queensland scheme, as quoted in: Sean Parnell, 'Labor would review laws that clash with assisted-dying schemes', *Brisbane Times* (online, 25 April 2022) <<https://www.brisbanetimes.com.au/national/queensland/labor-would-review-laws-that-clash-with-assisted-dying-schemes-20220425-p5afut.html>>.

“suicide related material”.<sup>29</sup> Broadly speaking, the Code sets out a range of offences for the following situations:

- Counselling or incitement of suicide or attempts at suicide.
- Using a carriage service to access, transmit or cause to be transmitted, make available or publish or otherwise distribute suicide related material.
- Promotion of methods of suicide or providing instruction on a particular method of suicide.

44. The ALA is not aware of any prosecutions for offences under sections 474.29A and 474.29B of the Code.

45. Since “suicide” is not defined in the Code, it has been a source of debate among authors as to whether Voluntary Assisted Dying would meet the legal definition of “suicide”.<sup>30</sup> The matter was, therefore, brought to the Federal Court of Australia for judicial determination in relation to Victoria’s Voluntary Assisted Dying scheme.

- a. Justice Wendy Abraham handed down her judgement on 30 November 2023.<sup>31</sup> Justice Abraham determined that:

The term “suicide”, as used in ss 474.29A and 474.29B of the *Criminal Code Act 1995* (Cth), does apply to the ending of a person’s life in accordance with, and by the means authorised by, the *Voluntary Assisted Dying Act 2017* (Vic) and *Voluntary Assisted Dying Regulations 2018* (Vic).

- b. **Since it has been determined that Voluntary Assisted Dying falls within the meaning of “suicide”, there needs to be careful consideration as to how the Northern Territory’s Voluntary Assisted Dying scheme could interact with the Code offences.**

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<sup>29</sup> *Criminal Code Act 1995* (Cth) ss 474.29A–474.29B.

<sup>30</sup> See: Katrine Del Villar, et al, ‘Voluntary Assisted Dying and the Legality of Using a Telephone or Internet Service: The Impact of Commonwealth ‘Carriage Service’ Offences’ (2021) 47(1) *Monash University Law Review* 125; Cf: Cameron Stewart, et al, ‘Suicide-Related Materials and Voluntary Assisted Dying’ (2020) 27 *Journal of Law and Medicine* 839.

<sup>31</sup> *Carr v Attorney-General (Cth)* [2023] FCA 1500.

46. The ALA refers the Expert Advisory Panel to analysis of the experience in other jurisdictions, analysis which was published before the Federal Court’s decision.

- a. In their article, ‘Voluntary Assisted Dying and the Legality of Using a Telephone or Internet Service: The Impact of Commonwealth ‘Carriage Service’ Offences’, Del Villar et al interpreted the provisions of the Code against the Voluntary Assisted Dying schemes in Victoria and Western Australia.<sup>32</sup>
- b. The authors noted that the interpretation of the Code was not settled and as such, its interaction with the schemes in Victoria and Western Australia were unclear.<sup>33</sup> If the meaning of “suicide” captured the use of self-administered medication authorised under a State scheme, they were of the view that the likelihood of breaching the Code provisions depended on whether the communication involved the patient directly, the level of specificity of the information provided and whether the communication occurred towards the beginning or end of the Voluntary Assisted Dying process.<sup>34</sup> They concluded that providing information about specific methods of Voluntary Assisted Dying may constitute an offence, and providing the detailed information required when prescribing or dispensing a Voluntary Assisted Dying substance was highly likely to contravene the Code if performed electronically.<sup>35</sup> They considered the risk to practitioners to increase towards the end of the Voluntary Assisted Dying process because the level of detail concerning the method of Voluntary Assisted Dying would likewise increase.<sup>36</sup>

47. The Victorian Government’s response to the above inconsistencies between their Voluntary Assisted Dying scheme and the Code was to issue a Guidance requiring all discussions, consultations and assessments concerning Voluntary Assisted Dying to occur in person rather than by telephone, email, or Telehealth.<sup>37</sup>

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<sup>32</sup> Katrine Del Villar, et al, ‘Voluntary Assisted Dying and the Legality of Using a Telephone or Internet Service: The Impact of Commonwealth ‘Carriage Service’ Offences” (2021) 47(1) *Monash University Law Review* 125.

<sup>33</sup> *Ibid* 166.

<sup>34</sup> *Ibid* 167.

<sup>35</sup> *Ibid*.

<sup>36</sup> *Ibid* 168.

<sup>37</sup> Department of Health and Human Services, Victorian Government, *Voluntary Assisted Dying: Guidance for Health Practitioners* (Policy Document, July 2019) 4, 74.

48. Health professionals and Victoria’s Voluntary Assisted Dying Review Board alike have continuously identified the barriers this poses to the operation of Victoria’s Voluntary Assisted Dying scheme since mid-2019.<sup>38</sup>
49. The Western Australia Voluntary Assisted Dying scheme specifically allows the use of audio-visual communication for a patient’s verbal requests for Voluntary Assisted Dying and the final administration decision if an in-person assessment is not practicable.<sup>39</sup>
- a. However, the Western Australian Voluntary Assisted Dying Guidelines caution practitioners about the provision of information via a carriage service and state that “as a general rule, any information that relates specifically to the act of administering a Voluntary Assisted Dying substance or provides details or instructions about the act of administering a Voluntary Assisted Dying substance must not be discussed or shared by phone, fax, email, videoconference, internet and the like”.<sup>40</sup> They go on to state that some discussions must occur in person and some information must be provided in hard copy.<sup>41</sup>
  - b. Western Australia’s Voluntary Assisted Dying Board has affirmed that the Code’s provisions regarding the use of a carriage service have placed limitations on Voluntary Assisted Dying consultations.<sup>42</sup> Western Australia’s Voluntary Assisted Dying Board has recommended that the Code be amended.<sup>43</sup>
50. **The ALA considers the potential inconsistencies between the state or territory Voluntary Assisted Dying schemes and the Code to be undesirable.** It puts health professionals and other persons who are involved in the Voluntary Assisted Dying schemes at risk of prosecution and has had significant impacts on the accessibility and efficiency of Voluntary Assisted Dying schemes for health practitioners and patients alike, including in Victoria and Western Australia.

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<sup>38</sup> See, egs: Every report from Victoria’s Voluntary Assisted Dying Review Board since 2019 has identified the concerns of practitioners and the Voluntary Assisted Dying Review Board and the need for reform of the Commonwealth’s Criminal Code: <[www.safercare.vic.gov.au](http://www.safercare.vic.gov.au)>.

<sup>39</sup> *Voluntary Assisted Dying Act (WA)* ss 18(2)(c), 47(2)(b), 56(3)(b), 158(2).

<sup>40</sup> Department of Health, Government of Western Australia, *Western Australian Voluntary Assisted Dying Guidelines* (Policy Document, 2022) 26.

<sup>41</sup> *Ibid.*

<sup>42</sup> Voluntary Assisted Dying Board Western Australia, *Annual Report 2021–22* (16 November 2022) 3.

<sup>43</sup> *Ibid.*

51. The ALA considers that Commonwealth Government action is required and that the Code should be amended so that “suicide” does not include Voluntary Assisted Dying in circumstances where Voluntary Assisted Dying is carried out lawfully pursuant to a state or territory law. **The ALA invites the Northern Territory Government to urge the Commonwealth Government to amend the definition of “suicide” in the Code to allow Telehealth consultations for Voluntary Assisted Dying, for at least one of the two consultations a person is required to undertake with a health professional to access Voluntary Assisted Dying.**

### **Should a nurse practitioner be also able to help a person access Voluntary Assisted Dying in the Northern Territory?**

52. The ALA supports the involvement of suitably qualified nurse practitioners to participate in the Northern Territory’s Voluntary Assisted Dying scheme, if they otherwise meet any training or other requirements (discussed below) and especially if that would enable access to Voluntary Assisted Dying for persons living in regional, rural and remote areas.

### **Notification and registration of a person’s death**

53. The ALA contends that the Northern Territory should require that a person who dies through their participation in the Northern Territory’s future Voluntary Assisted Dying scheme is taken to have died from the disease, illness or medical condition from which the person suffered, and which made them eligible for accessing Voluntary Assisted Dying.

54. Legislation should require that this is reflected on that person’s death certificate. This would acknowledge that Voluntary Assisted Dying is not suicide, as is explicitly noted in Voluntary Assisted Dying legislation in other jurisdictions in Australia,<sup>44</sup> for the purposes of ensuring that a person and their family/support network are not disadvantaged through choosing Voluntary Assisted Dying. An example of this is the impact on a person’s death insurance if their death through Voluntary Assisted Dying were to be classified as suicide.

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<sup>44</sup> 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.

## Discussion Guide 4: The role of health professionals and health services

55. This section of the ALA's submission addresses the role of health professionals and health services in the Northern Territory's Voluntary Assisted Dying scheme, on which Discussion Guide 4 focuses.

### **What role should health professionals play in the Voluntary Assisted Dying process, and what safeguards should be in place to protect health professionals and their patients?**

56. 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 on the Voluntary Assisted Dying scheme itself. This latter criterion regarding training will be addressed in the next subsection of our submission.

57. In addition to not being a family member of the person requesting to access Voluntary Assisted Dying, the ALA notes that the varied minimum qualifications in the states' schemes include the following:

- South Australian legislation requires that the coordinating and consulting practitioners have held a fellowship with a specialist medical college for at least five years or have been a vocationally registered general practitioner for at least five years,<sup>45</sup> as well as that one of the practitioners has "relevant expertise and experience in the disease, illness or medical condition expected to cause the death of the person being assessed".<sup>46</sup>
- In Queensland, it is sufficient for a coordinating and consulting practitioner to have general registration with five years' experience;<sup>47</sup>
- Legislation in NSW and Western Australia requires coordinating and consulting practitioners with general registration to have had at least 10 years' experience,<sup>48</sup>

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<sup>45</sup> *Voluntary Assisted Dying Act 2021 (SA)* s 27(1) and (2).

<sup>46</sup> *Ibid* s 27(3).

<sup>47</sup> *Voluntary Assisted Dying Act 2021 (Qld)* s 82(1)(a)(ii).

<sup>48</sup> *Voluntary Assisted Dying Act 2022 (NSW)* s 18(a)(ii); *Voluntary Assisted Dying Act 2019 (WA)* s 17(2)(a)(ii).

- In Tasmania and Victoria, at least one of the doctors involved must be a specialist with at least five years' experience, and one must specialise in the person's disease, illness or medical condition.<sup>49</sup>

58. **The ALA recommends that health professionals, including nurse practitioners and those who would be coordinating health professionals or consulting health professionals in the Northern Territory's Voluntary Assisted Dying scheme, should be required to have general registration with five years' experience.**

59. 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 regional, rural and remote communities where access to a range of doctors with specific qualifications can be very limited.<sup>50</sup>

#### Training requirements and resourcing

60. The ALA believes it is appropriate that Northern Territory health professionals undertake specific training about Voluntary Assisted Dying and the processes governing the Northern Territory's scheme, once established by future legislation proposed by the Northern Territory Government.

61. Other jurisdictions have utilised the time between passing the legislation establishing a Voluntary Assisted Dying scheme and Voluntary Assisted Dying becoming accessible (usually 18 months) to offer that training to practitioners.

62. The ALA notes the importance of training a large enough group of health practitioners to meet demand when Voluntary Assisted Dying becomes accessible, especially in smaller jurisdictions and/or rural areas. The ALA refers the Northern Territory Government to issues that arose in Tasmania where only a small group of health practitioners had completed the training by the

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<sup>49</sup> *Voluntary Assisted Dying Act 2017* (Vic) s 10; *End-of-Life Choices (Voluntary Assisted Dying) Act 2021* (Tas) s 9.

<sup>50</sup> This has been noted by the Queensland Law Reform Commission: *A Legal Framework for Voluntary Assisted Dying* (Report No. 79, May 2021) 403 at 13.114.

time Voluntary Assisted Dying became accessible in Tasmania.<sup>51</sup> That resulted in longer wait times and accessibility issues for Tasmanians seeking to access Tasmania's Voluntary Assisted Dying scheme.<sup>52</sup>

63. There have been calls, for example in Western Australia, for incentives and greater support offered to health practitioners to undertake Voluntary Assisted Dying training, especially health practitioners in rural areas who are overworked and overstretched as is.<sup>53</sup>

64. **The ALA recommends that the Northern Territory Government ensure ample training resources and structures are available to health professionals – including nurse practitioners – and that undertaking that training is incentivised to ensure there are an adequate supply of appropriately-trained health professionals ready when the Northern Territory's Voluntary Assisted Dying scheme officially begins.**

#### Remuneration for health professionals

65. The Voluntary Assisted Dying schemes in the six states are tightly regulated and involve significant input from health professionals, particularly coordinating practitioners, who are responsible for co-ordinating the care of people seeking to access Voluntary Assisted Dying. That care includes:

- completing the aforementioned mandatory training;
- travelling to see patients in person, especially given audio-visual communication is not permissible and the patient may also be unable to travel to the practitioner;
- assessing the patients;
- liaising with the patient's family members and/or friends;
- liaising with other practitioners about the patient's condition; and
- completing a substantial amount of documentation.

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<sup>51</sup> Meg Whitfield, 'Voluntary assisted dying is now legal in Tasmania but for some, the wait remains', *ABC News* (online, 28 November 2022) <<https://www.abc.net.au/news/2022-11-28/voluntary-assisted-dying-legal-in-tasmania-but-wait-remains/101703358>>.

<sup>52</sup> *Ibid.*

<sup>53</sup> Katie Hampson, 'Perth doctor reveals how WA's voluntary assisted dying laws are making an impact', *The West Australian* (online, 27 October 2021) <<https://thewest.com.au/lifestyle/health-wellbeing/dying-with-dignity-ng-b881982971z>>.

66. As described by Casey M. Haining et al,<sup>54</sup> medical practitioners perceive that they are largely unremunerated despite the significant time commitment involved in providing Voluntary Assisted Dying services. The ALA notes there are no dedicated Medicare Benefits Schedule (MBS) items for Voluntary Assisted Dying, although some MBS items can be used for services rendered for counselling/assessment about Voluntary Assisted Dying.
67. Western Australia and Victoria have provided some funding to support practitioners involved in the scheme; however, if appropriate funding is not provided, practitioners have expressed that they would be reluctant to privately bill their patients for Voluntary Assisted Dying services.<sup>55</sup> This affects the ability of health professionals to remain involved in the Voluntary Assisted Dying scheme.
68. Without health professionals willing to be involved in the provision of Voluntary Assisted Dying services, any Voluntary Assisted Dying scheme is unlikely to succeed in meeting its intentions of providing a lawful medical service to the relatively small number of patients that would be eligible to access the scheme.
69. **As such, the ALA considers that there should be careful consideration as to how health professionals are to be remunerated under the Northern Territory's future scheme, as well as whether local funding will be made available with consideration given to what extent of MBS items are not expanded to cover Voluntary Assisted Dying services.**

### **Should a health professional be allowed to start a conversation with a person about Voluntary Assisted Dying?**

70. The ALA contends that it is important that in any Voluntary Assisted Dying scheme, appropriately-qualified health professionals are permitted to initiate conversations about Voluntary Assisted Dying.
71. Providing patients with information about all lawful end-of-life options, including Voluntary Assisted Dying, is part of good clinical practice and should lead to optimal end-of-life care.

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<sup>54</sup> Casey M Haining, Lindy Willmott, Simon Towler and Ben P White, 'Access to voluntary assisted dying in Australia requires fair remuneration for medical practitioners', (2023) 218(1) *Medical Journal of Australia* 8.

<sup>55</sup> See: Marcus Sellars, et al, 'Medical practitioners' views and experiences of being involved in assisted dying in Victoria, Australia: a qualitative interview study among participating doctors' (2022) *Social Science & Medicine* 292.

72. **The ALA notes that there are no prohibitions on health professionals from initiating discussions about any other lawful treatment options for other diseases, illnesses, or medical conditions in Australia.**
73. A person seeking to access Voluntary Assisted Dying would still need to meet all eligibility criteria to access Voluntary Assisted Dying, make at least two formal requests to access Voluntary Assisted Dying and fulfil all other processes for accessing the Northern Territory's Voluntary Assisted Dying scheme (as discussed earlier in this submission).
74. **The ALA recommends that the Northern Territory's legislation concerning Voluntary Assisted Dying permits health professionals to initiate conversations about Voluntary Assisted Dying before a person makes formal requests to access Voluntary Assisted Dying.**

### **Conscientious objections by health professionals**

75. The ALA considers that health professionals should be allowed to conscientiously object to Voluntary Assisted Dying and should not be forced to participate in any Voluntary Assisted Dying scheme.
76. The ALA recognises that there is a wide range of personal views and beliefs that will determine whether individuals support the introduction of a Voluntary Assisted Dying scheme in the Northern Territory, including individuals within the health profession.
77. The ALA strongly believes that the personal beliefs and values held by medical and health practitioners should not be devalued by their forced participation in a Voluntary Assisted Dying scheme.
78. Inclusion of clauses regarding conscientious objections in the Northern Territory's legislative scheme would also ensure consistency with the legislative Voluntary Assisted Dying schemes in all six states,<sup>56</sup> as well as with codes of conduct for medical and health professionals.<sup>57</sup>

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<sup>56</sup> See, eg, *Voluntary Assisted Dying Act 2021* (Qld) ss 16(2)(a), 26(3)(a), 84–5.

<sup>57</sup> See, eg, Medical Board of Australia, *Good medical practice: A code of conduct for doctors in Australia* (2009) rr 2.4.6-2.4.7.

**79. Regarding the process of a health professional communicating their conscientious objection to Voluntary Assisted Dying, the ALA supports the following processes for inclusion in the Northern Territory's legislative scheme:**

- A requirement for health professionals to immediately advise a person of their conscientious objection; and
- A requirement that health professionals who, following a person's request to access Voluntary Assisted Dying, refuse to act as a coordinating practitioner must provide that person with information that assists the person to navigate referral services that are available to assist with Voluntary Assisted Dying.

80. The ALA believes that the above processes will promote the autonomy of persons seeking to access Voluntary Assisted Dying to make their own decisions about their end-of-life options and to ensure that health professionals' personal views about Voluntary Assisted Dying do not adversely impact on the care of their patients and prevent patient access to a lawful end of life option.

81. A requirement for health professionals to refer a person to another practitioner in these circumstances is consistent with concepts of good medical practice in codes of conduct and medical ethics.

82. The ALA supports legislation that ensures a person is not prevented from accessing information about Voluntary Assisted Dying or that prevents access to the Northern Territory's future scheme.

### **The role of health services in Voluntary Assisted Dying access, including conscientious objections by those running health services or facilities**

83. Health services and related institutions play an important role in Voluntary Assisted Dying schemes, including public and private hospitals, residential aged care facilities, and accommodation for people living with a disability.

**84. The ALA submits that a health service or related institution should not be able to prevent the provision of Voluntary Assisted Dying services at their facility.**

85. In a paper by Ben P. White et al,<sup>58</sup> the authors interviewed 32 family caregivers and one patient about the experience of 28 patients who had sought Voluntary Assisted Dying in Victoria. Participants reported institutional objection affecting eligibility assessments, medication access, and taking the medication or having it administered. Institutional objections occurred across all health settings and institutions often did not clearly communicate their objections to patients and family members.<sup>59</sup> It was concluded that institutional objections created additional barriers in a system that was already procedurally challenging, and the policy approach appeared to preference institutional positions over patient choice.<sup>60</sup>
86. In another paper by Ben P. White et al,<sup>61</sup> the following three possible models of legal regulation were discussed: (1) permitting institutional objections without limit; (2) permitting institutional objections but imposing limits on them; and (3) not permitting institutional objections.
- a. The authors considered that a model permitting institutional objections without limit would have adverse outcomes for some individuals, who may be deprived from accessing Voluntary Assisted Dying if they were unable to transfer to another facility. They considered the second model worthy of consideration but considered that such a model should be subject to regulation rather than left to policymakers.
87. **The ALA is of the view that not permitting institutional objections is the most appropriate way to ensure access for the small cohort of patients seeking Voluntary Assisted Dying at the end stages of their life.**
88. If institutional objections are permitted to some extent, the ALA considers that regulations should be introduced which promote transparency of objections and impose positive obligations on those health services or institutions to connect and facilitate transfers to other health services or institutions that do not hold such objections to ensure patients are not prevented from accessing lawful end-of-life options.

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<sup>58</sup> Ben P. White, et al, 'The impact on patients of objections by institutions to assisted dying: a qualitative study of family caregivers' perceptions' (2023) 24(1) *BMC Medical Ethics* 22, 24.

<sup>59</sup> Ibid.

<sup>60</sup> Ibid.

<sup>61</sup> Ben White, et al, 'Legislative Options to Address Institutional Objections to Voluntary Assisted Dying in Australia' [2021] 3 *University of New South Wales Law Journal Forum* 1, 13.

## **Timeframes throughout the Voluntary Assisted Dying process for health professionals and health services to provide information about Voluntary Assisted Dying**

89. When an individual approaches a health professional or health service about Voluntary Assisted Dying, the timeliness of the information that individual receives about next steps or further referrals is important.
90. The ALA notes that the ACT’s proposed legislation 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 service 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.<sup>62</sup>
91. The ALA refers the Expert Advisory Panel to 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”.<sup>63</sup> **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.**
92. **The ALA also submits that health service 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.**
93. The ALA recommends that, in the time between the relevant legislation passing through the parliamentary process and Voluntary Assisted Dying actually becoming legal in the Northern Territory, the Northern Territory Government should ensure that all health practitioners and services 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.

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<sup>62</sup> See, egs, Voluntary Assisted Dying Bill 2023 (ACT) cl 14(1) and cl 99(2).

<sup>63</sup> *Voluntary Assisted Dying Act 2021* (Qld) s 16(4).

## Discussion Guide 5: Monitoring, compliance and safety

94. This final section of the ALA’s submission addresses matters relating to the monitoring of, compliance with and safety within the Northern Territory’s Voluntary Assisted Dying scheme, as addressed in Discussion Guide 5.

### Reporting by health professionals

95. The ALA supports comprehensive record-keeping – that is, all stages of the Voluntary Assisted Dying process in the Northern Territory must be recorded and those records must be accessible.

96. The ALA refers the Expert Advisory Panel to Victoria’s Voluntary Assisted Dying Portal, where medical practitioners can complete and submit all forms required for Victoria’s Voluntary Assisted Dying assessment process.<sup>64</sup>

97. We submit that clear guidance must accompany the introduction of any reporting system and structure for the Northern Territory’s future Voluntary Assisted Dying scheme.

### Checking that health professionals are following the law

98. Oversight over and reviewing Voluntary Assisted Dying legislation have been identified as “critical” in order to ensure schemes are improved, where needed.<sup>65</sup>

99. **The ALA contends that ongoing oversight and review of the Northern Territory’s Voluntary Assisted Dying Scheme is crucial for ensuring ongoing safety and accessibility.**

100. The ALA refers the Northern Territory Government to all six state jurisdictions, which have established statutory bodies for these purposes. While some functions differ between jurisdictions, all six statutory bodies:

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<sup>64</sup> Safer Care Victoria, Victoria State Government, *Voluntary Assisted Dying Portal* (Web Page, 2024) <[www.safercare.vic.gov.au/report-manage-issues/voluntary-assisted-dying-portal](http://www.safercare.vic.gov.au/report-manage-issues/voluntary-assisted-dying-portal)>.

<sup>65</sup> Ben P. White, et al (2022) ‘Who is eligible for voluntary assisted dying? Nine medical conditions assessed against five legal frameworks’ 45(1) *University of New South Wales Law Journal* 401, 444.

- monitor the operation of their respective pieces of Voluntary Assisted Dying legislation and processes, including reports from medical practitioners about applications for Voluntary Assisted Dying;
- refer any identified issues to government or other relevant public entities for legislative amendment, investigation or further action; and
- review and report on the functions, powers and implementation of the Voluntary Assisted Dying scheme in their jurisdiction.

101. We note that the ACT has also proposed to establish a statutory body to oversee the ACT's future Voluntary Assisted Dying Scheme.<sup>66</sup>

102. **The ALA thus supports the establishment of a Northern Territory Voluntary Assisted Dying Review Board which should be established as an independent, statutory body to oversee, monitor, review and report on the operation of Voluntary Assisted Dying in the Northern Territory.**

## Conclusion

103. The Australian Lawyers Alliance (ALA) welcomes the opportunity to have input to the Expert Advisory Panel on developing a framework for Voluntary Assisted Dying in the Northern Territory.

104. The ALA is available to provide further assistance to Expert Advisory Panel on the issues raised in this submission.



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<sup>66</sup> Voluntary Assisted Dying Bill 2023 (ACT) Part 8.