Submission
No 97

INQUIRY INTO PROVISIONS OF THE VOLUNTARY ASSISTED DYING BILL 2021

Name: Professor Lindy Willmott and Professor Ben White

Date Received: 22 November 2021

Australian Centre for Health Law Research

Submission to Standing Committee on Law and Justice in relation to *Voluntary Assisted Dying Bill 2021 (NSW)* November 2021

Director
Standing Committee on Law and Justice
Parliament House
Macquarie Street
Sydney NSW 2000

By email: law@parliament.nsw.gov.au

Dear Committee members

EXECUTIVE SUMMARY

- New South Wales should aim to enact the best voluntary assisted dying (VAD) legislation possible, rather than copying other States. The design of the New South Wales legislation should also be evidence-based. An incoherent law, with ad hoc added safeguards later through amendments, should be avoided.
- The *Voluntary Assisted Dying Bill 2021* (NSW) is a sensible and measured Bill that will provide choice for terminally-ill patients while operating safely, including protecting the vulnerable in our community. While there is scope for some amendments to improve the Bill, the Committee should recommend the Bill be passed.
- If there is to be a time limit until expected death included in the Bill, then a standard 12-month time limit until expected death for all patients is preferred. This allows more time to navigate the complex VAD process which has shown to be challenging in Victoria.
- We support the legislative proposal for exemptions in relation to New South Wales residency requirements, and suggest that a similar exemption also be applied to Australian residency requirements.
- We support the inclusion of choice in relation to VAD administration decisions, as this approach best reflects the principles of patient autonomy and equality.
- The Committee should consider removing the requirement to obtain formal authorisation before a VAD substance can be administered, in order to reduce delays for individuals.
- Clause 10 of the Bill (Health care worker not to initiate discussion about VAD) should be excluded due to its potential implications for impeding patient access.
- Our final preliminary observation is to support the proposal to deal with entities that hold a conscientious objection to VAD in the legislation. As a bare minimum, objecting entities (including health establishments) should be required to allow access to VAD for their patients who are too unwell to be transferred elsewhere. For this reason, we believe that the legislation in Queensland better protects patient or resident access while still protecting the desire of any entity not to provide VAD.

BACKGROUND

We are members of the Australian Centre for Health Law Research (ACHLR), a specialist research centre within the Queensland University of Technology's Faculty of Business and Law. ACHLR undertakes empirical, theoretical and doctrinal research into complex problems and emerging challenges in the field of health law, ethics, technology, governance and public policy.

We have been conducting research into the law, policy and practice of end-of-life decision-making for 20 years. A particular area of research focus is voluntary assisted dying (VAD), and we are currently working on a 4-year Australian Research Council study into 'Optimal Regulation of Voluntary Assisted Dying'. We have been invited to participate in the VAD reforms that have occurred in Australia in recent years, and played a key role in supporting debate on the *Voluntary Assisted Dying Act* 2021 (Qld) and its ultimate passing. We have also been involved in implementation, including through designing and developing, on behalf of the Victorian and Western Australian Governments, the legislatively-mandated training that clinicians must undertake.

We have recently released a policy briefing which summarises the key findings from our research about VAD over a period of almost two decades. The briefing is reproduced in full below. The briefing and the research upon which it is based are also able to be accessed at the following link:

https://research.qut.edu.au/voluntary-assisted-dying-regulation/other-resources/

Australian Centre for Health Law Research

Voluntary assisted dying research: a policy briefing

This briefing summarises research about voluntary assisted dying (VAD) conducted by Professors Ben White and Lindy Willmott (with colleagues).

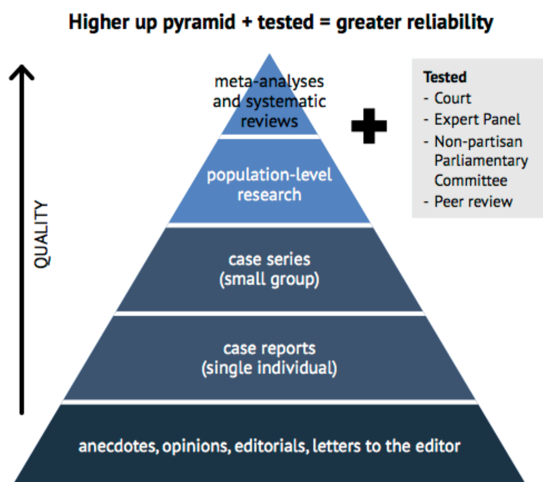
1 Australia should have VAD laws: they are ethical and VAD can be safely regulated

- There is a strong ethical case for allowing a limited cohort of patients, who are already dying, to choose VAD.
- Reliable evidence about VAD systems internationally and now in Australia shows that VAD can be safely regulated.
- Politically, legalising VAD has been challenging. Only narrow and conservative VAD models have passed in Australia.

2 VAD laws must be evidence-based and consistent with intended policy goals

- Law reform must be based on reliable evidence (see the "reliability pyramid").
- VAD laws must be designed to meet their intended policy goals.

Higher up pyramid + tested = greater reliability



3 There is now a broad "Australian VAD model" but each jurisdiction should pass a law most appropriate for its circumstances

- Although based on the same model, Victoria, Western Australia, Tasmania and South Australia have all taken slightly different approaches to regulating VAD.
- Jurisdictions should learn from how existing laws work in practice and design a law that is most appropriate for its circumstances (e.g. unique geography and population distribution).

4 Designing VAD laws requires seeing how the entire legal framework operates

- Evaluating a VAD law must be based on how it will work as a whole, and not by considering individual provisions in isolation.
- For example, numerous eligibility criteria for accessing VAD work together in these laws. Concern about one criterion when considered in isolation may resolve if all criteria are considered as a whole.
- The process of designing VAD laws should include testing how eligibility criteria affect who can access VAD and for what medical conditions.

5 "Piling on" ad hoc safeguards to already sound VAD laws does not make laws safer and can make them worse

- Ad hoc safeguards have been added during parliamentary processes to already sound proposals for VAD laws.
- This led to inconsistency and incoherence in those laws without improving patient or community safety.

www.research.qut.edu.au/achlr

6 VAD systems must be workable so eligible patients can access VAD

- The complex Victorian VAD law and system make patient access to VAD challenging.
- Key problems include:
  - doctors are not allowed to raise the topic of VAD with patients
  - the need to obtain a government permit to access VAD, and
  - the complexity of the administrative process when applying for VAD.

7 The Commonwealth Criminal Code must be changed: it is an unjust barrier for patients seeking VAD and their doctors

- The Code makes illegal using a "carriage service" (e.g. email, telephone, fax, telehealth) in relation to "suicide". This creates risk for doctors and others who are otherwise acting legally under State VAD systems.
- This means some steps in the VAD process must be done face-to-face. This is causing hardship and delay for patients and doctors.
- For constitutional law reasons, States cannot resolve this issue.
- The Commonwealth Government should amend this law so it will not apply to lawful VAD systems.

8 Institutions should not have power to prevent their patients or permanent residents from accessing VAD

- There is some limited evidence that institutions are blocking access to VAD in Victoria. Some institutions in other States have also indicated they will block access.
- Legislation should permit an institution to not participate but must ensure eligible patients and permanent residents can still access VAD.

9 Effective implementation of VAD is challenging but very important

- How a VAD system operates depends not only on the law, but also system design, including factors such as IT, navigation and support services.
- Sufficient time and resources are needed to effectively implement VAD laws. And once implemented, VAD systems should be kept under constant review.
- VAD laws are complex so implementation should aim to make the patient, family and doctor experience as smooth and simple as possible.
- Effective training for practitioners involved in VAD (and others) is critical as is a user-friendly IT system.

A compilation of the 37 research papers this policy briefing is based on is available here:
https://research.qut.edu.au/voluntary-assisted-dying-regulation/other-resources

Professor Ben White **Professor Lindy Willmott**

www.research.qut.edu.au/achlr

Australian Centre for Health Law Research, Faculty of Business and Law, Queensland University of Technology

August 2021

'MODEL VOLUNTARY ASSISTED DYING BILL' AND OUR APPROACH TO THIS SUBMISSION

As part of our VAD research, we have developed a VAD Bill which has been published in a legal journal.[1] This Bill was developed after articulating the relevant principles that should guide law reform in this area.[2]

We continue to consider that this Bill generally represents optimal law reform (with some minor amendments in light of experience in Victoria and subsequent legislation passing in Western Australia, Tasmania, South Australia and Queensland).

Having made this general point, we note that there is a different Bill before this Committee. Because the *Voluntary Assisted Dying Bill 2021* (NSW) is the subject of review in this Committee, we will generally confine our present submission to commenting on its provisions.

Finally, we note that we have not addressed all clauses of the Bill. For example, some clauses clearly reflect now established law in other Australian States. We would be pleased to provide further thoughts on specific provisions if requested, but have tended to focus on particular issues that are new in this Bill or where there is a case to specifically comment on a particular provision.[3]

BEST VOLUNTARY ASSISTED DYING LEGISLATION FOR NEW SOUTH WALES

New South Wales should not just copy other jurisdictions such as Victoria

Before turning to the NSW Bill, we want to state our position that the aim of any VAD reform exercise should be to produce the best possible legislation for NSW. This is reflected in the process we described above for developing our Model VAD Bill. We did not assume that the Victorian law was the best law possible and use it as our starting point. Instead, we began by identifying the principles that should guide reform in this area and developed our Model based on those principles.

This is an important point because arguments can sometimes be advanced that if the New South Wales Bill is different from Victoria (or other States), then this, in and of itself, is cause for alarm. But such claims cannot be sustained. First, the Victorian, Western Australian, Tasmanian, South Australian and Queensland VAD laws are all different from each other. It is true that they are all based on the same broad model – which New South Wales has also adopted. But the parliaments of Western Australia, Tasmania, South Australia and Queensland, coming after Victoria, have exercised their own judgment about what law should be passed in light of what is best for those States. As a result, there is already variation across the country and it is reasonable and appropriate to expect more.

[1] This Bill has been published in Ben White and Lindy Willmott, 'A Model Voluntary Assisted Dying Bill' (2019) 7(2) *Griffith Journal of Law and Human Dignity* 1.
[2] Lindy Willmott and Ben White, 'Assisted Dying in Australia: A Values-based Model for Reform' in Ian Freckelton and Kerry Peterson, *Tensions and Traumas in Health Law* (Federation Press, 2017).
[3] As a result, not commenting on a provision should not be taken as endorsement of it.

Secondly, the people of New South Wales should expect that its Parliament pass the best law possible for New South Wales, even if that means some differences from other Australian states. The fact that Victoria happened to be the first does not make it better. Indeed, we now have experience and evidence about some challenges in the Victorian system that New South Wales has the opportunity to address. We discuss some of these challenges further below but in short, the Victorian system is working safely but there have been challenges in practice for patients trying to access VAD.

Law-making on voluntary assisted dying must be evidence-based

A final point in relation to developing the best possible VAD legislation for New South Wales is to repeat our call for evidence-based law-making in this area. There is a large body of reliable evidence about how VAD systems operate internationally. There is also emerging evidence about how the Victorian system is operating in practice, including that which suggests there are challenges with that model. Our call for evidence-based law-making in relation to VAD laws is set out here: Ben White and Lindy Willmott, 'Evidence-based Law Making on Voluntary Assisted Dying' (2020) 44(4) *Australian Health Review* 544-546.

Avoid incoherent law by ad hoc addition of safeguards

We urge the New South Wales Parliament to avoid the situation that other States have experienced where safeguards are awkwardly added to already sound law in an ad hoc way. This leads to the VAD law being incoherent or inconsistent in important ways.

An example of this is eligibility for VAD depending on a variable time period – 6 or 12 months until expected death – depending on the nature of a patient's illness. This change in timing was a political compromise in Victoria which has since been uncritically adopted and replicated in all other states in Australia except Queensland. Yet this was only a last-minute addition to the Victorian Bill as a result of political compromise.

Our research has shown that the Victorian VAD law fails to meet its own stated policy goals in important respects, sometimes because of these later ad hoc additions during the law-making process: Ben White et al, 'Does the Voluntary Assisted Dying Act 2017 (Vic) Reflect Its Stated Policy Goals?' (2020) 43(2) *University of New South Wales Law Journal* 417.

For this reason, we argue that any proposed changes to the Bill must be carefully scrutinised in light of the Bill as a whole:

> 'When thinking about the politics of reform, it can be tempting to only consider each safeguard or process individually. Each may have merit and advance a particular policy goal. It may also be difficult politically to argue that a specific safeguard is not needed, particularly if it appears to achieve at least some useful purpose. However, when the safeguards are aggregated, the VAD system as a whole can become very complex and unwieldly, and slowly take

> the legislation away from its policy goals. This "policy drift by a thousand cuts" – the incremental loss of policy focus through accumulation of individual safeguards without reference to the whole – is a key issue for other states to consider when evaluating their proposed VAD reforms. It is suggested that each part of the law be evaluated both on its own, and also for its impact on the functioning of the overall system. This is needed to enable VAD laws to meet their policy goals, in particular, the two key goals at the core of the design of the VAD Act: safeguarding the vulnerable while respecting the autonomy of eligible persons who wish to access to VAD.'[4]

We have also written on this point in 'Comparative and Critical Analysis of Key Eligibility Criteria for Voluntary Assisted Dying Under Five Legal Frameworks':

> 'Taking a holistic view is also an important consideration more generally when designing VAD regulation. While it may be politically attractive to add numerous safeguards to VAD legislation, including in the eligibility criteria, there is a risk of what we have called elsewhere 'policy drift by a thousand cuts' if the cumulative effect of these individual safeguards is not properly considered. For example, it is possible that a series of provisions designed to make VAD legislation safe, when aggregated, can in fact make access to VAD cumbersome or even unworkable.'[5]

Some of the ways in which the Victorian system has been shown to be cumbersome or very challenging to navigate as a result of the aggregation of safeguards is discussed further below.

SUBMISSION ON *VOLUNTARY ASSISTED DYING BILL 2021* (NSW)

Our overall position

We welcome the tabling in Parliament of the *Voluntary Assisted Dying Bill 2021* (NSW). Our assessment of the Bill is that it includes some important protections for individuals and entities, but there is scope for amendments to improve the Bill.

Eligibility criteria

We comment below on particular aspects of the Bill's eligibility criteria.

<u>Expected to cause death within 12 months or 6 months – Clause 16(1)(d)(ii)</u>

We prefer no time limit; it is sufficient that death is expected

The Bill includes as part of its eligibility criteria that the person's disease, illness or medical condition will, on the balance of probabilities, cause death – for a

---

[4] Ben White, Katrine Del Villar, Eliana Close and Lindy Willmott, 'Does the Voluntary Assisted Dying Act 2017 (Vic) Reflect Its Stated Policy Goals?' (2020) 43(2) *University of New South Wales Law Journal* 417, 451.

[5] Ben P White et al, 'Comparative and Critical Analysis of Key Eligibility Criteria for Voluntary Assisted Dying Under Five Legal Frameworks' (2021) 44(4) *University of New South Wales Law Journal* (forthcoming) 1, 53.

neurodegenerative disease, illness or medical condition – within a period of 12 months, and otherwise – within a period of 6 months. As a preliminary point, we note that our preferred view is that requiring a specific timeframe until death is not appropriate and so our Model Bill does not impose such a requirement. Part of our reasoning is that we argue that a timeframe makes little difference in practice to who is eligible to access VAD when the eligibility criteria are viewed holistically. As we wrote in ‘Comparative and Critical Analysis of Key Eligibility Criteria for Voluntary Assisted Dying Under Five Legal Frameworks’:

> ‘A third design point to make is that a system of regulation operates holistically. This means that looking at a single aspect of the eligibility criteria without understanding its role in the wider framework can be misleading. That is, it is important to examine eligibility criteria cumulatively and in context. This is the intention of the legislators in constructing the criteria in this way and this has significant implications for who can access VAD. As described above, the model Bill provides a good example of this: if the focus is restricted to the fact that the Bill does not impose a time limit until death, it may seem to be very broadly drafted. But when aggregated with the requirement for a medical condition that is incurable, advanced and progressive, the scope for access to VAD is considerably narrowed.’[6]

This was confirmed when we analysed eligibility to access VAD in relation to nine medical conditions across a range of legal frameworks. In the paper ‘Who is Eligible for Voluntary Assisted Dying? Nine Medical Conditions Assessed against Five Legal Frameworks’, we concluded that the absence of a time limit under our Model Bill did not affect access.[7] In other words, access to VAD was possible for the same medical conditions under the Victorian VAD law (primarily a 6-month time limit) as under our Model Bill (no time limit).

Importantly, a practical (implementation) benefit of not having a temporal requirement is that the difficult task of prognostication about time to death is avoided.

If a time limit is imposed, 12 months is preferrable to 6 months

The above point also supports the proposition that if a time limit is to be included, 12 months for all medical conditions is preferrable to 6 months/12 months model.

Additionally, there are a number of advantages to preferring the Queensland *Voluntary Assisted Dying Act 2021* approach of a standard 12-month time limit over the approach taken in other Australian States, namely 6 months or 12 months if the condition is neurodegenerative. One obvious point is that it is very hard to justify having different time limits to access VAD depending on the nature of your illness.

[6] Ibid 53.
[7] Ben P White et al, ‘Who is Eligible for Voluntary Assisted Dying? Nine Medical Conditions Assessed against Five Legal Frameworks’ (2022) 45(1) *University of New South Wales Law Journal* (forthcoming) 52-53.

But a second argument in favour of this slightly longer eligibility period is that it allows a person who is diagnosed with a medical condition more time to apply for VAD. The Victorian experience shows that the process of seeking assistance can be demanding for terminally-ill patients and takes time.[8] We have undertaken research involving interviews with 32 doctors who have provided VAD to patients under the Victorian system in its first review of operation. That work has been published as:

- Ben White et al, 'Prospective Approval of Assisted Dying: A Qualitative Study of Doctors' Perspectives in Victoria, Australia' (2021) *BMJ Supportive and Palliative Care* (early online).
- Lindy Willmott et al, 'Participating Doctors' Perspectives in the Regulation of VAD in Victoria: A Qualitative Study' (2021) 215(3) *Medical Journal of Australia* 125.

Findings from this work included that doctors reported delays throughout the VAD process. This included from the oversight provided by the VAD Review Board's secretariat, the permit approval process from the Government, and the process of accessing the medication via the Statewide Pharmacy Service. This time taken resulted in challenges for access to VAD by patients, including some doctors reporting that patients died during the process of seeking access to VAD.

Allowing a 12-month period, instead of the default 6-month period in Victoria, may allow patients to start the process of seeking VAD a little earlier, and reduce the likelihood that they may die or lose decision-making capacity before accessing VAD. This doesn't mean that people will necessarily take the VAD medication earlier; just that they can be approved as eligible in that longer time frame.

Make clear that eligibility criteria are interpreted in light of the right to refuse medical treatment

The Bill does not expressly deal with how treatment refusals would be considered when interpreting the eligibility criteria, in particular those criteria requiring that the person's medical condition would cause death and that that death would be expected to occur within 12 months or 6 months. We consider this position should be made clear in the Bill.[9] Our Model Bill makes this explicit in relation to causing death (time limits are not part of this model and so are not addressed), stating that whether a medical condition will cause death 'is to be determined by reference to available medical treatment that is acceptable to the person'.[10] We propose that a similar clause should be inserted in the New South Wales Bill to make this clear.

Residency requirements – Clause 16(1)(b) and (c)

[8] Lindy Willmott et al, 'Participating Doctors' Perspectives on the Regulation of Voluntary Assisted Dying in Victoria: A Qualitative Study' (2021) 215(3) *Medical Journal of Australia*, 125.

[9] For a discussion of treatment refusals and VAD eligibility criteria, see Ben P White et al, 'Comparative and Critical Analysis of Key Eligibility Criteria for Voluntary Assisted Dying Under Five Legal Frameworks' (2021) 44(4) *University of New South Wales Law Journal* (forthcoming) 45-47.

[10] Clause 10(2) of the Model Bill in Ben White and Lindy Willmott, 'A Model Voluntary Assisted Dying Bill' (2019) 7(2) *Griffith Journal of Law and Human Dignity* 1.

There is emerging evidence from Victoria that there can be difficulties in terminally-ill patients or their families gathering sufficient documentary evidence to prove that the person is an Australian citizen or permanent resident, or that the person has been ordinarily resident in the relevant state for 12 months prior to the request. Evidence of this is set out in: Lindy Willmott et al, 'Participating Doctors' Perspectives in the Regulation of VAD in Victoria: A Qualitative Study' (2021) 215(3) *Medical Journal of Australia* 125.

Sub-clauses 16(1)(b)(iii) and 17(1) may make this administrative task of gathering evidence to satisfy these two separate requirements more achievable, or otherwise allow a just outcome to be achieved. We support the aspect of the Bill whereby exemptions to the New South Wales residency requirement can be granted where the person demonstrates that the person has sufficient connection to New South Wales. However, we suggest that consideration also be given to providing for an exemption to the Australian residency requirement where the person has a substantial connection to New South Wales, as was enacted in Queensland (see section 10(1)(e)(iv)).

We also consider that statutory declarations about residence may be a desirable way to establish residence requirements in appropriate circumstances.

However, if New South Wales passes its VAD law, VAD will be lawful in all six Australian states. As such, the issue of VAD tourism becomes significantly reduced. Therefore, given the current climate of legislative reform, we recommend that the Committee considers abolishing the New South Wales residency requirement.

We also recommend that in clause 17 dealing with the residency exemption, given the state of health of the patient seeking an exemption, the Board should be required to make a determination within a prescribed period. We suggest that this period be within 3 business days of receiving the application.

Process

<u>Administration decision – Clause 57</u>

Clause 57 of the Bill allows people to decide, in consultation with and on the advice of their coordinating practitioner, whether they wish to self-administer the voluntary assisted dying substance, or have the substance administered to them by the administering practitioner. We support this aspect of the Bill.

As we wrote in Assisted Dying in Australia: A Values-based Model for Reform:

> 'The value of autonomy grounds the suggestion that a person be able to choose to receive assistance to die either by a doctor directly providing that assistance or by enabling the person to bring about his or her own death the value of equality would also favour access to both. Providing only physician-assisted suicide would unfairly exclude individuals who lack the physical ability to end their own life from assisted dying regimes. The value of life would also favour access to both as limiting access to assisted suicide could

> lead to individuals to kill themselves earlier than they otherwise would in order not to become trapped in a body incapable of ending their own life.'[11]

We prefer that people be given a free choice as to method. We believe giving a person the choice of administration options better promotes the principle of 'autonomy, including autonomy in relation to end of life choices' which is one of the principles that underpins the NSW Bill (clause 4(1)(b)).

Authorisation in relation to voluntary assisted dying substance – Part 4 Division 4

Requirement to seek and be granted (or refused) VAD authorisation

We do not support the requirement in the Bill that medical practitioners must apply to the Board for a voluntary assisted dying substance authorisation for the patient before the patient may access VAD. As we have articulated in published work, we believe that the requirement for such an authorisation does not promote the principles that should underpin VAD laws, in particular, the principle of reducing suffering. This is outlined in Ben White et al, 'Does the Voluntary Assisted Dying Act 2017 (Vic) Reflect Its Stated Policy Goals?' (2020) 43(2) *University of New South Wales Law Journal* 417.

Instead, we suggest that the Committee considers abolishing the requirement for an authorisation by the Board.

We note that the Bill makes efforts to reduce delays for individuals, for example, by imposing a 5-day timeframe on certain activities of the medical practitioner. As a matter of principle, it is important to reduce delay. Research conducted with Australian doctors involved in VAD suggests that, in some cases, eligible patients have died before obtaining the VAD substance.[12] It is our view is that the requirement of a VAD authorisation or 'permit' system has the potential to cause or prolong delays for individuals seeking access to VAD. For further consideration of the problems associated with prospective approval mechanisms, see Ben White et al, 'Prospective Approval of Assisted Dying: A Qualitative Study of Doctors' Perspectives in Victoria, Australia' (2021) *BMJ Supportive and Palliative Care* (early online).

Other

Clause 10 – Health care worker not to initiate discussion about VAD

This provision is an improvement on the blanket prohibition on medical practitioners initiating conversations which exists in Victoria (section 8 of their legislation). The Victorian prohibition raises concerns about whether persons are able to make an

---

[11] Lindy Willmott and Ben White, 'Assisted Dying in Australia: A Values-based Model for Reform' in Ian Freckelton and Kerry Peterson, *Tensions and Traumas in Health Law* (Federation Press, 2017).
[12] Lindy Willmott et al, 'Participating Doctors' Perspectives on the Regulation of Voluntary Assisted Dying in Victoria: A Qualitative Study' (2021) 215(3) *Medical Journal of Australia* 125, 125-127.

informed choice without being aware of all available treatment options including VAD. We have explored this in several publications including:

- Lindy Willmott et al, ‘Participating Doctors’ Perspectives in the Regulation of VAD in Victoria: A Qualitative Study’ (2021) 215(3) *Medical Journal of Australia* 125.
- Lindy Willmott et al, ‘Restricting Conversations about Voluntary Assisted Dying: Implications for Clinical Practice’ (2020) 10(1) *BMJ Supportive and Palliative Care* 105.

However, we are concerned about the possible implications of the proposed clause 10 in this Bill. There is potential for this provision to be misunderstood by, and confusing for, ‘health care workers’ who are subject to the provision. The provision is relatively complex as the prohibitions imposed by the provision affect different workers in different ways. The concern is that this confusion may lead to health professionals taking a conservative approach of not raising VAD (although they are permitted to do so) even if they think a patient may wish to consider it, for fear of being in breach of a legislative prohibition.

Institutional Objection

We commend the Bill for dealing with the issue of institutional objection. We wish to highlight the need to balance the ability of entities not to provide VAD with the need to ensure a person has access to VAD if they so choose. We explore this issue further in Ben White et al, ‘Legislative Options to Address Institutional Objections to Voluntary Assisted Dying in Australia’ (2021) *University of New South Wales Law Journal Forum* 1.

We suggest that it is important to find a middle path to accommodate both institutional and individual interests where possible, but if both cannot be accommodated in a particular case, then the interests of the individual who is seeking VAD should be prioritised, as it is the individual who is potentially terminally ill and enduring intolerable suffering.

As a minimum requirement, objecting or non-participating entities should be required to allow a person to access VAD on the premises of the objecting entity if the person is too unwell to be transferred elsewhere. This approach strikes the balance in favour of the patient when the institutional objection will unduly compromise the patient’s interests. This is because the patient is in a vulnerable position. Not taking this approach would mean that a person who is unable to be reasonably transferred or to leave the institution for periods to access VAD would be prevented from accessing VAD, which we consider to be unacceptable.[13]

In terms of a general scheme, we consider the Queensland provisions regulating institutional objection to be the best of the Australian models.

Implementation

---

[13] Ben White et al, ‘Legislative Options to Address Institutional Objections to Voluntary Assisted Dying in Australia’ (2021) *University of New South Wales Law Journal Forum* 1, 17.

We recognise that the focus of the Committee's inquiry is on the Bill. However, we did wish to make the following brief observations about implementation.

- We support the legislative reference to an 'official voluntary assisted dying care navigator service'. This is appropriate to have legislative recognition of this role given its significance.

- We repeat our earlier calls for the Commonwealth Government to amend the Commonwealth Criminal Code prohibition relating to 'suicide' and a 'carriage service'. Our views on how the Code could be very simply amended to avoid the risk of criminalising otherwise lawful activity authorised under state VAD legislation are set out in this article: 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) *Monash University Law Review* (forthcoming). The adverse implications for clinicians are also described in this article: Eliana Close et al, 'Voluntary Assisted Dying and Telehealth: Commonwealth Carriage Service Laws are Putting Clinicians at Risk' (2021) 215(9) *Medical Journal of Australia* 406-409. We recognise this is not a matter that the State of New South Wales can resolve as this is Commonwealth law, but urge continued advocacy from the State government during the implementation period.

In conclusion, we note that this submission represents our views but does not necessarily represent the views of other members of ACHLR. For this reason, we request that any mention of this submission refers to us as authors and not ACHLR, the Business and Law Faculty or QUT as entities.

Thank you for the opportunity to contribute to this Inquiry.

Yours sincerely

Professor Lindy Willmott
Australian Centre for Health Law Research

Professor Ben White
Australian Centre for Health Law Research

APPENDIX – PUBLISHED RESEARCH REFERRED TO ABOVE

The below list of publications is presented in the order in which they are cited.

- Ben White and Lindy Willmott, 'A Model Voluntary Assisted Dying Bill' (2019) 7(2) *Griffith Journal of Law and Human Dignity* 1.
- Lindy Willmott and Ben White, 'Assisted Dying in Australia: A Values-based Model for Reform' in Ian Freckelton and Kerry Peterson, *Tensions and Traumas in Health Law* (Federation Press, 2017).
- Ben White and Lindy Willmott, 'Evidence-based Law Making on Voluntary Assisted Dying' (2020) 44(4) *Australian Health Review* 544.
- Ben White et al, 'Does the Voluntary Assisted Dying Act 2017 (Vic) Reflect Its Stated Policy Goals?' (2020) 43(2) *University of New South Wales Law Journal* 417.
- Ben White et al, 'Comparative and Critical Analysis of Key Eligibility Criteria for Voluntary Assisted Dying Under Five Legal Frameworks' (2021) 44(4) *University of New South Wales Law Journal* (forthcoming).
- Ben White et al, 'Who is Eligible for Voluntary Assisted Dying? Nine Medical Conditions Assessed against Five Legal Frameworks' (2022) 45(1) *University of New South Wales Law Journal* (forthcoming).
- Ben White et al, 'Prospective Approval of Assisted Dying: A Qualitative Study of Doctors' Perspectives in Victoria, Australia' (2021) *BMJ Supportive and Palliative Care* (early online).
- Lindy Willmott et al, 'Participating Doctors' Perspectives in the Regulation of VAD in Victoria: A Qualitative Study' (2021) *Medical Journal of Australia*.
- Lindy Willmott et al, 'Restricting Conversations about Voluntary Assisted Dying: Implications for Clinical Practice' (2020) 10(1) *BMJ Supportive and Palliative Care* 105.
- Ben White et al, 'Legislative Options to Address Institutional Objections to Voluntary Assisted Dying in Australia' (2021) *University of New South Wales Law Journal Forum* 1.
- 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) *Monash University Law Review* (forthcoming).
- Eliana Close et al, 'Voluntary Assisted Dying and Telehealth: Commonwealth Carriage Service Laws are Putting Clinicians at Risk' (2021) 215(9) *Medical Journal of Australia* 406-409.