

**Written Evidence Submitted by Associate Professor Kerstin Braun, School of Law and Justice, University of Southern Queensland, Australia (ADY0506)**

Dear Chair,

**Assisted Dying/Assisted Suicide**

Thank you for the opportunity to submit written evidence to the inquiry into Assisted Dying/ Assisted Suicide.

**I. BACKGROUND**

I am an Associate Professor in the School of Law and Justice and a member of the Centre for Health Research at the University of Southern Queensland, Australia. My research interests include voluntary assisted dying ('VAD') and law reform in this space. I am the author of several articles in Australian and international journals pondering different aspects of VAD.<sup>1</sup>

VAD laws were first introduced in Victoria in 2017 and have since been enacted in all Australian States. Much of my written evidence submission below relates to the operation of VAD in the Australian context and I hope that my ideas and comments can be useful for the Health and Social Care Select Committee.

**II. SUMMARY**

In response to the inquiry into Assisted Dying/Assisted Suicide by the Health and Social Care Committee I provide evidence in relation to the following questions from the Terms of Reference.

Question 2: What can be learnt from the evidence in countries where assisted dying/assisted suicide is legal?

Question 4: What, if any, are the physical and mental health criteria which would make an individual eligible to access assisted dying/assisted suicide services?

Question 7: What capabilities would a person need to be able to consent to assisted dying /assisted suicide?

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<sup>1</sup> Anthony Gray and Kerstin Braun, 'Voluntary Assisted Dying, the Conscientious Objector Who Refuses to Facilitate it and Discrimination Law' (2022) 29(4) *Journal of Law and Medicine* 1128; Kerstin Braun, 'Self-Administration or Practitioner Administration? The Scope of Future German Assisted Dying Legislation' (2022) 31(1) *Medical Law Review* 141; Kerstin Braun, 'When Ill Is Not ill Enough — Timeframe Until Expected Death Restrictions in Australian Voluntary Assisted Dying Laws and Human Rights Compatibility' (2022) 28(1) *Australian Journal of Human Rights* 21; Kerstin Braun, 'The Right to Assisted Dying: Constitutional Jurisprudence and Its Impact in Canada, Germany and Austria' (2021) 15(3) *Vienna Journal on International Constitutional Law* 291; Kerstin Braun, 'Voluntary Assisted Dying and the Merits of Offence-Specific Prosecutorial Guidelines in Australia' (2021) 45(2) *Criminal Law Journal* 81.

Question 8: What should the Government's role be in relation to the debate?

**Key findings:**

**Question 2:** From the Australian experience the learnings are that VAD operates safely and lawfully.

**Question 4:** While Australian jurisdictions require a person to have a terminal illness and to be expected to die within a specific timeframe (ranging from six to 12 months depending on the illness and jurisdiction) this is not (or no longer) required in other jurisdictions including Canada and the Netherlands. The Committee may wish to explore whether it would be necessary to limit access to future assisted dying schemes in the UK to those individuals suffering from a terminal condition.

**Question 7:** All Australian VAD Acts require patients to have capacity at all stages of the VAD process. This excludes certain individuals from accessing VAD. In light of the rising number of persons living with dementia the Committee may wish to consider whether and to what extent persons with dementia should be granted access to a future assisted dying scheme if they so desire.

**Question 8:** The Australian experience demonstrates that government support and leadership in the VAD debate is vital for successful law reform in this space.

**III. TERMS OF REFERENCE**

***Question 2: What can be learnt from the evidence in countries where assisted dying/assisted suicide is legal?***

In all Australian jurisdictions, taking one's own life or attempting to do so no longer gives rise to criminal responsibility. Yet, aiding, counselling, or inciting another person to kill himself or herself is generally a criminal offence. Moreover, ending the life of another, even with their consent, can give rise to criminal liability for homicide offences.<sup>2</sup> To prevent or limit criminal responsibility for participation in VAD, between 2017 and 2022 all Australian States have enacted specific VAD frameworks.<sup>3</sup> All Acts are in operation except for the New South Wales VAD Act which is expected to commence in November 2023. While VAD is currently unlawful in the Northern Territory and the Australian Capital Territory, debate on VAD law reform has already begun.

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<sup>2</sup> See Kerstin Braun, 'Voluntary Assisted Dying and the Merits of Offence-Specific Prosecutorial Guidelines in Australia' (2021) 45(2) *Criminal Law Journal* 81, 82.

<sup>3</sup> *Voluntary Assisted Dying Act 2017* (Vic) ('Vic VAD Act'); *Voluntary Assisted Dying Act 2019* (WA) ('WA VAD Act'); *End-of-Life Choices (Voluntary Assisted Dying) Act 2021* (Tas) ('Tas VAD Act'); *Voluntary Assisted Dying Act 2021* (SA) ('SA VAD Act'); *Voluntary Assisted Dying Act 2021* (Qld) (Qld VAD Act); *Voluntary Assisted Dying Act 2022* (NSW) ('NSW VAD Act').

Australian laws allow VAD through a medical practitioner who administers a lethal substance, so-called practitioner administration,<sup>4</sup> and through a person taking a prescribed lethal substance, so-called self-administration.<sup>5</sup>

As VAD has been lawful in a number of Australian States for some time now, the Select Committee is able to draw on evidence regarding the operation of VAD in these jurisdictions. The currently available reports from bodies overseeing the operation of VAD in Victoria and Western Australia suggest that the legislation operates safely.

In Victoria, where VAD legislation has been in operation the longest in Australia, the Voluntary Assisted Dying Review Board reports on the operation of the Victorian VAD Act. In 2022, the Board reflected on the past three years of operation and concluded that '[t]he most significant matter to report is that voluntary assisted dying in Victoria continues to operate safely and lawfully.'<sup>6</sup> Between 1 July 2021 and 30 June 2022, a total of 401 deaths of applicants with assisted dying permits were recorded. The Board identified only four cases which it deemed non-compliant with the Victorian VAD Act. Three cases were deemed non-compliant due to delays by the contact person in returning any outstanding lethal substance to the pharmacy. This must occur within 15 days of the death of an applicant. The fourth case was a violation of the Victorian VAD Act section prohibiting someone who signs on behalf of an applicant to also be a witness to the document. The Board's investigation determined this to be an oversight and the case to be clinically appropriate. Consequently, no action was taken.<sup>7</sup>

The Western Australian Voluntary Assisted Dying Review Board published its first annual report on the operation in November 2022. During the timeframe 190 deaths were recorded following the administration of a voluntary assisted dying substance. The Western Australian Board made only one referral to the Chief Executive Officer of the Department of Health relating to the timeliness of an authorised disposal of a voluntary assisted dying substance. The Board concluded overall that

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<sup>4</sup> See Vic VAD Act ss 46, 48; WA VAD Act ss 56(1)(b), 59; Tas VAD Act s 86(3); SA VAD Act s 64; Qld VAD Act s 53; NSW VAD Act s 60. According to the Acts, the primary method is self-administration and practitioner administration is only possible where the person is incapable of self-administration (Victoria, South Australia) or where self-administration is inappropriate (Western Australia, Tasmania, Queensland). The NSW VAD Act provides a true choice between practitioner and self-administration. See Vic VAD Act s 48(3)(a); WA VAD Act s 56(2); Tas VAD Act s 86(5); SA VAD Act s 64(c)(i); Qld VAD Act s 50(2); NSW VAD Act s 57.

<sup>5</sup> See Vic VAD Act ss 45, 47; WA VAD Act ss 56(1)(a), 58; Tas VAD Act s 91; SA VAD Act s 63; Qld VAD Act s 52; NSW VAD Act s 59.

<sup>6</sup> Voluntary Assisted Dying Review Board, Report of Operations July 2021 to June 2022 (Victoria 2022) 1 <https://www.safercare.vic.gov.au/reports-and-publications/voluntary-assisted-dying-report-of-operations-july-2021-to-june-2022>.

<sup>7</sup> Voluntary Assisted Dying Review Board Victoria, Report of Operations July 2021 to June 2022 (Victoria 2022).

voluntary assisted dying had become ‘accessible and safe for Western Australians’.<sup>8</sup> As the VAD Acts in other jurisdictions have only recently commenced operation no annual reports are available, yet.

**Question 4: What, if any, are the physical and mental health criteria which would make an individual eligible to access assisted dying/assisted suicide services?**

When contemplating the physical and mental health criteria relating to eligibility it is beneficial to consider the criteria set out in Australian VAD laws.

In Australian jurisdictions, a person seeking access to VAD must meet certain requirements<sup>9</sup> including be diagnosed with a disease, illness or medical condition, which is advanced, progressive and is expected to cause death<sup>10</sup> within six months unless suffering from a neurodegenerative disease, in which case it is no more than 12 months until expected death in Victoria, Western Australia, Tasmania, South Australia and New South Wales.<sup>11</sup> In Queensland death must be expected to occur within 12 months regardless of the nature of the illness, disease or condition.<sup>12</sup> Moreover, the illness must cause suffering which the person considers to be intolerable.<sup>13</sup> The person must also: be an Australian citizen or permanent resident and have been ordinarily resident of the respective State for at least 12 months at the time of first requesting VAD,<sup>14</sup> be 18 years or older,<sup>15</sup> act voluntarily, with decision-making capacity in relation to VAD, and their request must be enduring.<sup>16</sup>

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<sup>8</sup> Voluntary Assisted Dying Review Board Western Australia, Annual Report 2021–22, 16 November 2022, 4 [https://ww2.health.wa.gov.au/~/\\_/media/Corp/Documents/Health-for/Voluntary-assisted-dying/VAD-Board-Annual-Report-2021-22.pdf](https://ww2.health.wa.gov.au/~/_/media/Corp/Documents/Health-for/Voluntary-assisted-dying/VAD-Board-Annual-Report-2021-22.pdf).

<sup>9</sup> See Kerstin Braun, ‘When Ill Is Not ill Enough — Timeframe Until Expected Death Restrictions in Australian Voluntary Assisted Dying Laws and Human Rights Compatibility’ (2022) 28(1) *Australian Journal of Human Rights* 21.

<sup>10</sup> Vic VAD Act s 9(1)(d); WA VAD Act s 16(1)(c); Tas VAD Act s 6(1); SA VAD Act s 26(1)(d); NSW VAD Act s 16(1)(d)(ii)(B). In Victoria, Tasmania and South Australia the illness, disease or condition must be incurable. In Western Australia and New South Wales it is required that the disease will, on the balance of probabilities, cause death. In Queensland the disease does not have to be incurable but must cause death, Qld VAD Act s 10(1)(a)(i).

<sup>11</sup> Vic VAD Act ss 9(1)(d)(iii), 9(4); WA VAD Act s 16(1)(c)(ii); Tas VAD Act s 6(1)(c); SA VAD Act ss 26(1)(d)(iii), 26(4); NSW VAD Act s 16(1)(d).

<sup>12</sup> Qld VAD Act s 10(1)(a)(ii).

<sup>13</sup> Vic VAD Act s 9(1)(d); WA VAD Act s 16(1)(c); Tas VAD Act s 6(1); SA VAD Act s 26(1)(d); Qld VAD Act s 10(1); NSW VAD Act s 16(1)(d)(iii).

<sup>14</sup> Vic VAD Act s 9(1)(b); WA VAD Act s 16(1)(b); TAS VAD Act ss 10(1)(b), 11 (in Tasmania it also suffices that where a person is not a permanent resident of Australia the person has been resident in Australia for at least 3 continuous years immediately before the person makes the relevant first request); SA VAD Act s 26(1)(b); Qld VAD Act s 10(1)(e) (in Queensland it also suffices that a person who is not a permanent resident of Australia has been ordinarily resident in Australia for at least 3 years immediately before the person makes the first request. In addition, exemptions from Australian residency can be granted by the chief executive under certain circumstances); NSW VAD Act s 16(1)(b),(c) (in NSW it also suffices that a person who is not a permanent resident of Australia has been ordinarily resident in Australia for at least 3 years immediately before the person makes the first request; exemptions to the residency requirements can be granted; NSW VAD Act s 17).

<sup>15</sup> Vic VAD Act s 9(1)(a); WA VAD Act s 16(1)(a); Tas VAD Act s 10(1)(a); SA VAD Act s 26(1)(a); Qld VAD Act s 10(1)(d); NSW VAD Act s 16(1)(a).

While a terminal illness is currently required to access VAD in Australian jurisdictions, it should be noted that several international jurisdictions do not, or no longer, require a person wishing to obtain assistance in dying to have a terminal illness.

For example, in Canada the restriction that a person's death must be reasonably foreseeable to access Medical Assistance in Dying (MAiD) was initially enshrined in Canadian VAD legislation. The constitutionality of the restriction was subsequently successfully challenged in 2019 in the case of *Truchon and Gladu v Attorney General of Canada and Attorney General of Quebec*.<sup>17</sup> As a consequence, the requirement that natural death must be reasonably foreseeable was removed from legislation.<sup>18</sup> To protect the lives of vulnerable individuals, safeguards have been introduced into the legislation which differ depending on whether natural death is or is not reasonably foreseeable. Where natural death is not reasonably foreseeable, for example, there needs to be at least 90 days between the first eligibility assessment and the day assisted dying is provided.<sup>19</sup>

In the Netherlands, the law does not specify a particular disease or illness in the context of VAD. Rather, the law enshrines that a patient's suffering must be 'lasting and unbearable', and the patient must 'hold the conviction that there was no other reasonable solution for the situation he was in'.<sup>20</sup>

Particularly in light of recent law reform in the Canadian context, the Committee may wish to explore whether it would be necessary to limit access to a future assisted dying scheme in the UK to individuals suffering from a terminal condition.

***Question 7: What capabilities would a person need to be able to consent to assisted dying /assisted suicide?***

All Australian VAD laws require capacity during all stages of the process. That means a person with a condition that impairs their decision-making capacity may not qualify for assisted dying in Australia. For example, many individuals living with advanced dementia who wish to access VAD may not be eligible in Australia.

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<sup>16</sup> Vic VAD Act ss 9(1)(c), 20(1)(a), (c)–(d), 29(1)(a), (c)–(d); WA VAD Act ss 6(2), 16(1)(d), (f); Tas VAD Act ss 12, 13, 53; SA VAD Act s 26(1)(c); Qld VAD Act s 10(1)(b); NSW VAD Act s 16(1)(f), (g), (h). That the request is enduring is per se no eligibility criterion in Victoria, Tasmania, South Australia and Queensland. However, in Victoria and South Australia the practitioners must each be satisfied that the person's request 'is enduring' in the context of their eligibility assessment: Vic VAD Act ss 20(1)(d); 29(1)(d); SA VAD Act ss 38(1)(d); 47(1)(d). In contrast, in Western Australia and New South Wales this is one of the eligibility criteria proper: WA VAD Act s 16(1)(f); NSW VAD Act s 16(1)(h). The term, 'enduring' does not feature in the Tas or Qld VAD Acts.

<sup>17</sup> 2019 QCCS 3792.

<sup>18</sup> See: Kerstin Braun, 'When Ill Is Not ill Enough — Timeframe Until Expected Death Restrictions in Australian Voluntary Assisted Dying Laws and Human Rights Compatibility' (2022) 28(1) *Australian Journal of Human Rights* 21.

<sup>19</sup> *Criminal Code Canada* s 241.2 (3.1)(i).

<sup>20</sup> *Termination of Life on Request and Assisted Suicide (Review Procedures) Act* (the Netherlands) s 2(1).

The situation is different in Canada. Since 2021, eligible persons whose death is already reasonably foreseeable can agree to a final consent waiver for MAiD while they still have capacity. Even if they subsequently lose capacity, MAiD can still be provided at the agreed time if the person does not demonstrate resistance to its administration.<sup>21</sup>

In the Netherlands, Advanced Euthanasia Directives can replace an oral request for assisted dying where a person has lost capacity. This means a patient who is no longer capable of expressing their will, but before 'reaching this state was deemed capable of making a reasonable appraisal of his own interests' and has made a written declaration requesting that their life be terminated, can still receive assisted dying.<sup>22</sup>

In light of the rising number of persons living with dementia the Committee may wish to consider whether and to what extent persons with dementia should be granted access to assisted dying if they so desire.

**Question 8: What should the Government's role be in relation to the debate?**

The Australian experience demonstrates that government support and leadership in the VAD debate is vital for successful law reform in this space. To illustrate this point further, between 1993 and 2017, 57 Bills dealing with VAD law reform were unsuccessfully introduced in Australian jurisdictions.<sup>23</sup> All failed Bills relating to aspects of VAD were Private Members' Bills and thus introduced without government backing.

In 2017, for the first time in Australian history, a VAD Bill was backed by the government. The Victorian VAD Bill attracted higher levels of publicity and was perceived with more credibility than prior Private Members' Bills which remained unsuccessful.<sup>24</sup> It has been emphasised that '[t]he Victorian government's leadership and cross-party support for the development of this legislation contrasts with the many unsuccessful attempts by individual politicians in Australia to put private member's bills into legislation'<sup>25</sup>. The support of the Victorian governments therefore seems to have been an essential aspect of bringing about law reform in this space.

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<sup>21</sup> *Criminal Code Canada* s 241.2 (3.2).

<sup>22</sup> *Termination of Life on Request and Assisted Suicide (Review Procedures) Act* (the Netherlands) s 2(2).

<sup>23</sup> Andrew McGee et al, 'Informing the Euthanasia Debate: Perceptions of Australian Politicians' (2018) 41(4) *University of New South Wales Law Journal* 1368, 1374.

<sup>24</sup> Lindy Willmott and Ben White, 'The Challenging Path to Voluntary Assisted Dying Law Reform in Australia-Victoria as a Successful Case Study' In Ben White and Lindy Willmott (eds) *International Perspectives on End-of-Life Law Reform: Politics, Persuasion and Persistence* (Cambridge University Press, 2021) 84, 102.

<sup>25</sup> Margaret O'Connor et al, 'Documenting the Process of Developing the Victorian Voluntary Assisted Dying Legislation' (2018) 42 *Australian Health Review* 621, 624.

I hope that my ideas can be useful and please do contact me if you have any questions.

Sincerely

**Kerstin Braun**  
Associate Professor (Law)

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