Voluntary Assisted Dying Bill 2021

Statement of Compatibility

Prepared in accordance with Part 3 of the *Human Rights Act 2019*

In accordance with section 38 of the *Human Rights Act 2019*, I, Yvette D’Ath, Minister for Health and Ambulance Services make this statement of compatibility with respect to the Voluntary Assisted Dying Bill 2021.

In my opinion, the Voluntary Assisted Dying Bill 2021 is compatible with the human rights protected by the *Human Rights Act 2019*. I base my opinion on the reasons outlined in this statement.

Overview of the Bill

The Voluntary Assisted Dying Bill 2021 provides a lawful process through which eligible persons may access voluntary dying services. It achieves this by defining who is eligible to access voluntary dying, setting out a staged request and assessment process involving trained health practitioners, and providing choice on how the life ending substance is administered. Crucially, it builds in appropriate safeguards and oversight into the process to prevent abuse of the scheme and to ensure accountability and compliance with the requirements of the Bill.

The Bill is the result of consultation with the community and detailed consideration over a number of years by the Health, Communities, Disability Services and Domestic and Family Violence Prevention Committee (‘Parliamentary Committee’) as well as the Queensland Law Reform Commission (‘QLRC’).

On 14 November 2018, the Legislative Assembly referred to the Parliamentary Committee an inquiry into aged care, end-of-life, palliative care and voluntary assisted dying. The Parliamentary Committee’s report into assisted dying was tabled on 31 March 2020.

The Parliamentary Committee heard from thousands of people who participated in the inquiry, including people who had experienced the death of a loved one, health practitioners, and representatives of community organisations. Ultimately, a majority of the Parliamentary Committee voted to recommend a legislative scheme for voluntary assisted dying in Queensland.

On 21 May 2020, the Hon Stirling Hinchliffe MP, Acting Attorney-General and Minister for Justice referred to the QLRC the issue of developing an appropriate legislative scheme for voluntary assisted dying for Queensland and the preparation of draft legislation.

The QLRC delivered its report, *A legal framework for voluntary assisted dying*, on 10 May 2021. The QLRC gave detailed consideration to the human rights principles that apply, the public submissions it received as well as the models for voluntary assisted dying that apply in Victoria, Western Australia, Tasmania, New Zealand, Europe and North America. From this analysis, the QLRC proposed a legal framework for a voluntary assisted dying scheme, including a draft Bill.

Human Rights Issues

There are ‘conflicting, and highly contested, views within our society on the ethical and moral issues’ at stake in prohibiting or allowing voluntary assisted dying.[1] For that reason, courts overseas have often recognised that the executive and Parliament are better placed to determine how to weigh up the competing principles and to decide whether assisted dying laws are compatible with human rights.[2] Even when courts have ruled that human rights demand some form of voluntary assisted dying framework, the courts have still given Parliament wide scope to determine precisely what form that framework should take.[3]

That does not mean that any assisted dying law will be compatible with human rights. It means that it is primarily up to the government and the Parliament to grapple with that difficult question. In this statement of compatibility, the government has taken up that task.

Human rights principles engaged

Human rights principles informed the development of the Voluntary Assisted Dying Bill 2021. The QLRC proceeded on the basis that any framework for allowing voluntary assisted dying would engage a number of fundamental human rights principles, including:[4]
- the sanctity of life;
- respect for human dignity;
- respect for individual autonomy;
- protection of the vulnerable; and
- respect for different views on the sanctity of life.

Sanctity of human life

Clause 5(a) of the Bill states that one of the principles which underpin the Bill is that ‘human life is of fundamental importance’. The sanctity of life is one of our most fundamental societal values. Section 16 of the *Human Rights Act* is also rooted in profound respect for the value of human life. It declares that ‘[e]very person has the right to life and has the right not to be arbitrarily deprived of life’. As the UN Human Rights Committee has recognised, the right to life is ‘the supreme right’ because life is ‘the prerequisite for the enjoyment of all other human rights’.[5]

But the right to life is not a duty to live.[6] While the State has a positive obligation to protect human life, death should not always be seen as a negation of that right. After all, ‘dying is part

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[1] *R (Conway) v Secretary of State for Justice* [2018] EWCA Civ 1431; [2018] 3 WLR 925, 967 [186].

[2] *Pretty v United Kingdom* [2002] ECHR 427; (2002) 35 EHRR 1, 38-9 [70]-[78]; *R (Nicklinson) v Ministry of Justice* [2013] EWCA Civ 961; [2014] UKSC 38; [2014] 3 WLR 200, 259 [60], 350-2 [188], [190], 383 [267], 391-2 [293], [297]; *Searles v Attorney-General (NZ)* [2015] NZHC 1239; [2015] 3 NZLR 556, 599-600 [211].

[3] *Carter v Canada (Attorney-General)* [2015] 1 SCR 331, 379-80 [97]-[98], 389-90 [126].

[4] QLRC, *A Legal Framework for Voluntary Assisted Dying* (Report No 79, May 2021) ch 4. See also Health, Communities, Disability Services and Domestic and Family Violence Prevention Committee, Parliament of Queensland, *Voluntary assisted dying* (Report No 34, March 2020) 112-3 [8.1]; *Searles v Attorney-General (NZ)* [2015] NZHC 1239; [2015] 3 NZLR 556, 573 [62].

[5] UN Human Rights Committee, *General Comment No. 36: Article 6 (Right to Life)*, 124th sess, UN Doc CCPR/C/GC/36 (3 September 2019) 1 [2].

[6] *Carter v Canada (Attorney-General)* [2015] 1 SCR 331, 367 [63].

of life, it is completion rather than its opposite'.[7] How a person chooses to pass the closing moments of their life is 'part of the act of living'.[8]

It has also been recognised that failure to allow voluntary assisted dying has the potential to threaten the very thing that prohibitions on assisted suicide seek to protect: human life. When people are unable to rely on the assistance of others to die, they may 'take their own lives prematurely, for fear that they would be incapable of doing so when they reached the point where suffering was intolerable'.[9] That is borne out by the personal stories heard by the Parliamentary Committee of people planning to suicide in the absence of voluntary assisted dying.[10] That extra time alive is also precious.

Dignity

Clause 5(b) of the Bill states that another principle which underpins the Bill is that 'every person has inherent dignity and should be treated equally and with compassion and respect'. The preamble to the *Human Rights Act* also recognises that our society values '[t]he inherent dignity and worth of all human beings'. 'The bedrock value of human rights is that every individual without exception has a unique human dignity which is their birthright'.[11]

A dignified life is one of dignity during all stages of life, including the passage to death. Dignity is an aspect of the right to life in s 16 of the *Human Rights Act*.[12] As courts overseas have recognised, 'the rights to dignity and to life are entwined. The right to life is more than existence – it is a right to be treated as a human being with dignity: without dignity, human life is substantially diminished. Without life, there cannot be dignity.'[13]

Dignity also underlies other human rights such as the right to privacy in s 25(a), and the right to liberty and security of the person in s 29(1) of the *Human Rights Act*.[14]

Individual autonomy

Clause 5(c) of the Bill states that 'a person's autonomy, including autonomy in relation to end of life choices, should be respected'. Underlying important human rights, such as the right to privacy in s 25(a) of the *Human Rights Act*, is 'the principle of personal autonomy in the sense of the right to make choices about one's own body'.[15] Individual autonomy recognises that human beings have agency and self-determination in all aspects of their life, including to decide

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[7] *Cruzan v Director, Missouri Department of Health*, 497 US 261, 343 (1990).

[8] *Pretty v United Kingdom* (2002) 35 EHRR 1, 37 [64]; *R (Purdy) v DPP* [2009] UKHL 45; [2009] 3 WLR 403, 416 [36], 424 [60].

[9] *Carter v Canada (Attorney-General)* [2015] 1 SCR 331, 366 [57]; *Searles v Attorney-General (NZ)* [2015] NZHC 1239; [2015] 3 NZLR 556, 592 [165].

[10] Health, Communities, Disability Services and Domestic and Family Violence Prevention Committee, Parliament of Queensland, *Voluntary assisted dying* (Report No 34, March 2020) 7-8 [2.4].

[11] *PJB v Melbourne Health* [2011] VSC 327; (2011) 39 VR 373, 382 [32]. See also *Clubb v Edwards* [2019] HCA 11; (2019) 267 CLR 171, 196 [50].

[12] UN Human Rights Committee, *General Comment No. 36: Article 6 (Right to Life)*, 124th sess, UN Doc CCPR/C/GC/36 (3 September 2019) 1 [3].

[13] *S v Makwanyane* [1995] ZACC 3; [1995] 3 SA 391, 506 [327]; *Stransham-Ford v Minister for Justice and Correctional Services* [2015] ZAGPPHC 230; [2015] 4 SA 50, 60 [22]; *Searles v Attorney-General (NZ)* [2015] NZHC 1239; [2015] 3 NZLR 556, 574 [66].

[14] *Carter v Canada (Attorney-General)* [2015] 1 SCR 331, 368 [64]; *Stransham-Ford v Minister for Justice and Correctional Services* [2015] ZAGPPHC 230; [2015] 4 SA 50, 59 [19].

[15] *Pretty v United Kingdom* (2002) 35 EHRR 1, 37 [66].

how and when to die.[16] Autonomy to choose how to lead one's life is imperilled when voluntary assisted dying is not permitted and people are forced to endure intolerable suffering against their will.[17]

Equally, failing to protect vulnerable people may threaten their autonomy to choose to continue to live. People who lack capacity to make end of life decisions are particularly vulnerable. Autonomy is not served by respecting the choice of a person to die when they lack the capacity to make that decision: 'it is just as much an interference with the individual autonomy … for a … consequence to be imposed on someone lacking mental capacity as it is to deny the right to take such a step to someone who has it'.[18]

Protection of the vulnerable

Clause 5(g) of the Bill states that 'a person who is vulnerable should be protected from coercion and exploitation'. History warns us that state programmes for assisted dying can devolve into involuntary euthanasia and be used against minorities and other marginalised people.[19] Involuntary euthanasia represents an egregious breach of the right to life in s 16. When it is used disproportionately against minorities and other vulnerable people such as people with a disability or an impairment, euthanasia may also breach the right to equality and non-discrimination under s 15 of the *Human Rights Act*.

In light of that history, 'the risks of abuse inherent in a system that facilitates access to assisted suicide should not be underestimated'. Where voluntary assisted dying is permitted, strict regulations are 'all the more necessary'.[20] As the UN Human Rights Committee has said, if voluntary assisted dying is allowed, the State 'must ensure the existence of robust legal and institutional safeguards to verify that medical professionals are complying with the free, informed, explicit and unambiguous decision of their patients, with a view to protecting patients from pressure and abuse'.[21] The requirement for full, free and informed consent for medical treatment is enshrined in s 17(c) of the *Human Rights Act*.

Nonetheless, safeguards to protect the vulnerable should not erect unnecessary barriers or impediments to people requesting medical assistance in dying. After all, people have a right to access health services under s 37(1) of the *Human Rights Act*. According to the UN Committee on Economic, Social and Cultural Rights, the realisation of the right to health requires 'attention and care for chronically and terminally ill persons, sparing them avoidable pain and enabling them to die with dignity'.[22] Besides, it is 'important to ensure that medical judgements are not based upon assumptions as to vulnerability. To do otherwise would devalue respect for the principle of individual autonomy.'[23]

Respecting different views

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[16] *Haas v Switzerland* [2011] ECHR 2422; (2011) 52 EHRR 33, 1184 [51]; *Koch v Germany* [2012] ECHR 1621; (2012) 56 EHRR 6, 207 [46], 208 [51]; *Gross v Switzerland* [2013] ECHR 429; (2013) 58 EHRR 197, 211 [60].

[17] *Carter v Canada (Attorney-General)* [2015] 1 SCR 331, 368 [64].

[18] *Goddard Elliott (a firm) v Fritsch* [2012] VSC 87, [547].

[19] *Airedale NHS Trust v Bland* [1993] AC 789, 826.

[20] *Haas v Switzerland* [2011] ECHR 2422; (2011) 52 EHRR 33, 1185 [57]-[58].

[21] UN Human Rights Committee, *General Comment No. 36: Article 6 (Right to Life)*, 124th sess, UN Doc CCPR/C/GC/36 (3 September 2019) 2 [9].

[22] UN Committee on Economic, Social and Cultural Rights, *General Comment No 14 (2000): The Right to the Highest Attainable Standard of Health (Article 12 of the International Covenant on Economic, Social and Cultural Rights)*, 22nd sess, UN Doc E/C.12/2000/4 (11 August 2000) 8 [25].

[23] *Searles v Attorney-General (NZ)* [2015] NZHC 1239; [2015] 3 NZLR 556, 577 [80].

Clause 5(h) of the Bill declares that ‘a person’s freedom of thought, conscience, religion and belief and enjoyment of their culture should be respected’. Likewise, the preamble to the *Human Rights Act* recognises that ‘[h]uman rights are essential in a democratic and inclusive society’. One of the values that underpin such a society is ‘accommodation of a wide variety of beliefs’.[24] Section 20 of the *Human Rights Act* enshrines the right to freedom of thought, conscience, religion and belief. In a pluralistic society like Queensland, people hold very different but deeply held views about life and death.

Some physicians and other health practitioners have a conscientious or religious objection to assisting a person to die. Religious, moral and ethical beliefs are central to the lives of many health practitioners. These beliefs may inform everything they do, including their practice of medicine. Some believe that human life is sacred and that complicity in depriving a person of life is sinful or wrong.[25] To force these health practitioners to participate in perceived wrongdoing would be an assault on their human dignity.

However, ‘patients should not bear the burden of managing the consequences of physicians’ religious objections’.[26] For patients enduring intolerable suffering who wish to have assistance dying, the ‘belief or moral doubts of third parties is not the main point’.[27] ‘If we are serious about protecting autonomy we have to accept autonomous individuals have different views about what makes their lives worth living’.[28] A balance must be struck between the right to freedom of conscience and religion of some health practitioners, on the one hand, and the rights of patients to autonomy, dignity and access to health services, on the other.[29]

The Voluntary Assisted Dying Bill 2021 weighs up these principles in a way that is designed to maximise the enjoyment of human rights. However, in doing so, the Bill does engage or limit a number of human rights.

Allowing voluntary assisted dying

Human rights engaged or limited (Part 2, Divisions 2 and 3 Human Rights Act 2019)

Aiding suicide is an offence under s 311 of the *Criminal Code*. Clause 8 and Part 10 of the Bill create an exception for voluntary assisted dying which is carried out in accordance with the framework of the Bill, including its comprehensive safeguards. By creating an exception, the Bill may also create a risk of involuntary loss of life.

The right not to be arbitrarily deprived of life under s 16 of the *Human Rights Act* is engaged by any State intervention that is ‘capable, at least in the cases of <u>some</u> individuals on <u>some</u> occasions, of putting at risk their life’.[30] Deprivation of life which is truly voluntary does not

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[24] *R v Oakes* [1986] 1 SCR 103, 136 [64].

[25] *Christian Medical and Dental Society of Canada v College of Physicians and Surgeons of Ontario*, 2019 ONCA 393; (2019) 147 OR (3d) 444, [66]-[67]; *Hospice New Zealand v Attorney-General (NZ)* [2020] NZHC 1356, [91].

[26] *Christian Medical and Dental Society of Canada v College of Physicians and Surgeons of Ontario*, 2019 ONCA 393; (2019) 147 OR (3d) 444, [185].

[27] *Stransham-Ford v Minister for Justice and Correctional Services* [2015] ZAGPPHC 230; [2015] 4 SA 50, 62 [25].

[28] *R (Purdy) v DPP* [2009] UKHL 45; [2009] 3 WLR 403, 426 [66].

[29] *Christian Medical and Dental Society of Canada v College of Physicians and Surgeons of Ontario*, 2019 ONCA 393; (2019) 147 OR (3d) 444, [166].

[30] *Chaoulli v Quebec (Attorney General)* [2005] 1 SCR 791, 879 [200] (underlining in original). See also at 846-50 [112]-[124].

engage the right to life, because people do not have a duty to live.[31] In the context of assisted dying, the right not to be arbitrarily deprived of life protects against the risk that a vulnerable person will make a decision that is not truly voluntary or otherwise the product of rational choice, or is motivated by reasons other than to relieve suffering and maintain dignity (such as relieving the financial and emotional burden on family members). The existence of such risks means that the Bill engages the right not to be arbitrarily deprived of life.

The question then is whether the risk of deprivation of life is 'arbitrary'. Arbitrary has a special human rights meaning. It means capricious, unpredictable, unjust or unreasonable in the sense of not being proportionate to a legitimate aim sought.[32] Because questions of proportionality arise when considering justification of limits on human rights under s 13, it is convenient to consider these questions at the next stage of the analysis.[33]

Whether any limits on human rights are reasonable and justifiable (section 13 Human Rights Act 2019)

(a) <u>the nature of the right</u>

The right to life is the supreme right and the prerequisite for the enjoyment of all other human rights. What is at stake is the risk of involuntary death of vulnerable people.

(b) <u>the nature of the purpose of the limitation to be imposed by the Bill if enacted, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom</u>

The purpose of the Bill is 'to give persons who are suffering and dying, and who meet eligibility criteria, the option of requesting medical assistance to end their lives' (cl 3(a)). This allows people suffering intolerably with a terminal illness to make a free and informed decision to end their suffering and maintain their dignity. That purpose ultimately serves to protect:

- the right to life by not forcing people to suicide earlier than they otherwise would in the absence of voluntary assisted dying;
- the right to privacy by upholding the dignity and autonomy of people to make choices about their own body, their life and their own death; and,
- the right to liberty and security of the person by removing the requirement that people endure intolerable suffering.

Because the purpose of allowing voluntary assisted dying is to promote human rights, it is necessarily consistent with a free and democratic society based on dignity, equality and freedom.

(c) <u>the relationship between the limitation to be imposed by the Bill if enacted, and its purpose, including whether the limitation helps to achieve the purpose</u>

Allowing voluntary assisted dying will help to achieve those purposes. The rational connection is not severed by a risk that the framework will be abused. The Bill contains a comprehensive

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[31] *Carter v Canada (Attorney-General)* [2015] 1 SCR 331, 367 [63].

[32] Explanatory note, Human Rights Bill 2018 (Qld) 22; *PJB v Melbourne Health* [2011] VSC 327; (2011) 39 VR 373, 395 [85].

[33] Following the approach in *Minogue v Thompson* [2021] VSC 56, [86], [140].

regime for determining whether a person with a terminal illness may access the option of assisted dying, including strict requirements that the person has decision-making capacity.

(d) whether there are any less restrictive (on human rights) and reasonably available ways to achieve the purpose

One alternative would be to maintain the status quo where assisting someone to die is prohibited. That would not achieve the purpose, nor would it impose lesser restrictions on human rights. It would force people to continue to bear the unbearable.

Other alternatives would involve different suites of safeguards. The safeguards in the Bill are directed to ensuring that a person's decision to access assisted dying is truly voluntary and made with capacity (cl 3(c)). In order to receive medical assistance to die under the Bill, a person must meet the eligibility criteria (cl 10), and pass through a rigorous, multi-stage request and assessment process (outlined in cl 9). The person must make three separate requests to access assisted dying (cll 14, 37 and 42). The second request must specify that the person makes the request voluntarily and without coercion, and that they understand its nature and effect. Two medical practitioners, who meet the eligibility criteria (cl 82) and have completed approved training (cll 20 and 31), must independently assess the person as meeting the eligibility requirements for access to voluntary assisted dying (cll 19 and 30), and as understanding certain information which is required to be given about what voluntary assisted dying entails (cll 22 and 33). Other safeguards include oversight of the process by the Voluntary Assisted Dying Review Board (part 8), the availability of review of certain decisions by the Queensland Civil and Administrative Tribunal (part 7), and ineligibility for people to play certain roles in the process if they stand to gain from the death (cll 38(2), 82(1)(d), 83(d) and 157).

Any combination of safeguards which is more onerous would erect barriers to a person's access to voluntary assisted dying, and therefore not achieve the purpose of the Bill, nor impose a lesser burden on human rights. It would increase suffering. Conversely, any suite of safeguards that is more relaxed would increase the risk of involuntary euthanasia.

Accordingly, there is no alternative which achieves the purpose of allowing voluntary assisted dying, but which imposes less harm to human rights. The impact on the right to life is necessary to achieve the purposes of the Bill.

(e) the balance between the importance of the purpose of the Bill, which, if enacted, would impose a limitation on human rights and the importance of preserving the human rights, taking into account the nature and extent of the limitation

On one side of the scales, preventing the risk of involuntary euthanasia is of undoubted importance. However, as outlined above, the Bill includes comprehensive safeguards to minimise that risk to the greatest extent possible consistent with the purpose of allowing people to make a free and informed decision to end their suffering and maintain their dignity. Any risk of involuntary loss of life is tightly controlled, and therefore the extent of harm to human rights is small.

On the other side of the scales, a compassionate society such as ours places great value in allowing a person with a terminal illness to exercise their free choice not to continue to endure intolerable suffering. Our society also places great value in not forcing people to shorten their lives for fear that they will be unable to suicide when the suffering becomes intolerable. The importance of allowing voluntary assisted dying clearly outweighs the tightly controlled, and exceedingly small, risk of involuntary loss of life.

The risk of loss of life is not disproportionate or arbitrary. Accordingly, the right to life is engaged but not limited. Alternatively, even if the right to life is limited, that limit is reasonable and demonstrably justified.

By allowing voluntary assisted dying, the Bill more than meets the threshold of compatibility with human rights. The Bill goes beyond that threshold to positively promote the enjoyment of human rights.

Eligibility criteria – terminal disease, illness or medical condition

Human rights engaged or limited (Part 2, Divisions 2 and 3 Human Rights Act 2019)

Under cl 10(1)(a), to be eligible for access to voluntary assisted dying, a person must be diagnosed with a disease, illness or medical condition that:
- is advanced, progressive and will cause death;
- is expected to cause death within 12 months; and
- is causing suffering that the person considers to be intolerable.

Eligibility criteria are designed to exclude people. In the context of a voluntary assisted dying scheme, the eligibility criteria serve as an important safeguard against abuse. Nonetheless, the eligibility criteria will exclude people in a way that engages or limits human rights, and those limits will require justification.

For example, cl 10(1)(a) will exclude people who are suffering an intolerable condition but who do not have a prognosis of death within 12 months. A concrete example of the impact of this is provided by the Canadian case of *Truchon v Attorney-General (Canada)*.[34] Jean Truchon suffered from spastic cerebral palsy with triparesis since birth. He was completely paralysed with the exception of his left arm. He led a rich and fulfilled life into adulthood until he was diagnosed with severe spinal stenosis as well as myelomalacia. As a result, he lost the use of his left arm and became fully paralysed. He also developed enduring and constant pain, with intense burning sensations and painful spasms. Mr Truchon no longer wished to endure life, but he had limited means available to suicide, and he was not eligible for voluntary assisted dying because he was not at the end of his life.

Clause 10(1)(a) of the Bill may limit a number of human rights of a person in Queensland in a similar position to Mr Truchon, including:
- the right to equality and non-discrimination in s 15(2), (3) and (4) of the *Human Rights Act*, because:
    - the eligibility criteria may directly discriminate between two classes of people with a disability or impairment – those with an impairment that will likely lead to death within 12 months and those with an impairment that will likely not; and,
    - the eligibility criteria may indirectly discriminate against a person with a disability or impairment who wishes to suicide (and would do so without any

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[34] 2019 QCCS 3792, [17]-[35].

need for assistance were it not for their disability), in circumstances where other people without the disability can suicide without any need for assistance;[35]

- the right to life in s 16, because some people facing intolerable and indefinite pain may suicide earlier than they otherwise would if voluntary assisted dying were available to them;[36]
- the right to privacy in s 25(a), because their autonomy about what to do with their own body is overridden;[37]
- the right to liberty and security of the person in s 29(1), because the person will be forced to endure unbearable suffering without any end in sight;[38] and,
- the right of access to health services without discrimination under s 37(1), given that the person will be denied access to the health service of voluntary assisted dying.

Some of these rights have internal limitations. For example, the right to life will only be limited if the risk of deprivation of life is 'arbitrary', and the right to privacy will only be limited if the interference with privacy is 'unlawful' or 'arbitrary'. As these raise questions that are addressed in considering whether any limit is proportionate, it is convenient to consider these questions at the next stage of the analysis.[39]

Whether any limits on human rights are reasonable and justifiable (section 13 Human Rights Act 2019)

(a) <u>the nature of the right</u>

As to the rights in s 15, the value underlying equality is the dignity that all human beings have by virtue of being human. When we discriminate for no rational reason we fail to see people – such as those enduring intolerable but indefinite suffering – as fellow human beings.[40]

As to the right to life in s 16, life is inherently valuable and intimately linked to dignity. The value underlying the right to access health services in s 37(1) is also human dignity. Without life and without health, we cannot enjoy other human rights.

The rights to privacy (s 25) and to liberty and security of the person (s 29) encompass 'personal autonomy … involving control over one's bodily integrity free from state interference'.[41]

Overall, in this context, what is at stake is the recognition of the equal suffering, dignity and autonomy of people like Mr Truchon, who are suffering an intolerable medical condition, but for whom death is not imminent.[42]

(b) <u>the nature of the purpose of the limitation to be imposed by the Bill if enacted, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom</u>

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[35] *Truchon v Attorney-General (Canada)* 2019 QCCS 3792, [647]-[649], [652]-[684].
[36] *Truchon v Attorney-General (Canada)* 2019 QCCS 3792, [514]-[522].
[37] *Pretty v United Kingdom* [2002] ECHR 427; (2002) 35 EHRR 1, 35-7 [61]-[67].
[38] *Truchon v Attorney-General (Canada)* 2019 QCCS 3792, [533]-[535].
[39] Following the approach in *Minogue v Thompson* [2021] VSC 56, [86], [140].
[40] *Re Lifestyle Communities Ltd [No 3]* [2009] VCAT 1869; (2009) 31 VAR 286, 311 [109].
[41] *Carter v Canada (Attorney-General)* [2015] 1 SCR 331, 368 [64]. See also *Pretty v United Kingdom* [2002] ECHR 427; (2002) 35 EHRR 1, 37 [66].
[42] *Truchon v Attorney-General (Canada)* 2019 QCCS 3792, [661].

As the QLRC identified, the eligibility criteria in cl 10(1)(a) are designed to maintain a distinction between assisted dying and assisted suicide: 'voluntary assisted dying is not a choice between life and death but a choice for those who are dying to exercise some control over the timing and manner of their death.'[43] It also serves as a safeguard against abuse of the voluntary assisted dying scheme 'by limiting access to this type of assistance for everyone and by granting it to only those who are truly facing death'.[44]

Accordingly, the exclusions in cl 10(1)(a) have the purpose of safeguarding life for people who are not suffering and dying. Protecting the life of others is a legitimate aim.[45]

(c) the relationship between the limitation to be imposed by the Bill if enacted, and its purpose, including whether the limitation helps to achieve the purpose

Allowing voluntary assisted dying for people who are not approaching death poses certain risks. Prohibiting voluntary assisted dying for people who are not approaching death is 'a rational method of curtailing those risks'.[46] The eligibility criteria in cl 10(1)(a) will help to achieve the purpose of safeguarding life for people who are not dying.

(d) whether there are any less restrictive (on human rights) and reasonably available ways to achieve the purpose

The QLRC gave careful consideration to alternative eligibility criteria that apply in other jurisdictions.[47] It should be noted that the QLRC proposed a more liberal timeframe until death of 12 months for all diseases, illnesses or medical conditions, whereas Victoria, Western Australia and Tasmania have a timeframe of 12 months only in the case of a neurodegenerative condition, and otherwise 6 months. That is, the timeframe in cl 10(1)(a) of the Bill imposes a lesser burden on human rights compared to the timeframes that apply in all other Australian jurisdictions that allow voluntary assisted dying.

The QLRC also considered the alternative of not including a timeframe until death (as in Canada, the Netherlands, Belgium and Luxembourg). The Commission rejected that model on the basis that it would conflate assisted dying with assisted suicide. Any alternative which does not include a timeframe until death would not achieve the purpose of safeguarding life for people who are not approaching death. As there is no alternative way of achieving that purpose which would impose a lesser burden on human rights, the limits on human rights imposed by cl 10(1)(a) are necessary.

(e) the balance between the importance of the purpose of the Bill, which, if enacted, would impose a limitation on human rights and the importance of preserving the human rights, taking into account the nature and extent of the limitation

The eligibility criteria will exclude people who do not have a prognosis of death within 12 months, and thereby condemn them to the possibility of 'many years of extreme pain, loss of autonomy, indignity, and mental anguish'.[48] For some people, such as those who find

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[43] QLRC, *A Legal Framework for Voluntary Assisted Dying* (Report No 79, May 2021) 111 [7.146]. See also at 99 [7.71].

[44] *Truchon v Attorney-General (Canada)* 2019 QCCS 3792, [562].

[45] *Pretty v United Kingdom* [2002] ECHR 427; (2002) 35 EHRR 1, 37 [69]; *Truchon v Attorney-General (Canada)* 2019 QCCS 3792, [599]-[601].

[46] *Truchon v Attorney-General (Canada)* 2019 QCCS 3792, [613].

[47] QLRC, *A Legal Framework for Voluntary Assisted Dying* (Report No 79, May 2021) 88-9 [7.6].

[48] QLRC, *A Legal Framework for Voluntary Assisted Dying* (Report No 79, May 2021) 105 [7.104].

themselves in a similar position to Mr Truchon, the incursion into their rights to equality, autonomy and dignity will be particularly deep.

On the other side of the scales, '[t]he fundamental and inherent value of every human life is undoubted.'[49] The sanctity of human life and the need to protect vulnerable people are sufficiently important[50] that they are capable of outweighing the impacts on the human rights of people who do not meet the eligibility criteria in cl 10(1)(a).

In my opinion, the value of human life and the need to protect vulnerable people outweighs the deep impacts on the human rights of people who will be excluded from voluntary assisted dying because they do not meet the eligibility criteria in cl 10(1)(a) (in particular, people who do not have a prognosis of death within the next 12 months).

In coming to that conclusion, I take into account that in *Truchon v Attorney-General (Canada),* the Superior Court of Quebec found that these deep limits on human rights could not be justified by reference to the need to protect vulnerable people.[51] In accordance with that ruling, Canada has since removed the requirement that the person's death be 'reasonably foreseeable'. While that case goes to show that the impact on human rights of a requirement of a timeframe until death is very serious, it does not represent an international consensus about what is required for compatibility with human rights.

I also take into account that cl 154 requires the Bill to be reviewed after three years, including the eligibility criteria. This will allow the human rights impact of cl 10(1)(a) to be reassessed in light of the experience of how the voluntary assisted dying scheme operates in practice.

Because the impact on life and privacy is not disproportionate, the impact is not arbitrary. It follows that cl 10(1)(a) engages but does not limit the rights to life and privacy. Even if those rights are limited, the limits on human rights are reasonable and demonstrably justified. Likewise, the limits on the rights to non-discrimination, liberty and security of the person, and equal access to health services are reasonable and demonstrably justified.

In my opinion, the eligibility criteria in cl 10(1)(a) are compatible with human rights.

Eligibility criteria – decision-making capacity

Under cl 10(1)(b), to be eligible for access to voluntary assisted dying, a person must have decision-making capacity in relation to voluntary assisted dying. This may engage the right to equality and non-discrimination in s 15 of the *Human Rights Act*. This is because it draws a distinction on the basis of an impairment. It is possible that people with an impairment will be less likely to have decision-making capacity whereas people without the impairment will be more likely to have decision-making capacity. However, the requirement of decision-making capacity does not constitute indirect discrimination because the requirement is clearly reasonable in the circumstances. Moreover, allowing assisted dying for a person who lacks capacity to consent would violate individual autonomy and the right not to be subject to medical treatment without full, free and informed consent.

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[49] QLRC, *A Legal Framework for Voluntary Assisted Dying* (Report No 79, May 2021) 30 [4.25].

[50] Eg *R (Conway) v Secretary of State for Justice* [2018] EWCA Civ 1431; [2018] 3 WLR 925, 970-1 [205]-[207]; *R (Conway) v Secretary of State for Justice* [2018] UKSC B1; [2019] 1 WLR 1125.

[51] *Truchon v Attorney-General (Canada)* 2019 QCCS 3792, [625]-[638], [685]-[690].

Clause 10(1)(b) engages some human rights, but does not limit any. It is therefore compatible with human rights.

Eligibility criteria – age

Human rights engaged or limited (Part 2, Divisions 2 and 3 Human Rights Act 2019)

One of the eligibility criteria for access to voluntary assisted dying is that the person is at least 18 years of age (cl 10(1)(d)). By treating people differently on the basis of their age, cl 10(1)(d) limits the right to equality and non-discrimination. Section 15(3) of the *Human Rights Act* affirms that every person is 'entitled to the equal protection of the law without discrimination', and s 15(4) affirms that every person 'has the right to equal and effective protection against discrimination'. Discrimination means, among other things, direct and indirect discrimination on the basis of age.[52]

In addition, s 15(2) provides that every person has a right to enjoy their other human rights without discrimination. That means that children have a right to enjoy their rights to life (s 16), privacy (ss 25(a)), liberty and security of the person (s 29(1)) and access to health services (s 37(1)) without discrimination on the basis of their age.

Finally, s 26(2) of the *Human Rights Act* recognises that children have the right 'to the protection that is needed by the child, and is in the child's best interests, because of being a child'. The UN Committee on the Rights of the Child has pointed out that a child's views must be taken into account to determine what is in their best interests: '[a]ny decision that does not take into account the child's views or does not give their views due weight according to their age and maturity, does not respect the possibility for the child or children to influence the determination of their best interests.'[53] Clause 10(1)(d) limits this aspect of the best interests of the child right by excluding consideration of the child's views about their life and their death.

There are other aspects of the child's best interests which weigh in favour of an age restriction, such as the risk of abuse and their right to life. Where a child's best interests are subject to competing considerations, 'the elements will have to be weighted against each other in order to find the solution that is in the best interests of the child or children.'[54] I propose to do that at the justification stage.

These limits on equality, non-discrimination and the best interests of the child require justification under s 13 of the *Human Rights Act*.

Whether any limits on human rights are reasonable and justifiable (section 13 Human Rights Act 2019)

(a) <u>the nature of the right</u>

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[52] *Human Rights Act*, sch 1 (definition of 'discrimination'); *Anti-Discrimination Act 1991*, s 7(f).

[53] Committee on the Rights of the Child, *General Comment No 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art 3, para 1)*, UN Doc CRC/C/GC/14 (29 May 2013) 13 [53].

[54] Committee on the Rights of the Child, *General Comment No 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art 3, para 1)*, UN Doc CRC/C/GC/14 (29 May 2013) 17 [81].

As to the rights in s 15, the value underlying equality is the dignity that all human beings have by virtue of being human. When we discriminate against children for no rational reason we fail to see them as fellow human beings.[55]

As to the right in s 26(2), '[t]he concept of the child's best interests is aimed at ensuring both the full and effective enjoyment of all the [child's human rights] and the holistic development of the child.'[56]

The gravamen of the limit on human rights is that, under the Bill, adults have a choice to avoid unbearable suffering through voluntary assisted dying. But children will not have that choice and will be required to go on suffering, regardless of their maturity and regardless of their views on the matter.[57]

(b) <u>the nature of the purpose of the limitation to be imposed by the Bill if enacted, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom</u>

The QLRC identified the purpose of the age restriction in cl 10(1)(d) as follows:[58]

> In this context, the age requirement is designed to limit voluntary assisted dying to persons who are presumed, because of their age, to have sufficient understanding and intelligence to understand fully what is proposed, and to be able to give informed consent to a process that will end their lives. Children are not presumed to have such a capacity.

A related purpose of the age restriction is to eliminate the risk of incorrectly assessing a child as having sufficient maturity to decide to die, when in fact they do not. This purpose is indicated by the QLRC's observation that:[59]

> Guidelines for deciding 'Gillick competence' for health-related decision-making may need to be adapted to the different context of voluntary assisted dying, which is an active process. These are important issues that have not been satisfactorily resolved to date in jurisdictions with laws that are comparable to the draft Bill. At present, there are gaps in the scientific, evidence-based research to inform the development of policy in this area.

These purposes can be seen as reinforcing aspects of the right of children to protection in their best interests. Indeed, s 26(2) of the *Human Rights Act* recognises that children are vulnerable by virtue of their age, and are 'especially entitled to protection from harm'.[60]

Those purposes are consistent with the values of our society.[61]

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[55] *Re Lifestyle Communities Ltd [No 3]* [2009] VCAT 1869; (2009) 31 VAR 286, 311 [109].

[56] Committee on the Rights of the Child, *General Comment No 19 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art 3, para 1)*, UN Doc CRC/C/GC/14 (29 May 2013) 3 [4].

[57] As pointed out by Professor Colleen Cartwright: Health, Communities, Disability Services and Domestic and Family Violence Prevention Committee, Parliament of Queensland, *Voluntary assisted dying* (Report No 34, March 2020) 116 [8.2.1].

[58] QLRC, *A Legal Framework for Voluntary Assisted Dying* (Report No 79, May 2021) 148 [7.367].

[59] QLRC, *A Legal Framework for Voluntary Assisted Dying* (Report No 79, May 2021) 148 [7.369].

[60] *Secretary, Department of Human Services v Sanding* [2011] VSC 42; (2011) 36 VR 221, 227 [11].

[61] *An NHS Trust v X* [2021] EWHC 65 (Fam); [2021] 4 WLR 11, 31 [134].

(c) the relationship between the limitation to be imposed by the Bill if enacted, and its purpose, including whether the limitation helps to achieve the purpose

Restricting eligibility to people aged 18 or over may not be rationally connected to the purpose of ensuring that the person is sufficiently mature to understand their prognosis and the nature and consequences of assisted dying. There are children below the age of 18 who have that level of maturity. This is recognised by the common law principle set out in *Gillick v West Norfolk and Wisbech Area Health Authority*.[62] Conversely, there are adults over the age of 18 who may not have that level of maturity.

Further, age tends to be used as a proxy for maturity in situations where it would be impracticable to assess maturity on an individual basis, but that is not the case with voluntary assisted dying. Under the Bill, every patient will be assessed on a case by case basis in any event.

For these reasons, the limit on the human rights of children may not actually help to achieve the purpose of ensuring the person has sufficient maturity to make the decision to end their life. I note that the New Zealand Attorney-General came to the same conclusion when considering the age criteria in the End of Life Choice Bill 2017 (NZ).[63]

However, unlike the New Zealand Attorney-General, I consider that the age restriction serves another purpose. A blanket ban for children does ensure that children will not be mistakenly assessed as having *Gillick* competency to decide to die when in fact they do not. As no assessment of competency will be carried out on children, there can be no risk of an incorrect assessment. That is the only purpose that the age restriction clearly helps to achieve. Accordingly, only that purpose is considered further in the analysis.

(d) whether there are any less restrictive (on human rights) and reasonably available ways to achieve the purpose

The Parliamentary Committee received submissions about a number of alternative models, including:[64]

- allowing assisted dying for children above a certain age, such as 12, provided the child has decision-making capacity and their parents also provide consent (the Dutch model); and,
- allowing assisted dying for people of any age, provided they can demonstrate ‘competent understanding’ (the Belgian model).

The QLRC also considered the issue of limiting access to voluntary assisted dying by age. However, it did not consider specific alternatives which would have imposed a lesser burden on the right to non-discrimination on the basis of age.

Other alternatives might include:

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[62] [1986] 1 AC 112, 188-9.

[63] Hon Christopher Finlayson, *Report of the Attorney-General under the New Zealand Bill of Rights Act 1990 on the End of Life Choice Bill* (4 August 2017) 5-6 [27]-[33].

[64] Health, Communities, Disability Services and Domestic and Family Violence Prevention Committee, Parliament of Queensland, *Voluntary assisted dying* (Report No 34, March 2020) 115-7 [8.2.1].

- allowing assisted dying for *Gillick* competent children, with parental consent, and court approval; and,
- maintaining an age restriction of 18 years, but allowing an exception of some kind in extraordinary circumstances.

It is noteworthy that only three jurisdictions in the world allow voluntary assisted dying for children (Belgium, the Netherlands and Columbia). The voluntary assisted dying models in Victoria, Western Australia, Tasmania, New Zealand, Canada and elsewhere only apply to adults. Legislative action to protect vulnerable groups is not 'necessarily restricted to the least common denominator of actions taken elsewhere'.[65]

More importantly, while these alternatives might address much of the risk of a mistaken assessment of competency in children, they cannot eliminate that risk. As the QLRC pointed out, there are still gaps in the evidence regarding the capacity of children to give voluntary and informed consent to assisted dying.[66] Until the evidence is clearer, the Parliament is entitled to take a cautious approach in order to protect children as a vulnerable part of society. Only a total ban on voluntary assisted dying for children can entirely eliminate the risk that children will die as a result of a mistaken assessment that they have capacity to make that decision.

As there is no alternative that would harm human rights to a lesser extent but still achieve the purpose to the same extent, the limits imposed on human rights by the age restriction are necessary to achieve their purpose (of eliminating the risk of mistaken assessments of *Gillick* competency).

(e) <u>the balance between the importance of the purpose of the Bill, which, if enacted, would impose a limitation on human rights and the importance of preserving the human rights, taking into account the nature and extent of the limitation</u>

On one side of the scales, the age restriction forces some children to endure intolerable suffering – no matter how mature they are, and no matter what their personal views are on the matter – in circumstances where adults have a choice not to endure that suffering. Because cl 10(1)(d) is a blanket rule, the extent of the harm to human rights is particularly large. As the Canadian Supreme Court said in one case, '[g]iven the significance we attach to bodily integrity, it would be arbitrary to assume that no one under the age of 16 [or indeed 18] has capacity to make medical treatment decisions'.[67]

On the other side of the scales, there is obvious importance in ensuring that children are not killed on the basis of a mistaken assessment that they have sufficient maturity to understand the nature and consequences of assisted dying, when in reality they do not have that maturity. The Parliamentary Committee and the QLRC both noted that there can be difficulty in assessing capacity in children.[68] As the Supreme Court of Canada noted in one case, 'it is the ineffability inherent in the concept of "maturity" that justifies the state's retaining an overarching power to determine whether allowing the child to exercise his or her autonomy in

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[65] *Irwin Toy Ltd v Quebec (Attorney-General)* [1989] 1 SCR 927, 999.

[66] QLRC, *A Legal Framework for Voluntary Assisted Dying* (Report No 79, May 2021) 148 [7.368]-[7.369].

[67] *AC v Manitoba (Director of Child and Family Services)* [2009] 2 SCR 181, 241 [107].

[68] Health, Communities, Disability Services and Domestic and Family Violence Prevention Committee, Parliament of Queensland, *Voluntary assisted dying* (Report No 34, March 2020) 115 [8.2.1]; QLRC, *A Legal Framework for Voluntary Assisted Dying* (Report No 79, May 2021) 148 [7.368]-[7.369].

a given situation actually accords with his or her best interests'.[69] In a voluntary assisted dying framework, the consequences of a mistake about a child's maturity are a matter of life and death.

The question is whether the importance of avoiding any possible risk of an incorrect assessment of maturity (and subsequent death) outweighs the impact on children who have *Gillick* competency but are forced to bear unbearable suffering. The competing values are finely balanced. Arguably, a fairer balance might have been struck. But, in my opinion, it is appropriate to take a cautious approach and weigh the sanctity of life of children more heavily than the right of children to non-discrimination and their right to have a say about what is in their best interests.

Given that this assessment is based on the need to take a cautious approach while there are still gaps in the evidence, it should be noted that cl 154 requires the Bill to be reviewed after three years. The review is to include the eligibility criteria. The QLRC noted that access to voluntary assisted dying for children is currently under review in Canada. Clause 154 allows for this question to be revisited once further evidence is gathered.

Accordingly, in my opinion, the requirement in cl 10(1)(d) that the person be at least 18 years of age is compatible with human rights.

Eligibility criteria – citizenship and residency requirements

Human rights engaged or limited (Part 2, Divisions 2 and 3 Human Rights Act 2019)

Under cl 10(1)(e), a person is only eligible for access to voluntary assisted dying under the Bill if they:

- are an Australian citizen;
- are a permanent resident;
- have been ordinarily resident in Australia for at least three years; or
- have been granted an Australian residency exemption by the chief executive under cl 12.

The chief executive must grant the exemption if the person has a substantial connection to Queensland and there are compassionate grounds for granting the exemption.

This criterion may indirectly discriminate on the basis of citizenship or nationality. While some non-citizens will be able to satisfy the criterion (for example, as permanent residents), non-citizens will still be disproportionately affected. Citizenship and nationality are likely protected attributes of discrimination under s 15 of the *Human Rights Act*. 'Discrimination' is defined in the *Human Rights Act* as including discrimination on the grounds of the protected attributes set out in s 7 of the *Anti-Discrimination Act 1991*. One of those grounds is race (s 7(g)), which includes 'nationality or national origin'. Because the definition of discrimination in the *Human Rights Act* is inclusive, other grounds may also be protected. In Canada, which also has an inclusive definition of discrimination, the Supreme Court has held that non-citizenship is an analogous ground of discrimination which is protected.[70]

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[69] *AC v Manitoba (Director of Child and Family Services)* [2009] 2 SCR 181, 231 [86].

[70] *Andrews v Law Society of British Columbia* [1989] 1 SCR 143; *Lavoie v Canada* [2002] 1 SCR 769.

In addition, under cl 10(1)(f), a person is only eligible for access to voluntary assisted dying if they have been ordinarily resident in Queensland for at least 12 months, or they have been granted a Queensland residency exemption by the chief executive under cl 12. The criteria for the exemption are the same as for an Australian residency exemption.

Clause 10(1)(f) will treat people differently on the basis of interstate residency. It is not clear whether interstate residency is a ground of discrimination under the *Human Rights Act*. It is not a protected attribute under s 7 of the *Anti-Discrimination Act*. In cases that have come before the Canadian Supreme Court, it has held that residency in a particular Province is generally not an analogous ground of discrimination.[71] However, the Supreme Court has left open the possibility that a person's Province of residence may be a personal characteristic capable of constituting a ground of discrimination in a future case.[72] Taking a cautious approach, I will proceed on the basis that interstate residency is a protected attribute under the *Human Rights Act*.

Whether any limits on human rights are reasonable and justifiable (section 13 Human Rights Act 2019)

(a) <u>the nature of the right</u>

All human beings in Queensland have human rights, even people who are not Queenslanders and even people who are not Australian. When we exclude non-citizens and interstate residents from a voluntary assisted dying scheme, even though they are enduring intolerable suffering, we are saying that they are not 'equally deserving of [our] concern, respect and consideration'.[73] That is the underlying value of equality which is at stake.

(b) <u>the nature of the purpose of the limitation to be imposed by the Bill if enacted, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom</u>

According to the QLRC Report, the purpose of the citizenship and residency requirements is not simply to prevent 'death tourism' (where people come to Queensland solely to access voluntary assisted dying). Indeed, if that were the sole purpose, it would likely involve discriminating as an end in itself, which can never be consistent with the values of our society.

Instead, the purpose identified by the QLRC is to 'maintain the integrity of the State's health system and to ensure the availability of voluntary assisted dying services for Queensland residents'.[74] That purpose recognises 'the priority that residents of the legislating jurisdiction should expect to have in a system that depends on limited resources and a finite number of qualified persons to assess eligibility and to administer medication'.[75] Clause 10(1)(e) does this by prioritising access to people with an enduring connection to Australia, and cl 10(1)(f) does this by prioritising access to people with an enduring connection to Queensland more specifically.

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[71] *R v Turpin* [1989] 1 SCR 1296, 1332-3; *Siemens v Manitoba (Attorney General)* [2003] 1 SCR 6, 32-3 [48]. See also *Magee v United Kingdom* (2000) 31 EHRR 822, [50].

[72] *R v Turpin* [1989] 1 SCR 1296, 1333; *Siemens v Manitoba (Attorney General)* [2003] 1 SCR 6, 32-3 [48].

[73] *R v Kapp* [2008] 2 SCR 483, [15].

[74] QLRC, *A Legal Framework for Voluntary Assisted Dying* (Report No 79, May 2021) 159 [7.448].

[75] QLRC, *A Legal Framework for Voluntary Assisted Dying* (Report No 79, May 2021) 158 [7.437]. See also 160 [7.452]-[7.455].

The starting position is that '[a] society must seek to ensure that the basic necessities of life are accessible to all' – even non-citizens and interstate residents – 'if it is to be a society in which human dignity, freedom and equality are foundational.'[76] However, in the face of limited resources, it is legitimate to target resources at citizens and residents of the State over non-citizens and interstate residents.[77]

(c) the relationship between the limitation to be imposed by the Bill if enacted, and its purpose, including whether the limitation helps to achieve the purpose

The citizenship and residency requirements help to ensure that people with an enduring connection to Australia and Queensland – who have a higher claim on the finite resources of the State – have priority in accessing voluntary assisted dying.

It might be said that the requirement of Australian citizenship or residence in cl 10(1)(e) does not actually help to achieve the purpose because the State residency requirement in cl 10(1)(f) already ensures priority access for Queensland residents.[78] However, cl 10(1)(e) helps to achieve the slightly different purpose of prioritising access to people with an enduring connection to Australia as a whole. Both sets of requirements are rationally connected to their purpose.

(d) whether there are any less restrictive (on human rights) and reasonably available ways to achieve the purpose

The QLRC gave careful consideration to the citizenship and residency requirements that apply in the equivalent legislation in Victoria, Western Australia and Tasmania. Ultimately, the QLRC recommended a more liberal combination of citizenship and residency requirements than applies in each of those States; that is, the QLRC recommended a lesser burden on the right to equality and non-discrimination.

Most importantly, the Bill allows the chief executive to grant an exemption from the residency requirements under cl 12. This ameliorates the possibility of harsh and unintended consequences for non-citizens and interstate residents who have a connection to Queensland.[79]

The citizenship and residency requirements in cl 10(1)(e) and (f) represent the least restrictive way of achieving the purpose of prioritising access to voluntary assisted dying for people with an enduring connection to Australia and Queensland.

(e) the balance between the importance of the purpose of the Bill, which, if enacted, would impose a limitation on human rights and the importance of preserving the human rights, taking into account the nature and extent of the limitation

Every person in Queensland deserves our concern, respect and consideration; all the more so when they are enduring intolerable suffering. We should be cautious of drawing distinctions and excluding people based on nationality, citizenship or interstate residence. However, it is also important to prioritise access to limited resources for residents of Australia and

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[76] *Khosa v Minister of Social Development* [2004] ZACC 11; [2004] 6 SA 505, [52].

[77] *Khosa v Minister of Social Development* [2004] ZACC 11; [2004] 6 SA 505, [58]; *R (Tigere) v Secretary of State for Business, Innovation and Skills* [2015] UKSC 57; [2015] 1 WLR 3820, 3834 [34].

[78] QLRC, *A Legal Framework for Voluntary Assisted Dying* (Report No 79, May 2021) 161 [7.461]-[7.464].

[79] QLRC, *A Legal Framework for Voluntary Assisted Dying* (Report No 79, May 2021) 164 [7.490]-[7.494].

Queensland. By including a mechanism for exemptions by the chief executive under cl 12, the citizenship and residency requirements in cl 10(1)(e) and (f) strike a fair balance between the right to equality and non-discrimination, on the one hand, and the need to prioritise access to voluntary assisted dying by Australian and Queensland residents, on the other hand.

Importantly, cl 154 of the Bill requires the eligibility criteria to be reviewed after three years. As the QLRC states, the residency requirement was based on a concern about demand for access to voluntary assisted dying which was 'precautionary rather than based on hard evidence'.[80] It may be that '[f]uture developments, including the introduction of voluntary assisted dying schemes in other Australian jurisdictions and the operation of the scheme in Queensland may call into question the need to have a residency requirement at all.'[81] The review under cl 154 will help to ensure the justification for the limit on equality and non-discrimination is reviewed as the evidence and circumstances change.

The citizenship and residency eligibility criteria in cl 10(1)(e) and (f) are compatible with human rights.

Requirement of conscientious objectors to give information

Human rights engaged or limited (Part 2, Divisions 2 and 3 Human Rights Act 2019)

Under cl 84(1), registered health practitioners have a right of conscientious objection. This means that if they have a conscientious objection to voluntary assisted dying, they are not required to participate in various stages of the process under the Bill. Speech pathologists also have a right of conscientious objection under cl 85(1). Other provisions of the Bill reinforce the right of conscientious objection at various stages of the process (cll 16(2) and 26(3)). All of these provisions serve as important protections of the right to freedom of thought, conscience, religion and belief under s 20 of the *Human Rights Act*.

However, under cll 16(4) and 84(2), the compromise is that the registered health practitioner with a conscientious objection to voluntary assisted dying must inform the person that there are others who can assist, as well as provide information of those who can assist or provide the details of an official voluntary assisted dying care navigator service.

Similarly, under cl 85(2), a speech pathologist with a conscientious objection must inform certain persons of another speech pathologist or speech pathology service who is able to assist in providing the speech pathology services requested.

There are registered health practitioners and speech pathologists who hold a deeply-held belief that any complicity in depriving a person of life is sinful or wrong. Providing information which may enable a person to access voluntary assisted dying may be seen as complicity in any death that results.[82]

Accordingly, cll 16(4), 84(2) and 85(2) of the Bill interfere with the right to freedom of thought, conscience, religion and belief under s 20 of the *Human Rights Act*. By requiring conscientious

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[80] QLRC, *A Legal Framework for Voluntary Assisted Dying* (Report No 79, May 2021) 165 [7.497].

[81] QLRC, *A Legal Framework for Voluntary Assisted Dying* (Report No 79, May 2021) 165 [7.498].

[82] QLRC, *A Legal Framework for Voluntary Assisted Dying* (Report No 79, May 2021) 442-3 [14.133]-[14.134]; *Christian Medical and Dental Society of Canada v College of Physicians and Surgeons of Ontario*, 2019 ONCA 393; (2019) 147 OR (3d) 444, [66]-[67].

objectors to give certain information, those provisions of the Bill also limit the freedom of expression under s 21 of the *Human Rights Act*, because 'freedom of expression necessarily entails the right to say nothing or the right not to say certain things'.[83]

Whether any limits on human rights are reasonable and justifiable (section 13 Human Rights Act 2019)

(a) <u>the nature of the right</u>

Freedom of conscience and religion in s 20 of the *Human Rights Act* recognises that people are entitled to have differing beliefs in a pluralistic society. 'The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination. But the concept means more than that … Freedom means that, subject to such limitations as are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others, no one is to be forced to act in a way contrary to his beliefs or his conscience.'[84] Freedom of religion has been recognised as being 'of the essence of a free society'.[85]

Freedom of expression in s 21 of the *Human Rights Act* has intrinsic value to individual self-fulfilment. It also has instrumental importance for society as a whole. There cannot be democracy or the rule of law without freedom of expression. Those values are no different when it comes to the freedom not to impart information. 'Silence is in itself a form of expression which in some circumstances can express something more clearly than words could do.'[86]

What is at stake is that these provisions of the Bill subject some health practitioners to the indignity of being forced to participate in something they believe to be deeply wrong.

(b) <u>the nature of the purpose of the limitation to be imposed by the Bill if enacted, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom</u>

The purpose of requiring a conscientious objector to give the required information is to ensure that patients have access to voluntary assisted dying, whatever the moral, ethical and religious beliefs of their health practitioner.

Ultimately, the purpose is to promote the right of the patient to exercise autonomy to make decisions about their body under s 25(a) of the *Human Rights Act*, as well as to promote the right of access to health services without discrimination under s 37(1) of the *Human Rights Act*. These are legitimate aims consistent with the values of our multicultural and multifaith society.[87]

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[83] *Slaight Communications Inc v Davidson* [1989] 1 SCR 1038, 1080.

[84] *R v Big M Drug Mart Ltd* [1985] 1 SCR 295, 336-7, 351.

[85] *Church of the New Faith v Commissioner of Pay-roll Tax (Vic)* [1983] HCA 40; (1983) 154 CLR 120, 130.

[86] *Slaight Communications Inc v Davidson* [1989] 1 SCR 1038, 1080.

[87] *Christian Medical and Dental Society of Canada v College of Physicians and Surgeons of Ontario*, 2019 ONCA 393; (2019) 147 OR (3d) 444, [100]-[108].

(c) the relationship between the limitation to be imposed by the Bill if enacted, and its purpose, including whether the limitation helps to achieve the purpose

Requiring health practitioners to give the required information (such as information about another health practitioner who can assist with voluntary assisted dying) will help to ensure equitable patient access to those health care services.[88]

(d) whether there are any less restrictive (on human rights) and reasonably available ways to achieve the purpose

The QLRC gave careful consideration to a number of alternatives which were raised in submissions, including:[89]

- a requirement to give an effective referral to another health practitioner who can assist (not only information about such a health practitioner);
- a requirement to give information about another health practitioner who can assist, without the option of referring the patient to a care navigator service which can in turn refer the patient to a health practitioner who can assist;
- maintaining a 'central information service';
- dealing with the provision of information and referrals in ethical or practice guidelines, rather than in legislation;
- putting the onus on the patient to find a health practitioner who does not have a conscientious objection; and,
- not requiring a health practitioner to disclose that they have a conscientious objection.

The formulation proposed by the QLRC represents the middle ground. It only requires the giving of information and does not impose a requirement 'to refer'.[90] It is therefore less demanding than regimes elsewhere, for example, in Ontario, Canada, where physicians with a conscientious objection are required to give an effective referral. That requirement has been found to be compatible with the right to freedom of religion.[91] While the Bill might have imposed a greater burden on freedom of conscience and religion in pursuit of its aims of equitable access to voluntary assisted dying, the Bill does not go so far. For present purposes, alternatives which would be more demanding – such as a duty to refer – would be more restrictive of the right to freedom of thought, conscience, religion and belief.

The QLRC proposal is also more demanding than regimes elsewhere, such as Victoria, where there is no requirement in the legislation to provide the information required by cll 16(4), 84(2) and 85(2). However, alternatives which would be even less demanding would offer less protection to the right of patients to access health services, such as voluntary assisted dying, under s 37(1) of the *Human Rights Act*. When considering this question in Canada, the Ontario Court of Appeal found that patients who wish to access voluntary assisted dying are exceptionally dependent on their health care providers. The whole purpose of the scheme would be undermined by 'requir[ing] already vulnerable patients to attempt to navigate the

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[88] *Christian Medical and Dental Society of Canada v College of Physicians and Surgeons of Ontario*, 2019 ONCA 393; (2019) 147 OR (3d) 444, [113].

[89] Eg QLRC, *A Legal Framework for Voluntary Assisted Dying* (Report No 79, May 2021) 441 [14.123]-[14.128], 443 [14.137], 444 [14.141]-[14.143].

[90] QLRC, *A Legal Framework for Voluntary Assisted Dying* (Report No 79, May 2021) 448 [14.172].

[91] *Christian Medical and Dental Society of Canada v College of Physicians and Surgeons of Ontario*, 2019 ONCA 393; (2019) 147 OR (3d) 444, [187].

health care system on their own, without any direct personal assistance from their physicians, whom they entrust to act as their navigators for health care services'.[92]

Accordingly, any alternative would come at the cost of someone's human rights, either those of patients or of conscientious objectors. As there are no alternatives that would impose a lesser burden on human rights, the requirements in cll 16(4), 84(2) and 85(2) of the Bill are necessary to achieve their purpose of equitable access to health services.

(e) the balance between the importance of the purpose of the Bill, which, if enacted, would impose a limitation on human rights and the importance of preserving the human rights, taking into account the nature and extent of the limitation

On one side of the scales, cll 16(4), 84(2) and 85(2) of the Bill require some health practitioners to go against fundamental beliefs they hold about what is right and what is wrong. However, the impacts on their freedom of thought, conscience, belief and religion as well as their freedom of expression are mitigated in a number of ways. First, the Bill contains an extensive right of conscientious objection which allows health practitioners the freedom not to participate in most aspects of voluntary assisted dying. The only aspect they cannot opt out of is the requirement to provide information that would enable access to voluntary assisted dying by another health practitioner. Even when it comes to that bare minimum requirement, the Bill does not go as far as it could have to ensure access to voluntary assisted dying (for example, by requiring an effective referral, or even information about a particular health practitioner who is able to assist).

On the other side of the scales, patients have human rights too, including rights to autonomy, dignity and access to health services without discrimination. They 'should not bear the burden of managing the consequences of physicians' religious objections'.[93]

Ultimately, as the QLRC found, cll 16(4), 84(2) and 85(2) of the Bill represent 'the appropriate balance between a practitioner's right to refuse to do certain things on the grounds of a conscientious objection and the right of a person to access voluntary assisted dying and be informed about it and other lawful end of life options.'[94]

The requirements imposed by the Bill on conscientious objectors to provide certain information are compatible with human rights.

Impacts on entities such as churches

Part 6, division 2 of the Bill relates to participation by entities. Many facilities are run by religious organisations or other organisations that will not provide access to voluntary assisted dying for ethical, moral or religious reasons. However, Part 6, division 2 will still require that 'relevant entities' do various things to allow access to voluntary assisted dying for people in their facilities. Clause 87 defines 'relevant entity' as not including individuals. That means that relevant entities will not have human rights, as only human beings have human rights. Of course, relevant entities – such as churches – are comprised of human beings.

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[92] *Christian Medical and Dental Society of Canada v College of Physicians and Surgeons of Ontario*, 2019 ONCA 393; (2019) 147 OR (3d) 444, [157].

[93] *Christian Medical and Dental Society of Canada v College of Physicians and Surgeons of Ontario*, 2019 ONCA 393; (2019) 147 OR (3d) 444, [185].

[94] QLRC, *A Legal Framework for Voluntary Assisted Dying* (Report No 79, May 2021) 449 [14.178].

To the extent that Part 6, division 2 of the Bill impacts on the rights to freedom of conscience and freedom of expression of individuals, those impacts are justified for the same reasons given above regarding cll 16(4), 84(2) and 85(2) of the Bill.

Part 6, division 2 is compatible with human rights.

Regulating discussions about voluntary assisted dying

Clause 7 of the Bill provides that a health care worker must not initiate a discussion about voluntary assisted dying, subject to certain exceptions. A number of other provisions regulate the information that is to be provided about voluntary assisted dying (for example, cll 16(3), 22, 33 and 164).

These provisions interfere with whether and how a person may express their opinions and ideas. Accordingly, they limit the right to freedom of expression under s 21 of the *Human Rights Act*.

However, the limits on freedom of expression are clearly justified by the need to ensure that information about voluntary assisted dying is sought by the patient rather than anybody else, and to ensure that the information they receive is accurate and complete so that they may make an informed decision in light of all the relevant information.

The provisions of the Bill which regulate discussions about voluntary assisted dying, as well as the information that may or may not be provided, are compatible with human rights.

Age criteria

Apart from the eligibility criteria in cl 10, a number of other provisions in the Bill require a person to be at least 18 years of age to carry out various roles under the Bill (cll 37(5), 38(1), 54(1), 58(2) and 59(3)). For example, a contact person must be 18, in recognition of the maturity required to carry out the important responsibilities of a contact person, including reporting the person's death in certain circumstances and giving a voluntary assisted dying substance to an authorised disposer in certain circumstances.

While these age-based distinctions engage or limit the right to equality and non-discrimination under s 15 of the *Human Rights Act*, the age requirements are readily justified by reference to the need to ensure that the person has the requisite level of maturity to carry out the relevant role. Unlike the eligibility criteria for access to voluntary assisted dying under cl 10(1)(d), it is not possible to assess a person's maturity on a case-by-case basis. Age is an appropriate proxy for maturity in those circumstances. Age-based distinctions of this kind 'are a common and necessary way of ordering our society'.[95]

Clauses 37(5), 38(1), 54(1), 58(2) and 59(3) of the Bill are compatible with human rights.

Hearings to be held in private

Part 7 of the Bill provides for review of certain decisions by the Queensland Civil and Administrative Tribunal ('QCAT'). Clause 112 provides that a hearing of a review of a

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[95] *Gosselin v Quebec (Attorney General)* [2002] 4 SCR 429, 467 [31].

reviewable decision before QCAT must be held in private. By requiring a closed hearing, the right to a fair and public hearing in s 31 of the *Human Rights Act* is engaged. The principle of open justice, provided through publicly accessible hearings, is enshrined in s 31(2) and (3) of the *Human Rights Act*.

However, the limit on the open justice principle is clearly justified by reference to the need to protect 'the private and potentially sensitive nature of the subject matter'.[96] Clause 112 ultimately serves to protect the right to privacy in s 25 of the *Human Rights Act*. While it may be possible to imagine alternatives (such as allowing a public hearing where the people involved wish to have a public hearing), I consider that the approach taken by cl 112 falls within a range of reasonable alternatives. It should also be noted that cl 112 does not exclude all members of the public from hearings as a blanket rule. As the QLRC noted, the Tribunal will still 'retain its power to make directions, on its own initiative or on the application of a party, about the persons who may attend a hearing or a part of a hearing'.[97]

The requirement for hearings to be held in private under cl 112 of the Bill is compatible with human rights.[98]

Eligibility criteria for members of the Voluntary Assisted Dying Review Board

Part 8 of the Bill provides for the establishment of the Voluntary Assisted Dying Review Board which will have important oversight functions. Clause 124 sets out eligibility and disqualification criteria for appointment to the Board. Clause 124(3), in particular, disqualifies a person who:

- is an insolvent under administration under s 9 of the *Corporations Act 2001* (Cth);
- has a conviction, other than a spent conviction, for an indictable offence; or
- is a member of the Legislative Assembly.

By excluding certain classes of people from membership of the Board, cl 124 may engage the right of equal access to the public service under s 23(2)(b) as well as the right to privacy in s 25(a) of the *Human Rights Act*. The right of equal access to the public service only applies to people who are 'eligible'. It is not clear whether that means that any eligibility criteria will be automatically justified or whether exclusions from the public service will limit the right and call for justification.

The right to privacy may encompass 'the right for an individual to form and develop relationships with other human beings, including relationships of a professional or business nature'.[99] Overseas, the right to privacy applies to '[e]xcluding a person from employment in her chosen field'.[100]

When it comes to disqualification based on criminal convictions, generally criminal convictions are not a private matter because they take place in public in open courts. However, convictions may become part of a person's private life and protected by the right to privacy 'as

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[96] QLRC, *A Legal Framework for Voluntary Assisted Dying* (Report No 79, May 2021) 530 [16.166].
[97] QLRC, *A Legal Framework for Voluntary Assisted Dying* (Report No 79, May 2021) 530 [16.166].
[98] *PIM v Director-General, Department of Justice and Attorney-General* [2020] QCAT 188, [196]-[197].
[99] *C v Belgium* (2001) 32 EHRR 2, 33-4 [25].
[100] *R (L) v Commissioner of Police of the Metropolis* [2009] UKSC 3; [2010] 1 AC 410, 426 [24].

[they] recede[] into the past'.[101] Ordinarily, a conviction recedes into the past at the point that it becomes spent under *Criminal Law (Rehabilitation of Offenders) Act 1986*. Clause 124(3)(b) of the Bill does not limit the right to privacy in this particular way, because it does not exclude a person with a spent conviction (unless the spent conviction has been revived).

Even if the disqualification criteria in cl 124 limit the right of access to the public service and the right to privacy, those limits are readily justified by the need to ensure that the Board is composed of suitable members who are independent and able to discharge the important oversight functions of the Board. The disqualification criteria help to achieve that purpose, are necessary and strike a fair balance.

The eligibility criteria for membership of the Voluntary Assisted Dying Review Board are compatible with human rights.

Minor impact on defamation

Section 25(b) of the *Human Rights Act* affirms the right not to have one's reputation unlawfully attacked. This right is fulfilled by the law of defamation.[102]

Clause 139 of the Bill provides protection from liability to a person who gives certain information to the Voluntary Assisted Dying Review Board. One of those protections is that, in a proceeding for defamation, the person has a defence of absolute privilege for publishing the information. While this may affect the scope of the protection afforded by the law of defamation (and therefore engage the right in s 25(b)), that impact is clearly necessary to ensure that the Board receives all information which it requires to effectively oversee the voluntary assisted dying scheme.

Clause 139 of the Bill is compatible with human rights.

Powers of inspectors

Clause 151 of the Bill provides for the functions and powers of inspectors to investigate and ensure compliance with the Bill. To achieve this, inspectors appointed under the *Medicines and Poisons Act 2019* are further empowered to investigate and enforce compliance with the Bill. The powers conferred on inspectors are those contained in the relevant provisions of the *Medicines and Poisons Act*. By expanding the circumstances in which those powers may be exercised, cl 151 impacts a number of human rights.

There are important safeguards under cl 151(2)(b) of the Bill and chapter 5, part 5, divisions 1 and 2 of the *Medicines and Poisons Act*. These safeguards include a duty of inspectors to exercise their powers in a way that avoids inconvenience and minimises damage, a requirement to give notice of any damage, and the availability of compensation from the State for loss arising from the exercise of a power by an inspector.

Power of entry and application for warrant

An inspector is empowered to enter a place for the purpose of ensuring compliance with the Bill in one of three scenarios: where the occupier consents, where the place is a public place,

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[101] *R (T) v Chief Constable of Greater Manchester Police* [2014] UKSC 35; [2015] AC 49, 65-6 [18]; *R (L) v Commissioner of Police of the Metropolis* [2009] UKSC 3; [2010] 1 AC 410, 427 [27].

[102] UN Human Rights Committee, *General comment No 16: Article 17 (Right to privacy)*, 32nd sess (1988) 2 [11].

or where entry is authorised under a warrant (under cl 151 of the Bill and s 140(1)(a) to (c) of the *Medicines and Poisons Act*).

A power of entry may engage the right to property (an incident of which is the ability to exclude others) under s 24 of the *Human Rights Act*, as well as the right not to have one's home arbitrarily interfered with under s 25. However, neither right will be engaged where there is consent, or where the place is a public place (such that there is no private ownership or there is implied consent to enter). Accordingly, the power of entry only engages the rights to property and home where an inspector enters a place owned or occupied by a natural person which is not public, and under warrant (under s 140(1)(c) of the *Medicines and Poisons Act*). In my opinion, the rights to property and home only engage at the point that an inspector decides to apply for a warrant. The inspector will be a public entity under the *Human Rights Act*. Accordingly, when the inspector decides to apply for a warrant, they will need to give proper consideration to human rights.

A warrant may only be granted on application to a magistrate. In deciding whether to issue the warrant, the magistrate must be satisfied 'there are reasonable grounds for suspecting that there is at the place, or will be at the place within the next 7 days, a particular thing or activity that may provide evidence of an offence against' the Bill (s 148 of the *Medicines and Poisons Act*). When deciding whether to issue a warrant, the magistrate will be exercising an administrative function and will therefore be a public entity under the *Human Rights Act*. Accordingly, the magistrate will be required to give proper consideration to human rights and make the decision in a way that is compatible with human rights. This also means that the powers to apply for and to issue a warrant are compatible with human rights.

Power to stop or move vehicles

An inspector is empowered to stop or move a vehicle if the inspector 'reasonably suspects, or is aware, that a thing in or on a vehicle may provide evidence of the commission of an offence against' the Bill (s 153 of the *Medicines and Poisons Act*). That power clearly limits the right to freedom of movement under s 19 of the *Human Rights Act*.[103]

However, the power has been conferred on inspectors who are public entities and therefore required to give proper consideration to human rights. The power must only be used for the purposes of investigating an offence against the Bill. The inspector is required to clearly identify that they are exercising powers and to produce their identity card when the vehicle stops.

The power to stop and move vehicles helps to achieve the purpose of investigating offences against the Bill, and therefore ensure compliance with the safeguards in the voluntary assisted dying scheme. The limit on freedom of movement is the least restrictive possible, taking into account the identification requirements and the obligation to act compatibly with human rights. Ultimately, the right to freedom of movement is 'one of the most qualified rights',[104] and is outweighed by the importance of investigating offences against the Bill.

General powers after entry

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[103] *DPP v Kaba* [2014] VSC 52; (2014) 44 VR 526, 560 [118], 593 [231].

[104] *Kerr v Attorney-General (NZ)* (1996) 4 HRNZ 270, 274.

Inspectors are conferred with a number of general powers after entering a place by cl 151 of the Bill and chapter 5, part 4, division 2 of the *Medicines and Poisons Act*.

The inspector's powers after entry include searching and inspecting the place, taking samples for examination, placing an identifying mark on parts of the place, taking documents or extracts of documents or photographing the place. The inspector can also bring any equipment and materials necessary for exercising their powers into the place and remain there for the time necessary to achieve the purpose of entry.

These powers may impact on the right to property (s 24) and the right to non-interference with privacy and home (s 25 of the *Human Rights Act*). Both of these rights will only be limited if the deprivation or interference is 'arbitrary' (which means, among other things, disproportionate).

However, the powers have the purpose of facilitating the investigation of offences against the Bill, and to ensure compliance with the safeguards in the voluntary assisted dying scheme. The powers will help to achieve that purpose. No less restrictive alternative would be as effective in facilitating investigations. Ultimately, the need for powers to effectively investigate compliance with the Bill outweighs any impact on property and privacy. Because the powers are not disproportionate, they are not arbitrary. Accordingly, the rights to property and non-interference with family and home are not limited. Alternatively, any limit is reasonable and demonstrably justified.

Power to require reasonable help

Inspectors have a power to require reasonable help, which can include producing a document or giving information, under cl 151 of the Bill and s 159 of the *Medicines and Poisons Act*. The information that is sought may be incriminating. This means that the inspector's power to require reasonable help engages the right not to incriminate oneself under s 32(2)(k) of the *Human Rights Act*. However, the right is not limited because the privilege against self-incrimination is a reasonable excuse for failing to comply under s 160(2) of the *Medicines and Poisons Act*.

Seizure of property

Inspectors are empowered to seize property in certain circumstances under s 151 of the Bill and ss 161 to 163 of the *Medicines and Poisons Act*. The inspector may only seize certain property depending on the circumstances, such as the evidence for which a warrant was issued, or property that the inspector reasonably suspects is evidence of an offence against the Bill.

There are important safeguards set out in ss 167 to 169 of the *Medicines and Poisons Act*, including a requirement to give a receipt and information notice for a seized thing, a requirement to give access to a seized thing, and a requirement to return a seized thing (subject to limited exceptions).

The seizure powers interfere with a person's ability to deal with their property in anything seized. Accordingly, the right to property in s 24 of the *Human Rights Act* is engaged.

The purpose of the seizure powers is to gather evidence of offences against the Bill. The powers will help to achieve that purpose, they go no further than necessary (taking into account the safeguards), and they strike a fair balance. Because the impact on property is proportionate to the need to allow evidence to be gathered, the impact on the right to property is not arbitrary. Accordingly, the right to property is not limited, or if it is, the limit is justified.

Forfeiture and disposal of property

Under cl 151 of the Bill and s 170 of the *Medicines and Poisons Act*, the chief executive may decide that a seized thing is forfeited to the State if an inspector:

- after making reasonable inquiries, cannot find an owner;
- after making reasonable efforts, cannot return it to an owner; or
- reasonably believes it is necessary to keep the thing to prevent it being used to commit the offence for which it was seized.

Under cl 151 of the Bill and s 174 of the *Medicines and Poisons Act*, if a person is convicted of an offence against the Bill, the court may make an order for the disposal of anything that was the subject of, or used to commit, the offence, or anything else the court considers is likely to be used to commit a further offence against the Bill.

Forfeiture to the State and disposal of property both engage the right to property in s 24 of the *Human Rights Act*. However, forfeiture and disposal are intended to disincentivise the commission of an offence or to finalise an investigation in the event that the owner cannot be found. The forfeiture and disposal provisions go no further than is necessary to achieve those purposes. Ultimately, they strike a fair balance between those purposes and the right to property. Because the impact on property is not disproportionate, it is not arbitrary. Accordingly, the right to property is not limited, or if it is, any limit is justified.

Disposal of property related to the commission of an offence does not limit the right not to be punished more than once under s 34 of the *Human Rights Act*, in circumstances where the disposal does not have a punitive purpose.[105] The power of the court to make a disposal order is not punitive, but is addressed to deterrence and ensuring that persons who commit offences cannot benefit from the offence. The right not to be doubly punished is therefore not limited.

Power to require name and address

Under cl 151 of the Bill and s 175 of the *Medicines and Poisons Act*, an inspector may require a person to state their name and address if the inspector:

- finds a person committing an offence against the Bill;
- finds a person in circumstances that lead the inspector to reasonably suspect the person has just committed an offence against the Bill; or
- has information that leads the inspector to reasonably suspect a person has just committed an offence against the Bill.

Requiring a person to disclose personal information about themselves, such as their name and address, engages the right to privacy in s 25(a) of the *Human Rights Act*.[106] However, the impact on privacy is tailored to achieve the purpose of verifying a person's identity who is reasonably suspected of committing an offence. The limit on privacy is small, goes no further than necessary, and is outweighed by the need to verify a person's identity to enforce

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[105] *DPP (ACT) v Nikro* [2017] ACTSC 15; (2017) 265 A Crim R 158, 190 [59].

[106] *DPP (Vic) v Kaba* [2014] 44 VR 526; (2014) 44 VR 526, 564 [134].

compliance with the Bill. The impact on privacy is not arbitrary, so that there is no limit on the right to privacy, or alternatively any limit is justified.

Other information-obtaining powers

Under cl 151 of the Bill and s 177 of the *Medicines and Poisons Act*, an inspector may require a person to produce certain documents, or to certify that a copy of a document that has been produced is a true copy of the document.

Under ss 178(2) and 179(2) of the *Medicines and Poisons Act*, self-incrimination privilege is not a reasonable excuse for failure to comply. However, under s 188, there is a limited evidential immunity against the future use of the information or document given in compliance with the requirement.

These provisions may require a person to produce a document which is incriminating. Accordingly, the right not to incriminate oneself in s 32(2)(k) of the *Human Rights Act* is engaged. Arguably, the right does not prevent investigating authorities from obtaining compulsory evidence such as documents.[107] There may still be consequences for a person's fair trial, but the provision of a direct and indirect use immunity in s 188 of the *Medicines and Poisons Act* satisfies the requirements of the right not to incriminate oneself and the right to a fair hearing.[108]

Inspectors also have a power under s 180 of the *Medicines and Poisons Act* to require a person to give information relating to an offence under certain circumstances. The privilege against self-incrimination is a reasonable excuse under s 181(2). Accordingly, the power in s 180 engages, but does not limit, the right not to incriminate oneself under s 32(2)(k) of the *Human Rights Act*.

Overall, the powers of inspectors under cl 151 of the Bill engage and limit a number of human rights, but any limits are reasonable and demonstrably justified. Clause 151 is compatible with human rights.

Minor impacts on privacy

The right to privacy in s 25(a) of the *Human Rights Act* is engaged whenever a person's name and other personal information is required to be disclosed.[109] Many provisions of the Bill impose a minor incursion on the right to privacy by requiring a person to disclose or record a person's name, address and other personal details (for example, cll 17 and 59), and by authorising the collection, use and disclosure of such information (for example, cl 118(2)). These impacts on privacy are necessary in order to ensure:

- clear identification of the people involved in the process, such as the contact person;
- an accurate record of the process; and,
- oversight of the voluntary assisted dying scheme.

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[107] *Saunders v United Kingdom* [1996] ECHR 65; (1996) 23 EHRR 313, 337 [67].

[108] *Re Application under section 83.28 of the Criminal Code* [2004] 2 SCR 248, 283 [70]-[71].

[109] *DPP (Vic) v Kaba* [2014] 44 VR 526; (2014) 44 VR 526, 564 [134].

There are privacy protections to mitigate any impact on the right to privacy, including requirements to de-identify reports under cll 134(2)(d) and 136, as well as an offence of recording or disclosing personal information contrary to cl 146.

Overall, the minor limits on privacy are clearly outweighed by the need to ensure that the voluntary assisted dying scheme operates effectively, including the safeguards which are critical to ensuring that the scheme is not abused.

Because the impacts on privacy are not disproportionate, they are not arbitrary. Accordingly, the minor impacts on privacy imposed by the Bill engage, but do not limit, the right to privacy. Alternatively, any limits imposed on the right to privacy are reasonable and demonstrably justified. Accordingly, these minor impacts on privacy are compatible with human rights.

Conclusion

In my opinion, the Voluntary Assisted Dying Bill 2021 is compatible with human rights under the *Human Rights Act 2019* because it limits human rights only to the extent that is reasonable and demonstrably justifiable in accordance with s 13 of the Act.

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