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**THE LEGISLATIVE ASSEMBLY FOR THE
AUSTRALIAN CAPITAL TERRITORY**

VOLUNTARY ASSISTED DYING BILL 2023

SUPPLEMENTARY EXPLANATORY STATEMENT

**Dr Marisa Paterson MLA
Member for Murrumbidgee**

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VOLUNTARY ASSISTED DYING BILL 2023

The Bill is a Significant Bill. Significant Bills are bills that have been assessed as likely to have significant engagement of human rights and require more detailed reasoning in relation to compatibility with the *Human Rights Act 2004*.

This explanatory statement relates to private members amendments to the *Voluntary Assisted Dying Bill 2023*. It has been prepared to assist the reader of the amendments and to help inform public comment on a Consultation Draft prior to moving the amendments in the ACT Legislative Assembly. This explanatory statement does not form part of the amendments and has not been endorsed by the Assembly. The statement is to provide assistance to the reader of the amendments and is to be read in conjunction with the amendments. What is said about a provision is not to be taken as an authoritative guide to the meaning of a provision, this being a task for the courts. A consultation draft for these amendments will be released and public consultation will be undertaken.

PURPOSE

The purpose of the amendments to the *Voluntary Assisted Dying Bill 2023* is to propose a framework that will provide a power to a specifically designated and defined VAD attorney (who has authority under an Enduring Power of Attorney (EPOA)) to authorise access to VAD for an individual if they do not have decision-making capacity, following the final assessment report.

BACKGROUND

Every state in Australia have legalised Voluntary Assisted Dying in the last five years. The ACT is one of the last jurisdictions to do so. This has provided the ACT Government with the ability to look at what other jurisdictions have implemented to inform an evidence-based, best-practice VAD scheme in the ACT.

All other jurisdictions have based their legislation on the ‘Australian Model’ which refers to the Victorian Act passed in 2017. This has meant all states where VAD is legislated has included similar eligibility requirements, including a time to death requirement. The ACT Bill represents a departure from the ‘Australian Model’ as it does not include a time to death requirement to access VAD. In the same way that the ACT departed the ‘Australian Model’ around timeframe to death, is it proposed through these amendments that it is also reasonable for the ACT to consider some of the questions raised around loss of capacity.

Currently, the *Voluntary Assisted Dying Bill 2023* will see an individual who loses decision making capacity at any point from the first request to be ineligible to access VAD. These amendments will provide a framework that will provide a power to a specifically designated and defined VAD attorney (who has authority under an

Enduring Power of Attorney (EPoA)) to authorise access to VAD for an individual if they do not have decision-making capacity, following the final assessment report.

Currently, an administering practitioner must be satisfied that the individual has decision-making capacity before administering the substance. The practitioner must also record on the death report that they were satisfied the individual had decision-making capacity in relation to VAD at the time of death.

These proposed amendments will allow an EPoA who has express powers in relation to VAD to exercise those powers if the consenting individual loses decision-making capacity after the final assessment report is complete. There are clear safeguards in place to ensure appropriate and reasonable exercise of such powers through the *Powers of Attorney Act 2006*, along with all the safeguards of the *Voluntary Assisted Dying Bill 2023* as they stand. These amendments will enhance the legislation to allow a very small cohort of people who are suffering intolerably, met all eligibility criteria, have expressly consented at every stage - with capacity, but lost capacity in the last stages of life to have access to VAD.

Enduring powers of attorney provisions are in law and operative in every state and territory in Australia. Here in the ACT, the governing legislation is the *Powers of Attorney Act 2006*. The concept is straightforward: the EPoA needs to act consistently with a person's wishes that they set out at a time they had capacity. Medical practitioners are experienced in dealing with the functions of EPoA. The use of an EPoA in healthcare is common practice, especially when it relates to withdrawing care and other end-of-life decisions. These amendments maintain the principles of the *Powers of Attorney Act 2006* by ensuring individuals dignity and autonomy to have a say in their end-of-life care.

When looking at other VAD systems in place around the world, Canada's medical assistance in dying (MAiD) offers an approach similar in nature to this. Under recent amendments, Canada has a final consent waiver that a person can sign in advance of losing capacity. This means that they can still undergo MAiD if they lose decision-making capacity in their final days. This is explained in more detail later when considering the consistency of these amendments with human rights.

OVERVIEW OF THE AMENDMENTS

These amendments will make a range of considered changes to the *Voluntary Assisted Dying Bill 2023* to allow access to VAD for a person who loses decision-making capacity following the final assessment report.

These amendments retain the original objects of the Bill which are to:

- Give individuals who are suffering and dying the option of requesting the assistance of health practitioners to end their lives; and
- Establish a process for individuals to exercise the option to request assistance to end their lives if they have been assessed as meeting the requirements under the Bill;
- Establish mechanisms to ensure that VAD is accessed only by individuals who want to exercise the option to request assistance to end their lives; and have been assessed as meeting the requirements under the Bill to access VAD; and
- Protect individuals from coercion and exploitation; and
- Provide protection for health practitioners who choose to assist, or not assist, individuals to exercise the option of ending their lives in accordance with this Bill; and
- Provide for the monitoring and enforcement of compliance with this Bill.

These amendments will enhance these objectives by establishing a framework for individuals who go through the process of accessing VAD but then lose decision-making capacity following the final assessment report. A summary of this framework is as follows:

- These amendments will establish and define a VAD attorney which will become operative if an individual loses decision-making capacity under the *Powers of Attorney Act 2006*
- Establishes the ability for a VAD attorney to make an administration decision (an attorney decision) once they become operative
- Expand strict liability and other criminal offences for non-compliance with matters involving a VAD attorney
- Consequential amendments to the *Powers of Attorney Act 2006* to expressly authorise people with powers of an EPoA to exercise power in relation to VAD.

CONSULTATION ON THE PROPOSED APPROACH

Public consultation through the ACT Government's YourSay webpage and targeted roundtables and meetings was undertaken from 7 February to 6 April 2023.

The ACT Government's consultation sought views on how VAD should work in the ACT. The YourSay Conversations website provided the community with information including a detailed Discussion Paper containing 36 questions for comment, a series of shorter Discussion Guides translated into Easy English and five common languages for the ACT community, and an invitation for people to have their say. The Discussion

Paper was also available in ACT libraries, and by mail on request. The consultation received 366 'short answer' submissions from individuals and 106 formal submissions received from organisations and individuals. In addition, 2,937 Canberrans who were part of the ACT Government's YourSay Panel completed a survey on VAD. Further public consultation was conducted through the Assembly *Inquiry into the Voluntary Assisted Dying Bill 2023*. Submissions were able to be lodged by the public in a period commencing on 31 October 2023 and concluding on 8 December 2023. In total, 83 submissions were received by the Committee. Public hearings were held in the week of 29 January 2024 through 2 February 2024. The final report was published on 29 February 2024.

During the consultation and inquiry period, the issue was consistently raised calling on the ACT Government to address the issue of individuals losing decision-making capacity while undertaking the VAD process.

The Listening Report from June 2023 considered responses to matters raised in public consultation. The matter of 'Decision-making capacity and advance care directives' was among the most popular raised by the community. The report states "*Many contributors felt strongly that a person should be able to request voluntary assisted dying in advance care planning documents, so that voluntary assisted dying could take place once the person had lost capacity*". This demonstrates strong community support for the consideration of this issue.

In the 'Conversation Snapshots' CHS clinicians, disability and mental health communities, and health professionals all expressed their interest in 'decision-making capacity be explored further. Specifically, the snapshot of health professionals expressed desire to "consider the role of advance care plans and the role of enduring power of attorney"¹.

The ACT Assembly Inquiry received evidence of this issue from several groups with interest in and lived experience of VAD. Dying with Dignity Victoria (DWDV) recommended that the ACT VAD Bill further explore issues of ensuring equitable access to VAD, and VAD ineligibility². Similar calls are made from Dying with Dignity WA who states the Bill should allow access to VAD by those who have carefully expressed wishes for such access but subsequently lose capacity³. Carers ACT stated that while they were happy with the issue of capacity being reviewed in three years, their view is that a progressive Government should look at reviewing this sooner⁴. The Australian College of Nursing suggested that "*VAD be incorporated into an enduring power of attorney, advanced care planning documents or be given as a health directive when the person would be deemed incapable of decision-making when their capacity*

¹ Conversation snapshot: voluntary assisted dying stakeholder roundtables. ACT Government, 16th March 2023

² Submission 082, Dying with Dignity Victoria, Inquiry into the Voluntary Assisted Dying Bill 2023

³ Submission 067, Dying with Dignity Western Australia, Inquiry into the Voluntary Assisted Dying Bill 2023

⁴ Submission 042, Carers ACT, Inquiry into the Voluntary Assisted Dying Bill 2023

*is diminished*⁵. In the submission by the Healthcare Consumers Association, their members raised the question of dementia and suggested that ACDs be considered for such people⁶. They acknowledge however this option may be legally complicated.

The ACT Branch of Exit International also suggested the Government make the Bill compatible with advanced care directives⁷. They noted this can improve well-being for people if they know options are in place if they were to lose capacity. National Seniors Australia expressed concern that the Bill excludes people at all stages if they lose capacity⁸. They suggested that ACDs be considered, and that people who continually express desire to access VAD to be eligible when they have lost capacity. The Ministerial Advisory Council for Multiculturalism also raised the question of dementia and suggested rigorous ACDs to deal with the matter⁹

These submissions highlight the importance placed on a proper consideration of the issues of capacity by relevant stakeholders. Stakeholders raised a range of proposed suggestions such as ACDs and allow for operation of an EPoA for individuals lose capacity. The question of dementia was also raised on several occasions, and these give grounds for discussing, and investigating, the matters further.

Prior to the amendments becoming public, there was significant advice sought from a range of stakeholders that have not necessarily provided input again on the second round of consultation. Most of this advice came from legal academics, health practitioners in other jurisdictions who practice VAD and the ACT Law Society .

We received specific and technical feedback from 9 clinicians (ACT, Vic and NSW practitioners – who had range of oncology, intensive care, palliative care, geriatrics and general practice expertise) in the development of the amendments.

Once the amendments were public, a broad range of stakeholder groups were contacted seeking their input, there was the option for community members to submit feedback through my website or email, and two community meetings were held.

We received responses from 22 organisations (58%). Of those who responded, 17 were supportive (77%), and 5 raised concerns. During the community consultation period of 16th May to 29th May, we received responses from 76 members of the community. Of these, 70 were in support, and 6 were opposed.

⁵ Submission 016, Australian College of Nursing, Inquiry into the Voluntary Assisted Dying Bill 2023

⁶ Submission 028, Health Care Consumers Association, Inquiry into the Voluntary Assisted Dying Bill 2023

⁷ Submission 029, Exit International ACT Branch, inquiry into Voluntary Assisted Dying Bill 2023

⁸ Submission 030, National Seniors Australia, Inquiry into Voluntary Assisted Dying Bill 2023

⁹ Submission 039, Ministerial Advisory Council for Multiculturalism, Inquiry into Voluntary Assisted Dying Bill 2023

CONSISTENCY WITH HUMAN RIGHTS

During the development of these amendments, due regard was given to its compatibility with human rights as set out in the *Human Rights Act 2004 (ACT) (HRA)*.

An assessment of these amendments against section 28 of the HRA is provided below. Section 28 provides that human rights are subject only to reasonable limits set by laws that can be demonstrably justified in a free and democratic society.

Rights engaged

These amendments engage with the following sections of the HRA:

- Section 8 – Recognition and equality before the law (promoted)
- Section 9 – Right to life (promoted and limited)
- Section 12 – Right to privacy and reputation (promoted and limited)
- Section 14 – Right to freedom of thought, conscience, religion, and belief (promoted and limited)
- Section 18 – Right to liberty and security of a person (limited)
- Section 21 – Right to a fair trial (limited)
- Section 22 – Rights in criminal proceedings (limited)

Rights promoted

Access to VAD: right to life, right to privacy, recognition and equality before the law

1. Right to life

Section 9 of the HRA states ‘Everyone has the right to life. In particular, no-one may be arbitrarily deprived of life’. This is in accordance with the UN Committee on Human Rights which states the “right to life has crucial importance both for individuals and for society as a whole¹⁰. It is most precious for its own sake as a right that inheres in every human being, but it also constitutes a fundamental right, the effective protection of which is the prerequisite for the enjoyment of all other human rights and the content of which can be informed by other human rights.”

An important starting point is that VAD is not inherently incompatible with the right to life. The right to life does not impose on individuals a duty to live¹¹, nor impose on governments ‘a duty in every case to take steps to keep a terminally ill patient alive by all means for an indefinite period¹².’ Although the State has a positive obligation to protect human life, death is not always a negation of that

¹⁰ UN Human Rights Committee (HRC), General comment no. 36, Article 6 (Right to Life), 3 September 2019, CCPR/C/GC/35, accessed 8 May 2024, available at: <https://www.refworld.org/docid/5e5e75e04.html>

¹¹ *Carter v Canada (Attorney-General)* [2015] 1 SCR 331, 367 [63].

¹² *Shortland v Northland Health Ltd* [1998] 1 NZLR 433; *Auckland Area Health Board v Attorney-General* [1993] 1 NZLR 235. See also *Auckland Health Care Services Ltd v L* [1998] 1 NZFLR 74.

right. How a person chooses to pass the final moments of their life is ‘part of the act of living’¹³.

The United Nations Committee on Human Rights has stated that governments may allow health professionals ‘to provide medical treatment or the medical means to facilitate the termination of life of afflicted adults, such as the terminally ill, who experience severe physical or mental pain and suffering and wish to die with dignity’, as long they ‘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’¹⁴.

While some may argue that a person without decision-making capacity is arbitrarily being deprived of life, this should not be considered the case if the person has directly appointed a VAD attorney, gone through all the request and approval stages with capacity. While an individual has decision-making capacity, they must appoint a VAD attorney under the *Powers of Attorney Act 2006*, they must make their requests to access and be given a copy of the final assessment report, while having capacity. This demonstrates a very clear intention, and clear consent to access VAD as part of their end-of-life care. During the appointment of a VAD attorney, the individual will also specify the circumstances in which the EPoA is to become operative. This is in-line with existing provisions in the *Powers of Attorney Act 2006*. A VAD attorney also retains the right to conscientiously object, and there are further safeguards that align with the Bill in respect to strict liability offences and offences that further strengthening protections and promote the individuals’ right to life. When assessing for loss of capacity, the practitioner must be satisfied that the individual is not reasonably likely to regain capacity. This provides a safeguard against people who may experience temporary delirium or have other temporary issues with capacity from side-effects of medication.

An additional safeguard to protect against arbitrary loss of life is included in sections 63 (4) and 76 (3) (ca). This safeguard prevents the administering practitioner from administering the substance if the individual communicates in whichever way they can that they do not wish to access VAD at the time. Examples in section 63 (4) include words, sounds, or gestures, as well as augmentative or alternative communication including sign language, a computer or other device. While the person does not have decision-making capacity, this matter resolves an ethical dilemma that was raised in consultation. If an individual resisted VAD in anyway, it would have been the

¹³ *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].

¹⁴ Above n 3, [9].

call of the practitioner not to proceed. While this may be a rare circumstance, this provision explicitly states they may not proceed with VAD. This further protects against arbitrary loss of life.

If an individual loses decision-making capacity prior to, or during any steps before the final assessment report is completed, they remain ineligible, consistent with the proposed guidelines in the Bill. Additionally, under these amendments, the VAD attorney is not compelled to act under any circumstance. This further promotes the individual's right to life.

This approach is considered the most reasonable and practicable way to preserve the individual's right to life. Clinicians around Australia report that when an individual fears they are at risk of losing capacity, they will rush to access VAD sooner. These amendments will alleviate this fear, and individuals will not feel compelled to take the substance before losing capacity.

These amendments have sought to provide a pathway where an individual's right to life can be promoted, and an appropriate advocate is appointed to carry out the express wishes of the individual.

The issue of the appropriate way to carry out an individual's wishes is a matter of significant international debate and has been analysed through scientific literature. A paper published in *BMC Medical Ethics* by Variath et al¹⁵ examined practitioners experience of Advanced Care Directives (ACD). Several practitioners stated the difficulty in situations that present in implementing an ACD as it may be against the wish of the family. One practitioner stated "*All the family are saying, no, don't do this and there's no one in the bed that can look at you and say, yes, do this*". There are significant complexities in implementation ACDs for VAD.

Other jurisdictions have attempted to address these issues by proposing other models, for example, final consent waivers. Canada offers the most notable example of a final consent waiver. Under Canadian law, individuals seeking access to VAD must consent immediately prior to the substance being administered¹⁶. This meant that people who lose capacity at any point originally were not able to continue with VAD. Under amendments' known as 'Audrey's Amendment', a final consent waiver was introduced to assist people who lose capacity in their final days¹⁷. Under this model people can sign the waiver while they still have decision-making capacity in the event, they lose capacity in their final days. The onus is on the administering practitioner to administer VAD.

¹⁵ Variath, C., et al. Health care providers' ethical perspectives on waiver of final consent for Medical Assistance in Dying (MAiD): a qualitative study. (2022). *BMC Medical Ethics*, 23(8)

¹⁶ Bill C-14 (Canada), available at <https://www.parl.ca/DocumentViewer/en/42-1/bill/C-14/royal-assent>

¹⁷ Bill C-7 (Canada), available at <https://www.parl.ca/DocumentViewer/en/43-2/bill/C-7/royal-assent>

A qualitative analysis of the practitioner experience of the 2021 Canadian amendments by Close et al¹⁸ examined this matter. While the data from Close et al show that practitioners were positive overall around the introduction of the final consent waiver, there remained some challenges in implementation. One practitioner reported that “... *the waiver of final consent is mostly a good thing. It’s a good thing for patients and an irritating thing for clinicians [because of the challenges in interpreting and implementing it].*”. Practitioners also reported the ethical dilemma they face with implementing the waiver. One practitioner summarised this as “...*when my dementia patient [completes the waiver] and then they . . . lose capacity, and the question is when do I invoke that? How do I decide it’s time? I don’t need the family’s consent, but I’m not going to go ahead without the family’s consent. That’s a lot of responsibility. That feels much more cumbersome than MAiD in general because I’ve got a patient who’s sitting there and walking and talking, who’s no idea what’s going on and I’m supposed to put a needle in their arm and end their life. That’s much more tense. That’s much more difficult morally for me and I’m not quite sure if I’m going to feel I can actually do that.*”.

White et al (2024)¹⁹ examined the practitioner understanding of end-of-life laws in Victoria. Concerns were raised around the non-binding nature of ACDs, which led to them not being followed. These amendments would provide a solution using EPoA provisions. There will also be less complexity for implementation and interpretations by physicians as they are already familiar with EPoAs. Further, an EPoA empowers both the individual and the family, whereas ACDs place the onus on practitioners.

The right to life is also enhanced and safeguarded by an ACAT referral mechanism in section 12D. Under these amendments, an affected person, who is any other person who has sufficient and genuine interests in the rights of the person in relation to VAD, can seek advice or opinion. Primarily, this will relate to the exercise of a power by the VAD attorney. By permitting anyone with a sufficient or genuine interest to seek advice or opinion from ACAT, abuse of a vulnerable person will be safeguarded against. This presents a similar model to the *interested person* in s74 of the *Powers of Attorney Act 2006*. However, the *affected person* will provide a more narrow scope, only including those with a sufficient and genuine interest in the rights of the individual.

¹⁸ Close, E., Downie, J., White, B. P. (2023). Practitioners’ experiences with 2021 amendments to Canada’s medical assistance in dying law: a qualitative analysis. *Palliative Care & Social Practice*, 17, 1-23.

¹⁹ White, B. et al (2024). ‘Can a relative override a patient’s advance care directive?’: end-of-life legal worries of general practitioners and nurses working in aged care. *Australian Journal of Primary Health*, 30, PY23213

2. Right to privacy

Section 12 of the HRA provides everyone the right to not have their privacy, family, home or correspondence interfered with unlawfully and not to have their reputation unlawfully attacked. The right to privacy also covers an individual's right to have agency and self-determination in all aspects of life, including how and when to die.

These amendments will promote the right to privacy by upholding an individual's autonomy to make choices regarding their own body. The right to privacy also protects options of individual existence and autonomy that '[do] not touch upon the sphere of liberty and privacy of others'²⁰. This right also provides a 'right to one's own body'²¹, recognising that human beings have agency and self-determination in all aspects of their life, including to decide how and when to die²².

These amendments will enhance this right by allowing individuals to have greater freedom to choose when, and how, they want to die. By appointing a VAD attorney, an individual has expressly chosen to have another person advocate for them, to continue with their decision to access VAD. A decision that they have already expressed through the requests that they have made and been approved – while they had capacity. An individual who expressly states they seek to continue the process of accessing VAD after losing decision-making capacity should be granted that right and protections to protect their rights.

When an individual appoints an EPoA, they can set out the circumstances in which they wish the attorney to make decisions on their behalf in the event they lose capacity. This can be as detailed as the individual requires. This ability is available for an individual in appointing a VAD attorney, where they can outline any requirements in the circumstance that they would like the VAD attorney to act. In most situations this occurs in relation to withdrawal of treatment or refusing treatment. The *Powers of Attorney Act 2006* requires an EPoA to act in a way that is consistent with the previous requests of the principle. Therefore, a VAD attorney, under the current EPoA framework would extend this to also include decisions around VAD expressed by the individual when they had capacity.

This proposed model is consistent with the general principles of the *Powers of Attorney Act 2006* which provides that an individual's own's decisions must be

²⁰ Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (NP Engel, 2nd rev. ed, 2005), 385.

²¹ Above n 12, 389

²² *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].

upheld to the greatest extent practicable. This ensures that when an attorney is makes a decision on behalf of another, they are carrying out the express wishes of the individual. This further enhances the individual's right to privacy.

3. Right to equality:

These amendments will strengthen the right to equality and non-discrimination in the Bill by providing access to VAD for a small cohort of individuals that are currently excluded. While the Bill provides strong protections for these rights for individual's seeking to access VAD who retain decision-making capacity – those who loose capacity following the final assessment report are currently excluded.

These amendments will ensure an individual who commences the VAD process but loses decision-making capacity after the final assessment report is complete, will retain a right to equality in remaining eligible to access VAD through the authority provided by a VAD attorney. This enhances the right to equality and non-discrimination for that cohort of people who are suffering intolerably. Safeguards to prevent abuse of this cohort of people such as coercion, are included, and expanded upon, in the amendments.

The new section 43A in the amendments provides for an attorney decision to be made regarding administration when a VAD attorney is operative. This enhances the right to equality of the individual by carrying out their wishes. When a VAD attorney is acting, they must comply with the general principles set out in Schedule 1 of the *Powers of Attorney Act 2006*.

Human worth and dignity is a major principle upheld by the function of the VAD attorney. The *Powers of Attorney Act 2006* states “*An individual with impaired decision-making capacity has an inherent right to respect for the individual's human worth and dignity as an individual*”. As the VAD attorney is acting on the individual's express wish to access VAD to end their suffering, the dignity of the individual is preserved in that decisions made about their end-of-life care are implemented.

The *Powers of Attorney Act 2006* also states “*An individual's wish to involve family members and relatives in decisions affecting the individual's life, property, health and finance must be recognised and taken into account*”. The very appointment of a VAD attorney, in and of itself, requires the expressed desire of the individual to continue to access VAD following the loss of capacity. The individual will have their autonomous decision and express wish to involve family members and relatives (or whoever may act as VAD attorney) in matters of their life, and health in relation to VAD. Not allowing for this can result in

immense distress and pain for the individual and their families under the current Bill, as individual who loses capacity is no longer eligible for VAD.

The general principles of the *Powers of Attorney Act 2006* also set out that when making a decision, an EPoA must ensure that the individual's own decisions are reserved to the greatest extent practicable. In relation to the operation of a VAD attorney, power can only be exercised if the individual expressly authorised the use of power in relation to VAD.

These amendments strongly uphold an individual's right to equality and non-discrimination to access VAD following the loss of capacity after the final assessment report.

Right to privacy and reputation: ACAT hearings held in private

The new section 12D will allow ACAT to give opinion or advice on the authority of a VAD attorney to exercise power under the Act. This can include advice that the VAD attorney does not have the authority to act. This could occur in circumstances where there is conflicting advice around an individual's decision-making capacity. In accordance with the *ACT Civil and Administrative Tribunal Act 2008*, hearings around this advice or opinion can be held in private. Section 39 (5) of the Act states "*the right to a public hearing is outweighed by competing interests if the tribunal is satisfied that the application, or part of the application, should be kept private - (b) because the interest of the private lives of the parties require the privacy*". It is anticipated that should 12D be called upon, that the applicant will apply for a private hearing under section 39 of the ACAT Act.

The amendments also provide for an *affected person* to be able to apply to ACAT for advice or opinion. This person is anyone with a sufficient and genuine interest in the rights of the individual in relation to VAD. As such, it is important to ensure their right to privacy and reputation is protected by being able to ask for hearings of ACAT to be held in private.

Rights to freedom of thought, conscience, religion and belief: provision for conscientious objection

Section 14 of the HRA provides everyone the right to thought, conscience, religion, and belief. This includes having the religion of their choice, freedom to practise how they see fit and no coercion to adopt another's beliefs or limit their own. These rights, while strongly protected in the Bill through a range of clauses concerning conscientious objection, these amendments also engage and protect these rights through amendments through new section 23 (2) of the *Powers of Attorney Act 2006*. A person who is asked to act as a VAD attorney reserves the right to conscientiously object from acting in such a capacity. An individual must tell the principal if they have a conscientious objection to voluntary assisted dying before accepting the

appointment to act as a VAD attorney. This promotes the right to thought, conscience, religion and belief for a potential VAD attorney who has a moral, ethical, or religious objection to VAD.

Rights limited

Access to VAD – right to life

1. *Nature of the right and the limitation (s28(a) and (c))*

Section 9 of the HRA states ‘Everyone has the right to life. In particular, no-one may be arbitrarily deprived of life’. This is in accordance with the UN Committee on Human Rights which states the “right to life has crucial importance both for individuals and for society as a whole¹⁰. It is most precious for its own sake as a right that inheres in every human being, but it also constitutes a fundamental right, the effective protection of which is the prerequisite for the enjoyment of all other human rights and the content of which can be informed by other human rights.”

An important starting point is that VAD is not inherently incompatible with the right to life. The right to life does not impose on individuals a duty to live¹¹, nor impose on governments ‘a duty in every case to take steps to keep a terminally ill patient alive by all means for an indefinite period¹².’ Although the State has a positive obligation to protect human life, death is not always a negation of that right. How a person chooses to pass the final moments of their life is ‘part of the act of living’¹³.

These amendments place limitations on the right to life by making it lawful for an authorised individual to provide authorisation of access to a substance that is intended to cause death and for certain individuals to assist another individual to die. These amendments provide a power to a clearly defined VAD attorney to authorise administration of an approved substance intended to cause death. When considering limitations on such a right, it is of utmost importance to ensure life is not being arbitrarily deprived from an individual.

The Government’s explanatory statement for the Bill speaks to the obligations placed on Government to protect the right to life, that would be afforded through these amendments. Governments have an obligation not to arbitrarily take life; an obligation to safeguard life in specific circumstances; and an obligation to undertake proper and effective investigations into certain deaths.

The arbitrary deprivation of one’s life must be considered through a lens of actions which are considered inappropriate, unjust, lack predictability and due process of law. This can further rely on the reasonable, necessary and proportionality of such an act.

Governments are also responsible for ensuring appropriate safeguards are in place to prevent arbitrary loss of life. These are written into legislation and often involve criminal offences with imprisonment terms as maximum penalties to deter people from taking life arbitrarily. In this Bill, imprisonment terms are included for offences considered to be the most serious.

Government's must also ensure that appropriate mechanisms are in place for proper and effective investigations if such deaths should occur. This includes an independent, impartial, and unbiased judiciary to conduct these investigations.

2. *Legitimate purpose (s28(b))*

The purpose of introducing VAD is to promote the human rights of individuals who are suffering and dying by enabling an eligible individual to both 'enjoy a life with dignity' and 'die with dignity', and by providing choices for a person about the circumstances of their death. This is discussed further in the 'rights promoted' section above.

VAD aims to provide a safe, effective, and accessible process where an eligible individual chooses to access VAD in the ACT. The Bill seeks to strike the right balance between the fundamental value of human life and the values of individual autonomy in order to reduce suffering.

These amendments expand access to VAD which provides a limitation of the right to life to a broader cohort of people than the Bill itself proposes. The amendments create the function of a VAD attorney to provide authorisation for access to VAD, if an individual loses capacity. Accessing VAD is intended to promote the human rights of individuals who are suffering intolerably and have demonstrated their express intention to access VAD before losing decision-making capacity. This right to die with dignity should be afforded to those people who have met all the eligibility criteria but have lost capacity and are not reasonably likely to regain capacity.

When speaking with VAD practitioners in other Australian jurisdictions, various circumstances have been highlighted where a person was eligible for VAD but lost capacity, rendering them ineligible. These are outlined below:

- A patient with motor neuron disease was awaiting the intravenous VAD substance. When the VAD practitioner arrived, the patient was mildly delirious due to an intercurrent UTI (urinary tract infection). While that was not sufficient to lead to death, it made the patient feel terrible, in addition to being febrile and, paradoxically required antibiotic treatment (that can take several days to be effective) to restore a normal mental

state to confirm the wish to have the VAD substance. To force the patient to undergo treatment over several days for a very unpleasant UTI simply for them to be able to access VAD after the final assessment has already been approved, is clearly a great imposition on an individual's right to life and dignity.

- An eligible patient with advanced cancer got a chest infection with associated mild confusion or disorientation and was then not able to access VAD. The EPoA was then faced with the decision to either progress with antibiotic treatment for the chest infection until capacity to make and communicate a decision is restored, or No VAD medication and no antibiotic treatment with a drawn-out death of breathlessness, gurgling, fever, dropping oxygen levels and clear evidence of suffering all witnessed by the family.
- Another eligible patient with advanced cancer subsequently suffered a stroke. This was not severe enough to hasten death but removed their decision-making capacity. This led to a long-drawn-out period of increased disability until they succumb to their cancer, the very situation that they wanted to avoid.

These situations described above are clear examples of the instances of the legitimate purpose of these amendments, describing the practical purpose of the limitation of this right. In all these cases, forcing the individual to suffer further imposes restrictions on their right to life, and right to dignity. These are restricted even further if the person has made it expressly clear, through appointing a VAD attorney that they seek to access VAD if they lose decision making capacity.

3. *Rational connection between limitation and the purpose (s28(d))*

The connection between the limitation and the purpose is ultimately because individuals in this situation are suffering intolerably. Protecting an individual's right to life by establishing a safe and effective process for a person to access VAD, even after they lose capacity, is very important. An individual is supported to make choices about their own body, their life and their death, with protections in place from coercion and exploitation.

The amendments provide an extra layer of decisions and opportunity for an individual to express their desire, in the circumstance that they lose capacity, to proceed to access VAD.

4. *Proportionality (s28(e))*

These amendments represent a proportional alternative to ensure that eligible individuals, who have gone through all stages of approvals with capacity – do not have access restricted if they lose capacity. Restricting access to VAD for eligible individuals who are suffering intolerably but lose capacity in the final stages is a clear barrier and will result in individuals either suffering further or choosing to end their life early to avoid losing capacity.

Enduring powers of attorney are commonly used in medical settings to enhance the right to life of people who are unable to make decisions for their end-of-life care. Commonly, this is a family member (most usually a spouse) who the individual has a high level of trust in. This person is the individual who they trust to be an express advocate for their wishes. This is particularly critical when it comes to placing trust in other for them to make end-of-life choices on behalf of the individual.

Further, if an individual who wishes to access VAD fears they will lose capacity during the process and become ineligible, they may choose to take the VAD substance earlier than needed.

Evidence shows the loss of capacity criteria results in individual taking the substance earlier than needed. This was the basis for ‘Audrey's Amendments’ in Canada where Audrey died sooner than she would otherwise out of fear of losing capacity.

By permitting a VAD attorney to act if an individual loses capacity, this fear of loss of capacity will be relieved, allowing people in such a situation a longer lifespan than they would otherwise have had. Such limitations are balanced by the enhanced right to life of individuals who are at risk, or fear, of losing capacity in their final days as they will still have access to VAD, through authorisation of a VAD attorney.

As the functioning of a VAD attorney is predicable, the actions taken by one should not constitute an arbitrary deprivation of life. These actions are predictable as the individual, while they had capacity, has expressly appointed the person to act as the attorney, on matters relating to VAD. When these are carried out, the VAD attorney must also comply with the general principles of the *Powers of Attorney Act 2006*. For a VAD attorney to become operative, the practitioner must be satisfied that the individual will not reasonably regain capacity. This adds a further level of predictability to a situation where a VAD attorney becomes operative and exercises their power.

To further safeguard against arbitrary deprivation of life, a range of safeguards with severe penalties are applied in the Bill and these amendments. Section 49 imposes a maximum penalty of 7 years imprisonment for an individual who, either dishonestly, or by coercion, induces an attorney or individual (if they have capacity) to make or revoke an administration decision. Additionally, a penalty of up to 12 months' imprisonment is imposed under section 93 if a person who acts as a practitioner is not compliant with section 92 of the Bill. A range of strict liability offences are also included in the Bill and these amendments to place further safeguards on the life of an individual.

As with all deaths, the proper and effective investigative processes remain. This Bill makes no changes to how these would otherwise occur. For any death, especially one considered to have occurred in breach of this Bill, or other Acts, they will be investigated by an independent, impartial and unbiased judiciary.

Allowing access to VAD – administration decision – right to life

1. Nature of the right and the limitation (s28(a) and (c))

Section 43A of the amendments provides for a VAD attorney to make an administration decision. For the purposes of proving a distinction between the individual making a practitioner administration decision, the decision made by a VAD attorney is referred to as an attorney decision. In practice however, an attorney decision gives effects to the authorisation for a practitioner to administer the substance to the individual.

This provides a limitation on the right to life of the individual, while the attorney acts on the express wishes of the individual, the individual cannot provide consent to the administration due to loss of capacity. The Bill provides that an administration decision must be clear and unambiguous and made by the individual personally. The individual may make an administration decision in writing, verbally or by another means of communication available to the individual. The decision may be made following consultation with the individual's coordinating practitioner. These amendments will permit a VAD attorney to make a decision regarding administration, providing the individual has given them express consent to exercise power under the EPoA provisions.

If the individual has previously made an administration decision, either self-administration, or practitioner administration, this is taken as revoked when an attorney decision is in effect.

2. *Legitimate purpose (s28(b))*

The legitimate purpose of this limitation is that the individual has provided express consent to the VAD attorney to authorise VAD on their behalf in the event they lose capacity.

3. *Rational connection between limitation and the purpose (s28(d))*

The rational connection between the limitation and the purpose is because an individual does not have decision making capacity, they are no longer eligible for a self-administration decision or a practitioner administration decision. The VAD attorney gives the decision to the individuals coordinating practitioner.

4. *Proportionality (s28(e))*

This is considered the least restrictive limitation on the right to life for an attorney decision to be carried out, given they are acting on the express wishes of the individual. For an attorney decision to be made, it must be made in writing, be made in consultation with, and on advice of the individual's coordinating practitioner, and given to the individual's coordinating practitioner. Once this notice is received, the coordinating practitioner must record the decision in the individual's health record and give the board written notice within four business days after receipt of the decision. Failure to report to the board in accordance with the amendments is a strict liability offence and carries a maximum penalty of 20 penalty units.

For any practitioner involved in carrying out an attorney decision, they still must meet the requirements for acting in such a capacity under section 92 of the Bill. If someone acting as a practitioner is not compliant with section 92, the offence covered by section 93 applies. This offence carries a penalty of 100 penalty units, 12 months' imprisonment, or both.

The amendment to section 49, which deals with inducement of a decision, also safeguards against inducing a VAD attorney. Under section 49 (1) (b), inducing a VAD attorney to make (or revoke) a decision, either dishonestly or by coercion, carries a maximum penalty of 7 years imprisonment.

Obligations on conscientious objectors – right to freedom of thought, conscience, religion and belief

1. *Nature of the right and the limitation (s28(a) and (c))*

Section 14 of the HRA provides everyone the freedom of thought, conscience, religion, and belief. These amendments provide an additional obligation of practitioners who conscientiously object to VAD. If an individual is being represented by a VAD attorney, amendments to section 95 (2) place an obligation on a practitioner to refer the VAD attorney to an approved care navigator service. This imposes a limit on their freedom of religion, conscience and belief as although a practitioner may be morally, spiritually, or ethically opposed to VAD, they are still required to play a role in directing the individual in the appropriate direction to continue with the VAD process.

Some in the medical field may also be opposed to continuing with the VAD process for an individual who has lost decision-making capacity. In this case, the practitioner will still be obliged to direct the VAD attorney to the approved care navigator service to allow the individual to continue with VAD.

2. *Legitimate purpose (s28(b))*

The purpose of this limitation is to ensure that individuals who have lost capacity and are represented through a VAD attorney can still choose to die with dignity how they wish and not have the beliefs of other prevent this.

3. *Rational connection between limitation and the purpose (s28(d))*

Health practitioners have an obligation to comply with ethical standards of practice. One of these standards is to ensure that patient care is not impeded, and that alternative care options are provided to individuals. This legislation is also consistent with obligations around conscientious objection in the ACT and across Australia.

4. *Proportionality (s28(e))*

This has been determined to be the least restrictive way to balance the rights of practitioners to conscientiously object on grounds of religion, belief, or conscience, with the rights to equality and life of the individual seeking VAD.

No practitioner is forced to participate in VAD, which is consistent with section 9 (2) of the HRA which provides no-one is to be coerced to limit their freedom of religion. Additionally, this also holds true for practitioners who are morally or ethically opposed to VAD for people who have lost decision-making capacity.

In these instances, the only obligation on the practitioner will be to refer the individual and/or VAD attorney to the approved care navigator service.

This is seen as the most justifiable means to strike a balance between the right of practitioner to object, while also ensuring the beliefs of others do not prevent eligible people from accessing VAD.

Right to privacy and reputation: requirement to disclose/collect personal information

1. *Nature of the right and the limitation (s28(a) and (c))*

Section 12 of the HRA provides everyone has the right to not have their privacy, family, home, or correspondence interfered with unlawfully. Limitations placed on this right in the Bill include identifying information being handed over such as that of the individual, and a contact person to the relevant medical practitioner and services. There is an additional limitation placed on this right for people who act as a VAD attorney. They will be required to also hand over personal identifying and contact details, as well as sensitive documents such as EPoA documents. Amendments to sections 59 (1) (g) and 76 (3) (ca) call for the VAD attorney to the original EPoA or a certified copy of the original to the coordinating practitioner. This also means the information of the witness to the enduring power of attorney will have their details handed over to the practitioner. In section 11, on page 6, of the approved form under section 96 of the *Powers of Attorney Act 2006*, a witness is someone who is an adult, authorised to witness the signing of a statutory declaration, is not appointed as an attorney under the enduring power of attorney they are witnessing, and did not sign the enduring power of attorney for the principle.

2. *Legitimate purpose (s28(b))*

The legitimate purpose of this limitation is to ensure that people who are acting on behalf of an individual as a VAD attorney is authorised with that power.

3. *Rational connection between limitation and the purpose (s28(d))*

These amendments require the collection of personal information to achieve the purpose of the Bill to ensure proper provisions are followed in the access of VAD. The collection of such information also helps ensure proper checks and balances are maintained as well as ensuring accurate record keeping is maintained in line with legislation. Without the collection of such information, the VAD Board would not be able to fulfil its capacity and VAD would be undertaken without scrutiny. This would be particularly problematic with provisions around the functions of a VAD attorney.

4. *Proportionality (s28(e))*

This has been determined to be the least restrictive way to place a limitation on the right to privacy while also ensuring the legitimate purpose and safeguards of the Bill is met. Additionally, the Bill and these amendments set out clearly defined reasons for which personal information is collected, and as such, is not to be considered as arbitrary. The collection of information is only limited to the individual and family members/others who 'opt-in' to participating in VAD in some capacity.

Information sharing is also regulated in other Territory Acts such as the *Health Records (Privacy and Access) Act 1997*, and the *Information Privacy Act 2004*. In particular, the *Health Records (Privacy and Access) Act 1997* includes several safeguards and imposes serious penalties for misuse of data.

Rights in criminal proceedings: strict liability offences

1. *Nature of the right and the limitation (s28(a) and (c))*

Strict liability offences are prescribed in certain circumstances by the Bill and these amendments to ensure the effectiveness of the VAD framework. These offences engage with and limit the rights in criminal proceedings of individuals who fail to comply with certain provisions of these amendments. Section 22 (1) of the HRA provides everyone charged with a criminal offence has the right to be presumed innocent until proven guilty according to law. Strict liability offences however impose criminal penalties on individuals without the requirement to prove fault.

In addition to the original 34 strict liability offences prescribed in **Appendix 1** of the Bill, these amendments also impose additional strict liability offences. The new section 43A (6) sets out an additional strict liability offence. Under this section, the individual's coordinating practitioner must record an attorney decision being made in the individual's health record and notify the board within 4 business days of receiving the decision. This is a strict liability offence with a maximum penalty of 20 penalty units.

An additional offence will be included in these amendments in line with the existing section 95 (2). Section 95 (2) speaks to providing contact details for a care navigator service within 2 business days should a health practitioner refuse any of the provisions outlined in section 94 concerning conscientious objection. These amendments extend section 95 (2) to place an obligation on practitioners to provide a VAD attorney with contact details of the approved care navigator services should a VAD attorney be operational. The maximum penalty for such an offence will be 20 penalty units.

Further, a person commits an offence if a person, dishonestly or by coercion induces an individual's VAD attorney into making an attorney decision under new clause 49 (1).

2. *Legitimate purpose (s28(b))*

Strict liability offences are imposed through the amendments to ensure an effective legislative system is in place to ensure there are deterrents against unlawful behaviour. This extends to both practitioners and other individuals who take part in the VAD process.

3. *Rational connection between limitation and the purpose (s28(d))*

Strict liability offences are to act as the appropriate regulatory actions to ensure community confidence in the prescribed safeguards around VAD. Additional offences which aren't strict liability offences, are also prescribed by these amendments to further support the Objects of the Bill. Imposition of criminal liability for certain offences is essential to strike a balance between the right to life and equality for individuals while limiting the rights in criminal proceedings for others.

4. *Proportionality (s28(e))*

These limitations have been determined to be the least restrictive means of balancing limitation and enhancement of certain rights for individuals involved in the VAD process.

These amendments are consistent with all provisions in the Bill around offences (including strict liability). Including these offences around functions of VAD attorneys emphasises the importance and serious nature of such a role.

Right to liberty and security of person: imprisonment offences

1. *Nature of the right and the limitation (s28(a) and (c))*

These amendments will limit the right to liberty and security of a person by imposing an additional offence with imprisonment as a penalty. Section 18 of the HRA provides everyone has the right to liberty and security of person. This means no one can be arbitrarily arrested or detained. Additionally, no-one may be deprived of liberty, except on grounds and in accordance with procedures established by law.

Section 49 (1) in the Bill places an imprisonment term for coercion of an individual to make an administration decision as the maximum penalty. These amendments add an additional requirement of this clause to apply to a person who dishonestly, or by coercion, induces a VAD attorney to make an administration decision. The maximum penalty for such an offence is 7 years imprisonment.

2. *Legitimate purpose (s28(b))*

The purpose of imposing criminal offences with imprisonment terms is to highlight the significant and serious nature at which VAD needs to be considered.

3. *Rational connection between limitation and the purpose (s28(d))*

Including an offence for inducing a VAD attorney through dishonesty or coercion, highlights the serious nature of an individual participating in VAD. Imprisonment terms are included as the highest order of punishment in legislation to highlight the serious nature of the matter, deter untoward conduct, and to provide an effective regulatory process should unlawful behaviour arise. Imprisonment terms are common in ACT law, including pieces of health legislation, where serious or deadly consequences can be reasonably predicted. These include the *Health Act 1993 (ACT)*, and the *Therapeutic Goods Act 2008 (ACT)*. This demonstrates the situations in which offences punishable by terms of imprisonment exist for health-related matters.

4. *Proportionality (s28(e))*

In line with the Bill, imprisonment is the most appropriate maximum penalty to be applied to severe misconduct for the most serious aspects of the Bill. This is also viewed as being required to seek the appropriate balance between ensuring the promotion of the right to life, and the right to liberty and security of a person for an individual who seeks to access VAD while limiting the right to liberty and security of person for a practitioner involved in the process.

It is important to note the Bill and amendments outline the maximum penalty a court can hand down. Sentencing remains a matter at the discretion of the Judge. They can impose a sentence they see fit both in line with this Bill as well as the obligations under the *Sentencing Act 2005* to deliver what they feel is a fair sentence. While a lesser maximum sentence may be considered less restrictive, it is not considered appropriate in this case.

Right to a fair trial: ACAT hearings in private

1. *Nature of the right and the limitation (s28(a) and (c))*

Section 21 of the HRA provides everyone the right to be heard by a competent, impartial, and independent court of tribunal after a fair and public hearing. However, section 21 (2) indicates circumstances in which hearings are to be heard in private such as when morals, public order, or national security must be protected; if the interest of private lives requires the exclusion; and in special circumstances which would otherwise prejudice the interests of justice.

These amendments will include additional reviewable decisions by ACAT with respect to the role of VAD attorney (section 12D). The authority of an individual to fulfill the functions of a VAD attorney under these amendments and the *Powers of Attorney Act 2006* will be reviewable for opinion or advice by ACAT.

While public hearings are generally fundamental to the transparency and accountability of the courts, some exceptions to the principle of open justice are permitted. The *ACT Civil and Administrative Tribunal Act 2008* provides for hearings to be held in private upon application under section 39. It is anticipated this will be called upon for hearings at the ACAT under these amendments.

2. *Legitimate purpose (s28(b))*

The legitimate purpose of allowing ACAT to review the capacity for an individual to act as a VAD attorney is to ensure an additional safeguard to prevent abuse of power over a vulnerable person. Additionally, permitting the hearing to be held in private ensures any private identifying or personal information remains confidential.

3. *Rational connection between limitation and the purpose (s28(d))*

As information which can be admissible will include information around the decision-making capacity of an individual, their treatment and relevant conditions, and other personal information, it is essential this remains private and out of the public sphere or the press. This works to promote the individuals, and by extension the VAD attorneys, right to privacy.

4. *Proportionality (s28(e))*

This is considered the most proportionate way for an individual's capacity to act as a VAD attorney to be examined by a competent, independent and impartial court or tribunal while protecting the individual. The only other alternative is to

have public hearings which will place unnecessary limitations on the right to privacy of the individual.

ACAT retains the right to publish their decisions. However, this can be done by de-identifying all individuals involved after considering the sensitivity of the matter. ACAT has discretion over this. This builds on the Bill which highlighted that ACAT has responsibility to weigh up competing interests in their decision to publish decisions.

CLAUSE NOTES

Part 1 – Preliminary

Clause 1 – Section 2 – Commencement

This clause omits the original commencement date and substitutes two dates to allow for a delayed commencement of Schedule 4. The Act (other than Schedule 4) will commence from 3 November 2025, in line with the date agreed by Government. Schedule 4 (Other amendments – VAD attorneys) will commence on 3 November 2026

Part 13 – Consequential and other amendments

Clause 2 – Section 160 – Legislation amended

This clause will omit the original section 160 and substitute it with new wording. The revised wording gives effect to the Act amending legislation mentioned in both schedules 3 and 4.

Clause 3 – Proposed new schedule 4

This clause will insert a new Schedule 4 into the Act. The schedule will be titled ‘Other amendments – VAD attorneys’. Each clause in the schedule is explained in turn below

Part 4.1 – Voluntary Assisted Dying Act 2023

[4.1] – Section 10 (g), when individual may access VAD

This clause inserts ‘or their VAD attorney’ after ‘the individual’. The purpose of this is to give effect to a VAD attorney being able to make an administration decision for an individual who has lost decision making capacity in relation to VAD.

[4.2] – New Part 2A – VAD attorneys

12A Meaning of enduring power of attorney

The new section 12A will define enduring power of attorney for the purposes of VAD. The definition shall align with that in section 8 of the *Powers of Attorney Act 2006*. That is, an enduring power of attorney is a power not revoked when the principle becomes a person with impaired decision-making capacity.

12B Meaning of VAD attorney

This section will define VAD attorney for the purposes of this Act. Subsection (1) states a VAD attorney shall be an attorney under an enduring power of attorney which has become operative, and that the enduring power of attorney expressly authorises exercise of power in relation to VAD if the individual has impaired decision-making capacity.

Subsection (2) defines *attorney* and *impaired decision-making capacity*. The definition of *attorney* will align with section 6 of the *Powers of Attorney Act 2006*. An attorney shall be a person who is authorised under a power of attorney to make decisions and do particular other things for the person (the principal) who made the power of attorney.

The definition of *impaired decision-making capacity* will be aligned to that in section 9(2) of the *Powers of Attorney Act 2006*. For the purposes of this Act, a person shall have impaired decision-making capacity if the person cannot make decisions in relation to the person's affairs or does not understand the nature or effect of the decisions the person makes in relation to their affairs.

12C When VAD attorney may exercise power under Act

This section sets out the circumstances in which a VAD attorney becomes operative and can exercise power. A VAD attorney may exercise power for an individual if the individual's coordinating practitioner has prepared the final assessment report under section 36 (2). The VAD attorney is authorised under the *Powers of Attorney Act 2006* if they are the individual's enduring power of attorney, and a doctor is satisfied the individual does not have decision-making capacity in relation to VAD and is not reasonable likely to regain capacity. This means that if a practitioner believes the individual is likely to regain capacity (i.e. temporary delirium) then the VAD attorney is not operative. All these criteria must be met for the VAD attorney to become operative.

12D VAD attorney may seek ACAT opinion or advice

This section will specify that, on application from the VAD attorney or an affected person, the ACAT must give opinion or advice about whether the VAD attorney is authorised to exercise power under this Act.

An *affected person* will be defined as, in relation to an individual's VAD attorney exercising a power under the Act, any person who has a sufficient and genuine interest in the rights of the individual in relation to voluntary assisted dying.

12E ACAT procedures

This section sets out the procedure if a person seeks the advice or opinion of ACAT under 12D. This section only applies if someone applies to ACAT for advice or opinion under 12D. If so, the ACAT must decide to hold a hearing and set a date as soon as practicable, but no later than 2 days after receiving the application. The case must also be decided as soon as practicable.

Part 3 – Request and assessment process for access to voluntary assisted dying

Division 3.5 – Transfer of coordinating practitioner functions

[4.3] – Section 37 (2) – Transfer request made by coordinating practitioner

This clause inserts ‘or their VAD attorney’ after ‘the individual’. The purpose is to allow the original practitioner to transfer the individual to another coordinating practitioner with the consent of the VAD attorney if the individual has lost decision making capacity in relation to VAD.

[4.4] – Section 37 (5) and (8)

This clause inserts ‘or VAD attorney’ after ‘the individual’ in sections 37 (5) and 37 (8)

In 37 (5) (a), the purpose is to ensure once the transfer from original practitioner to a new coordinating practitioner is complete, the original practitioner must notify the VAD attorney the request has been accepted.

In 37 (5) (c) and (8), this gives effect to a time limit on the original practitioner to provide the board written notice of the transfer request being accepted. This must be done no later than two business days after notifying the VAD attorney if the individual has lost decision making capacity in relation to VAD.

The original practitioner must also refer the VAD attorney to the approved care navigator service if the original practitioner is unable to transfer their functions after taking reasonable steps to do so.

[4.5] – Section 38 heading

This clause omits the heading, and substitutes ‘Transfer request made by individual or VAD attorney’

[4.6] – Section 38 (2)

This clause omits section 38 (2) in the Bill and substitutes revised wording. This new wording provides for an individual, or their VAD attorney, to make a transfer request for another health practitioner to become the coordinating practitioner.

[4.7] – Section 38 (3) and (5)

This clause inserts ‘or VAD attorney’ after ‘the individual’ in sections 38 (3) and (5). In subsection (3), this gives effect to a time limit of two business days after the VAD attorney enters a transfer request, for the other practitioner to: tell the VAD attorney if they accept the transfer request, or if they refuse to accept the transfer request, must refer the VAD attorney to approved navigator care services.

In subsection (5) (b), if the other practitioner accepts the VAD attorney's transfer request, this gives effect to a time limit of no more than two business days for the other practitioner to notify the VAD attorney that they accept the request.

Part 4 – Accessing voluntary assisted dying and death

Division 4.1 – Administration decision

[4.8] – Section 42 heading

This clause will substitute a new heading for section 42 of 'Making administration decision – individual'.

[4.9] – Section 43 heading

This clause will substitute a new heading for section 43 of 'Changing administration decision – individual'.

[4.10] – New Section 43A – Making administration decision – VAD attorney

This section covers how a VAD attorney makes an administration decision.

A VAD attorney must notify the individual's coordinating practitioner that the VAD attorney has decided that the approved substance shall be delivered to the individual by the health practitioner. This will be referred to as an *attorney decision* for the purposes of this Act. The note directs to s12C for when an individual's VAD attorney becomes operative.

An attorney decision must be made in writing, made in consultation with, and on the advice, of the individual's coordinating practitioner, and be given to the individual's coordinating practitioner.

The attorney decision will take effect once this notice is provided to the individual's coordinating practitioner.

If the individual had made either a self-administration decision, or a practitioner administration decision before losing decision-making capacity, that decision will be revoked when an attorney decision is in effect.

When a coordinating practitioner receives an attorney decision, the coordinating practitioner must record the decision in the individual's health record and give the board written notice of the decision within four business days from the day the coordinating practitioner receives the notice. Failure to do so is a strict liability offence with a maximum penalty of 20 penalty units.

[4.11] – Section 44 (1)

This clause omits ‘their coordinating practitioner or another health practitioner (the *requested practitioner*)’ and substitutes ‘a relevant practitioner. This allows the individual to ask any practitioner to act as their administering practitioner if they have made a decision of practitioner administration or have changed their decision to practitioner administration under Section 43 (1) (a).

[4.12] – new Section 44 (1A)

This clause will create a new Section 44 (1A) which states: ‘An individual’s VAD attorney may ask a relevant practitioner to act as the individual’s administering practitioner if they VAD attorney has made an attorney decision’.

This allows the VAD attorney to ask any practitioner they wish to act as the administering practitioner for the individual, if the VAD attorney has made an attorney decision under Section 43A.

A note in this section directs to s12C for when an individual’s VAD attorney may exercise a power under this Act.

[4.13] – Section 44 (2)

This clause substitutes ‘the individual or their VAD attorney makes a request, the relevant practitioner’ into section 44 (2). This applies the 2-day limit on the relevant practitioner to notify the individual or the VAD attorney of their decision to accept or refuse to act as the individual’s administering practitioner, and to notify the individual or VAD attorney of this decision.

[4.14] – Section 44 (2) (b)

This clause inserts ‘or VAD attorney’ after ‘the individual’ to allow a VAD attorney to be notified of a practitioner’s decision to act as the administering practitioner.

[4.15] – Section 44 (3)

This clause will omit ‘requested practitioner’ and substitute it with ‘relevant practitioner’. This gives effect to the relevant practitioner being required to refuse to act as the administering practitioner if they do not meet the requirements under section 92. They may also refuse if they are unable or unwilling to exercise the functions of the administering practitioner.

[4.16] – Section 44 (4) and (5)

This section substitutes new wording into sections 44 (4) and (5). For subsection (4), the relevant practitioner will become the administering practitioner for the individual, when they tell the individual or their VAD attorney they agree to act as such. For subsection (5), of the relevant practitioner agrees to act as the administering

practitioner, they must provide the board written notice within 4 business days from when they notify the individual or their VAD attorney. Failure to do so carries a maximum penalty of 20 penalty units.

[4.17] – Section 44 (7)

This clause will substitute new wording into section 44 (7) of the Bill. This clause covers provisions for when the relevant practitioner refuses to act as the administering practitioner. If this decision is made, the practitioner must notify the individual or VAD attorney of other practitioners who may be able to assist with the request. They must also provide the party they notify with information about another practitioner they believe will likely be willing to assist, or the approved care navigator service.

[4.18] – Section 44 (8)

This clause will substitute 'relevant practitioner' for 'requested practitioner'. This will mean that following a request for practitioner administration to be made, the relevant practitioner must record that the request was made, the practitioner's decision and the steps taken under section 44 (7) if the practitioner refused the request, in the individual's health record.

[4.19] – New Section 44 (9)

This clause will create a new section 44 (9) to define 'relevant practitioner'. The definition will be 'the individual's coordinating practitioner, or another health practitioner'.

[4.20] – Section 46 (2)

This clause will insert 'or their VAD attorney' after 'the individual'. This gives effect to when a transfer request is being made by an administering practitioner, they must seek the consent of the VAD attorney to make a transfer request.

[4.21] – Section 46 (5) (a) and (8)

This clause inserts 'or VAD attorney' after all mentions of 'the individual' in this section. In subsection (5) (a), this means if the other health practitioner accepts the transfer request, the original practitioner must notify the VAD attorney the request has been accepted and provide the other health practitioner's name and contact details to the VAD attorney.

For subsection (8), if the original practitioner is unable to transfer the individual after taking reasonable steps, they must refer the individual or VAD attorney to the approved care navigator service

[4.22] – Section 47 heading

This clause omits the heading on the Bill and substitutes ‘Transfer of administering practitioner functions – transfer request made by individual or VAD attorney’.

[4.23] – Section 47 (2)

This clause omits section 47 (2) and substitutes it with revised wording. The new wording allows for the individual or their VAD attorney to enter a transfer request for another health practitioner to become the administering practitioner for the individual.

[4.24] – Section 47 (3) and (5)

This clause inserts ‘or VAD attorney’ after ‘the individual’. In subsection (3), after making a transfer request, the health practitioner must tell the individual or VAD attorney they accept or refuse the request, and if the consulting practitioner refuses the request, they must refer the individual or VAD attorney to the approved care navigator service. This must be done within 2 business days.

In subsection (5), if the other health practitioner accepts, they transfer request, they must notify the individual or VAD attorney of their acceptance and within 2 business days of notifying them.

[4.25] – Section 49 (1)

This clause omits the section 49 (1) of the Bill and substitute new wording to also capture coercion of a VAD attorney. The new wording provides that it will be an offence if a person dishonestly, or by coercion, induces an individual, or the individual’s VAD attorney, to make an administration decision. The maximum penalty for this offence will remain at an imprisonment term of 7 years.

[4.26] – Section 49 (2)

This clause will omit ‘an administration decision’ and substitute it with ‘a practitioner administration decision or self-administration decision’. This is due to an update in the definition of administration decision which will also include an attorney decision. As section 49 (2) refers exclusively to the individual, the types of administration decisions they can make is either a self-administration decision or practitioner administration.

Division 4.2 – Contact person

[4.27] – Section 54 (1)

This clause will omit the section 54 (1) and substitutes new wording. This section will apply if the individual changes their administration under section 43 (1) (a), if the individual revokes their self-administration decision, or if the individual’s self-administration decision is taken as revoked under section 43A (4).

Division 4.3 – Dealing with approved substances

[4.28] – Section 58 (1) (a)

This clause will substitute section 58 (1) (a) with revised wording of ‘an administration decision is in effect for the individual; and’. This means the first prescription can be issued for an individual if the VAD attorney has made a decision on administration. This includes both self-administration and practitioner administration.

[4.29] – Section 58 (1) (c)

This clause will insert ‘or attorney decision’ following ‘practitioner administration decision’. This will mean that the individual will have an administering practitioner if either a decision of practitioner administration or an attorney decision has been made.

[4.30] – Section 58 (1) (d) and (e)

This clause will substitute section 58 (1) (d) with revised wording. If an individual has a practitioner administration or self-administration decision in effect, the individual’s coordinating practitioner has given any information prescribed by regulation to the individual before the administration decision has been made.

Subsection (e) gives effects to a VAD attorney being given all information prescribed by regulation if an attorney decision is in effect, by the individual’s coordinating practitioner.

[4.31] – Section 59 (1) (a)

This clause omits section 59 (1) (a) of the bill and substitutes it with ‘an administration decision is in effect for the individual; and’. This widens the scope of the requirements for having a subsequent prescription to be provided if the administration decision being made is an attorney decision.

[4.32] – Section 59 (1) (c)

This clause will insert ‘or attorney decision’ after ‘practitioner administration decision’. This provide that the individual will have an administering practitioner if either the individual chose practitioner administrating, or if a VAD attorney has made an attorney decision on administration.

[4.33] – Section 59 (1) (f)

This clause will insert ‘if the individual has a practitioner administration decision or a self-administration decision in effect’ before ‘the coordinating’. If the individual has decided on either practitioner administration, or self-administration, the coordinating practitioner must undertake a further final assessment to ensure the individual meets the requirements of the final assessment. The coordinating practitioner must also decide that the individual meets the necessary requirements.

[4.34] – New Section 59 (1) (g)

This clause will insert a new section 59 (1) (g) into the Bill. This new section will provide the ability to be issued a subsequent prescription if the individual has an attorney decision in effect. For this to apply, the individual's coordinating practitioner must have seen the original enduring power of attorney, or a certified copy of the enduring power of attorney, which authorises them to act as a VAD attorney. This is a check-and-balance step to ensure the VAD attorney has the authority to exercise power in relation to VAD.

[4.35] – Section 60 (2) (a) and (b)

This clause will substitute revised wording for section 60 (2) (a) and (b). Section 60 deals with possessing, preparing and supplying approved substances – approved suppliers and couriers.

For subsection (2) (a), if a self-administration decision is in effect, the individual or their contact person can be provided with the substance from an approved supplier following receipt of the prescription.

For subsection (2) (b), if a practitioner administration decision or attorney decision is in effect, the individuals administering practitioner can be provided with the substance from an approved supplier following receipt of the prescription.

[4.36] – Sections 63 (1) (a) and 63C (1) (a)

This amendment will insert 'or attorney decision' after 'practitioner administration decision' in sections 63 (1) (a) and 63C (1) (a).

Section 63 refers to Receiving and possessing approved substances—administering practitioner. These amendments will ensure that this section will apply if an attorney decision is in effect, in addition to a practitioner administration decision.

Section 63C refers to Administering approved substances—administering practitioner. These amendments ensure this section will apply if an attorney decision is in effect, in addition to a practitioner administration decision.

[4.37] – Section 63C (3) and (4)

This amendment will substitute new wording into section 63C (3) to (5).

Section 63C (3) outlines exceptions to when a practitioner must not administer the substance to an individual. If an administration decision is in effect, the administering practitioner must be satisfied immediately before delivering the substance that the individual has decision-making capacity and is acting voluntarily and without coercion. If an attorney decision is in effect, the practitioner must have seen either an original copy, or certified original copy of the enduring power of attorney which authorises the VAD attorney to exercise power. In addition to the power of attorney, the administering

practitioner must also have seen the original, or a certified copy, of the attorney decision. The administering practitioner must also be satisfied that, immediately before delivering the substance, the individual does not have decision-making capacity and did not communicate in whatever way they can that they do not want VAD. Examples include (1) words, sounds, gestures, and (2) augmentative and alternate communication including sign language, a computer or other device.

In both circumstances, the administering practitioner must also administer the substance in the presence of an eligible witness.

The proposed new clause 63C (4) covers the witness certificate which is required to be certified by the witness to administration. By written statement, they must certify that the approved substance was administered to the individual in the presence of a witness, that if a practitioner administration decision is in effect, that the individual was acting voluntarily and without coercion, and if an attorney decision is in effect, they did not appear to have communicated in any way, to the practitioner or another person present, that they did not want to receive VAD at that time.

[4.38] – Section 64A

This clause will substitute revised wording into section 64A. This section refers to giving approved substances to approved disposer If administration decision revoked – individual, contact person or other person.

This section shall apply if either: an individual revoke a self-administration decision, or the individual's self-administration decision is taken as revoked under section 43A (4); and a relevant person is in possession of an approved substance, or any part of the approved substance at the time the decision is revoked.

The relevant person may possess the unused substance for the purpose mentioned in (b). They must give the unused substance to an approved disposer as soon as practicable. This must occur no more than 14 days after the day the self-administration decision is revoked. Failure to do so carries a maximum penalty of 100 penalty units.

For this section, a relevant person shall be defined as the individual or their contact person (for (1)(a)(i)) or the individual's contact person, or any other person in possession of the unused substance when the self-administration decision is revoked (for (1)(a)(ii)).

[4.39] – Section 66 (1) (a)

This clause will insert 'or attorney decision' after 'practitioner administration decision'. This section refers to the administering practitioner giving approved substances to an approved disposer. This amendment will have this section apply if an attorney decision has been made.

[4.40] – New Section 66 (1) (c) (ia)

This clause will insert a new section 66 (1) (c) (ia). This new section will provide that the administering practitioner will begin the process of disposal of the substance if the individual's practitioner administration decision is revoked under section 43A (4).

Division 4.4 – Notification about death

[4.41] – Section 75 (1) (b)

This clause will omit the section 75 (1) (b) in the Bill and substitute it with revised wording. The new wording will refer to when an administering practitioner will need to notify the board, coordinating practitioner and director-general about the death of an individual. In the new wording, will make this section apply if the individual dies when a practitioner administration decision is in effect or an attorney decision.

[4.42] – Section 76 (3) (a) and (b)

This clause will omit sections 76 (3) (a) and (b) from the Bill and substitute them with new wording. This section refers to the preparation of the administration certificate by the administering practitioner following the death of an individual. The new wording will allow for an attorney decision to be in effect for the individual when the substance was administered.

[4.43] – Section 76 (3) (c)

This clause will insert 'for a practitioner administration decision–' before 'that the administering'. This amendment will specify that the individual must have decision making in relation to VAD and was acting voluntarily and without coercion for a practitioner administration to be in effect.

[4.44] – New Section 76 (3) (ca)

This clause inserts a new section 76 (3) (ca) into the Bill. This section will outline the requirements of the administering practitioner when an attorney decision is in effect. In this case, prior to administering the substance, the administering practitioner must have seen the original enduring power of attorney, or a certified copy of the original enduring power of attorney, that authorises the VAD attorney to exercise power in relation to VAD. In addition to the power of attorney, the administering practitioner must also have seen the original or certified copy of the attorney decision. The administering practitioner must also be satisfied that the individual does not have decision-making capacity in relation to VAD immediately before the substance is administered and did not communicate in any way, to the practitioner or another person present, that they did not want to access VAD at that time.

[4.45] – Section 79 heading

This omits the heading in the Bill and substitutes the following – “Board may request information from coordinating practitioner, contact person or VAD attorney”

[4.46] – New Section 79 (2) (c)

This clause will insert a new section 79 (2) (c) into the Bill. This section refers information which the board may request from the coordinating practitioner or the contact person about the death of an individual. The new section will extend this to the board also being able to ask for information from the individual’s VAD attorney.

[4.47] – Section 79 (3) to (5)

This clause will omit all mentions of ‘coordinating practitioner or contact person’ and substitute them with ‘coordinating practitioner, contact person or VAD attorney’ in section 79 (3) through (5). This will give effect to several aspects of the people listed providing information to the board. Amending 79 (3) will result in the coordinating practitioner, contact person, or VAD attorney being provided a reasonable period of time to comply with the request of the board. They will also be able to seek an extension on that time frame before or after the period ends. This amendment to subsection (4) will also allow the board to extend the time frame on the coordinating practitioner, contact person, or VAD attorney to provide information before or after the period ends. Finally, the amendment to subsection (5) compels the coordinating practitioner, contact person, or VAD attorney to comply with the request of the board under subsection (2). This is a strict liability offence and carries a maximum penalty of 20 penalty units.

Part 6 – Conscientious objections – health practitioners and health service providers

[4.48] – Section 95 heading

This clause will substitute a new heading into section 95 of ‘Giving individual and VAD attorney contact details for approved care navigator service’.

[4.49] – Section 95 (2)

This clause will omit the section 95 (2) in the Bill and substitute it with revised wording. This section refers to giving the individual contact information for the approved care navigator service within 2 business days.

The revised wording in this section will extend the requirement of a health practitioner or health care service provider who conscientiously objects to provide in writing to the individual (in any case) and the VAD attorney (if they believe on reasonable grounds the individual has a VAD attorney). This still must be done with 2 business days. The maximum penalty for failure to comply remains 20 penalty units.

Dictionary

[4.50] – Definition of *administration decision*

This clause will omit the current definition of *administration decision* and substitute it with a new wording. Under the new wording, an *administration decision*, will mean any of either a practitioner administration decision, a self-administration decision, or an attorney decision.

[4.51] – New definitions

This clause will insert new definitions for: *attorney decision*, *enduring power of attorney*, and *VAD attorney*.

The definition of *attorney decision* is stated in section 43A (1). An attorney decision occurs when a VAD attorney makes a decision that an individual will be administered an approved substance by a health practitioner. Note that the requirements for an attorney decision are laid out in section 43A (3).

The definition for *enduring power of attorney* will align to section 8 in the *Powers of Attorney Act 2006*. Section 8 of the Act states an enduring power of attorney is an attorney under the Act that is not revoked when the principle loses decision-making capacity.

The definition of *VAD attorney* for an individual will be as defined in section 12B of the Bill. A person will be a VAD attorney for an individual if they are an enduring power of attorney for the individual that has become operative, and the enduring power of attorney expressly authorises the exercise of power in relation to VAD if the individual has impaired decision-making capacity.

Part 4.2 – Powers of Attorney Act 2006

[4.52] – New Section 23 (2)

The new section 23 (2) will be inserted after the *note* on page 14 of the *Powers of Attorney Act 2006*. This amendment will cover conscientious objection to VAD by an enduring power of attorney. An enduring power of attorney with express authorisation in relation to VAD must inform the principal if they conscientiously object to VAD before accepting the appointment.

[4.53] – Section 37 (1) (da)

This clause will omit the consequential amendment from the Bill for section 37 (da) in the *Powers of Attorney Act 2006*.

[4.54] – New Section 41AA

The new section 41AA will be inserted in division 4.3.2, after section 41 in the *Powers of Attorney Act 2006*. This new section will refer to express authority to exercise power in relation to VAD. An enduring power of attorney may expressly authorise an attorney to exercise a power in relation to VAD for the principal. An attorney must not exercise power in relation to the principle accessing VAD other than in accordance with the *Voluntary Assisted Dying Act 2023*.