



A legal framework for voluntary assisted dying

Review update

Queensland
Law Reform Commission

**A legal framework for voluntary
assisted dying**

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February 2021

Postal address: PO Box 13312, George Street Post Shop, Qld 4003
Telephone: (07) 3564 7777
Facsimile: (07) 3564 7794
Email: lawreform.commission@justice.qld.gov.au
Website: www.qlrc.qld.gov.au

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INTRODUCTION

1.1 In this review, the Commission's task is to recommend 'the best legal framework for people who are suffering and dying to choose the manner and timing of their death in Queensland'.¹

1.2 The Commission's task is not to consider the desirability or otherwise of introducing voluntary assisted dying legislation in Queensland. Instead, it is to recommend the contents of an appropriate voluntary assisted dying scheme and to prepare draft legislation.

1.3 Our terms of reference use the term 'voluntary assisted dying'. This refers to the self-administration of prescribed medication by the person or its administration by a health practitioner with the purpose of bringing about the person's death. It is based on the person's voluntary request. The process of request, assessment and administration must comply with the legislation's requirements.

1.4 As the terms of reference make clear, the proposed legislation is to be about individuals who are 'suffering and dying'. The legislative scheme is not intended to

¹ See Terms of Reference, para 1, set out in Appendix A.

apply to individuals, of whom there are many, who wish to die because they are tired of life or in decline, but who are not dying.

1.5 This fact may disappoint those individuals and supporters of a broad-based scheme for voluntary euthanasia or medically assisted suicide. It also may allay the fears of others that a voluntary assisted dying scheme would be generally accessible for those who do not wish to go on living, including the vulnerable.

1.6 The Commission must consult widely, consider interstate and overseas legislation, make recommendations and prepare legislation.

1.7 The Commission's review started on 1 July 2020 and its original reporting date was 1 March 2021. Due to the size and complexity of the Commission's task, the reporting date was altered to 10 May 2021. In February I agreed to write to the Attorney-General and Minister for Justice with a review update, including the Commission's process of consultation.

CONSULTATION

Issues for consultation

1.8 The review requires the Commission to consult the public and stakeholders, and to carefully consider many issues. These include:

- who should be eligible to access the scheme: eligibility criteria in legislation typically include a disease, illness or medical condition that is advanced and will cause death; a timeframe until death; being aged 18 or over; decision-making capacity; and residency;
- safeguards to ensure that decisions are voluntary and made without coercion;
- the process of requesting voluntary assisted dying and eligibility assessments by two independent, suitably-qualified health professionals;
- the qualifications and training of health practitioners in this field;
- access to information and to suitably-qualified persons to provide advice, conduct assessments and administer a voluntary assisted dying substance;
- participation by health practitioners in the voluntary assisted dying process, and the right of a health practitioner to refuse to participate on the grounds of a conscientious objection;
- whether the right of a health practitioner to conscientiously object to voluntary assisted dying should be coupled with a requirement:
 - to inform the person of their objection; and
 - to refer the person elsewhere or to transfer their care.
- the rights and obligations of entities that do not wish to provide access to voluntary assisted dying to individuals under their care;

- access to information and advice, particularly in remote and regional areas of our state;
- the implications of sections 474.29A and 474.29B of the *Commonwealth Criminal Code* for the use of 'telehealth' technology (or even telephone communications) between health practitioners and patients, particularly in remote and regional areas of our state;
- the need for laws, guidelines and practices to address the cultural and linguistic diversity of our state;
- the need to establish a voluntary assisted dying care navigator service which is able to provide individuals with information, including the name and contact details of medical practitioners or health service providers who may be able to assist them with information and advice;
- appropriate safeguards and protections, including for health practitioners who act in accordance with the legislation;
- the creation of new offences to enforce compliance with the legislation;
- oversight and compliance mechanisms;
- the development of guidelines to assist individuals, practitioners and others to understand the legislation and to ensure that it works in practice;
- the implementation of a scheme if one is legislated.

1.9 In preparing draft legislation, the Commission is required to have regard to:

- the Parliamentary Committee's Report No 34 Report, *Voluntary assisted dying*, including the draft legislation in Appendix A of the Report and Information Paper No. 5, *Summary of the Findings and recommendations from Report No.34 on Voluntary assisted dying*;
- the Parliamentary Committee's Report No 33 Report, *Aged care, end-of-life and palliative care*;
- consultation with stakeholders and the community that occurred during the Parliamentary Committee's consideration of the matter;
- views of experienced health and legal practitioners;
- views of the Queensland public; and
- legislative and regulatory arrangements in other Australian and international jurisdictions.

The process of consultation

1.10 The process of consultation is a vital part of the Commission's work on any review. The Terms of Reference provide for the Commission to consult with any group or individual, in or outside of Queensland, to the extent it considers necessary.

1.11 The process of consultation is continuing, with the Commission communicating with participants in the schemes in Victoria (operational since 19 June 2019) and in Western Australia (still in its implementation phase), academic researchers into those schemes and entities which have chosen to not participate in the Victorian scheme.

1.12 A major part of the process of consultation with the public and stakeholders was conducted through a consultation paper.² The amount of work required to produce a consultation paper about this complex issue in a short period of time was enormous. In that time, the Commission had a new chair and new part-time members appointed. I again thank the staff of the Commission's Secretariat and the Commission's part-time members, both past and present, for their hard work and dedication.

1.13 On 16 October 2020, the Commission released its consultation paper inviting submissions on the key issues outlined in the paper. The consultation paper ran to 176 pages and posed 50 important questions (not including sub-parts) for members of the public and organisations about which to make submissions.

1.14 Submissions closed on Friday 27 November 2020. Some respondents were unable to meet that tight timetable and were granted a short extension.

1.15 The Commission received 124 submissions, many of which addressed all 50 questions. The respondents included researchers with a detailed knowledge of this complex topic (who supplemented their submissions with articles), professional bodies representing a range of health practitioners and disciplines, organizations which support or oppose voluntary assisted dying, religious bodies, unions, members of the public who have experienced suffering themselves or witnessed it in members of their family, health practitioners, including practitioners in the field of palliative care, disability advocates, lawyers' groups, public authorities, ethicists, and members of the public.

1.16 The Commission has considered the submissions. Each member of the Commission has been briefed with copies of them. We express our sincere appreciation of the time and effort that has been taken by so many people and organisations to address the many questions posed in the consultation paper and, often, to raise new issues.

1.17 As predicted, the analysis of submissions proved to be a time-consuming task and extended into early 2021. The analysis has involved tabulating submissions, summarising them, quoting salient extracts from many of them, and distilling the issues which emerge from them.

²

See Queensland Law Reform Commission, *A legal framework for voluntary assisted dying*, Consultation Paper, WP No 79 (October, 2020) <<https://www qlrc.qld.gov.au/ data/assets/pdf file/0003/658506/qlrc-wp-79-2020.pdf>>.

THE PROCESS OF DECIDING MANY COMPLEX ISSUES

1.18 The 50 questions posed in the consultation paper are only some of the issues that the Commission is considering in developing a report which proposes legislation for Queensland.

1.19 The Commission is constituted by part-time members, who usually meet monthly. Each member has to consider substantial written materials prepared by the Secretariat, reports and submissions. It takes time for these written materials to be properly developed by the Secretariat and for each member to independently consider them before each meeting. At each meeting, and sometimes between meetings, the part-time members discuss the materials, and seek further information from the Commission's staff. The members discuss and carefully consider each issue on its merits, and also consider how the various parts of any piece of legislation will interact.

1.20 Because of the Commission's reporting date, it has had to meet more frequently than normal in order to complete the review. I appreciate the dedication of the part-time members (who have other jobs and commitments) to meet more frequently, and to consider material in a compressed timetable between meetings. I also appreciate the commitment of the Secretariat to develop materials for the part-time members to consider so that the Commission might meet its reporting date.

ADDITIONAL RESOURCES

1.21 The Commission has been given additional resources for this review, including a Principal Legal Officer on secondment from the Department of Justice and Attorney-General, an additional Senior Legal officer, two Senior Legal Officers on secondment from Queensland Health and an additional administrative officer.

1.22 The Commission has also been able to engage Dr Jayne Hewitt from Griffith University as a consultant. Dr Hewitt is an experienced Registered Nurse with many years of critical care experience and personal knowledge of how the law affects healthcare practitioners and the patients for whom they care. She holds a Bachelor of Laws, Masters of Health Law and her PHD thesis examined understandings of justice in healthcare. She has undertaken research and developed voluntary assisted dying training in Victoria. Her academic work in this area and her practical experience in nursing and training health practitioners complements the Commission's staff.

1.23 The Secretariat and those legal officers who have been seconded to the Commission have a high level of experience in legal research and analysis and policy development.

1.24 Each member of the Commission's Secretariat as well as the persons who have been appointed for this review have been working hard to progress matters and to inform the discussions and deliberations of Commission members.

1.25 The leader of this review is the Commission's Assistant Director, Ms Cathy Green, who has worked tirelessly since July 2020 on this reference. She has maintained a high standard of work and productivity, coordinated staff, facilitated the

flow of information into the Commission and continued consultations with a large number of persons in Queensland and in other jurisdictions.

1.26 I have been able to devote additional time to the Commission's work on this review as a result of being appointed a full-time member of the Commission between February and May 2021.

1.27 The Commission has developed a good working relationship with Queensland Health to which it looks for information and briefings on a range of technical issues. We are fortunate to have two Senior Legal Officers from Queensland Health with a good knowledge of health practice and health law to assist the Commission.

THE COMMISSION'S APPROACH

1.28 In recommending the best legal framework for a voluntary assisted dying scheme in Queensland, the Commission is not constrained by similar legislation in other Australian jurisdictions. It recognises the desirability of achieving reasonable consistency with the legislation in other Australian jurisdictions and in comparable countries like New Zealand. However, the proposed legislation should be the best it can be to serve the Queensland community.

1.29 It would have been a simpler task to adopt, with some minor modifications, legislation from another state or overseas jurisdiction. However, this is not the Commission's task.

1.30 The Commission has attempted to develop recommendations about an appropriate voluntary assisted dying scheme for Queensland by first identifying the values, principles and policies that should underpin any scheme.

1.31 The legislation has to be suited to Queensland's unique conditions, including its geography, population diversity, access to qualified health professionals and public and private hospital systems. Legislation that may operate in a place like New Zealand or Victoria may not be suited to a large, decentralised state like Queensland, many of whose citizens live in remote areas.

1.32 The system must be workable in Queensland. Therefore, it is important that Queensland not adopt provisions from another jurisdiction which, upon analysis, are unnecessary or run counter to the policies that the legislation aims to implement.

1.33 The Commission's discussions and deliberations are informed by ongoing research and writing by experts who have thought carefully about these issues and who have studied the experience of similar legislation in other jurisdictions.

1.34 The Commission has attempted, as best it can, to understand the operation of legislation in other jurisdictions. This has included consideration of reports of the Victorian Voluntary Assisted Dying Review Board about the operation of the Victorian Act, discussions with participants in schemes in comparable jurisdictions, and consideration of the research of independent scholars into the implementation and practical operation of those schemes.

1.35 Another guiding principle that the Commission has adopted is that the legislation be clear and no more complex than it needs to be to achieve its purposes.

1.36 Legislation should be in a form that can be reasonably understood by those who may wish to use it and by those who have to apply its provisions. Processes and safeguards should be clear and workable so that they can be applied in cases of individuals whose health may be declining rapidly.

VALUES AND PRINCIPLES

1.37 Any proposed legislative scheme for people who are 'suffering and dying' must be based on values and principles. They are many in number and conflict to some extent. They must therefore be reconciled and balanced.

1.38 Individuals and organisations, who have considered these issues deeply, will have disagreements about where the balance is to be struck.

1.39 The principles include that:

- human life is of fundamental importance;
- every person has the right to be treated equally, with compassion and respect;
- a person's autonomy, including autonomy in respect of end of life choices, should be respected;
- every person approaching the end of life should be provided with high quality care and treatment, including palliative care, to minimise the person's suffering and maximise the person's quality of life;
- access to voluntary assisted dying and other end of life choices should be available irrespective of where the person lives in Queensland;
- a person has the right to be supported in making informed decisions about end of life choices;
- persons who are vulnerable should be protected from coercion and exploitation; and
- all persons, including health practitioners, have the right to be shown respect for their culture, beliefs, values and personal characteristics.

LEGISLATIVE MODELS

1.40 The Commission has had regard to the Parliamentary Committee's Report No 33 *Aged care, end-of-life and palliative care* and its Report No 34 *Voluntary assisted dying*. The latter recommended that the draft legislation submitted to it by Professors Ben White and Lindy Willmott be considered as 'the basis for a legislative scheme for voluntary assisted dying'. For ease of reference we have called this the 'White and Willmott Model', and have had regard to it, along with Professor White and Willmott's more recent research and writing about legislative schemes for voluntary assisted dying.

1.41 As required, we also have had regard to legislative and regulatory arrangements in other Australian and international jurisdictions.

1.42 The White and Willmott Model and legislative schemes in other Australian and some other overseas jurisdictions, such as New Zealand and Canada, have a similar basic architecture. In simple terms they provide:

- **eligibility criteria** for access to voluntary assisted dying, such as age, residency, that the person suffers from a condition that will cause death and experiences suffering that cannot be relieved in a manner that the person considers tolerable. The eligibility criteria also usually include provisions about decision-making capacity and that the person is acting voluntarily.
- **a process for independent assessment** of eligibility by two suitably qualified and experienced health practitioners.
- **administration of medication**, either self-administration of a prescribed lethal dose of medication (possibly but not necessarily in the presence of a health practitioner) or administration by a health practitioner at the person's request.
- **conscientious objection** by health practitioners who do not wish to participate in the scheme.
- **accountability** by oversight provisions that include reporting obligations, monitoring by an oversight body and provisions to enforce compliance.

1.43 Protection of the vulnerable requires safeguards and eligibility criteria to ensure that, if the person has a disease, illness or medical condition making them eligible to access the scheme, they:

- have decision-making capacity;
- make decisions that are voluntary and made without coercion;
- make choices that are informed about other end-of-life options, such as further treatment and palliative care; and
- demonstrate that any choice to request voluntary assisted dying is enduring.

1.44 This last point means that access to voluntary assisted dying should not be available simply after one request. The request should be a settled one and endure over a reasonable period.

VIEWING THE PROPOSED LEGISLATION AS A WHOLE

1.45 An important point in assessing the terms and operation of legislation in other jurisdictions, and in designing 'the best legal framework for people who are suffering and dying to choose the manner and timing of their death in Queensland', is that a system of regulation operates as a whole.

1.46 As Professors White and Willmott and their co-authors have recently observed:³

...a system of regulation operates holistically. This means that looking at a single aspect of the eligibility criteria without understanding its role in the framework can be misleading. That is, it is important to examine eligibility criteria cumulatively and in context....

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

DRAFTING LEGISLATION

1.47 Drafting legislation is a difficult task. The Commission often calls upon the expertise of the Office of Queensland Parliamentary Counsel (OQPC) in its reviews. Sometimes a Commission's report will require the amendment of a few sections of an existing Act, or the drafting of a few sections of a new law.

1.48 This review requires the drafting of necessarily detailed legislation.

1.49 One of the Commission's goals is to ensure that the legislation is no more complex than it needs to be. However, any new law necessarily will have many provisions because the legislation must deal with many complex matters.

1.50 To expedite the drafting process, the Commission has agreed to provide the OQPC with drafting instructions as it develops its recommendations on particular components of the draft legislation, rather than wait to provide a full set of drafting instructions based on a complete set of final recommendations.

1.51 The Commission appreciates the support of the OQPC.

THE COMMISSION'S CURRENT TASKS

1.52 The Commission's members continued to meet over the December-January period, working through the numerous issues we have to consider, discuss and agree upon, if possible.

1.53 We continue to meet each fortnight, having received before each meeting a large volume of written material from the Secretariat to review and discuss.

1.54 While some provisional views have been reached on eligibility criteria, any concluded view on those issues must depend upon consideration of the interaction between different parts of the legislation. Developing sound and workable

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BP White et al, 'Comparative and Critical Analysis of Key Eligibility Criteria for Voluntary Assisted Dying under Five Legal Frameworks' (2021) *University of New South Wales Law Journal* (forthcoming).

recommendations about the process for request and assessment is likely to be time-consuming.

1.55 The issue of administration of medication is also complex. This requires careful consideration of other legislative schemes, the alternative courses of self-administration and administration by a practitioner, the processes that are required for prescribing and dispensing, and safety issues concerning the provision of medication and the return of unused medication.

1.56 The participation of health practitioners, and the right of conscientious objection by health practitioners, involves a number of issues. They include the availability, qualifications and training of practitioners who are willing and able to assist, and defining the rights and responsibilities of health practitioners who are unwilling to participate, either on the grounds of conscientious objection or for some other reason.

1.57 It should come as no surprise that the Commission supports the creation in legislation of an oversight body to ensure compliance with the legislation.

1.58 Although the Commission has been very busy with this review, a large body of work remains to be done.

CONCLUSION

1.59 The Commission will complete this complex review as soon as it reasonably can. It hopes that it will be able to report and provide well-drafted legislation by its reporting date of 10 May 2021. However, the Commission cannot exclude the possibility that its report and the requested draft legislation will not be complete at that date.

1.60 The Commission's task is to develop 'the best legal framework for people who are suffering and dying to choose the manner and timing of their death in Queensland'. The legislation has to be suited to Queensland's unique conditions.

1.61 The Commission's goal is to develop detailed legislation that is compassionate, safe and practical.



The Hon Justice Peter Applegarth AM
Chair
Queensland Law Reform Commission

February 2021

Appendix A

Terms of reference

Queensland's laws relating to voluntary assisted dying

Background

In Queensland, people seeking relief from prolonged intolerable suffering due to a life-limiting illness or a neurodegenerative condition are currently unable to access voluntary assisted dying (VAD). While these people may receive palliative care or a range of other supports, the options available to them are limited to refusal of medical treatment, refusal of food and/or hydration, palliative sedation and suicide. These options are further constrained by restrictions on what health practitioners can legally provide to their patients.

Voluntary assisted dying is a very complex and deeply personal issue, in which competing interests and views must be carefully balanced. The lives of the elderly and most vulnerable people in the community must be protected.

There are very divergent views held by the community, health, palliative and aged care providers and health and legal practitioners on the matter of voluntary assisted dying, with some supporting and others opposing voluntary assisted dying laws in Queensland.

On 14 November 2018, an inquiry on aged care, end-of-life and palliative care and voluntary assisted dying was referred to the Health, Communities, Disability Services and Domestic and Family Violence Prevention Committee (the Committee).

The Terms of Reference for the Committee Inquiry were as follows:

1. That the Health, Communities, Disability Services and Domestic and Family Violence Prevention Committee inquire into aged care, end-of-life and palliative care and report to the Legislative Assembly on:
 - a. the delivery of aged care, end-of-life and palliative care in Queensland across the health and ageing service systems; and
 - b. Queensland community and relevant health practitioners' views on the desirability of supporting voluntary assisted dying, including provisions for it being legislated in Queensland and any necessary safeguards to protect vulnerable persons.
2. That in undertaking the inquiry, the Committee should consider:
 - a. in relation to aged care, the terms of reference and submissions made to the Australian Government's Royal Commission into the Quality and Safety of Aged Care and, in recognising the Commission will occur in

parallel, how to proactively work with the Commission to ensure an appropriate exchange of information to inform the conduct of the inquiry;

- b. outcomes of recent reviews and work including Queensland Health's Palliative Care Services Review; and
 - c. the current legal framework, relevant reports and materials in other Australian states and territories and overseas jurisdictions, including the Victorian Government's Inquiry into end-of-life choices, Voluntary Assisted Dying Act 2017 (Vic) and implementation of the associated reforms.
3. That the Committee report to the Legislative Assembly by 30 November 2019.

On 22 August 2019, the Queensland Parliament agreed to a motion that the date for the Inquiry into aged care, end-of-life and palliative care and voluntary assisted dying, be extended from 30 November 2019 to 31 March 2020.

On 24 March 2020, the Committee tabled Report No. 33, Aged care, end-of-life and palliative care (AEP Report). The AEP Report includes 77 recommendations.

On 31 March 2020, the Committee tabled Report No. 34, Voluntary assisted dying (VAD Report) and Information Paper No. 5, Summary of the Findings and recommendations from report No. 34 on Voluntary assisted dying (Information Paper No. 5). The VAD Report includes 21 recommendations.

Recommendation 1 of the VAD Report is that the Queensland Government should use the well-considered draft legislation submitted to the inquiry by Professors Lindy Willmott and Ben White as the basis for a legislative scheme for voluntary assisted dying in Queensland. The Committee's proposed VAD legislation mostly aligns with the Victorian and Western Australian approaches.

In particular, the Committee recommended that any voluntary assisted dying scheme in Queensland:

- should limit eligibility to adults aged 18 years or older and Australian citizens or permanent residents ordinarily resident in Queensland;
- should require that, to be eligible to access voluntary assisted dying, a person must be diagnosed by a medical practitioner as having an advanced and progressive terminal, chronic or neurodegenerative medical condition that cannot be alleviated in a manner acceptable to the person, and that the condition will cause death;
- should limit eligibility to people with decision-making capacity.

Under the Parliament of Queensland Act 2001, the Queensland Government is required to table a response to the Committee's AEP and VAD Reports by 24 June 2020 and 1 July 2020 respectively.

Terms of Reference

I, STIRLING JAMES HINCHLIFFE, Acting Attorney-General and Minister for Justice, refer to the Queensland Law Reform Commission, the issue of developing an appropriate legislative scheme for voluntary assisted dying for Queensland and the preparation of draft legislation to give effect to its recommendations, pursuant to section 10 of the Law Reform Commission Act 1968.

Scope

The provision of compassionate, high quality and accessible palliative care for persons at their end-of life is a fundamental right for the Queensland community.

The Queensland Law Reform Commission is asked to make recommendations about an appropriate voluntary assisted dying scheme and to prepare draft voluntary assisted dying legislation to give effect to its recommendations, with particular regard to:

1. the best legal framework for people who are suffering and dying to choose the manner and timing of their death in Queensland;
2. identifying who can access voluntary assisted dying;
3. the process for access to voluntary assisted dying to be initiated, granted or denied;
4. the legal and ethical obligations of treating health practitioners;
5. appropriate safeguards and protections, including for treating health practitioners;
6. ways in which compliance with the Act can be monitored;
7. timeframes for implementation of a scheme in Queensland, if progressed.

In preparing draft legislation, the QLRC should also have regard to the following:

- A. The Parliamentary Committee's Report No 34 Report, Voluntary assisted dying, including the draft legislation in Appendix A of the Report (VAD Report) and Information Paper No. 5, Summary of the Findings and recommendations from Report No. 34 on Voluntary assisted dying (Information Paper No. 5);
- B. The Parliamentary Committee's Report No 33 Report, Aged care, end-of-life and palliative care (AEP Report);
- C. Consultation with stakeholders and the community that occurred during the Parliamentary Committee's consideration of the matter;
- D. Views of experienced health and legal practitioners;
- E. Views of the Queensland public;

- F. Legislative and regulatory arrangements in other Australian and international jurisdictions.

Consultation

The QLRC shall consult with any group or individual, in or outside of Queensland, to the extent that it considers necessary.

Timeframe

The QLRC is to commence its review on and from 1 July 2020 and is to provide its final report and draft legislation to give effect to its recommendations to the Attorney General and Minister for Justice by ~~1 March 2021~~ **10 May 2021**.⁴

Dated the 21st day of May 2020

STIRLING HINCHLIFFE MP

Acting Attorney-General and Minister for Justice
Acting Leader of the House
Minister for Local Government, Minister for Racing and
Minister for Multicultural Affairs

⁴

This amendment to the terms of reference was made by letter from the Attorney-General and Minister for Justice, Minister for Women and Minister for the Prevention of Domestic and Family Violence, the Hon Shannon Fentiman MP, to the Chair of the Queensland Law Reform Commission, the Hon Justice Peter Applegarth AM, dated 7 December 2020.