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26 November 2020

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Your reference: #5348702

QLRC Consultation Paper WP 79 – A legal framework for voluntary assisted dying

Thank you for the opportunity to provide feedback on the issues in the Commission's consultation paper.

Our submission is attached.

Please contact me on the details below if you require any further information or clarification of the matters raised in this submission.

We would appreciate the opportunity to provide further submissions once the proposed legislation has been drafted.

Yours sincerely

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Avant submission to the QLRC Consultation Paper WP 79 - A legal framework on voluntary assisted dying

Avant is the largest medical defence organisation in Queensland and Australia overall. We provide professional indemnity insurance and legal advice and assistance to more than 78,000 medical practitioners and students around Australia.

In addition to assisting members in civil litigation, professional conduct matters and coronial matters, Avant has a medico-legal advisory service (MLAS) that provides support and advice to members when they encounter medico-legal issues. Our members have contacted us for advice about issues relating to end-of-life care and voluntary assisted dying. We provide our submission from this perspective.

In this submission we have answered select questions where we believe our experience could assist in creating a legislative framework which incorporates sufficient protections for those medical practitioners who choose to participate, and those who choose not to participate in voluntary assisted dying.

Key points

1. Any legislative framework must incorporate sufficient protections for those medical practitioners who choose to participate, and those who choose not to participate.

2. Legislation should clearly outline the processes to be followed and medical practitioners' obligations at a high level with further detail contained in guidelines.

3. The following protections should be included in the legislation:

    a. That a medical practitioner is not required or compelled to comply with a person's request, or to be involved in voluntary assisted dying at all.
    b. That a medical practitioner should not face any criminal, civil, administrative or disciplinary action for refusing to participate, or for choosing to participate.
    c. That a medical practitioner is immune from criminal and civil liability, and disciplinary action for providing treatment that causes death if they have acted in accordance with the requirements of the legislation in good faith and without negligence.
    d. That this immunity be extended to a medical practitioner being present when the person takes the medication.

4. The legislation should not include a prescriptive requirement for referral in the case of conscientious objection. Issues relating to referral where there is a conscientious objection should be dealt with under current ethical guidelines.

5. The oversight body should not have a role in determining whether or not there has been a breach of the legislative regime and should not have any investigative powers. These functions should remain with the authorities currently in existence, including the Office of the Health Ombudsman, the Australian Health Practitioner Regulation Agency, the Coroner and the police.

6. Avant supports national consistency of approach in legislation and national consistency of terminology in all areas of health law. As this type of legislation has only been passed in Victoria and Western Australia, there is a unique opportunity for other state and territory governments to develop legislation that is consistent with one another where appropriate.

   As a national organisation, we see the pitfalls of having multiple and inconsistent laws governing the same subject matter across Australia's many jurisdictions. It affects medical practitioners and patients. Medical practitioners need to understand the nuances of each law of each Australian jurisdiction if they are to practise in that area. This could be particularly burdensome for practitioners who have cross-border practices. Patients should not have varying levels of access or eligibility to healthcare depending on the state or territory in which they reside.

General comments on the legislative framework

The legislation needs to provide a clear framework within which patients and medical practitioners can operate.

As a matter of general principle, the legislation should balance the need for clear and unambiguous wording with the need to leave sufficient scope for the exercise of clinical judgement, consideration of the patient's individual circumstances and changing standards of medical practice.

If the legislation is too prescriptive, compliance will be difficult and may leave limited room for clinical judgement and increase medico-legal risk. Legislation that is too flexible may be open to interpretation and retrospective criticism.

Eligibility criteria for access to voluntary assisted dying

Q-5 Should the eligibility criteria for a person to access voluntary assisted dying require that the person must be diagnosed with a disease, illness or medical condition that:

(a) is incurable, advanced, progressive and will cause death (as in Victoria); or

(b) is advanced, progressive and will cause death (as in Western Australia)?

Where possible, Avant supports consistent terminology and criteria within legislation across Australian jurisdictions.

The phrase 'advanced, progressive and will cause death' demonstrates that the disease or illness is very serious and is on a deteriorating trajectory. This phrase suggests the disease or illness is incurable. The addition of 'incurable' is superfluous and will be harder for medical practitioners to determine with certainty. Arguably it introduces a higher threshold that may limit eligibility and accessibility.

Q-7 Should the eligibility criteria for a person to access voluntary assisted dying require that the person must be diagnosed with a disease, illness or medical condition that is expected to cause death within a specific timeframe?

Q-8 If yes to Q-7, what should the timeframe be? Should there be a specific timeframe that applies if a person is diagnosed with a disease, illness or medical condition that is neurodegenerative?

For example, should the relevant timeframe be within six months, or within 12 months in the case of a disease, illness or medical condition that is neurodegenerative (as in Victoria and Western Australia)?

On balance, we believe that Queensland's legislation should follow the time frames in the Victorian and Western Australian legislation in this regard.

We appreciate that having a set timeframe such six or 12 months can be arbitrary and clinically problematic, given that prognosis can be difficult to predict. Nevertheless, it will require medical practitioners and patients to turn their minds to the patient's prognosis with some precision. It sets some boundaries around eligibility and will be easier to implement in practice than eligibility criteria without a timeframe.

There would be potentially greater access to voluntary assisted dying without a timeframe. However, this needs to be balanced against the risk of over-inclusion and inconsistency in application of the eligibility criteria because of a broader interpretation. As death is a certain outcome of life, "will cause death" could be open to much broader interpretation than is intended.

Q-10 Should the eligibility criteria for a person to access voluntary assisted dying require that the person must be:
(a) an Australian citizen or permanent resident; and
(b) ordinarily resident in Queensland?

Q-11 If yes to Q-10(b), should that requirement also specify that, at the time of making the first request to access voluntary assisted dying, the person must have been ordinarily resident in Queensland for a minimum period? If so, what period should that be?

Avant supports the position that to be eligible, a person must be an Australia citizen or permanent resident and a resident of Queensland for at least 12 months at the time of making the first request. This would be consistent with the laws of Victoria and Western Australia.

Whatever period is determined, the criteria surrounding that period should be clear and specific so that medical practitioners can apply them easily.

We support provisions similar to those in Victoria and Western Australia, which allow the relevant state administrative tribunal to determine issues of usual residency where it is unclear.

P-2 The draft legislation should provide that, for a person to be eligible for access to voluntary assisted dying, the person must be acting voluntarily and without coercion.

P-3 The draft legislation should provide that, for a person to be eligible for access to voluntary assisted dying, the person must have decision-making capacity in relation to voluntary assisted dying.

Q-12 Should 'decision-making capacity' be defined in the same terms as the definition of 'capacity' in the Guardianship and Administration Act 2000 and the Powers of Attorney Act 1998, or in similar terms to the definitions of 'decision-making capacity' in the voluntary assisted dying legislation in Victoria and Western Australia? Why or why not?

We agree that it is fundamental that the person's decision to access this legislative scheme is voluntary. We understand that ensuring that a person's decision is voluntary and free from coercion or duress is an important safeguard.

Regarding the definition of 'decision-making capacity', we also agree with the Commission's preliminary view that the legislation should provide that for a person to be eligible to access voluntary assisted dying, the person must have the capacity to make the specific decision to access voluntary assisted dying.

Ideally, to ensure legal consistency and to avoid confusion, the same legal test for capacity should apply whatever medical decision is being made by a patient. The test for capacity in the voluntary assisted dying legislation should be consistent with the test for capacity in other legislation and the common law to the greatest extent possible.

The way capacity is determined in current Queensland law is sufficient. We believe that the test in the *Guardianship and Administration Act 2000* (Qld), would be appropriate to adopt in this legislation, particularly as this Act was recently amended and from 30 November 2020, new guidelines will be published to help medical practitioners undertake capacity assessments.

Initiating a discussion about voluntary assisted dying

Q-15 Should the draft legislation provide that a health practitioner is prohibited from initiating a discussion about voluntary assisted dying as an end of life option?

Avant supports medical practitioners being allowed to discuss voluntary assisted dying with their patients in the same way they initiate and discuss other medical decisions and care options. While we generally favour national consistency in health law across all Australian jurisdictions, we believe that the Queensland model should follow Western Australia, and not Victoria, on this point.

If the legislation is passed, voluntary assisted dying will be a legal, medical option, and it should form part of a medical practitioner's general discussion with their patients about end-of-life care. Absent the medical practitioner raising it as an option, they cannot fulfil their obligation to their patient to provide them with all the relevant information, including treatment options, to make an informed decision and to provide valid consent. This will allow medical practitioners to provide patients with information about all relevant, appropriate and legal treatment options.

In this regard, we support the W&W Model and agree that a prohibition on initiating the conversation would impede the frank discussions between medical practitioners and their patients that are needed for safe and high-quality end of life care.

The voluntary assisted dying process

Q-23 Should the draft legislation provide that, if the coordinating practitioner or consulting practitioner:

- ***(a) is not able to determine if the person has decision-making capacity in relation to voluntary assisted dying—they must refer the person to a health practitioner with appropriate skills and training to make a determination in relation to the matter (as in Victoria and Western Australia);***
- ***(b) is not able to determine if the person has a disease, illness or medical condition that meets the eligibility criteria—they must refer the person to:***
  (i) a specialist medical practitioner with appropriate skills and training in that disease, illness or medical condition (as in Victoria); or
  (ii) a health practitioner with appropriate skills and training (as in Western Australia);
- ***(c) is not able to determine if the person is acting voluntarily and without coercion—they must refer the person to another person who has appropriate skills and training to make a determination in relation to the matter (as in Western Australia)?***

Medical practitioners have an ethical duty to recognise and work within the limits of their competence and scope of practice.[1] It is good medical practice that medical practitioners refer patients to others with appropriate skills and training if they are unable to determine an aspect of the patient's care themselves.

Q-25 Should the draft legislation provide for an eligible applicant to apply to the Queensland Civil and Administrative Tribunal for review of a decision of a coordinating practitioner or a consulting practitioner that the person who is the subject of the decision:

- ***(a) is or is not ordinarily resident in the State (as in Victoria);***
- ***(b) at the time of making the first request, was or was not ordinarily resident in the State for a specified minimum period (as in Victoria and Western Australia);***
- ***(c) has or does not have decision-making capacity in relation to voluntary assisted dying (as in Victoria and Western Australia);***
- ***(d) is or is not acting voluntarily and without coercion (as in Western Australia)?***

Q-26 If yes to Q-25, should an application for review be able to be made by:

- ***(a) the person who is the subject of the decision;***
- ***(b) an agent of the person who is the subject of the decision; or***
- ***(c) another person who the tribunal is satisfied has a special interest in the medical care and treatment of the person?***

Yes, to both questions. Avant supports the right of applicants to apply to QCAT for a review of a decision of the coordinating or consulting practitioners regarding eligibility criteria. We also support applications being made by the above people as this would be consistent with the laws of Victoria and Western Australia.

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[1] Medical Board of Australia, Good medical practice: a code of conduct for doctors in Australia, 3.2.1, October 2020.

Q-29 Should the draft legislation provide that practitioner administration is only permitted if the person is physically incapable of self-administering or digesting the voluntary assisted dying substance (as in Victoria)?

Q-30 Alternatively to Q-29, should the draft legislation provide (as in Western Australia) that:

- ***(a) the person can decide, in consultation with and on the advice of the coordinating practitioner, whether the voluntary assisted dying substance will be self-administered or practitioner administered; and…***

Q-31 Should the draft legislation provide that the coordinating practitioner or another health practitioner must be present when the person self-administers the voluntary assisted dying substance?

Q-32 Should the draft legislation provide that a witness, who is independent of the administering practitioner, must be present when the practitioner administers the voluntary assisted dying substance?

We make no comment on whether or not a medical practitioner should only be permitted to administer the medication if the person is physically incapable of self-administration.

However, if a medical practitioner is permitted under the legislation to administer medication to a patient (whether or not the patient is physically capable of doing so), then there should be a requirement in the legislation that another person be present and witness the administration and that the process be documented. This is an important safeguard for both patients and medical practitioners.

Qualifications and training of health practitioners

Q-35 Should the draft legislation provide that only a medical practitioner can act as a coordinating practitioner or a consulting practitioner and assess the person's eligibility for access to voluntary assisted dying?

Q-36 Should the draft legislation set out minimum qualification and experience requirements that a medical practitioner must meet in order to act as a coordinating practitioner or a consulting practitioner?

Q-37 If yes to Q-36, what should the minimum qualification and experience requirements be? For example, should it be a requirement that either the coordinating practitioner or the consulting practitioner must:

- ***(a) have practised as a medical specialist for at least five years (as in Victoria); and***
- ***(b) have relevant expertise and experience in the disease, illness or medical condition expected to cause the death of the person being assessed (as in Victoria)?***

Yes, to all three questions. However, regarding Q37, the Queensland model should follow the Western Australian model. The Western Australian Ministerial Expert Panel considered the qualifications and training requirements of practitioners in light of the state's diverse

geography.[2] Queensland's geography and population spread are more akin to Western Australia than Victoria. Therefore, it should adopt similar provisions about the qualifications and training of health practitioners to ensure that access is not reduced, particularly in rural and remote areas of the state. The WA Ministerial Expert Panel also found that this access issue would be further compounded in smaller centres and towns if a sole practitioner had a conscientious objection to voluntary assisted dying.

Q-39 Should the draft legislation require health practitioners to complete approved training before they can assess a person's eligibility for access to voluntary assisted dying?

Yes. All medical practitioners should be required to complete mandatory approved training before they are able to undertake the process for voluntary assisted dying.

A review of enquiries to our medico-legal advisory service showed that one of the main reasons our members sought advice on VAD related to training and other information materials.

We support the W&W Model in this regard. We believe that practitioners should be required to meet minimum competencies, to be determined by a group of appropriately qualified practitioners. This could include competency in palliative care, end of life care generally, determining capacity and other relevant skills to undertake the assessment of the patient and provide treatment under this regime.

Robust training particularly in the area of eligibility will act as a safeguard for everybody involved. It will help ensure that the person is receiving the treatment they are eligible for and that the medical practitioner understands their legal obligations to their patient.

Conscientious objection

Q-40 Should the draft legislation provide that a registered health practitioner who has a conscientious objection to voluntary assisted dying has the right to refuse to do any of the following:

- ***(a) provide information about voluntary assisted dying;***
- ***(b) participate in the request and assessment process;***
- ***(c) if applicable, apply for a voluntary assisted dying permit;***
- ***(d) prescribe, supply, dispense or administer a voluntary assisted dying substance;***
- ***(e) be present at the time of the administration of a voluntary assisted dying substance; or***
- ***(f) some other thing (and, if so, what)?***

Q-41 Should a registered medical practitioner who has a conscientious objection to voluntary assisted dying be required to refer a person elsewhere or to transfer their care?

[2] Western Australian Ministerial Expert Panel on Voluntary Assisted Dying, Final Report of the Ministerial Expert Panel on Voluntary Assisted Dying (Final Report, Department of Health, 2019) (2019) 58-60.

We support the inclusion of a provision that allows a medical practitioner to conscientiously object to participating in voluntary assisted dying. We consider that the legislation should not include a positive obligation to refer a patient to a practitioner who has no objection. In this regard, we disagree with the W&W Model and prefer the Victorian approach. Referral should be dealt with under current ethical guidelines.

For some practitioners, their conscientious objection extends to steps taken to *refer* a patient for a procedure to which they conscientiously object, as well as objecting to the procedure itself. We have had experience assisting practitioners with the *Abortion Law Reform Act 2008* (Vic) which contains a positive obligation to refer. In our experience, this provision has caused difficulty for medical practitioners who have a conscientious objection, both in terms of their own conscience and in the way they provide care to patients. We agree with the Victorian Ministerial Advisory Panel, that there are key differences between the termination of pregnancy and voluntary assisted dying which make an obligation to refer unnecessary in the latter case.[3]

The Medical Board of Australia's Code of Conduct outlines the expected standard of practice where medical practitioners' religious or moral views have the potential to impact on patient access to care.[4] In our view, the guidance included in the Code of Conduct is sufficient to guide practitioners about their ethical obligations where they hold a conscientious objection.

Therefore, we recommend that issues relating to referral not be included in the legislation. We recommend that issues relating to referral continue to be dealt with within the ethical framework of the Code of Conduct.

Oversight, reporting and compliance

Q-45 Should notifications to the Health Ombudsman of concerns about health practitioners' professional conduct relating to voluntary assisted dying:

- ***(a) be dealt with by specific provisions in the draft legislation, as in Victoria, which provide for mandatory and voluntary notification in particular circumstances; or***
- ***(b) as in Western Australia, be governed by existing law under the Health Practitioner Regulation National Law (Queensland) which states when mandatory notification is required and voluntary notification is permitted?***

Q-47 Should the draft legislation include protections for health practitioners and others who act in good faith and without negligence in accordance with the legislation, in similar terms to those in the Voluntary Assisted Dying Act 2017 (Vic)?

We support the position taken in Western Australia, so that notifications about health practitioners' professional conduct relating to voluntary assisted dying are governed by existing law under the Health Practitioner Regulation National Law (Queensland). This law states when mandatory notification is required and when voluntary notification is permitted.

[3] Vic Ministerial Advisory Panel Final Report (2017) 110.

[4] Medical Board of Australia (October 2020), Good Medical Practice: a code of conduct for doctors in Australia, clauses 3.4.6 and 3.4.7.

We **strongly recommend** that the legislation incorporate sufficient protections for those medical practitioners who choose to participate (as outlined in the Queensland Parliamentary Report[5]), and those who choose not to participate.

The legislation should clearly state that:

1. a medical practitioner should not face any criminal, civil, administrative or disciplinary action for refusing to participate, or for choosing to participate.
2. a medical practitioner is immune from criminal and civil liability, and disciplinary action for providing treatment that causes death if they have acted in accordance with the requirements of the legislation in good faith and without negligence.

For the avoidance of doubt, we **recommend** that the legislation make it clear that the immunity extends to a medical practitioner (or other person) being present when the patient takes the medication.

These provisions will ensure medical practitioners are protected if they make decisions based on their clinical judgement, for example, a patient lives longer than anticipated when a medical practitioner originally assessed a patient as being at the end of life.

Queensland legislation should also address the tension between providing information about voluntary assisted dying through telehealth and the provisions in the Commonwealth *Criminal Code Act 1995*.[6] Telehealth has grown exponentially in 2020, particularly compared with utilisation levels when the Victorian and Western Australian legislation was being considered.

We request that the QLRC use this opportunity to provide certainty to medical practitioners that they will not be held liable if they provide information about voluntary assisted dying to their patients using telehealth and electronic communications. This will also support the Commission's aim to promote access, which is particularly important in a state like Queensland with its vast geography and rural and remote populations.

Other matters

Q-49 How should the death of a person who has accessed voluntary assisted dying be treated for the purposes of the Births, Deaths and Marriages Registration Act 2003 and the Coroners Act 2003?

Similar to Victoria and Western Australia, the Queensland legislation should require that the person's underlying medical condition is listed as the cause of death, but that the medical practitioner is to inform the Voluntary Assisted Dying Board of the death where voluntary assisted dying was accessed, and the Board in turn is to inform the Registrar of Births, Deaths and Marriages.

[5] Qld Parliamentary Committee Report No 34 (2020) 132, Rec 8.
[6] ss 474.29A and 474.29B.

We agree with the Western Australian Ministerial Expert Panel, that this ensures the relevant information is collected and recorded for statistical purposes, but the person's privacy is preserved.[7]

Regarding the *Coroners Act 2003*, we support the Victorian and Western Australian models, where death by means of voluntary assisted dying in accordance with their voluntary assisted dying legislation is not considered a reportable death under their respective Coroners Acts.

Avant Mutual
26 November 2020

[7] WA Ministerial Expert Panel Final Report (2019) 88–90, Rec 25.