

27 November 2020

The Secretary
Queensland Law Reform Commission
PO Box 13312
George Street Post Shop QLD 4003

By email: lawreform.commission@justice.qld.gov.au

Dear Sir/Madam,

A Legal Framework for Voluntary Assisted Dying

We the Society of Trust & Estate Practitioners Australia Pty Limited (STEP Australia) represent professionals from across Australia who are specialists in trusts, estate planning and in supporting the needs of families (young and old, wealthy and modest). The objective of a STEP Professional is to advance the interests of families across generations. This often involves us in identifying issues of relative importance to families and bringing these to the attention of those who can make a positive difference. This is the purpose of this submission.

STEP Australia's membership includes lawyers, accountants, financial wealth advisors and trustee company professionals from across Australia; our members bring a multi-disciplinary approach to the benefit of their clients. It is this unique multi-disciplinary approach that supports this submission.

A STEP member is perfectly placed to not only comment on and represent the interests of Australians, we also have the capacity and interest to communicate and inform our colleagues and clients on the workings and practical application of the Legal Framework for Voluntary Assisted Dying. This is a common topic of conversation in our professional lives. And because we are both national and local, we bring a national and local focus as the attached submission demonstrates.

It is in the foregoing context that STEP Australia endorses the submission prepared by STEP Queensland Branch that was provided on 26 November 2020 relating to the "User Experience Deceased Estates Tax Affairs".

More detailed information is contained in the STEP Queensland Submission attached.

On a national basis we recognise the importance of this topic and the sensitivities that need to be met. We also have the capacity to understand and respond to national issues that State law will impact upon. You will see this in the attached submission. We recognise and understand the potential impact from a Legal Framework for Voluntary Assisted Dying in Queensland on national life insurance and superannuation laws.

Put another way, we in STEP can provide a perspective that is legally and professionally based and also recognises the national impact on Queensland residents. We welcome the opportunity to work with you.

If you would like to discuss any aspect of the above or how we can help in forming good law, please at first instance speak with our colleagues at STEP Queensland who are identified in the submission. You are also very welcome to contact Peter Bobbin TEP, STEP Australia Board Chair, on email pbobbin@colemangreig.com.au.

Yours sincerely



Peter Bobbin

Chair of STEP Australia

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Dear Sir/Madam

A legal framework for voluntary assisted dying

We the Society of Trust & Estate Practitioners Queensland (STEP Qld) represent professionals from across Queensland who are specialists in trusts, estate planning and in supporting the needs of families (young and old, wealthy and modest). The objective of a STEP Professional is to advance the interests of families across generations. This often involves us in identifying issues of relative importance to families and bringing these to the attention of those who can make a positive difference. This is the purpose of this submission.

STEP Qld provides the following submission on the following questions and proposals contained in the Consultation Paper dated October 2020.

Introduction

Voluntary assisted dying regimes have been introduced in a number of overseas jurisdictions and, in Australia, in Victoria and Western Australia. Many of the questions and proposals raised in the Consultation Paper are, in STEP Qld's view, best responded to by health care professionals.

We note that the scope of the Commission's reference is limited to developing an appropriate legal framework for voluntary assisted dying.

We acknowledge that voluntary assisted dying is a very complex and deeply personal issue that requires a balancing of a range of competing considerations. Therefore, we have confined our submission to those questions that would be of interest to, and within the expertise of, our membership.

Consultation Questions

Consultation Question No 1

What principles should guide the Commission's approach to developing voluntary assisted dying legislation?

We support the Commission's guiding principles as set out in the Consultation Paper.

Consultation Question No 2

Should the draft legislation include a statement of principles:

(a) that aids in the interpretation of the legislation;

(b) to which a person must have regard when exercising a power or performing a function under the legislation (as in Victoria and Western Australia)?

We support the inclusion of a statement of principles to which a person must have regard when exercising a power or performing a function under the legislation.

Consultation Question No 3

If yes to Q-2(b), what would be the practical, and possibly unintended, consequences of requiring such persons to have regard to each of the principles?

A person seeking to exercise a power or perform a function under the legislation may feel paralysed in trying to balance the value of human life and the reduction of human suffering, for example. In practical terms, this may mean that the exercising of a power or the performance of a function may be unnecessarily delayed. We support thorough training for people who will be exercising a power or performing a function under the legislation in the belief that such training ought to reduce unintended consequences of including a statement of principles in the legislation.

Consultation Question No 4

If yes to Q-2(a) or (b) or both, what should the principles be? For example, should the statement of principles include some or all of the principles contained in:

(a) section 5(1) of the Voluntary Assisted Dying Act 2017 (Vic);

(b) section 4(1) of the Voluntary Assisted Dying Act 2019 (WA); or

(c) clause 5 of the W&W Model?

We support the inclusion of the W&W Model because it is succinct and potentially less complex than either the Victoria or Western Australian principles. The W&W Model aligns with the aim of the proposed legislation to be easy to understand.

Consultation Question No 6

Should the eligibility criteria for a person to access voluntary assisted dying expressly state that a person is not eligible only because they:

(a) have a disability; and

(b) are diagnosed with a mental illness?

We support the inclusion of an express statement that having a disability or a mental illness does not disqualify a person from being eligible to access voluntary assisted dying. Such an inclusion should minimise people with such conditions not being, at least initially, considered on the basis of the eligibility criteria.

Consultation Proposal No 1

The draft legislation should provide that, for a person to be eligible for access to voluntary assisted dying, the person must be aged 18 years or more.

We support the legislation initially limiting the eligibility for access to voluntary assisted dying to persons aged 18 years or more. The assessment of a person under the age of 18 years' capacity to consent to voluntary assisted dying is likely to be more complex because of the potential influence of parents or guardians. This issue should be reconsidered after the legislation has had time to operate to ensure that the nuances of capacity in adults are understood and catered for before considering whether to extend the eligibility to those under the age of 18 years.

Consultation Proposal No 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.

We support this proposal. Depending on whether the voluntary assisted dying legislation adopts the definition of capacity contained in the *Guardianship and Administration Act 2000* and the *Powers of Attorney Act 1998* which both contain the need for a person to be capable of freely and voluntarily making decisions about the matter to be decided, it may not need to be separately stated.

Consultation Proposal No 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.

We support this proposal. In our view, it is important the legislation makes it clear that the capacity to make the decision about voluntary assisted dying is the necessary capacity. This further supports the need to ensure that being disabled or having been diagnosed with a mental illness does not disqualify a person from being eligible for access to voluntary assisted dying.

Consultation Question No 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 support the definition of capacity being the same across the legislation. There is likely to be less confusion if the definitions are the same. Further, the definition of capacity in the *Guardianship and Administration Act 2000* and the *Power of Attorney Act 1998* allow for the capacity to be assessed in relation to a particular decision and include the need for the decision to be made freely and voluntarily.

Consultation Question No 13

What should be the position if a person who has started the process of accessing voluntary assisted dying loses, or is at risk of losing, their decision-making capacity in relation to voluntary assisted dying before they complete the process?

For example:

- (a) Should a person who loses their decision-making capacity become ineligible to access voluntary assisted dying?***
- (b) Should there be any provisions to deal with the circumstance where a person is at risk of losing their decision-making capacity, other than allowing for a reduction of any waiting periods? If so, what should they be?***
- (c) Should a person be able, at the time of their first request, to give an advance directive as to specific circumstances in which their request should be acted on by a practitioner administering a voluntary assisted dying substance, despite the person having lost capacity in the meantime?***

We acknowledge that these are difficult questions and individual views may differ. However, we are of the opinion that a person who loses decision-making capacity before they complete the process should not be eligible for voluntary assisted dying. If, after the legislation has been operating for some time, it becomes apparent that the loss of capacity between steps is a recurring issue, then the legislation can be amended to provide avenues to overcome the issue.

Consultation Question No 14

Should the eligibility criteria for a person to access voluntary assisted dying require that the person's request for voluntary assisted dying be enduring?

We support the need for the request to be enduring to ensure that the process is, in fact, voluntary.

Consultation Question No 17

Should the draft legislation provide that the person who makes a written declaration must sign the written declaration in the presence of:

- (a) two witnesses (as in Western Australia); or***

(b) two witnesses and the coordinating practitioner (as in Victoria)?

Because Queensland is a very large State and there can be limited appointments available in particular in regional areas with health practitioners, we are of the opinion that the declaration should be made in front of two witnesses.

Consultation Question No 18

Should the draft legislation provide that a person is not eligible to witness a written declaration if they:

(a) are under 18 years (as in Victoria and Western Australia);

(b) know or believe that they:

(i) are a beneficiary under a will of the person making the declaration (as in Victoria and Western Australia);

(ii) may otherwise benefit financially or in any other material way from the death of the person making the declaration (as in Victoria and Western Australia);

(c) are an owner of, or are responsible for the day-to-day operation of, any health facility at which the person making the declaration is being treated or resides (as in Victoria);

(d) are directly involved in providing health services or professional care services to the person making the declaration (as in Victoria);

(e) are the coordinating practitioner or consulting practitioner for the person making the declaration (as in Western Australia);

(f) are a family member of the person making the declaration (as in Western Australia)?

We broadly agree with the categories of witnesses suggested in the question. However, the inclusion of 'family member' may pose difficulties for people in remote and regional areas. Our view is that the ineligibility of witnesses who may benefit financially or in any other material way is sufficient to protect vulnerable people while still allowing more remote family members to witness the written declaration. The alternative posed in question 19 would provide a further layer of protection.

Consultation Question No 19

Alternatively to Q-18(f), should the draft legislation provide that not more than one witness may be a family member of the person making the declaration (as in Victoria)?

For the reasons outlined in the submission in response to consultation question no 18, we agree with this alternative to Q-18(f).

Consultation Question No 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)?***

We agree with the proposal outlined in Q-23(a). We believe that the proposal outlined in Q-23(b) is best answered by health practitioners. We agree generally with the proposal outlined in Q-23(c). We submit that the referral should be to the Queensland Civil and Administrative Tribunal.

Consultation Question No 24

Should the draft legislation provide (as in Western Australia) that the coordinating practitioner, the consulting practitioner, any health practitioner (or other person) to whom the person is referred for a determination of whether the person meets particular eligibility requirements, or the administering practitioner must not:

- (a) be a family member of the person; or***
- (b) know or believe that they are a beneficiary under a will of the person or may otherwise benefit financially or in any other material way from the person's death?***

In order for the legislation to be consistent (see Q-18), we agree that this limitation should be included in the draft legislation.

Consultation Question No 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)?***

If the draft legislation contains the residency requirements (which we believe is a policy decision for the Government and we make no submission in that respect), then the draft legislation should include the ability for an eligible applicant to apply to the Tribunal for a review of these decisions.

Consultation Question No 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?***

We agree that there should be a wider range of potential applicants for review than just the person the subject of the decision. However, we are of the view that the person the subject of the decision must be a party to the application to ensure that their interests are protected.

Consultation Question No 27

At what points during the request and assessment process should the coordinating practitioner or consulting practitioner be required to report to an independent oversight body? For example, should it be required to report to an independent oversight body:

- (a) after each eligibility assessment is completed (as in Victoria and Western Australia);***
- (b) after the person has made a written declaration (as in Western Australia);***

(c) after the person has made their final request (as in Victoria and Western Australia);

(d) at some other time (and, if so, when)?

There should be reporting to an independent oversight body after each state and after the substance has either been self-administered or administered by a practitioner. This is to ensure that the process is thoroughly documented and reported.

Consultation Question No 28

Is it necessary or desirable for the draft legislation to require the coordinating practitioner to apply for a voluntary assisted dying permit before the voluntary assisted dying substance can be prescribed and administered (as in Victoria)?

We do not support the inclusion of such a permit in the draft legislation. This may unnecessarily delay the process and lead to an unnecessary prolonging of the person's suffering.

Consultation Question No 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?

We do not support this inclusion in the draft legislation. This approach may cause unnecessary anxiety to a person who may wish for complete privacy or who may only want close family or friends around them at the time.

Consultation Question No 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 agree that this requirement should be included in the draft legislation.

Consultation Question No 33

Should the draft legislation provide that an interpreter who assists a person in requesting or accessing voluntary assisted dying must be accredited and impartial, in similar terms to the legislation in Victoria and Western Australia?

We support the inclusion of the requirement for an interpreter to be accredited and impartial. However, given the large area that comprises Queensland, we suggest that the interpreter be able to assist by way of digital technology, preferably video conferencing.

Consultation Question No 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?

We strongly support the requirement to complete approved training in order to ensure that the health practitioners understand the requirements of eligibility for access to voluntary assisted dying, particularly in regard to capacity. During the course of their work, our members have seen a noticeable difference in the way health practitioners approach an assessment of capacity. In order to ensure that a person seeking to access voluntary assisted dying is assessed in a careful, considered and consistent way, we believe that training will be required.

Consultation Questions No 41 and No 42

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?

Should the draft legislation make provision for an entity (other than a natural person) to refuse access to voluntary assisted dying within its facility? If so, should the entity be required to:

(a) refer the person to another entity or a medical practitioner who may be expected to provide information and advice about voluntary assisted dying; and

(b) facilitate any subsequent transfer of care?

We do not intend to comment on the ability for a medical practitioner or an entity (other than a natural person) to conscientiously object or refuse access to voluntary assisted dying. We are of the opinion that this is a question better suited to health practitioners. However, if such conscientious objection or refusal is provided for in the draft legislation, we strongly support the need for the person seeking information and advice about voluntary assisted dying to be referred to another entity or medical practitioner who may be expected to provide information and advice about voluntary assisted dying. This is particularly important in remote and regional parts of Queensland where there may be little or no choice of registered medical practitioner.

Consultation Question No 43

Should the draft legislation provide for an independent oversight body with responsibility for monitoring compliance with the legislation?

We strongly support an independent oversight body to ensure compliance with the legislation.

Consultation Question No 44

If yes to Q-43, should the oversight body have some or all of the functions and powers conferred on:

(a) the Voluntary Assisted Dying Review Board under the Voluntary Assisted Dying Act 2017 (Vic); or

(b) the Voluntary Assisted Dying Board under the Voluntary Assisted Dying Act 2019 (WA)?

We favour the Victorian model because of its role in the promotion of compliance and improvement in the quality and safety of the scheme as well as consultation and engagement with groups, government departments and agencies.

Consultation Question No 46

Should the draft legislation include specific criminal offences related to non-compliance with the legislation, similar to those in the Voluntary Assisted Dying Act 2017 (Vic) or the Voluntary Assisted Dying Act 2019 (WA)?

We support the inclusion in the draft legislation of specific criminal offences.

Consultation Question No 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 inclusion of those protections. Without such protections, it is less likely that health practitioners would be willing to be involved in the provision of voluntary assisted dying.

Consultation Question No 48

Should there be a statutory requirement for review of the operation and effectiveness of the legislation?

We support a statutory requirement for a review of this legislation, given its importance and the need to ensure that it is operating in a manner that supports those people seeking voluntary assisted dying. It would also assist in ensuring that issues such as whether people aged under 18 years should be eligible are reviewed. We suggest that the period of time for the review be set for between 3 and 5 years.

Consultation Question No 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?

The cause of death should be recorded as the underlying medical condition. The Registrar of Births, Deaths and Marriages should be informed that the person accessed voluntary assisted dying. This information should be shared between the oversight body and the Registrar to ensure that all uses of voluntary assisted dying are properly reported. The *Coroners Act 2003* should be amended to ensure that accessing voluntary assisted dying is not a 'reportable death' which would lead to the coroner being required to investigate.

Consultation Question No 50

What key issues or considerations should be taken into account in the implementation of voluntary assisted dying legislation in Queensland?

We support proper training and oversight of all people involved in the process.

We are concerned about the impact accessing voluntary assisted dying may have upon a person's life insurance, whether it be through their superannuation fund, connected to the provision of credit or as a standalone policy. In implementing voluntary assisted dying, we support measures being taken to ensure that a person who accesses voluntary assisted dying does not invalidate their life insurance policies.

We look forward to further participation in the consultation process.

If you would like to discuss any of the above, please do not hesitate to contact us at STEPQldBranch@step.org.

Yours faithfully,

Chris Herral TEP
Chair of STEP Queensland