



Brisbane Office
L16 State Law Building
50 Ann Street Brisbane Qld 4000
PO BOX 13554
George Street Brisbane Qld 4003
Telephone 1300 653 187
Fax 07 3738 9496
Email publicguardian@publicguardian.qld.gov.au

2 July 2021

Dr Jacqueline Dewar
Committee Secretary
Health and Environment Committee
Parliament House
George Street
BRISBANE QLD 4000

Via email: hec@parliament.qld.gov.au

Dear Dr Dewar

Thank you for the opportunity to make a submission regarding the Voluntary Assisted Dying Bill 2021 (the Bill).

The Office of the Public Guardian (OPG) is an independent statutory office which promotes and protects the rights and interests of children and young people in the child protection system or staying at visitable locations, and adults with impaired decision-making capacity for a matter.

Relevant to this inquiry, the OPG promotes and protects the rights of adults with impaired decision-making capacity through the following functions:

- When appointed by the Queensland Civil and Administrative Tribunal (QCAT), the guardianship function undertakes structured decision-making in relation to personal, legal and health care matters, supporting adults to participate in decisions about their life and acknowledging their right to live as a valued member of society.
- The investigations function investigates complaints and allegations that an adult with impaired decision-making capacity is being neglected, exploited or abused, or has inappropriate or inadequate decision-making arrangements in place.
- The adult community visiting and advocacy function independently monitors visitable sites (authorised mental health services, community care units, government forensic facilities, disability services and locations where people are receiving NDIS supports, and level 3 accredited residential services), to inquire into the appropriateness of the site and facilitate the identification, escalation and resolution of complaints by or on behalf of adults with impaired decision-making capacity staying at those sites.

The *Public Guardian Act 2014* (Public Guardian Act) and the *Guardianship and Administration Act 2000* (Guardianship and Administration Act) provide for the OPG's legislative functions, obligations and powers. The *Powers of Attorney Act 1998* (Powers of Attorney Act) regulates the authority for adults to appoint substitute decision-makers under an advance health directive or an enduring power of attorney.

Decision making about voluntary assisted dying

The Public Guardian may make decisions on behalf of an adult with impaired decision-making capacity in relation to personal, legal and/or health care matters if appointed by QCAT, or if appointed attorney by the adult under an enduring document which was made when the adult had capacity. When providing these services, the Public Guardian upholds the human rights of adults by supporting them to participate in decisions about their life, and acknowledges their right to live as a valued member of society using a structured decision-making framework, with substitute decision-making used only as a last resort. The Public Guardian is empowered to make decisions only when the adult has impaired decision-making capacity for the particular matter.

Structured decision-making is a statutory principle that must be applied by guardians and attorneys when performing a function or exercising a power for an adult with impaired decision-making capacity (under the Guardianship and Administration Act and the Powers of Attorney Act respectively). This principle requires guardians and attorneys to undertake a supported decision-making approach by recognising and preserving the adult's right to make their own decision, supporting the adult to make a decision, and taking into account the adult's views, wishes and preferences. If the adult's decision cannot be determined, guardians and attorneys must use the principle of substituted judgement and take into account what the adult's views, wishes and preferences would be if the adult had capacity.

Clause 10 of the Bill provides that a person is eligible to access voluntary assisted dying if they have decision-making capacity in relation to voluntary assisted dying (among other things). Clause 11 of the Bill provides that a person is presumed to have decision-making capacity in relation to voluntary assisted dying unless there is evidence to the contrary. Assessments of a person's eligibility to access voluntary assisted dying, including determinations about their decision-making capacity in relation to the matter, are conducted by medical practitioners and reviewable by QCAT.

Clause 172 of the Bill provides for the amendment of the Guardianship and Administration Act, and clause 173 inserts new section 250C which provides that voluntary assisted dying under the proposed *Voluntary Assisted Dying Act 2021* (*Voluntary Assisted Dying Act*) is not a matter to which the Guardianship and Administration Act applies.

Clause 176 of the Bill similarly provides for the amendment of the Powers of Attorney Act, and clause 177 inserts new section 159 which provides that voluntary assisted dying under the proposed *Voluntary Assisted Dying Act* is not a matter to which the Powers of Attorney Act applies.

The Explanatory Notes to the Bill describe the intention of these provisions as provided in the Queensland Law Reform Commission's (QLRC's) report: *A legal framework for voluntary assisted dying* (Report No. 79) (the QLRC report). The QLRC report states that amendment to the Guardianship and Administration Act and the Powers of Attorney Act is needed to exclude a substitute decision-maker (such as an attorney, guardian or administrator) from making decisions about voluntary assisted dying for an adult with impaired decision-making capacity (paragraph 19.83). The QLRC report further states that a declaratory provision will remove any doubts that might otherwise arise about the potential application of the guardianship legislation to decisions about voluntary assisted dying (paragraph 19.86).

The intended effect of these provisions is that appointed guardians and attorneys cannot provide structured decision-making services for an adult with impaired decision-making capacity for the purposes of the Bill. Neither supported nor substituted decision-making services can be provided in relation to voluntary assisted dying, as both fall within the structured decision-making principle of the Guardianship and Administration Act and the Powers of Attorney Act, which are precluded by the

Bill. As voluntary assisted dying is not a matter to which the Guardianship and Administration Act or the Powers of Attorney Act applies, the OPG's role would be extremely limited in relation to clients receiving guardianship services. If an existing client expressed views and wishes to the OPG to access voluntary assisted dying, we may refer the matter to their doctor to progress directly with the adult, or request the adult's service providers to assist them to refer the matter to their treating doctor. Clients could also raise the matter with their family, support network or service providers, who could directly support or assist them to access voluntary assisted dying services.

Investigations function

The Public Guardian may investigate any complaint or allegation that an adult with impaired decision-making capacity is being neglected, exploited or abused, or has inappropriate or inadequate decision-making arrangements in place (section 19, Public Guardian Act). As part of this function, the OPG provides education to decision makers about their responsibilities and takes any necessary protective action if the investigation finds the allegations are substantiated. If the OPG receives an investigation request, we generally seek medical advice to confirm that the adult has impaired decision-making capacity, which enlivens our jurisdiction to investigate.

As the Public Guardian's investigative function is limited to adults with impaired decision-making capacity, it is not anticipated there will be any intersect with people who successfully utilise the proposed Voluntary Assisted Dying Act, as these people will have been assessed as having decision-making capacity for the matter. Conversely, people with impaired decision-making capacity who may be the subject of an OPG investigation would unlikely be eligible to access the proposed Voluntary Assisted Dying Act. It is possible that determinations of impaired decision-making capacity in relation to voluntary assisted dying may lead to a small number of applications to QCAT for the appointment of a guardian and/or investigation requests.

Should you require further information regarding this matter, please contact Ms Kelly Unsworth, Principal Policy Officer, Corporate and Strategic Services, Office of the Public Guardian, by email on [REDACTED]

I trust this information is of assistance.

Yours sincerely



Shayna Smith
Public Guardian