



Our reference: BNE3417244

2 July 2021

Committee Secretary
Health and Environment Committee
Parliament House
BRISBANE QLD 4000

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

Dear Committee

Voluntary Assisted Dying Bill 2021

Thank you for the opportunity to make a submission to the inquiry into the Voluntary Assisted Dying Bill 2021 (the Bill). Please find attached the Queensland Human Rights Commission's submission.

Thank you for the opportunity to participate in your Inquiry into the Bill.

Yours sincerely

A handwritten signature in blue ink, which appears to read "Scott McDougall".

Scott McDougall
Queensland Human Rights Commissioner

STATEWIDE

tollfree
1300 130 670
info@qhrc.qld.gov.au
qhrc.qld.gov.au
fax 07 3193 9979

Brisbane

Level 20
53 Albert Street
Brisbane Q 4000
PO Box 15565
City East Q 4002

Cairns

Ground Floor
10 Grove Street
PO Box 4699
Cairns Q 4870

Townsville

Ground Floor
187-209 Stanley Street
PO Box 1566
Townsville Q 4810

Rockhampton

Level 1
209 Bolsover Street
PO Box 1390
Rockhampton Q 4700



Voluntary Assisted Dying Bill 2021

Submission to Health and Environment Committee

2 July 2021

Table of contents

Background to the Bill	4
Relevant rights	5
Victorian human rights analysis.....	5
Queensland Law Reform Commission report.....	5
Rights analysis	6
Principles to the Bill	8
Right to equality and to be free from discrimination	9
Safeguards	11
Palliative care funding	11
Relevant medical practitioners	12
Expertise in palliative care and assessing capacity.....	13
Options to allow further safeguards.....	14
Minimum training.....	15
Witnesses	16
Decision-making capacity	17
Conclusion.....	20

1. The Bill seeks to balance several rights and interests in a complex area of social and health policy. This submission does not seek to comprehensively review all aspects of the Bill for human rights compatibility, but rather highlight some issues that may assist the Committee.
2. In making this submission, the QHRC does not necessarily endorse that other parts of the Bill are compatible with human rights. Only that, in the time available, these are the most pertinent issues we have identified. This submission focusses on the adequacy of the justification in the Statement of Compatibility, rather than the substantive policy proposals in the Bill.
3. The Queensland Human Rights Commission (QHRC) commends the work of the former Health, Communities, Disability Services and Domestic and Family Violence Prevention Committee, and the Queensland Law Reform Commission (QLRC), in undertaking broad community consultation before recommending legislation with safeguards, based on the experiences of other jurisdictions.¹
4. The Statement of Compatibility draws upon this work and discusses several of the challenges in legislation that seeks to respect human dignity and individual autonomy, while also protecting the sanctity of life, those individuals who might be at risk of abuse, and religious beliefs and freedoms. It is inevitable that legislation of this kind will limit many human rights.
5. With this in mind, the QHRC suggests extending the safeguards offered by the Bill and/or providing further justification in relation to limitations on rights.² In summary, the QHRC recommends that:
 - The principles in clause 5 explicitly refer to the rights in the *Human Rights Act 2019* ('HRA') and that those exercising functions under the Bill must consider those principles.
 - The Statement of Compatibility discuss place of residence as a potential ground of discrimination.
 - The Minister should provide further justification for why some safeguards were not included in the Bill because of the limited access to health services in regional and remote communities, particularly why additional funding or the use of telehealth services could not address that issue.

¹ The particular safeguards chosen and why the Government suggests they represent a proportionate limitation on rights are discussed on page 7 of the Statement of Compatibility.

² See for example the recent Report of the Economics and Governance Committee, which recommended the Attorney-General clarify some issues raised regarding COVID-19 legislation in her second reading speech: Economics and Governance Committee, Parliament of Queensland, *Inquiry into COVID-19 Emergency Response and Other Legislation Amendment Bill 2021* (Report No 6, April 2021) 26.

- There be independent monitoring of the provision of palliative care services across Queensland, including by broadening the functions of the new VAD Board.

Background to the Bill

6. As the Statement of Compatibility notes ‘there are “conflicting, and highly contested, views within our society on the ethical and moral issues” at stake in prohibiting or allowing voluntary assisted dying’. A 2016 Issues paper of the Australian Human Rights Commission, *Euthanasia, human rights and the law*, concludes with a human rights-based analysis of voluntary euthanasia and commentary of the practice informed by human rights principles:

An analysis of international human rights law relevant to the practice of voluntary euthanasia does not lead to ‘the’ answer. Rather it reveals a balancing of rights, the appropriate balance of which may be subject to competing views.

The right to life does not (as a corollary) include a right to choose to die. But nor does it require a State to ensure that a person’s life is protected when this is against the express wishes of that person. In the case of a request for voluntary euthanasia, the State’s obligation to protect life must be balanced against the right to personal autonomy which is contained within the right to privacy.

Laws prohibiting access to voluntary euthanasia may interfere with the right to respect for private life as guaranteed under article 17 of the ICCPR, and as such need to be able to be justified as a legitimate limitation of that right.

In relation to access to passive euthanasia, it is important to note that to subject a person to medical treatment against their will or without their consent may violate their physical integrity and breach their rights under article 17 (and possibly article 7) of the ICCPR.

Further, the Disability Convention makes clear that people with disability are entitled to the same respect for their rights to life, health, physical integrity and personal autonomy as people without disability.

If a State does choose to legalise voluntary euthanasia, article 6 of the ICCPR requires that the legislation includes strict and effective safeguards against abuse. In order to be compatible with the right to

freedom of thought, conscience and belief, such laws may need to include an appropriately worded 'conscientious objection' provision.³

Relevant rights

Victorian human rights analysis

7. The HRA is based on the Victorian *Charter of Rights and Responsibilities Act 2006*. The Victorian Parliament's Scrutiny of Acts and Regulations Committee (SAR Committee) conducted a 'Charter Analysis'⁴ of the Voluntary Assisted Dying Bill 2017, which has since been enacted. The analysis involved consideration of similar rights in the Charter to those identified by the Australian Human Rights Commission and relevant to the Bill. The SAR Committee noted the findings of the Canadian Supreme Court that:

[T]he case law suggests that the right to life is engaged where the law or state action imposes death or an increased risk of death on a person, either directly or indirectly... This said, we do not agree that the existential formulation of the right to life requires an absolute prohibition on assistance in dying, or that individuals cannot 'waive' their right to life. This would create a 'duty to live', rather than a 'right to life', and would call into question the legality of any consent to the withdrawal or refusal of lifesaving or life-sustaining treatment.⁵

Queensland Law Reform Commission report

8. The QLRC report identified and discussed the application of the HRA to potential voluntary assisted dying legislation. It came to similar conclusions to that made by the Australian Human Rights Commission:

The HR Act protects a person from arbitrary deprivation of life, but not all acts that end in death will infringe this right. Overseas jurisdictions suggest that voluntary assisted dying legislation is neither required nor

³ Australian Human Rights Commission, *Euthanasia, Human Rights and the Law* (Web page, 20 May 2016) <<https://humanrights.gov.au/our-work/age-discrimination/publications/euthanasia-human-rights-and-law>>

⁴ Under the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (the Charter), the Scrutiny of Acts and Regulations Committee is required to report on the compatibility of proposed legislation with the human rights under the Charter. The Queensland *Human Rights Act 2019* provides for a similar obligation on portfolio committees of the Queensland Parliament.

⁵ Scrutiny of Acts and Regulations Committee, Parliament of Victoria, *Alert Digest* (Digest No 14 of 2017, 17 October 2017) ('SAR Committee Report') 28 citing *Carter v Canada* [2015] 1 SCR 331, [62]-[63].

precluded by the right to life, but that adequate limits and safeguards should be in place.⁶

Rights analysis

9. The QHRC acknowledges the significant consideration of human rights in the QLRC report, including discussion of when rights may be reasonably and proportionately be limited. The QLRC identified the following relevant rights for voluntary assisted dying legislation, which in some areas the Statement of Compatibility elaborates upon:

Section 15: the right to enjoyment of human rights without discrimination, to equal protection of the law without discrimination and to equal and effective protection against discrimination (equality rights);

The Statement of Compatibility notes this right may be limited if voluntary assisted dying were used disproportionately or without adequate safeguards for vulnerable people. Similarly, the statement notes that the eligibility requirements discriminate against children and some people with disability.

Section 16: the right to life and the right not to be arbitrarily deprived of life;

The Statement of Compatibility argues the Bill both promotes and limits this right by seeking to uphold human dignity and autonomy, but in the context of legalising assisted dying.

Section 25: the right not to have the person's privacy unlawfully or arbitrarily interfered with.

The Statement of Compatibility argues the Bill promotes this right by recognising individual autonomy.

Section 29: the right to liberty and security.

The Statement suggests this right is relevant to human dignity and autonomy, which the Bill seeks to promote.

Section 17: freedom from torture and cruel, inhuman or degrading treatment;

This rights protects against torture, as well as treatment that is cruel, inhuman or degrading way. This includes protection from treatment that humiliates a person. This right also protects people from having medical treatment or experiments performed on them without their full and informed consent. The Statement of Compatibility notes that this right would be limited if the Bill does not have adequate safeguards to protect vulnerable people.

⁶ SAR Committee Report, 30.

Section 37: the right to access health services without discrimination.

The Statement of Compatibility suggests that voluntary assisted dying is likely a health service and that safeguards must be balanced against any unreasonable limitation on this right that would result in a person being discriminated against in seeking to access the service.

Section 20: The right to freedom of thought, conscience, religion and belief

The Statement of Compatibility recognises that in a pluralistic society, people will hold different but deeply held views about life and death. The Bill limits this right by requiring individuals (health practitioners, staff in relevant facilities) to participate in the scheme to some extent even if they conscientiously object.

Section 26: right to protection of families and children, and **Section 28:** cultural rights, including those of Aboriginal and Torres Strait Islander peoples.

While the Statement acknowledges the protection of children may be promoted and limited by the ineligibility of children to participate in the scheme, it is silent as to the rights to family and Aboriginal and Torres Strait Islander peoples' cultural rights. In contrast, these rights were identified by the QLRC, including because of the risk that the scheme may disproportionately prevent people, including Aboriginal and Torres Strait Islander peoples, living in rural and remote communities from accessing the scheme without travelling great distances away from country and family. The QLRC also recommended (as reflected in the Bill) that family member should be defined to include a person who is regarded as such under Aboriginal tradition or Torres Strait Islander custom.

10. The enactment of legislation that allows for voluntary assisted dying therefore protects and promotes rights under sections 16 (right to life), section 17 (freedom from torture, and cruel, inhuman or degrading treatment)' section 25 (right to privacy).

11. Against this, there must be:

- a. Safeguards to prevent abuse, particularly in relation to at risk communities such as people with disability, and to uphold the rights in section 15 (recognition and equality before the law), section 16 (not to be arbitrary deprived of life), and section 17(c) (not to be subjected to medical treatment without the person's full, free and informed consent);
- b. Efforts to ensure that, as far as possible, people have equality of access to voluntary assisted dying (and similarly, equal access to safeguards), independent of where they live, in protection of section

15 (recognition and equality before the law), and section 37 (right to access health services without discrimination),

- c. Justification for rendering certain people ineligible to access voluntary assisted dying, such as residency, citizenship, children and people unable to give full, free and informed consent;
- d. Consideration of the rights of individuals involved in implementing voluntary assisted dying, and ensuring that their right under section 20 (right to freedom of thought, conscience, religion and belief) are not disproportionately limited;
- e. Consideration of the disproportionate impact the laws may have on Aboriginal and Torres Strait Islander people, who may be living in rural and remote communities, and their rights under s 28 (cultural rights of Aboriginal people and Torres Strait Islander people).

Principles to the Bill

12. The QHRC welcomes the inclusion of principles at clause 5 of the Bill, noting that the QLRC recommended principles were useful to provide guidance to those using the Bill.⁷ The QLRC noted that the principles should not necessarily restate principles that are in other laws, such as the HRA.
13. However, the HRA only imposes obligations on Public Entities to consider human rights and compatibly with human rights. Human rights nonetheless provides a valuable framework, and ensures consideration of broader issues, which would support good decision making and actions by all individuals and entities performing functions or making decisions under the Bill. For example, the right to protection of families is not outlined in clause 5 of the Bill, but may be a consideration regarding how practitioners involve family in the process of discussing voluntary assisted dying and palliative care options.
14. The QHRC therefore suggests that clause 5 be amended to refer to human beings in Queensland enjoying all relevant human rights, including those enshrined in the *Human Rights Act 2019*.
15. Further, the principles do not appear to have any direct effect on those exercising a power or performing functions under the Bill. The QLRC recommended such an approach to avoid confusion.⁸ However, the equivalent

⁷ Queensland Law Reform Commission, *A legal framework for voluntary assisted dying* (Report No 78, May 2021 [5.87] to [5.89] ('QLRC Report'))

⁸ QLRC Report [5.88]

legislation in Victoria and Western Australia does require the principles to be considered by those exercising powers or performing functions.⁹ Other Queensland legislation also requires those exercising a power or performing a function to consider relevant principles, with specific reference to relevant rights holders.¹⁰ The QHRC suggests for the principles to achieve their purpose, the Bill should require those exercising powers or performing functions under the Act to consider the principles and consideration be given to identifying specific rights holders such as people with disabilities.

Right to equality and to be free from discrimination

16. The QLRC report discussed in detail the challenges posed in creating a voluntary assisted dying scheme in a manner that ensured access for everyone living in Queensland. This is important, as the HRA protects all individuals in Queensland, regardless of residency or citizenship status.
17. The QHRC welcomes that the Statement of Compatibility identifies and seeks to justify the limitation on the right to equality (s 15) of patients based on residency and citizenship requirements. Nonetheless, we note rights promoted by the scheme (such as the right to privacy) are inevitably also limited by the Bill preventing individuals accessing the scheme. The Statement concludes this justification as follows:

This criterion may indirectly discriminate on the basis of citizenship or nationality. While some non-citizens will be able to satisfy the criterion (for example, as permanent residents), noncitizens will still be disproportionately affected. Citizenship and nationality are likely protected attributes of discrimination under s 15 of the Human Rights Act. It is not clear whether interstate residency is a ground of discrimination under the Human Rights Act. It is not a protected attribute under s 7 of the *Anti-Discrimination Act*. In cases that have come before the Canadian Supreme Court, it has held that residency in a particular Province is generally not an analogous ground of discrimination. However, the Supreme Court has left open the possibility that a person's Province of residence may be a personal characteristic capable of constituting a ground of discrimination in a future case. Taking a cautious approach, I

⁹ *Voluntary Assisted Dying Act 2017* (Vic) s 5 and *Voluntary Assisted Dying Act 2019* (WA) s 4.

¹⁰ See for example *Mental Health Act 2016* s 5 and *Guardianship and Administration Act 2000* s 250 and the accompanying *Queensland Capacity Assessment Guidelines 2020*.

will proceed on the basis that interstate residency is a protected attribute under the Human Rights Act.¹¹

18. This conclusion suggests that, based the Canadian case law cited, a person's location within Queensland (eg their place of residence) is not a protected attribute of discrimination, compared to their 'province of residence', which is. The QHRC instead suggests that the Statement of Compatibility should adopt the same approach to both attributes and justify the limitation on a person's place of residence within Queensland, particularly when the needs of those in regional and remote areas are cited as justification for many of the provisions.¹²
19. Section 15(2) of the HRA (the right to enjoy human rights without discrimination) is modelled on Article 26 of ICCPR which lists grounds of discrimination, but does not define the word 'discrimination'. Based on the United Nations Human Rights Committee's *General Comment 18: Non-discrimination*, discrimination is:
 - any distinction, exclusion, restriction or preference;
 - based on a non-exhaustive list of grounds;
 - that has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.¹³
20. However, there is nothing in the *Human Rights Act 2019* to suggest that individuals should be protected from discrimination only according to attributes identified under the ICCPR or as defined in other human rights jurisdictions.
21. In *Carson and others v United Kingdom*, the European Court of Human Rights suggested the status of place of residence could be a ground of discrimination. The court reached a similar conclusion in *Baraliija v Bosnia and Herzegovina*, concerning a person residing in a particular city (Mostar) being treated differently, under the same legislation, to a person residing in another part of Bosnia and Herzegovina.¹⁴
22. These cases reflect that human rights jurisdictions have developed their own jurisprudence in determining when a personal characteristic will be a ground of

¹¹ Page 16. We also note that the QLRC Report highlighted the potential Constitutional issues of eligibility based on residence at [7.442] to [7.455].

¹² Exemplified by s 5 (e) which states an underpinning principle of the Bill is to ensure choice regardless of where a person lives in Queensland.

¹³ Human Rights Committee, *General Comment 18: Non-discrimination*, 37th sess, UN Doc HRII/GEN/1/Rev.9 (Vol. I) (10 November 1989) [7].

¹⁴ *Baraliija v Bosnia and Herzegovina* (European Court of Human Rights, Chamber, Application no 30100/18, 29 October 2019)

discrimination, usually based on the factual circumstances of the matter. Caution must therefore be taken in applying this jurisprudence to Queensland.

23. Until resolved by Queensland courts, it remains uncertain how many further attributes beyond those recognised in the *Anti-Discrimination Act 1991* will be considered discrimination under the *Human Rights Act 2019*. In the interim, we suggest that place of residence should be assessed as a ground of discrimination for the purposes of the HRA.

Safeguards

Palliative care funding

24. A voluntary assisted dying scheme must not be a replacement for adequate palliative care services throughout Queensland including in regional and remote areas. The former Health Committee's report regarding voluntary assisted dying noted that that palliative care 'needs to be adequately resourced and supported irrespective of whether voluntary assisted dying legislation is introduced'. Further, the Committee noted that, 'if it is introduced, it is imperative that people have the full range of options available to them so that they can make an informed choice'.¹⁵
25. The QLRC supported the Committees' recommendations,¹⁶ and similarly noted that 'greater public resources will be required to address the demand on public hospitals and health services to provide end of life treatment, palliative care and voluntary assisted dying'.¹⁷ Further, the QLRC recommended that 'any scheme for voluntary assisted dying should complement, not detract from, the provision of high quality and accessible palliative care and treatment'.¹⁸ In its submission to the QLRC, PalliativeCare Queensland recommended 'legislation supporting and enshrining palliative care should be considered at the same time as VAD legislation'.¹⁹
26. The QHRC therefore welcomes the Queensland Government's announcement for additional funding to palliative care services. Nonetheless, such funding commitments are necessarily subject to budgetary cycles, and we note that

¹⁵ Health, Communities, Disability Services and Domestic and Family Violence Prevention Committee, Parliament of Queensland, *Voluntary Assisted Dying* (Report No 34, March 2020) 109 ('Former Health Committee Report').

¹⁶ QLRC Report, [21.197]

¹⁷ QLRC Report, [15.206]

¹⁸ QLRC Report, [21.199]

¹⁹ PalliativeCare Queensland, Submission to Law Reform Commission, *A Legal framework for voluntary assisted dying* (27 November 2020) <https://palliativecareqld.org.au/wp-content/uploads/2020/11/PCQ-response-to-QLRC-re-VAD_Nov2020.pdf> 2

some non-government organisations have suggested this additional investment is not sufficient.²⁰

27. The QHRC does not have the expertise to assess the need for additional services, but suggests the government must demonstrate that there is sufficient palliative care services available to ensure in every instance, the person is truly making a voluntary decision to opt for assisted dying.
28. We note that PalliativeCare Queensland suggests that palliative care frameworks continue to be separate from VAD.²¹ On the basis it would not put that approach in jeopardy, the QHRC suggests that in consultation with key stakeholders, the government develop an additional safeguard to ensure palliative care services are adequate throughout Queensland. One option would be to expand the functions of the new independent review board created by the Bill to monitor palliative care services in Queensland, as a safeguard against voluntary assisted dying being used as a replacement. The Board could be renamed the 'Dying with Dignity Review board' to reflect this broader role.

Relevant medical practitioners

29. The QHRC acknowledges that the particular expertise and specialisation of relevant medical practitioners assessing eligibility under the Bill is a complex area. While not necessarily advocating for the Bill to take a different approach, the QHRC submits that further justification should be provided in the Statement of Compatibility for the approach taken.
30. When scrutinising the Victorian Voluntary Assisted Dying Bill 2017 for human rights compatibility, the SAR Committee considered a similar scheme for voluntary assisted dying in Oregon, USA. A federal district court judge ruled that parts of Oregon's scheme were inconsistent with the United States Constitution's Bill of Rights, specifically its requirement for equal protection of the terminally ill. Although this decision was eventually overturned on the ground that the plaintiffs lacked standing, *Lee v Oregon* appears to be the only court ruling to date on the compatibility of a similar scheme. The court held:

...Measure 16 requires 'attending' and 'consulting' physicians who may not be psychiatrists, psychologists, or counsellors to make an evaluation whether a condition is causing impaired judgment, if a patient is

²⁰ For example see, PalliativeCare Queensland, 'Palliative Care Queensland welcomes AMA Queensland call for funding boost' (Media Release, 24 May 2021) <<https://palliativecareqld.org.au/wp-content/uploads/2021/05/20210524-PCQ-Media-Release.pdf>>

²¹ PalliativeCare Queensland, Submission to Law Reform Commission, *A Legal framework for voluntary assisted dying* (27 November 2020) <https://palliativecareqld.org.au/wp-content/uploads/2020/11/PCQ-response-to-QLRC-re-VAD_Nov2020.pdf> 2

depressed, or suffering from a psychiatric or psychological disorder. This is the final evaluation for persons, whom the physicians believe, are not suffering from impaired judgment. The Measure also relies on them to decide when a person's request is voluntary and not the product of undue influence. There is no requirement that the person consult a certified social worker or other specialist to explore social services which might assist the person to live in greater comfort. Also, it is the treating physician's responsibility to inform the person of 'feasible alternatives,' including 'comfort care, hospice care and pain control.'²²

31. The Bill includes similar issues to that identified by the SAR Committee, and the Statement of Compatibility does not appear to justify why other alternative options to legislate stronger safeguards were not considered. In highlighting this issue, the QHRC acknowledges that any additional safeguard risks creating new barriers to accessing the scheme and potentially limiting rights in other ways, particularly given Queensland's population distribution. We note these as options that the Statement should discuss rather than necessarily advocating the Bill should be amended to adopt them.

Expertise in palliative care and assessing capacity

32. The SAR Committee observed that while the Victorian legislation provided that a relevant health practitioner could refer a patient to another registered health practitioner with appropriate skills and training, there was no obligation on the medical practitioner to adopt the specialist's determination. Further, the Bill did not require that a specialist psychologist, psychiatrist or social worker, or an expert in palliative care assess the person.²³
33. Clause 21 of the Bill adopts the same approach. It provides that if the coordinating or consulting practitioner is unable to determine if the person has a condition that satisfies clause 10(1)(a) eligibility, or if the person has decision-making capacity, the medical practitioner must refer a person to another person who has appropriate skills and training to determine the matter. Subclause 21(4) states that the practitioner *may* adopt the determination of the referee. The QLRC Report justified this approach as follows:

Also, if a coordinating practitioner or consulting practitioner is unable to determine a specific matter related to eligibility, they must refer the matter to another practitioner for determination. This balances the need for practitioners to meet specified eligibility requirements, including minimum qualification and experience requirements, and the need for access to the

²² *Lee v Oregon*, 891 F Supp 1429 (1995), 1435 as cited in SAR Committee Report, 31.

²³ SAR Committee Report, 31.

scheme, including in remote parts of Queensland far away from where most specialists in certain fields are based.²⁴

34. A potentially stronger safeguard would be to ensure that at least one practitioner that makes the decision on whether the person is eligible has expertise in assessing capacity and palliative care. The current 'option to refer' fails to consider situations where an inexperienced practitioner is unable to identify relevant concerns.

Options to allow further safeguards

35. Clause 82 of the Bill does not require that a medical practitioner acting in the role of coordinating practitioner or consulting have particular experience in the illness that is causing the person intolerable suffering, or in the underlying disability or condition that may influence an assessment of whether the person has decision-making capacity. The QLRC explained the rationale for this as follows, including why the approach in the Victorian legislation was not followed:

This is similar to the approach in Western Australia, which has comparable geographical challenges to Queensland. We consider that a requirement, as in Victoria, for either the coordinating practitioner or consulting practitioner to be a specialist with at least five years' experience, and for either one to be a specialist in the person's disease, illness or medical condition, would be a barrier to access, especially in rural, regional and remote areas.²⁵

36. The Bill also follows the approach of the QLRC in not requiring the coordinating and consulting practitioners be independent from one another:

It is not necessary to include an additional requirement that the coordinating practitioner and the consulting practitioner must be independent of each other, in the sense that they must not be family members, or that one must not be employed by, or under the supervision of, the other. The draft Bill makes it clear that the coordinating practitioner and the consulting practitioner must each independently assess whether the person is eligible, and independently form their own opinions. Medical practitioners are subject to professional obligations, including to recognise and resolve conflicts of interest, and breaches of those obligations may result in disciplinary action, including the suspension or cancellation of the practitioner's registration. The coordinating practitioner and the consulting practitioner must each report the outcome of, respectively, the first

²⁴ QLRC Report [13.115]. Clause 27(2) of the South Australian Voluntary Assisted Dying Bill 2021 also requires that either the coordinating medical practitioner or each consulting medical practitioner must have relevant expertise and experience in the disease, illness or medical condition expected to cause the death of the person being assessed.

²⁵ QLRC Report, [13.114]

assessment and the consulting assessment, to the Board. This approach is consistent with the Victorian and Western Australian Acts.

A requirement for the coordinating practitioner and the consulting practitioner not to be in a supervisory relationship with each other may cause accessibility issues, particularly in rural, regional and remote areas, where access to practitioners may be limited. Such a requirement may also raise some uncertainty about the meaning of 'supervision' in this context, as workplace structures often mean that practitioners are considered to be in supervisory relationships, for example within clinical departments in public hospitals.

The coordinating practitioner and the consulting practitioner must each meet the eligibility requirements to act in these roles, including the minimum qualification and experience requirements. They must also have completed the approved training.²⁶

37. Despite the challenges faced by regional and remote communities, the Statement of Compatibility does not discuss in detail options that would have allowed some or all of the above safeguards to be adopted. For example, by:

- Increased funding for health services in regional and remote areas to ensure relevant specialists are available; or
- Provide for specialist medical practitioners to assess a person using telehealth or other similar communication method, something that is discussed in other contexts in the Explanatory Note.²⁷

38. We suggest further justification is sought from the Minister as to why these options would not allow the Bill to adopt these safeguards.

Minimum training

39. If the Government can justify why these options are not possible, then the training undertaken by medical practitioners is critical. Under the Bill, coordinating practitioners and consulting practitioners must also meet any additional requirements approved for this purpose by the chief executive of the Department (the 'approved medical practitioner requirements'). The medical practitioner requirements must be made publicly available on the Department's website.

40. Given these issues, at a minimum, we suggest the Minister must confirm that all relevant practitioners will be required to undertake specialist training in

²⁶ QLRC Report [8.187] – [8.189]

²⁷ For example, the discussion on page 37 of the Explanatory Notes regarding the application of the Commonwealth Criminal Code to the Bill appears to assume that such carriage services will be used for functions performed under the Bill.

palliative care and assessing capacity. As clause 31 does not appear to include a direct sanction (eg it is not a penalty provision) the QHRC suggests consideration be given to requiring a practitioner to formally declare they meet the training requirements approved by the Chief Executive.

Witnesses

41. The requirement in clause 38 of the Bill, that the second request to access voluntary assisted dying is signed in the presence of two witnesses is identified as an important safeguard in the Explanatory Statement. However, the necessity and eligibility of witnesses, either as a safeguard, or as a potential limitation on rights (such as the right to consent to medical treatment under s 17 of the HRA) is not discussed in the Statement of Compatibility.
42. The QHRC submits that one potentially less restrictive option which the Minister should have discussed in the Statement, would be to require that at least one of the witnesses is completely independent in the sense of not being a family member, carer, or would have an ongoing relationship with the individual's family or affairs after death.

43. The Explanatory Notes justify not taking this approach as follows:

The QLRC report notes that although imposing eligibility criteria about witnesses may restrict the pool of eligible witnesses available to the person, some categories of people should not be eligible to witness the signing of the second request due to their relationship with the person making the request (paragraph 8.407). This will provide another important safeguard.

However, the QLRC report also notes that one or both witnesses may be family members of the person if they are not ineligible to witness the second request (paragraph 8.416). This balances the need for the scheme to include safeguards with the need for voluntary assisted dying to be accessible to people who are suffering and dying.²⁸

44. This draws upon paragraph 8.416 of the QLRC, which states:

The draft Bill does not include any additional limitations about a person's family members acting as witnesses to the second request. One or both witnesses may be family members of the person, provided that they are not ineligible to witness the second request for one of the reasons described previously. We consider that excluding, as a witness, anyone who is a beneficiary in the person's will or who would otherwise benefit

²⁸ Page 84.

from the person's death, is a sufficient safeguard. To include further limitations on family members acting as witnesses has the potential to create or exacerbate difficulties associated with satisfying the witnessing requirements.²⁹

45. Nonetheless, the QHRC suggests further justification is required to explain why the Bill should not require that at least one of the witnesses is completely independent from the person seeking voluntary assisted dying.

Decision-making capacity

46. Decision making capacity is also one of the most complicated issues addressed in legislation of this kind. As the QLRC observed:

Decision making capacity for voluntary assisted dying is a fundamental safeguard that protects individual autonomy and helps ensure that a person is acting voluntarily. It also protects people who might be vulnerable.³⁰

47. Clause 10(1)(b) of the Bill requires that a person is only eligible for access to voluntary assisted dying if the person has decision-making capacity in relation to voluntary assisted dying. Clauses 46, 53 and 55 further require practitioners to be satisfied that a person has decision-making capacity throughout the process.
48. The QHRC supports the findings of the QLRC report, and the earlier submissions of the Public Advocate to that review, that the Bill define capacity in the same terms as in the *Guardianship and Administration Act 2000* (Qld).³¹
49. As observed by the Public Advocate in her submission to the QLRC, the 2019 amendments to the *Guardianship and Administration Act 2000* were informed by the *Convention on the Rights of Persons with Disabilities* (CRPD). This includes that there is a presumption of capacity and that people with impaired capacity have the same fundamental rights and freedoms as people without disability. Human rights law requires that capacity is assessed as decision-specific and time-specific.³² The Public Advocates concluded that these rights, and those in the HRA, will need to be balanced with other rights and interests.

²⁹ QLRC Report, [8.416].

³⁰ QLRC Report, [7.285]

³¹ Public Advocate, Submission to Law Reform Commission, *A Legal framework for voluntary assisted dying* (26 November 2020) <
https://www.justice.qld.gov.au/__data/assets/pdf_file/0006/669885/20201126-opa-vad-submission-final.pdf> 3.

³² As reflected in Queensland Capacity Assessment Guidelines, principle 2.

50. The QHRC welcomes the confirmation in clause 11 that a person is presumed to have decision making capacity, and should not be presumed not to have capacity because of a personal characteristic or disability. Further, the clause provides that a person may be capable of having decision making capacity with adequate and appropriate supports.³³ However, the QHRC suggests that this safeguard would be further strengthened if those assessing capacity were obliged to seek out or provide such supports whenever necessary and appropriate³⁴.
51. This also adds weight to the safeguard discussed above, whereby one of the relevant medical practitioners has expertise in accessing capacity. Such expert assessment would ensure equality of access to voluntary assisted dying for people with disability, and also protect those individuals who might not have capacity to consent.
52. Further, the QLRC provided detailed discussion on the relevant rights and risk factors that would arise from providing a person to provide advanced consent to voluntary assisted dying and/or to allow a person to continue in the process who loses capacity after their first request. In contrast, the Statement of Compatibility only briefly discusses the limitation on the right to equality that arises from a person who does not have the requisite decision-making capacity being prevented from participating in the scheme.
53. The Explanatory Notes also discuss that clause 173 of the Bill makes amendments to the *Guardianship and Administration Act 2000* to provide that the Voluntary Assisted Dying Act is not a matter to which that Act applies. The Notes suggest the purpose of this amendment is to ensure that an adult is excluded from making decisions about voluntary assisted dying in an advance health directive.³⁵
54. While not discussed in detail, this reflects the recommendation of the QLRC that a person who loses decision-making capacity should not continue to participate in the scheme.

The focus of any voluntary assisted dying scheme in Queensland will be on people who have decision-making capacity and who can make an autonomous and voluntary decision to access the scheme. Some of the key safeguards embedded in the draft Bill are that a person must have

³³ Clause 13 provides further protection, in confirming a person with a disability or mental illness may be eligible for VAD, but that eligibility cannot be based solely on the fact the person has a disability or mental illness.

³⁴ Article 12(3) of the UN Convention on the Rights of Persons with Disabilities provides that 'States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity'.

³⁵ Page 139 of the Explanatory Notes.

decision-making capacity at different stages of the process and must be acting voluntarily and without coercion. The scheme also makes it clear that a person who has applied or been approved for access to voluntary assisted dying can change their mind at any time....

... There is a strong argument that permitting a person to make an advance decision about voluntary assisted dying, and to have a voluntary assisted dying substance administered at a time when they no longer have capacity, would be inconsistent with these safeguards³⁶

55. However, the QLRC discussed the complexity of this issue and suggested that it should be revisited:³⁷

We are sympathetic to the views of respondents who advocated for decisions about voluntary assisted dying to be made in advance and those who identified concerns about people with dementia... We acknowledge that autonomy might reasonably be said to be protected if a person is permitted to make an advance decision where they clearly set out the choices they want to have respected and implemented in the future.³⁸

56. The QHRC appreciates that many who elect to commence a voluntary dying process may choose not to proceed to self-administration. There will be a sense of agency and control that comes from simply commencing the process. That change of mind may happen at any point in the process. The QLRC noted in their report that since the commencement of the Victorian Act, 32 per cent of permit holders died without administering the voluntary assisted dying substance (either before the substance was dispensed or the substance was not taken and subsequently disposed of). The QLRC noted that there may be a number of reasons why those people did not take the substance after it was dispensed. The Report discusses an example from a contact person of a person who obtained the voluntary assisted dying substance, but ultimately did not self-administer because she always planned to have the medication as a plan B should her disease progress past bearable, however she died peacefully and calmly from natural causes in hospital.³⁹
57. For those with fluctuating capacity, there is a risk that a person may be assumed to wish to proceed after losing capacity, when there is the real potential they may have changed their minds.

³⁶ QLRC Report [7.308] – [7.309]

³⁷ QLRC Report [7.315], [7.318].

³⁸ QLRC Report [7.307] – [7.310].

³⁹ QLRC Report [10.136].

58. The QHRC submits that the rights to equality and to be free from discrimination are limited (not just engaged) by the Bill, as it excludes a person who has impaired decision-making capacity at any point in the VAD process from being eligible to participate. This is either because of indirect discrimination (as the Statement concedes) or direct discrimination. As the QLRC discussed the complexities of this issue, it is unfortunate that the Statement of Compatibility does not discuss this issue further. Nonetheless, we agree that this issue should be closely examined and re-visited when the legislation is reviewed.

Conclusion

59. The Bill seeks to balance several competing rights and interests in a complex area of public policy. This submission has sought to identify the most relevant human rights issues that may benefit for further consideration, while acknowledging the extensive work that has preceded the Bill.