Terminally Ill Adults (End of Life) Second Reading Briefing: the Panel

Introduction

This briefing is prepared by Professor Gareth Owen, Professor Alex Ruck Keene KC (Hon), and Professor Katherine Sleeman, all members of the Complex Life and Death Decisions Group (CLADD). CLADD is a King's College London based group with expertise in psychiatry, palliative care, bioethics, public policy and law. We are neutral as to whether assisted dying / assisted suicide should be made law. We are committed to the principle that it is for Parliament to decide. We are equally committed, however, to the principle that any law that is passed must function as a workable framework which protects the interests of patients, professionals and wider society.

In our broader briefing, we set out why the Terminally Ill Adults (End of Life) Bill ('the TIA Bill') as it stands is not good law. We have prepared a version of the Bill which remedies the key problems that we identify in that briefing. This briefing looks in more detail at the Panel, and explains the amendments we recommend.

The policy intent behind the Panel

The idea of a final body designed to provide confirmation that the person meets the relevant criteria is one that is central to the policy of the Bill. The only analogue that exists for the Panel that is proposed at present is that established in Spain where every autonomous region or city must establish a 'Guarantee and Evaluation Committee.'

It is for Parliament to decide whether such a body is required, and this briefing proceeds on the basis that the policy intent remains to have such a body.

It is important to note, however, that the policy intent behind the Panel has evolved during the passage of the Bill so far. Initially, the intent was that the application had to be heard before the High Court (in a bespoke procedure), reflecting, no doubt, the gravity of the issues at stake. The courts are no longer involved because (1) the Panel is an administrative body not coming under HM Courts and Tribunal Service; and (2) any Panel member who also holds judicial office is not discharging those judicial functions when sitting on the Panel.

In moving the amendments which replaced the High Court with the Panel, Kim Leadbeater MP explained that this was to bring about multidisciplinary consideration, and specifically referenced how this was a response to the "evidence about the benefits of a multidisciplinary approach to choice at the end of life." (Public Bill Committee, 11 March 2025, 976). That evidence was, however, addressed to multidisciplinary consideration at the stage of assessment, not at the stage of confirmation, which would bring into play very different factors to those relevant to the functions of an oversight Panel.

The problems with the Panel

In part, perhaps, because of the evolution of the policy over time, the provisions relating to the Panel mean that:

- It is not an appropriate mechanism for multidisciplinary consideration of the person's circumstances of the kind recommended by those who gave evidence to the Public Bill Committee.
- It is unnecessarily complicated for cases where eligibility is clearly met;
- It does not have the powers or the expertise to address more complex cases;

- It is not subject to an appropriate route of challenge to address the fact that a decision to approve an application, as well to refuse an application, may be wrong.

The first of these matters is addressed in a separate briefing on multidisciplinary consideration, which also explains the amendments proposed to secure such consideration.

Our recommended amendments propose the following changes to the confirmation process.

Streamlined procedure where coordinating and independent professional agree

We propose a new clause (15A) which applies where the coordinating and independent professionals agree that the person meets the criteria. In such a case, there would be three options: (1) the Commissioner could consider the case personally; (2) the Commissioner could refer the case to a person qualified to sit on the Panel; or (3) the Commissioner could refer to a Panel. In either of the first two cases, the Commissioner / single member would still have to hear evidence from the relevant professionals and the person, but it would be a modified process, reflecting the fact that two appropriately qualified professionals have considered the person's situation (with, we also propose, greater consultation with others), and agree that they meet the eligibility criteria. Our amendments would also require consideration to move from the streamlined to the full process if it becomes clear that the matter is more complex.

Such an approach would provide important 'pre-mortem,' rather than 'post-mortem' oversight, maximising the chances of securing compliance with the procedural requirements of Article 2 ECHR set down by the European Court of Human Rights in *Mortier v Belgium* [2022] ECHR 764.

Procedure and powers where coordinating and independent professional disagree

In a case where the coordinating and independent professional disagree, we propose amendments to clause 17 and Schedule 2 to ensure that the Panel:

1. Is clear as to its task – namely to satisfy itself of the relevant matters, the current drafting leaving it unclear whether it is reviewing evidence[1] to see if it is within a reasonable range or considering (for instance) the person's capacity for itself.
2. Has the powers to interrogate the evidence properly, including by expanding the range of those who can sit on the Panel to include other professionals in relevant cases (for instance, in an appropriate case, having a palliative care consultant or an oncologist as one of the Panel members), and by appointing a person to test the evidence put before it;
3. Has the power to call for evidence itself from an NHS body or local authority where necessary (in similar fashion to the power that the Court of Protection has under s.49 Mental Capacity Act 2005).

Reasons for decisions made on eligibility

The policy intent behind the Bill is that failures by health and social care bodies to meet the needs of a person cannot serve as a bar to eligibility if the formal criteria are met. However, not least so as to enable the review provided for under clause 50 to serve its purpose of assessing how palliative care needs are being met (and, we suggest also, social care needs), data must be gathered about such situations. We therefore propose an amendment to clause 18 to cater for the situation where it appears that the formal criteria are met, but it appears that the person is requesting assistance because of service provision failures. The Panel would be required then to notify the Commissioner and any person

[1] We also propose an amendment to make clear that in all cases the Panel is hearing evidence, rather than simply "hearing from" the relevant persons. This change reflects the seriousness of the task that is being undertaken.

specified in regulations (which could, for instance, be the Department of Health and Social Care, the Care Quality Commission, or Health Inspectorate Wales).

Reconsideration

At present, the Bill has an unusual – indeed, as far as we are aware unprecedented – 'one way' route of challenge: it is only possible for a limited class of people to challenge a decision to refuse a certificate of eligibility. It is, unfortunately, not possible to rule out that errors may be made by the Panel in granting a certificate (either errors of procedure, or of substance). We therefore propose amendments to clause 18 which create the analogue to a conventional route of appeal – including a permission stage – which would apply if the decision of the Panel was the decision of a court. A new clause 15A would provide for reconsideration where the decision on eligibility has been taken by the Commissioner personally or by a single qualified Panel member. The proposed amendments set out who may make an application for reconsideration, which is not limited to the person themselves; a permission filter would enable any 'vexatious' applications to be disposed of speedily.

Fees and costs

The Bill at present is silent as to whether and under what circumstances a fee is payable in respect of applications for certificates of eligibility. We recommend a new clause 18A setting out provisions allowing for a fee, together with appropriate remissions. We also recommend a regulation-making power is introduced allowing for legal aid in relation to steps related to seeking a certificate of approval. If the policy intent is to ensure that the framework set up by the Bill is accessible to all, we suggest that there will be circumstances in which such access can only be secured with legal assistance.

Technical changes

We also propose a number of technical changes in relation to the Panel, including:

1. Making provision for the law of contempt to apply in relation to the protection of sensitive information about a person applying for assistance following a public hearing before the Panel.
2. Removing the ability of Honorary King's Counsel to sit as Panel Members, given that many such individuals will have no court room experience.
3. Providing for sufficiently senior solicitors to sit as legal members. Solicitors have historically formed a statistically smaller proportion than barristers at the rank of King's Counsel and appointed High Court judges. As drafted, the Bill therefore inadvertently narrows the pool of those with appropriate legal expertise and experience.

Conclusion

For more detail about any of the matters set out above, please contact alexander.ruck_keene@kcl.ac.uk.

More information about CLADD can be found here.

Alex Ruck Keene maintains a resources page on the TIA Bill here.