



New South Wales

Voluntary Assisted Dying Bill 2021

Explanatory note

This explanatory note relates to this Bill as introduced into Parliament.

This Bill is co-sponsored by Ms J K Aitchison, MP, Ms Abigail Boyd MLC, Mr T C Crakanthorp MP, the Hon Anthony D'Adam MLC, Mrs H J Dalton MP, Ms T L Doyle MP, Mr L J Evans MP, Ms Cate Faehrmann MLC, Mr J R Field MLC, the Hon John Graham MLC, Mr A H Greenwich MP, Ms J E Harrison MP, Ms J E Haylen MP, Ms S K Hornery MP, the Hon Emma Hurst MLC, The Hon T J Khan MLC, Ms Jenny Leong MP, Mr D R Mehan MP, Mr J T Parker MP, the Hon Mark Pearson MLC, Mr G M Piper MP, the Hon Adam Searle MLC, Mr David Shoebridge MLC, Ms T F Smith MP, Ms L D Tesch AM MP, Ms K R Washington MP, The Hon L G Williams MP, and Ms F L Wilson MP.

Overview of Bill

The objects of this Bill are to—

- (a) enable eligible persons with a terminal illness to access voluntary assisted dying, and
- (b) establish a procedure for, and regulate access to, voluntary assisted dying, and
- (c) establish the Voluntary Assisted Dying Board and provide for the appointment of members and functions of the Board.

Outline of provisions

Part 1 Preliminary

Division 1 sets out the name, also called the short title, of the proposed Act and provides for the commencement of the proposed Act. The Division provides for the proposed Act to bind the

Crown in right of New South Wales and, in so far as the legislative power of the Parliament of New South Wales permits, the Crown in all its other capacities.

Division 2 sets out the principles to be applied in exercising a power or performing a function under the proposed Act.

Division 3 provides for the Dictionary in the proposed Act, Schedule 1 to define certain words and expressions used in the proposed Act. The Division sets out requirements that must be met for a patient to have decision-making capacity in relation to voluntary assisted dying for the purposes of the proposed Act. The Division specifies that a patient is presumed to have the capacity to understand information or advice about voluntary assisted dying if it reasonably appears the patient is able to understand an explanation of the consequences of making the decision. A patient is presumed to have decision-making capacity in relation to voluntary assisted dying unless the patient is shown not to have the capacity.

The Division enables the Secretary of the Ministry of Health (the *Health Secretary*) to approve a voluntary assisted dying substance and sets out when a request and assessment process for voluntary assisted dying in relation to a patient has been completed.

Division 4 provides that a registered health practitioner who has a conscientious objection to voluntary assisted dying has a right to refuse to participate in voluntary assisted dying. The Division provides that a health care worker who provides health services or professional care services to a person must not, while providing services to the person, initiate a discussion with the person about voluntary assisted dying or suggest voluntary assisted dying to the person unless certain circumstances are satisfied.

The Division clarifies that a contravention of the proposed Act by a registered health practitioner may constitute unsatisfactory professional conduct or professional misconduct for the purposes of the *Health Practitioner Regulation National Law (NSW)*, whether or not the contravention constitutes an offence under the proposed Act.

The Division specifies that a person who dies as a result of the administration of a prescribed substance in accordance with the proposed Act does not die by suicide. The Division also provides that certain actions taken in relation to voluntary assisted dying do not constitute an attempt by the person to cause serious physical harm to themselves for the purposes of the *Mental Health Act 2007*, section 22, or otherwise provide a ground for a police officer to take action under that section.

The proposed Act does not affect the inherent jurisdiction of the Supreme Court. If there is an inconsistency between a provision of the proposed Act and a provision of the *Poisons and Therapeutic Goods Act 1966* or the *Drug Misuse and Trafficking Act 1985*, the provision of the proposed Act prevails to the extent of the conflict or inconsistency.

Part 2 Requirements for access to voluntary assisted dying

Part 2 sets out the requirements that must be met for a person to be eligible for access to voluntary assisted dying.

Part 3 Requesting access to voluntary assisted dying and assessment of eligibility

Division 1 sets out the requirements that must be met for a medical practitioner to act as a coordinating practitioner or consulting practitioner in relation to a person's request for access to voluntary assisted dying.

Division 2 provides for a person to make a first request to a medical practitioner for access to voluntary assisted dying and for the practitioner's response to the request. A person who makes a first request may decide at any time not to continue with the request and assessment process. The Division imposes certain record-keeping requirements on the medical practitioner, including a requirement to notify the Voluntary Assisted Dying Board (the *Board*) of the patient's first request and the practitioner's response. If the medical practitioner accepts the first request, the practitioner becomes the coordinating practitioner for the patient.

Division 3 sets out requirements that must be met by a coordinating practitioner when assessing a patient's eligibility for access to voluntary assisted dying, including requirements to—

- (a) refer a patient to—
 - (i) if the coordinating practitioner is unable to decide whether the patient has a disease, illness or medical condition that satisfies certain criteria for eligibility for access to voluntary assisted dying—a medical practitioner with appropriate skills and training, or
 - (ii) if the coordinating practitioner is unable to decide whether the patient has decision-making capacity in relation to voluntary assisted dying—a psychiatrist or another registered health practitioner with appropriate skills and training, or
 - (iii) if the coordinating practitioner is unable to decide whether the patient is acting voluntarily, or whether the patient is acting because of pressure or duress—a psychiatrist or another registered health practitioner or person with appropriate skills and training, and
- (b) inform a patient who meets all of the eligibility criteria about certain matters, and
- (c) assess a patient as—
 - (i) eligible for access to voluntary assisted dying if the coordinating practitioner is satisfied the patient meets all of the eligibility criteria and understands the matters about which the patient was informed, or
 - (ii) ineligible for access to voluntary assisted dying if the practitioner is not satisfied of these matters, and
- (d) inform the patient of the outcome of the first assessment as soon as practicable after its completion, and
- (e) give the patient and the Board a copy of an approved form completed by the coordinating practitioner, including information about the outcome of the first assessment, and
- (f) refer a patient to another medical practitioner for a consulting assessment if the patient is assessed as eligible for access to voluntary assisted dying.

Division 4 sets out requirements that must be met by a medical practitioner who receives a referral for a consulting assessment, including the circumstances in which the practitioner may or must refuse the referral. The medical practitioner must record certain information in the patient's medical record, including the practitioner's decision to accept or refuse the referral. The medical practitioner is required to give the Board an approved form, including information about the practitioner's decision to accept or refuse the referral. If the medical practitioner accepts the referral, the practitioner becomes the consulting practitioner. The consulting practitioner must—

- (a) assess whether the patient is eligible for access to voluntary assisted dying and, independently of the coordinating practitioner, form the practitioner's own opinion about the patient's eligibility, and
- (b) refer a patient to—
 - (i) if the consulting practitioner is unable to decide whether the patient has a disease, illness or medical condition that satisfies certain criteria for eligibility for access to voluntary assisted dying—a medical practitioner with appropriate skills and training, or
 - (ii) if the consulting practitioner is unable to decide whether the patient has decision-making capacity in relation to voluntary assisted dying—a psychiatrist or another registered health practitioner, or
 - (iii) if the consulting practitioner is unable to decide whether the patient is acting voluntarily, or whether the patient is acting because of pressure or duress—a person with appropriate skills and training, and
- (c) inform a patient who meets all of the eligibility criteria about certain matters, and
- (d) assess a patient as—

- (i) eligible for access to voluntary assisted dying if the consulting practitioner is satisfied the patient meets all of the eligibility criteria and understands the matters about which the patient was informed, or
- (ii) ineligible for access to voluntary assisted dying if the practitioner is not satisfied of these matters, and
- (e) inform the patient and the patient's coordinating practitioner of the outcome of the consulting assessment as soon as practicable after its completion, and
- (f) give the patient, the Board and the patient's coordinating practitioner a copy of an approved form completed by the consulting practitioner, including information about the outcome of the consulting assessment.

The coordinating practitioner may refer the patient to another medical practitioner if the consulting practitioner assesses the patient as ineligible for access to voluntary assisted dying.

Division 5 provides for a patient assessed as eligible for access to voluntary assisted dying by the patient's coordinating practitioner and consulting practitioner to make a written declaration requesting access. The Division specifies requirements that must be met in relation to the written declaration, including a requirement for the patient's coordinating practitioner to give a copy of the declaration to the Board.

Division 6 provides for a patient who has made a written declaration to make a final request to a coordinating practitioner for access to voluntary assisted dying. The coordinating practitioner for the patient must conduct a final review and complete an approved form before giving a copy of the form to the Board. In addition to other matters, the coordinating practitioner must include a statement in the form certifying whether or not the coordinating practitioner is satisfied that the patient has decision-making capacity, is acting voluntarily, is not acting because of pressure or duress and has made an enduring request to access voluntary assisted dying. A patient may decide not to take any further steps in relation to access to voluntary assisted dying despite the completion of the request and assessment process.

Part 4 Accessing voluntary assisted dying and death

Division 1 sets out the requirements that must be met for a person to be eligible to act as an administering practitioner for a patient.

Division 2 provides for the administration of a voluntary assisted dying substance to a patient if the request and assessment process has been completed and the patient's coordinating practitioner has certified certain requirements have been satisfied. A patient may, in consultation with, and on the advice of, the patient's coordinating practitioner, decide to self-administer a voluntary assisted dying substance or decide a substance is to be administered by a practitioner (an **administering practitioner**). The Division specifies requirements that must be met in relation to the decision about the administration of a voluntary assisted dying substance, including a requirement for the patient's coordinating practitioner to record the administration decision in the patient's medical record and complete and give a copy of the approved form for the administration decision to the Board.

The patient may, at any time, revoke the patient's decision to self-administer, or proceed with the administration of, a voluntary assisted dying substance. The Division specifies requirements that must be met in relation to the revocation, including a requirement for the coordinating practitioner or administering practitioner informed of the patient's decision to record the revocation in the patient's medical record and complete and give a copy of the approved form to the Board.

If a patient has decided to self-administer a voluntary assisted dying substance and has not revoked the decision, the patient is authorised to receive, possess, prepare and self-administer a dose of a voluntary assisted dying substance that is sufficient to cause death. An agent of the patient is authorised to receive, possess, prepare and supply the substance to the patient. If a patient has decided to proceed with the administration of a voluntary assisted dying substance and has not revoked the decision, the administering practitioner is authorised to receive, possess, prepare and, in the presence of a witness, administer the voluntary assisted dying substance if satisfied of certain matters at the time of administration. In both cases, the coordinating practitioner for the

patient is authorised to prescribe a sufficient dose of a voluntary assisted dying substance (a *prescribed substance*) and an authorised supplier is authorised to possess, prepare and supply the prescribed substance.

The patient's coordinating practitioner and administering practitioner, if relevant, must comply with certain reporting requirements. The Division specifies persons eligible to witness the administration of a prescribed substance.

The Division also provides for an administering practitioner to transfer the role of administering practitioner to another person eligible to act as an administering practitioner in certain circumstances. The Division specifies requirements that must be met if a person accepts the transfer of the role, including to inform the patient of the transfer, to record the transfer in the patient's medical record and to complete and give a copy of the approved form to the Board.

Division 3 requires a patient who has decided to self-administer a voluntary assisted dying substance to appoint a contact person. The patient, or another person acting on behalf of the patient, must include certain information about the contact person in the approved form. A copy of the form is to be given to the patient's coordinating practitioner and the Board. The patient's coordinating practitioner must not prescribe a voluntary assisted dying substance for the patient before the form is given to the practitioner.

The contact person is authorised to receive, possess, prepare and supply a prescribed substance to the patient for self-administration and give the substance, or any remaining substance, to a person authorised to dispose of the substance. The contact person must inform the patient's coordinating practitioner if the patient dies, regardless of whether or not the patient's death is the result of self-administering the prescribed substance. The contact person may refuse to continue the role at any time, at which point the patient must appoint another contact person.

Division 4 sets out requirements that must be met by a patient's coordinating practitioner in relation to an application to the Board for a prescribed substance authorisation for the patient. The Board must consider the application as soon as practicable after the application is received and decide to approve or, if the Board has not received certain documents or suspects the requirements of the proposed Act have not been met, refuse the application.

If the application is approved, the Board must, as soon as practicable after making the decision to approve the application, grant a voluntary assisted dying substance authority in relation to the patient. A voluntary assisted dying substance authority must be in the approved form and include certain information. If the application is refused, the Board must notify the patient's coordinating practitioner and specify the reasons for refusing the application.

Division 5 sets out requirements in relation to the prescription, supply, storage and disposal of voluntary assisted dying substances, including requirements to inform a patient or other person of certain matters.

Division 6 enables the Health Secretary to authorise a registered health practitioner, or persons in a class of registered health practitioners, to supply or dispose of prescribed substances. The Health Secretary may revoke an authorisation and must keep a register of practitioners authorised to supply or dispose of prescribed substances.

A coordinating practitioner must not direct a health professional to supply a prescribed substance to the practitioner's patient unless certain circumstances are met. A coordinating practitioner or administering practitioner must not direct a health professional to administer a prescribed substance to the patient.

The Division prohibits the issue of certain documents in relation to the administration or supply of medicine for the purpose of voluntary assisted dying.

The Division requires a patient's coordinating practitioner or administering practitioner to notify the Board, in the approved form, of the patient's death after becoming aware the patient has died, whether or not after self-administering or being administered a voluntary assisted dying substance in accordance with the proposed Act. A medical practitioner required to give a cause of death certificate for a person must also notify the Board if the practitioner knows or reasonably believes the person was a patient who self-administered, or was administered, a voluntary assisted dying substance in accordance with the proposed Act.

Part 5 Participation

Part 5 provides that residential facilities, private health facilities and public hospitals may decide they will not provide services relating to voluntary assisted dying at the facility or establishment. The decision not to provide services relating to voluntary assisted dying is subject to obligations imposed by the proposed Part on the following entities in relation to persons receiving care—

- (a) entities providing certain services at residential facilities,
- (b) entities that own or occupy residential facilities,
- (c) entities that own or operate private health facilities or public hospitals.

The nature of the obligations differ according to whether or not the entity provides certain services at a residential facility, owns or occupies a residential facility or owns or operates a private health facility or public hospital. The obligations relate to access to the following—

- (a) information about voluntary assisted dying,
- (b) the request and assessment process for voluntary assisted dying,
- (c) the administration of a voluntary assisted dying substance,
- (d) information about the fact that the entity does not provide services relating to voluntary assisted dying at the residential facility, private health facility or public hospital.

Part 6 Review by Supreme Court

Part 6 enables a person to apply to the Supreme Court for administrative review of certain decisions. The Part provides for the consequences of an application for administrative review of decisions relating to the request and assessment process in relation to a patient. An application for administrative review made in relation to a patient is taken to be withdrawn if the patient dies.

The Part specifies the decisions the Court may make and the effect of certain decisions, including in relation to a patient's access to voluntary assisted dying.

The Court must conduct hearings in private. The Principal Registrar and the Board are required to give notice of certain matters in relation to an application for administrative review. A patient's coordinating practitioner or consulting practitioner must give certain information and documents to the Principal Registrar in response to a notice received from the Principal Registrar. The Part inserts requirements in relation to the giving of reasons for a decision and the disclosure of personal information and clarifies that the Court may make an interim order it considers just.

Part 7 Offences

Part 7 creates offences in relation to the unauthorised administration of a prescribed substance and inducing another person to self-administer a prescribed substance, or request or access voluntary assisted dying. The Part also makes it an offence to give false or misleading information or advertise certain poisons as voluntary assisted dying substances. The Part sets out obligations and offences in relation to the cancellation of a document presented as a prescription for a voluntary assisted dying substance and the return of unused or remaining prescribed substances to an authorised disposer.

The Part also creates offences in relation to the recording, use, disclosure and publication of certain information.

Part 8 Enforcement

Part 8 provides for the enforcement of offences under the proposed Act, including requirements in relation to the commencement of proceedings.

Part 9 Protection from liability

Part 9 excludes persons from liability in the following circumstances—

- (a) exclusion from criminal liability—if the person, in good faith, assists another person to request access to, or access, voluntary assisted dying or is present when another person self-administers, or is administered, a prescribed substance,
- (b) exclusion from civil or criminal liability, or liability under certain administrative processes—if the person, in good faith and with reasonable care and skill, does a thing, or does not do a thing, in accordance with the proposed Act or believing on reasonable grounds the thing is done, or not done, in accordance with the proposed Act,
- (c) exclusion from punishment under law or sanction by a regulatory body—if a medical practitioner refers a person, seeks information, examines a person referred or gives information in response to a request,
- (d) exclusion from civil or criminal liability, or liability under certain administrative processes—for certain persons who, in good faith, do not administer lifesaving treatment in circumstances in which the other person has not requested the administration of lifesaving treatment, or the first person believes on reasonable grounds the other person is dying after self-administering or being administered a prescribed substance in accordance with the proposed Act.

Part 10 Voluntary Assisted Dying Board

Division 1 establishes the Voluntary Assisted Dying Board as an agent of the Crown with the status, immunities and privileges of the Crown.

Division 2 sets out the functions and powers of the Board. The Board may delegate a function of the Board to certain persons.

Division 3 requires the Health Secretary to ensure the Board is provided with staff, services and facilities and other resources and support that are reasonably necessary to enable the Board to perform its functions. The Board may, with the Minister's approval, appoint a person with special knowledge or skills to assist the Board in a particular matter.

Division 4 enables the Minister to give directions to the Board about the performance of the Board's functions and to have access to certain information.

Division 5 provides for the membership of the Board, including the term of office and remuneration of members of the Board.

Division 6 contains provisions relating to the requirements and procedures for Board meetings.

Division 7 requires Board members to disclose material personal interests and provides for the consequences of a disclosure. The Division also provides for the powers and responsibilities of the Minister in relation to disclosures.

Division 8 provides for the Board to establish committees to assist the Board in the performance of its functions.

Division 9 provides for the obligations and powers of the Board in relation to certain information in connection with the functions of the Board, including a requirement to record and keep statistical information about matters relating to voluntary assisted dying.

Division 10 contains provisions relating to the receipt of forms, execution of documents and the preparation of annual reports by the Board.

Part 11 Access standard

Part 11 requires the Health Secretary to issue a standard setting out how the Ministry intends to facilitate access to voluntary assisted dying.

Part 12 General

Part 12 contains various provisions relating to the general operation of the proposed Act, including provisions relating to the following—

- (a) the transfer of the role of coordinating practitioner,

- (b) the use of audiovisual communication and electronic signatures,
- (c) the publication of information about voluntary assisted dying,
- (d) the approval of an entity to provide support, assistance and information in relation to voluntary assisted dying to certain persons,
- (e) the Health Secretary's approval of training about matters relating to the operation of the proposed Act, including training for health practitioners in relation to practitioners' functions under the proposed Act, the assessment of a patient's eligibility for access to voluntary assisted dying and risk factors for pressure or duress,
- (f) the approval of forms,
- (g) requirements for interpreters,
- (h) the relationship of the proposed Act with other Acts,
- (i) the review of the operation and effectiveness of the proposed Act,
- (j) the power to make regulations.

Schedule 1A Consequential amendment of other Acts

Schedule 1A.1 amends the *Births, Deaths and Marriages Registration Act 1995* to require the Registrar, if the Registrar receives a cause of death certificate specifying that the medical practitioner knew or reasonably believed the deceased person self-administered, or was administered, a voluntary assisted dying substance in accordance with the proposed Act, to register the death in the Births, Deaths and Marriages Register and record certain information. The information recorded in the entry in the Register is not to be included in a certificate issued by the Registrar under the *Births, Deaths and Marriages Registration Act 1995*, section 49.

Schedule 1A.2 amends the *Criminal Procedure Act 1986* to insert certain offences under the proposed Act in the Act, Schedule 1. An offence under proposed section 124 of the proposed Act is an indictable offence to be dealt with summarily unless the prosecutor or person charged elects otherwise. An offence under proposed section 127 of the proposed Act is an indictable offence to be dealt with summarily unless the prosecutor elects otherwise.

Schedule 1A.3 amends the *Ombudsman Act 1974* to provide that, despite the exclusion of conduct of certain public authorities comprised of members appointed by the Governor or a Minister, the conduct of the Board may be the subject of a complaint to the Ombudsman.

Schedule 1 Dictionary

Schedule 1 defines certain words and expressions used in the proposed Act.