

**Submission
No 74**

**INQUIRY INTO PROVISIONS OF THE VOLUNTARY
ASSISTED DYING BILL 2021**

Organisation: Australian Medical Association (NSW) Ltd

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The Standing Committee on Law and Justice
Upper House Committees
Parliament of New South Wales

By email: law@parliament.nsw.gov.au

Dear Committee Members,

Inquiry into the Voluntary Assisted Dying Bill 2021 (NSW)

The Australian Medical Association (NSW) (**AMA (NSW)**) welcomes the opportunity to make this submission to the Upper House Inquiry into the *Voluntary Assisted Dying Bill 2021 (NSW)* (**the NSW Bill**).

1. Introductory remarks

- 1.1. AMA (NSW) is an independent association representing the State's medical profession. As the State's medico-political lobbying body, AMA (NSW) provides representation for the medical profession on medical matters, medico-political matters, and workplace relations matters.
- 1.2. AMA (NSW) recognises that the issue of access to voluntary assisted dying in New South Wales is one for society and government. AMA (NSW) acknowledges that many jurisdictions in Australia and around the world have enacted legislation for voluntary assisted dying. AMA (NSW)'s role is to ensure the medical profession is appropriately represented in the development of any legislation to ensure that, should NSW legislate on voluntary assisted dying, it is the most appropriate legislation.
- 1.3. AMA (NSW) has undertaken a review of the provisions of the NSW Bill and the legislation in other jurisdictions.
- 1.4. The following aspects of the NSW Bill have been identified by AMA (NSW) as requiring closer consideration.

2. Conscientious Objection and the provision of information to patients

- 2.1. AMA (NSW) understands that amendments are to be made to the NSW Bill to remove the requirement that a medical practitioner who does not wish to participate in voluntary assisted dying is required to provide certain information to the patient. AMA (NSW) supports the removal of this requirement.
- 2.2. Medical practitioners are required to comply with professional obligations that include not allowing their moral or religious views to deny patients access to medical care, but at the same time there is recognition that a medical practitioner is free to decline to personally

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provide or directly participate in that care.¹ It is AMA (NSW)'s position that these professional obligations provide patients with a right to access care, and the necessary obligation on medical practitioners not to impede patient access.

3. Time period between the first and final request

- 3.1. Clause 49 of the NSW Bill provides that a patient's final request to the patient's coordinating practitioner may not be made until 5 days after the first request was made.
- 3.2. There is provision in the Bill for this period of time to be shortened if, in the opinion of the coordinating practitioner and the consulting practitioner the patient is likely to die or lose decision-making capacity in relation to voluntary assisted dying before the end of the designated period (clause 49(2)).
- 3.3. Under section 38 of the *Voluntary Assisted Dying Act 2017* (Vic) (***the Victorian Act***) and section 48 of the *Voluntary Assisted Dying Act 2019* (***the WA Act***), there must be a period of 9 days between the first and final request, and again there is provision to shorten that period if the person's death is likely to occur before that time.
- 3.4. AMA (NSW) submits that the approach taken in Victoria and Western Australia is the preferred approach. The approach taken in those jurisdictions reflects a considered approach. The opinion of palliative care practitioners is that 9 days makes an accommodation for those palliative care patients who may suffer delirium that subsides after a few days.
- 3.5. In circumstances where there is the provision that allows for the time period to be shortened if determined to be necessary, there appears to be no persuasive reason for the 5 day time period.

4. Assessment of capacity

- 4.1. Under clause 27(1) of the NSW Bill, if the coordinating practitioner is unable to determine if the person has decision-making capacity or is acting voluntarily and without pressure or duress he or she must refer to a *psychiatrist or another registered health practitioner* who has appropriate skills and training to make a decision.
- 4.2. Under the WA Act and the Victorian Act the relevant provisions (section 26 and 18 respectively), require referral to a registered practitioner with appropriate skills and training to make the assessment.
- 4.3. AMA (NSW) encourages consultations with the Royal Australian and New Zealand College of Psychiatrists regarding the appropriateness or otherwise of specifically referencing referral to psychiatrists.

¹ Medical Board of Australia *Good medical practice: a code of conduct for doctors in Australia* - clause 3.4

5. Eligibility requirements for practitioners

- 5.1. AMA (NSW) has made representations regarding the minimum eligibility requirements for coordinating, consulting, and administering practitioners and understands that amendments are to be made that address the concerns raised.

6. Administration of voluntary assisted dying substance

- 6.1. Clause 57(1) of the NSW Bill provides that a person may, in consultation with and on the advice of the coordinating practitioner, decide to self-administer a voluntary assisted dying substance or decide a voluntary assisted dying substance is to be administered to the patient by the administering practitioner for the patient.
- 6.2. This provision is in the same terms as the provision in the WA Act save that the WA Act goes on to define the circumstances in which a practitioner-administration decision can be made. Those circumstances are when self-administration is inappropriate because of the ability of the patient to self-administer or patient's concerns about self-administration or based on the method of administration that is suitable for the patient (section 56). Similarly in Victoria, a practitioner can only administer if the patient is physically unable to do so (section 48(3) of the Victorian Act).
- 6.3. AMA (NSW) submits that the NSW Bill should be in keeping with the provisions of the WA Act, namely that the circumstances in which a practitioner may administer a voluntary assisted dying substance are confined. This provides protection for both patient and administering practitioner.

7. Membership of the Voluntary Assisted Dying Board

- 7.1. AMA (NSW) submits that there should be at least two registered medical practitioners on the Voluntary Assisted Dying Board (Part 10 of the NSW Bill).
- 7.2. Noting the functions and powers of the Board, AMA (NSW) submits it is important for there to be medical practitioner input.

8. The initiation of a discussion regarding voluntary assisted dying

- 8.1. AMA (NSW) submits that clause 10(3) of the Bill that permits a healthcare worker to initiate a discussion regarding voluntary assisted dying provided the healthcare worker also discusses palliative care and treatment options available to the patient should be removed from the Bill. A discussion regarding voluntary assisted dying is not a discussion for an acute setting. If a patient is in acute distress and / or pain, that is not the time for the initiation of a discussion regarding voluntary assisted dying. While it will not always be possible, ideally the discussion will be part of a considered discussion with a medical practitioner that canvasses treatment options, palliative care, and voluntary assisted dying.
- 8.2. In Victoria, only a patient may initiate a conversation regarding voluntary assisted dying (section 8 of the Victorian Act).

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- 8.3. In Western Australia, a medical practitioner or nurse practitioner may initiate a discussion about voluntary assisted dying if the practitioner also informs the person about the treatment options available and the likely outcomes of the treatment options, and the palliative care and treatment options available to the person and likely outcomes (section 10 WA Act).

9. Offences

- 9.1. AMA (NSW) encourages a review of the provisions of Part 7 of the Bill.
- 9.2. There are some provisions in Part 7 that could be better expressed to make it clearer to those participating in the voluntary assisted dying process what their obligations are and the consequences for failing to meet them. For example, section 129 might be amended to reflect that following revocation of a self-administration order after an authorised supplier has supplied a prescribed substance for the patient, should the contact person fail to give the prescribed substance to an authorised disposer as soon as practicable and not later than 14 days after the day on which the decision is revoked, commits an offence.
- 9.3. For provisions such as section 123 (unauthorised administration of a prescribed substance), consideration should be given as to whether, given the penalty, there should be an element of intention. The Victorian Act includes an element of intention in a number of offences.
- 9.4. The penalties for offences between jurisdictions vary considerably in some instances. For example, inducing the self-administration of a voluntary assisted dying substance is punishable by 6 years imprisonment and or 600 penalty units in Victoria. In New South Wales and Western Australia, it is punishable by life imprisonment. It is important to understand the rationale for the position that will be adopted in New South Wales on these issues.
- 9.5. While the term 'pressure or duress' is defined in the NSW Bill to include undue influence, coercion, intimidation and threats, the use of two terms suggests there may be a distinction between the two. The WA Act uses the term 'coercion' and in Victoria 'undue influence'. AMA (NSW) submits the preferable course would be for NSW to take the same approach.
- 9.6. The NSW Bill is silent on penalties for corporations. Under the Victorian Act there are penalties for corporations as well as individuals. AMA (NSW) submits that consideration to penalties for offences committed by corporations should be considered.
- 9.7. AMA (NSW) also submits that the penalties for the failure to submit paperwork within a designated timeframe are unnecessary (for example clause 30(2) of the NSW Bill. AMA (NSW) submits that medical practitioners have a professional obligation to act in a patient's best interest which includes ensuring they comply with relevant statutory requirements. If a medical practitioner fails to do so, there are existing regulatory processes that would be followed.

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10. Palliative care funding

Whether the NSW Bill (in its current form or amended form) becomes law in New South Wales, there is an urgent need for greater funding and resourcing for palliative care services in New South Wales. Patients facing end-of-life decisions and with time-limiting illnesses must be provided with information and access to all available options.

Yours sincerely,

*Dr Danielle McMullen
President, AMA (NSW)*