

**Submission
No 93**

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

Organisation: The Law Society of New South Wales

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THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: HRC:JWsb241121

24 November 2021

The Director
Standing Committee on Law and Justice
Parliament House
Macquarie Street
Sydney NSW 2000

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

Dear Director,

Inquiry into the provisions of the Voluntary Assisted Dying Bill 2021

Thank you for the opportunity to comment on the Voluntary Assisted Dying Bill 2021 (“the Bill”). The Law Society’s Human Rights Law Committee has contributed to this submission.

The Law Society notes that the purposes of the Bill are to enable, establish a procedure for, and regulate access to, voluntary assisted dying for persons with a terminal illness and to establish the Voluntary Assisted Dying Board (“the Board”) and provide for the appointment of members and functions of the Board.

There are different viewpoints in the community regarding voluntary assisted dying. From a human rights perspective, we note that the *International Covenant on Civil and Political Rights* may assist in providing one framework through which to discuss the context and implications of the Bill, particularly in light of the right to life (article 6); freedom from cruel, inhuman or degrading treatment (article 7); right to respect for private life (article 17); and right to freedom of thought, conscience and religion (article 18).¹

Given the range of views across our membership on this issue, the Law Society’s submission is confined to technical elements and potential unintended consequences arising from the operation of the Bill. Our interest is ensuring that if the Bill is passed, the voluntary assisted dying regime is subject to the appropriate safeguards to ensure its proper administration and oversight and that these are understood by the community.

1. Definition of eligible applicant

Under Part 6 of the Bill, an ‘eligible applicant’ includes another person who has a ‘sufficient and genuine interest’ in the rights and interests of a patient in relation to voluntary assisted dying (see s 108). An eligible applicant may apply to the Supreme Court for a review of any of the decisions set out in s 109.

The application for review of a decision can relate, for example, to the patient’s decision-making capacity in relation to voluntary assisted dying; whether or not the patient is acting

¹ For further discussion see Australian Human Rights Commission, *Euthanasia, human rights and the law* (Issues Paper, May 2016).

voluntarily; and whether or not the patient is acting because of pressure or duress.

As noted by the Legislation Review Committee, it is important that ‘sufficient and genuine interest’ is defined to avoid uncertainty as to who may apply to the Supreme Court for review.² In particular, to the extent it is suggested that ‘sufficient and genuine’ involves separate criteria, what is required to satisfy each test should be set out. The alternative is for the Court to decide on a case-by-case basis, but it is expected that this approach would take some time to lead to a coherent body of principle.

2. Request for Information

Section 174 of the Bill is in the following terms:

174 Request for information

(1) The Board may ask any person, including a patient’s contact person, to give information to the Board to assist the Board in performing any of its functions.

(2) A person may comply with a request under subsection (1) despite any Act that prohibits or restricts the disclosure of the information.

We note that s174(2) is drafted in discretionary terms. If the intention is for a person to be able to refuse a request for information from the Board, it may be preferable for this to be made explicit. Furthermore, the threshold that would enable the Board to make such a request for information is very low. Given the variety of functions provided to the Board by cl 142, it is feasible that a wide range of information, including confidential or privileged information, would “assist” a board with “performing any of its functions”. This is of concern, since cl 174(2) provides that a request for information from the Board permits a person to disclose that information “despite any Act that prohibits or restricts the disclosure of the information”.

To narrow the range of information that this clause applies to, we suggest it could be amended to apply only to information that is necessary for the exercise of specific functions of the Board. In addition to narrowing the scope of the clause, the functions of the Board that it applies to need to be carefully considered. For example, it may not be appropriate for the Board to use s 174 to collect information on a person whom they intend to refer to the Commissioner of Police under s 142(f)(i). It may also be appropriate to include specific limitations on the use or sharing of the information by the Board, given its potentially sensitive nature.

3. Communications around voluntary assisted dying

The Law Society recognises the importance of patients, families, carers and health professionals being able to understand the legislation, including each stage of the request and assessment process as well as the accompanying safeguards. We note in this context that if the legislation is enacted, it will be of utmost importance to engage in effective community outreach and education to ensure this understanding across the community.

Yours sincerely,

Juliana Warner
President

² Legislation Review Committee, Parliament of New South Wales, *Legislation Review Digest*, (No. 35 of 57, 19 October 2021) xvii.