



# issues backgrounder

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NSW Parliamentary Research Service

## The Voluntary Assisted Dying Bill 2017 (NSW): a comparison with the Victorian Bill

### 1. INTRODUCTION

On 21 September 2017, the [Voluntary Assisted Dying Bill 2017](#) was introduced into the NSW Legislative Council. This Private Members Bill is co-sponsored by three MLCs, Trevor Khan (The Nationals), Lynda Voltz (Labor) and Mehreen Faruqi (The Greens). They developed the Bill in a cross-party group of members which also included MPs Lee Evans (Liberal) and Alex Greenwich (Independent). A [consultation draft](#) of the Bill was released on 16 May 2017.

[A Bill](#) with the same title is currently being debated in the Victorian Parliament. On 20 September 2017, the Minister for Health, Jill Hennessy, introduced the Bill into the Legislative Assembly and, on 20 October 2017, the Bill passed the Assembly without amendment by 47 votes to 37. On 3 November 2017, the Bill passed the second reading stage in the Legislative Council by 22 votes to 18, and the Bill is now in the Committee stage. The Bill was developed following a July 2017 [Ministerial Advisory Panel Report](#). This Panel was set up after a June 2016 [report](#) by the Legislative Council's Legal and Social Issues Committee.

In June 2017, the NSW Parliamentary Research Service published an [Issues Backgrounder](#) on euthanasia and assisted suicide. The paper outlined developments in NSW, and in other Australian and overseas jurisdictions. It also contained a list of key reports, journal articles, and media articles. The purpose of this Issues Backgrounder is to compare the NSW and Victorian Bills. Note that the Victorian Parliamentary Library has published a [Research Note](#) on the Victorian Bill.

### 2. COMPARISON OF BILLS

The table below provides a comparison of the NSW and Victorian Bills. Some points of difference between the Bills include (for example):

- The Victorian Bill (126 pages) is much longer than the NSW Bill (28 pages).
- The Victorian Bill has a lower minimum age (18 years) for voluntary assisted dying than the NSW Bill (25 years).
- The Victorian Bill has a prohibition on a health practitioner initiating discussion with a person about voluntary assisted dying; the NSW Bill does not.

- The NSW Bill requires that, following assessment by two independent doctors, a psychiatrist or psychologist must assess whether the person has decision-making capacity and whether the person's decision was made freely, voluntarily and after due consideration. The Victorian Bill allows the two assessing doctors to determine this. If they cannot do so, they must refer the person to a health practitioner who has appropriate skills and training.
- The NSW Bill requires the first assessing doctor to offer to refer the person to a palliative care specialist; the person must then be asked whether their request for assisted dying stands. The Victorian Bill requires assessing doctors to provide information about palliative care but does not require them to offer to refer the person to a palliative care specialist.
- The Victorian Bill only allows assisted dying in accordance with a voluntary assisted dying permit. Applications for such a permit are made to, and determined by, the Secretary of the Department of Health and Human Services. The NSW Bill has no requirement for a permit.
- The Victorian Bill provides that a person's final request must be made at least nine days after the day of the person's initial request; and at least one day after the day of the second doctor's assessment. The NSW Bill provides that a doctor must not assist a person to die unless at least 48 hours has elapsed since the request certificate was completed (this certificate can only be completed after the person has passed the assessment process).

## The Voluntary Assisted Dying Bill 2017 (NSW): a comparison with the Victorian Bill

|                                   | New South Wales Bill  | Victorian Bill  |
|-----------------------------------|---|---|
| Length of Bill                    | 28 pages comprising 47 sections and 3 Schedules.  | 126 pages comprising 141 sections and 1 Schedule.   |
| Voluntary assisted dying          | <p>A doctor can prescribe or give an authorised substance to a person for self-administration.</p> <p>If a person is physically incapable of self-administration, a doctor can administer the substance to the person.</p> <p>Cl. 5</p>   | <p>A doctor can prescribe and supply a voluntary assisted dying substance to a person for self-administration.</p> <p>If a person is physically incapable of self-administration, a doctor can administer the substance to the person.</p> <p>Cl. 3, 45, 46.</p>  |
| Minimum age criteria              | <p>25 years of age.</p> <p>Cl. 9</p>  | <p>18 years of age.</p> <p>Cl. 9.</p>   |
| Residency criteria                | <p>Australian citizen, or permanent resident, and ordinarily resident in NSW.</p> <p>Cl. 9</p>  | <p>Australian citizen, or permanent resident, and ordinarily resident in Victoria.</p> <p>Cl 9.</p>   |
| Decision-making capacity criteria | <p>A person has decision-making capacity if they can:</p> <ul style="list-style-type: none"> <li>• understand the facts relevant to the person’s illness and condition; and</li> <li>• understand the medical treatment and other options available to the person; and</li> <li>• assess the consequences of the person’s decision to request the assistance and understand the impact of those consequences on the person; and</li> <li>• communicate the person’s decisions (whether by speaking, sign language or any other means).</li> </ul> <p>Cl. 7.</p> | <p>A person has decision-making capacity if they can:</p> <ul style="list-style-type: none"> <li>• understand the information relevant to the decision relating to access to assisted dying and the effect of the decision; and</li> <li>• retain that information to the extent necessary to make the decision; and</li> <li>• use or weigh that information as part of the process of making the decision; and</li> <li>• communicate the decision and the person's views and needs as to the decision in some way, including by speech, gestures or other means.</li> </ul> <p>A person is presumed to have decision-making capacity unless there is evidence to the contrary.</p> <p>In determining whether or not a person has decision-making capacity, regard must be had to a number of</p> |

|  | New South Wales Bill  | Victorian Bill  |
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|  |   | factors (e.g. a person may have decision-making capacity to make some decisions and not others).<br>Cl. 4, 9.   |
| Illness criteria                           | Suffering from a <i>terminal illness</i> , and as a result, has been experiencing severe pain, suffering or physical incapacity to an extent that is unacceptable to the person. A terminal illness is an <i>illness</i> that will, in reasonable medical judgment, result in the death of the person within 12 months. An illness includes injury or degeneration of mental or physical faculties.<br>Cl. 4, 9 | A disease, illness or medical condition that is: <ul style="list-style-type: none"> <li>• incurable;</li> <li>• advanced, progressive and will cause death;</li> <li>• expected to cause death within 12 months; and is</li> <li>• causing suffering to the person that cannot be relieved in a manner the person considers tolerable.</li> </ul> Cl. 9.  |
| Initiating discussion about assisted dying | The Bill does not contain any prohibition on doctors initiating discussion with a person about assisted dying.  | A health practitioner cannot initiate discussion with a person about assisted dying.<br>Cl. 8.  |
| Assisted dying request                     | An eligible person may make a request to a doctor. This request can be rescinded at any time and in any manner.<br>Cl. 9, 10.   | A person may make a request to a doctor. This can be verbal, or by gestures or other means of communication. A person may decide at any time not to continue the request and assessment process.<br>Cl. 11.   |
| Doctor can refuse to provide assistance    | A doctor may, for any reason and at any time, refuse to provide assistance under this Act.<br>Cl. 11  | A doctor who has a conscientious objection to assisted dying can refuse to provide assistance under the Act.<br>Cl. 7   |
| Assessments of person                      | Two doctors must independently assess the person who has requested assisted dying (unless the first doctor finds that the person is not eligible). The second assessing doctor must be registered in a specialty that is relevant to the diagnosis or treatment of the terminal illness from which the person is suffering.<br>Cl. 17.  | Two doctors must independently assess the person who has requested assisted dying (unless the first doctor finds that the person is not eligible). Either the first or second assessing doctor must have practised for at least five years; and either must have expertise and experience in the disease, illness or medical condition expected to cause the person's death. Both doctors must have completed approved assessment training (this is |

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|  | New South Wales Bill   | Victorian Bill   |
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|  |  | training that has been approved by the Secretary of the Department of Health and Human Services).<br>Cl. 10, 16, 17, 22, 26, 113.  |
| Assessment criteria for two assessing doctors                          | <p>Assisted dying assistance is dependent upon both doctors finding that:</p> <ul style="list-style-type: none"> <li>• The person meets the illness criteria; and</li> <li>• There is no medical measure acceptable to the person that can reasonably be undertaken in the hope of effecting a cure.</li> </ul> <p>Cl. 18.</p>   | <p>Assisted dying assistance is dependent upon both doctors finding that:</p> <ul style="list-style-type: none"> <li>• The person meets all the eligibility criteria;</li> <li>• The person understands the information required to be provided;</li> <li>• The person is acting voluntarily and without coercion; and</li> <li>• The person's request for assisted dying is enduring.</li> </ul> <p>Cl. 20, 29.</p> |
| Assessment of decision-making capacity by psychiatrist or psychologist | <p>After the person has been examined by the first and second assessing doctors, they must be examined by a qualified psychiatrist or psychologist. The person can only receive assisted dying assistance if the psychiatrist or psychologist is of the opinion that:</p> <ul style="list-style-type: none"> <li>• The person has decision-making capacity; and</li> <li>• The person's decision to request the assistance was made freely, voluntarily and after due consideration.</li> </ul> <p>Cl. 20.</p> | <p>If either the first or second assessing doctors are unable to determine whether the person has decision-making capacity, they must refer the person to a health practitioner who has appropriate skills and training.</p> <p>Cl. 18, 27.</p>  |
| Information to be provided   | <p>Before referring the person to the second assessing doctor, the first assessing doctor must provide the person with information on a range of matters such as the nature of the illness, and the treatment options including palliative care, counselling and psychiatric support. There is no requirement for the second assessing doctor to provide information.</p> <p>Cl. 19.</p>   | <p>The first assessing doctor must provide the person with information on a range of matters such as the nature of the illness, and the treatment options including palliative care. The second assessing doctor must also provide the person with information on the same matters.</p> <p>Cl. 19, 28.</p>   |

|   | New South Wales Bill   | Victorian Bill  |
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| Referral for palliative care and confirmation that request stands | <p>Before referring the person to the second assessing doctor, the first assessing doctor must offer to refer the person to a palliative care specialist. The patient must then indicate to the first assessing doctor that the decision to request assisted dying stands.</p> <p>Cl. 19.</p>  | <p>The Bill does not contain these requirements.</p>  |
| Certificate/declaration   | <p>A request certificate in the prescribed form must be signed by:</p> <ul style="list-style-type: none"> <li>• The person;</li> <li>• The first assessing doctor;</li> <li>• The second assessing doctor; and</li> <li>• An interpreter (if required to be present).</li> </ul> <p>The certificate contains declarations as to certain matters by all of the people who are required to sign it.</p> <p>If the person is physically unable to sign, he or she must make an audio-visual record of him or her reading aloud the declaration, or if he or she is unable to read it aloud, another person reading it aloud with his or her apparent agreement.</p> <p>The signature or audio-visual record must be made no earlier than seven days after the person made the initial request for assisted dying.</p> <p>The first assessing doctor must be present during the signing of the certificate or making of the audio-visual request.</p> <p>Cl. 22, 23.</p> | <p>A request declaration in the prescribed form must be signed by:</p> <ul style="list-style-type: none"> <li>• The person;</li> <li>• The first assessing doctor;</li> <li>• Two witnesses; and</li> <li>• An interpreter (if required to be present).</li> </ul> <p>The request declaration contains declarations as to certain matters by the person and the two witnesses.</p> <p>If the person is unable to sign it, another person who is over the age of 18 may sign it on his or her behalf.</p> <p>A person is not eligible to be a witness if the person is under 18, or the person may benefit financially or in any other material way from the death of the person.</p> <p>Cl. 34, 35, 36.</p> |
| Pre-conditions after the certificate/declaration                  | <p>A doctor must not provide assisted dying assistance to a person unless at least 48 hours has elapsed since the request certificate was completed.</p> <p>Cl. 12.</p>  | <p>A doctor must not provide assisted dying assistance to a person until the following requirements are met:</p> <ul style="list-style-type: none"> <li>• The person makes a final request – this must be made at least nine days after the day on which the</li> </ul>   |

|                                 | New South Wales Bill   | Victorian Bill   |
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|                                 |  | <p>person made the initial request; and, in any case, at least one day after the day of the second doctor's assessment;</p> <ul style="list-style-type: none"> <li>• The first assessing doctor completes a final review and certifies that the request and assessment process has been completed as required by the Act;</li> <li>• The first assessing doctor is satisfied of certain matters and applies for a voluntary assisted dying permit: either (i) a self-administration permit; or (ii) a practitioner administration permit;</li> <li>• The Secretary of the Department of Health and Human Services grants a permit. Note that the Secretary has a general right to refuse to issue a permit, including if he or she is not satisfied that the request and assessment process has been completed as required.</li> <li>• In the case of a practitioner administration permit – the person requests, in the presence of a witness, the first assessing doctor to administer the assisted dying substance, and the doctor is satisfied of certain matters.</li> </ul> <p>Cl. 37, 38, 41, 43, 45, 46, 47, 48, 49.</p> |
| <p>Review by Court/Tribunal</p> | <p>A <i>close relative</i> may apply to the Supreme Court for an order that a request certificate relating to a person is not an effective request certificate.</p> <p>A close relative means:</p> <ul style="list-style-type: none"> <li>• A parent, guardian or child of the person; or</li> <li>• A brother, sister, half-brother, half-sister, stepbrother or stepsister or the person; or</li> <li>• An existing spouse or de-facto partner of the person;</li> </ul> | <p>An <i>eligible applicant</i> may apply to the Victorian Civil and Administrative Tribunal (VCAT) for a review of:</p> <ul style="list-style-type: none"> <li>• A doctor's decision in an assessment, or when applying for a permit, that the person is or is not ordinarily resident in Victoria, or that the person has or does not have decision-making capacity; or</li> <li>• A decision of a doctor at the time of considering a request for administration of an assisted dying</li> </ul>  |



|   | New South Wales Bill   | Victorian Bill  |
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|   | <p>Before making an order, the Court must be satisfied that:</p> <ul style="list-style-type: none"> <li>• At the time of making the initial request for assisted dying, the person was not eligible to request assistance; or</li> <li>• At the time of making the initial request, undergoing an assessment, or signing the request certificate, the person did not have decision-making capacity; or</li> <li>• The person’s decision to request assisted dying was not made freely, voluntarily and after due consideration.</li> </ul> <p>Cl. 3, 24.</p>   | <p>substance, that the person has or does not have decision-making capacity.</p> <p>An eligible applicant means:</p> <ul style="list-style-type: none"> <li>• A person who is the subject of one of these decisions;</li> <li>• An agent of a person who is the subject of one of these decisions;</li> <li>• Any other person who VCAT is satisfied has a special interest in the medical treatment and care of the person.</li> </ul> <p>In determining an application, VCAT may determine that:</p> <ul style="list-style-type: none"> <li>• The person is or is not ordinarily resident in Victoria;</li> <li>• The person has or does not have decision-making capacity in relation to assisted dying.</li> </ul> <p>Cl. 68, 72.</p>       |
| <p><b>Voluntary Assisted Death Review Board</b></p> | <p>The Minister is to establish a Voluntary Assisted Death Review Board. The Review Board is to consist of seven members appointed by the Minister, as specified in the Bill (e.g. the State Coroner or their nominee).</p> <p>The Review Board has a range of functions (e.g.):</p> <ul style="list-style-type: none"> <li>• To monitor and review assisted deaths;</li> <li>• To communicate to the authorities any breach of the Act that it identifies in conducting a review of the death;</li> <li>• To make recommendations as to policies and practices for the prevention or reduction of breaches of the Act.</li> <li>• To maintain a register of assisted deaths; and</li> </ul> | <p>The Voluntary Assisted Dying Review Board is established by the Bill. The Board consists of the Chairperson, Deputy Chairperson (if any) and members appointed by the Minister who have appropriate knowledge and skills.</p> <p>The Review Board has a range of functions (e.g.):</p> <ul style="list-style-type: none"> <li>• To monitor matters related to assisted dying;</li> <li>• To review the exercise of any function or power under the Act;</li> <li>• To refer any issue it identifies that is relevant to certain persons or bodies: e.g. Chief Commissioner of Police; and</li> <li>• To report to Parliament on the Act’s operation and any recommendations to improve assisted dying.</li> </ul> <p>Cl. 92, 93, 94, 95.</p> |



|         | New South Wales Bill  | Victorian Bill  |
|---------|---|---|
|         | <ul style="list-style-type: none"> <li>To report to Parliament about the exercise of the functions of the Review Board.</li> </ul> <p>The Review Board is to conduct a review of each assisted death. This is to be conducted as soon as practicable after it receives the relevant medical records.</p> <p>Cl. 35, 36, 38.</p>   |   |
| Records | <p>The first assessing doctor must make the following records:</p> <ul style="list-style-type: none"> <li>A record of any oral request for assisted dying;</li> <li>A note by the doctor: <ul style="list-style-type: none"> <li>Certifying that the second assessing doctor and psychiatrist or psychologist are not closely associated with the first assessing doctor;</li> <li>Indicating that all requirements under the Act have been met;</li> <li>Indicating the steps taken to carry out a request for assisted dying;</li> <li>A notation of any authorised substance prescribed by the doctor</li> </ul> </li> </ul> <p>The first assessing doctor must keep these records and the following documents as part of the person’s medical record for at least 7 years:</p> <ul style="list-style-type: none"> <li>The request certificate and, if applicable, the audio-visual request;</li> <li>The written statement of the second assessing doctor confirming the opinion of the first assessing doctor;</li> <li>The report of psychiatrist or psychologist.</li> </ul> | <ul style="list-style-type: none"> <li>The doctor who accepts a person’s request for assisted dying must record the request and the acceptance;</li> <li>Within seven days after completing the first assessment, the first assessing doctor must complete the first assessment form and give a copy to the Review Board;</li> <li>Within seven days after completing the second assessment, the second assessing doctor must complete the second assessment form and give a copy to the Review Board;</li> <li>Within seven days after completing the final review form, the first assessing doctor must give a copy to the Review Board along with the following: <ul style="list-style-type: none"> <li>First assessment report;</li> <li>Second assessment report;</li> <li>Written request declaration;</li> <li>Contact person appointment form.</li> </ul> </li> <li>Within seven days after determining an application for an assisted dying permit, the Secretary must notify the Review Board;</li> <li>Within seven days after dispensing the assisted dying substance, the pharmacist must give a copy of the dispensing form to the Review Board;</li> </ul> |

|          | New South Wales Bill   | Victorian Bill   |
|----------|--|--|
|          | <p>The first assessing doctor must provide a copy of the person's relevant medical records to the Review Board within 14 days after the assisted death.</p> <p>Cl 31, 34.</p>  | <ul style="list-style-type: none"> <li>• Within seven days after administering an assisted dying substance to a person, the doctor must give the Board a copy of the administration form.</li> </ul> <p>Cl. 14, 21, 30, 41, 49, 60, 66.</p>  |
| Offences | <p>The offences are:</p> <ul style="list-style-type: none"> <li>• Improper conduct causing a person to make a request for assisted dying [4 years imprisonment].</li> <li>• Conduct that influences the provision of assisted dying: e.g. offering or accepting a financial advantage for assisted dying [4 years imprisonment].</li> <li>• Failing to make certain records, or failing to keep certain documents as part of a person's medical record for at least 7 years [\$11,000 fine].</li> </ul> <p>Cl. 15, 16, 34.</p> | <p>The offences are:</p> <ul style="list-style-type: none"> <li>• Improper conduct causing a person to make a request for assisted dying [5 years imprisonment].</li> <li>• A doctor administering an assisted dying substance to a person in breach of a practitioner administration permit [life imprisonment].</li> <li>• Administering to another person an assisted dying substance dispensed under a self-administration permit [life imprisonment].</li> <li>• Improperly inducing a person to self-administer an assisted dying substance dispensed under a self-administration permit [5 years imprisonment].</li> <li>• A contact person for a person who is the subject of a self-administration permit failing to return to the pharmacy any assisted dying substance that is unused after the death of the person [12 months imprisonment].</li> <li>• Falsifying a form or record, or making a statement in a report or form that the person knows is false or misleading [5 years imprisonment].</li> <li>• Failing to give to the Review Board a copy of a form in accordance with the Act [60 penalty units].</li> </ul> <p>Cl. 83, 84, 85, 86, 87, 88, 89.</p> |

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