Submission No 19

INQUIRY INTO REPRODUCTIVE HEALTH CARE REFORM BILL 2019

Organisation: New South Wales Bar Association

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NEW SOUTH WALES
BAR ASSOCIATION

18/684

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The Hon Shane Mallard MLC
Chair
Standing Committee on Social Issues
Parliament House
Macquarie Street
Sydney
NSW 2000

By email: committee.socialissues@parliament.nsw.gov.au

Dear Mr Mallard

Reproductive Health Care Reform Bill 2019

The New South Wales Bar Association ('the Association') welcomes the opportunity to make a submission in relation to the *Reproductive Health Care Reform Bill 2019* ('the Bill') to the inquiry being conducted by the NSW Legislative Committee on Social Issues.

The Association applauds the passage of the *Reproductive Health Care Reform Bill 2019* by the Legislative Assembly and supported the Bill in its unamended form. The Association addresses the amendments to the Bill and the context of their legal implications in the body of this submission and explains its position that the Bill should not be subject to further amendment.

In its 2019 Election Policy, the New South Wales Bar Association called on all political parties to decriminalise the termination of pregnancy in New South Wales. The position of the Association is that terminations should generally be treated as a health matter and a woman's autonomy and health should be promoted. It is anachronistic, and inconsistent with the position in all other States and Territories, for the offences in ss 82-84 of the *Crimes Act 1900* (NSW) to remain. The Association proposed that New South Wales adopt a similar legislative framework to the *Termination of Pregnancy Act 2018* (Qld) where:

- a medical practitioner may perform a lawful termination on a woman upon request, up to a gestational limit of 22 weeks;
- after 22 weeks, a lawful termination can be performed if at least two medical practitioners agree that the termination is appropriate in all the circumstances;
- registered health practitioners will be required to disclose to a woman any conscientious objection the practitioner holds to performing a termination and refer her to another health practitioner or provider that can provide the termination service and does not have a conscientious objection; and

- medical practitioners may perform a termination in an emergency, including where it is necessary to preserve the life of the pregnant woman.

The *Reproductive Health Care Reform Bill 2019* (NSW) as passed by the Legislative Assembly achieves these objectives. The Association looks forward to its passage by the Legislative Council. The Association does however wish to emphasise that it is important that the Bill is drafted so as to ensure that the new laws will apply to all women equally and that it does not create unnecessary obstacles to accessing abortion services in a timely and safe manner.

For example, imposing requirements as to where abortions must take place after 22 weeks, or constraints on the medical practitioners that can provide abortion services additional to those in the current Bill, may well have the potential to disadvantage women in regional areas without the same access to health services as women in the cities.

There is already a considerable burden imposed by the amendment made to the Bill in the House of Representatives adding a requirement of "informed consent", which at law, is not necessarily determined by medical standards or practices alone and has been recognised at law as a "somewhat 'amorphous phrase'" and a phrase that is "apt to mislead as it suggests a test of the validity of the patient's consent": cf. *Rogers v Whittaker* (1992) 175 CLR 490. The starting point is that, except in cases of emergency, all medical treatment is preceded by the choice to undergo it, upon advice in broad terms of the nature of the procedure to be adopted. Medical practitioners are trained in their duties to patients of disclosure and advice, which are subject to the therapeutic privilege. The position of the Association is that this amendment was unnecessary and may create confusion.

It is important that the laws are drafted so as to prevent confusion, and to ensure that unnecessary restrictions on access to abortion are not introduced. For this reason, it is the position of the Association in addition to the above, that the introduction of further requirements for what will or will not constitute "informed consent" or "information about counselling" are unnecessary as each of these requirements are, in accordance with the dictionary, governed by the professional standards applicable to health practitioners. The inclusion of such particular specification in the Bill already creates a legal burden on performance of a termination (other than in an emergency) that is not present for any other health procedure.

The provisions in the Bill governing conscientious objections and terminations after 22 weeks strike the right balance between the protection of women's health and autonomy and the protection of other interests.

The Association supports the position publicly expressed by AMA New South Wales in their media release of 7 August 2019 that any further amendments to these provisions are unnecessary and potentially harmful and again commends the Bill for passage.

Yours sincerely

Tim Game SC
President