Submission No 32

INQUIRY INTO REPRODUCTIVE HEALTH CARE REFORM BILL 2019

Organisation: Women's Legal Service NSW

Date Received: 13 August 2019

WOMEN'S LEGAL SERVICE NSW

13 August 2019

Hon Shayne Mallard MLC
Chair
Legislative Council Standing Committee on Social Issues

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

Dear Mr Mallard

Reproductive Health Care Reform Bill 2019

1. Women's Legal Service NSW (WLS NSW) thanks the Legislative Council Standing Committee on Social Issues for the opportunity to comment on the Reproductive Health Care Reform Bill 2019 ("the Bill").

2. WLS NSW is a community legal centre that aims to achieve access to justice and a just legal system for women in NSW. We seek to promote women's human rights, redress inequalities experienced by women and to foster legal and social change through strategic legal services, community development, community legal education and law and policy reform work. We prioritise women who are disadvantaged by their cultural, social and economic circumstances. We provide specialist legal services relating to domestic and family violence, sexual assault, family law, discrimination, victims support, care and protection, human rights and access to justice.

3. WLS NSW operates from a feminist framework. We support a woman's right to autonomy and access to safe and affordable healthcare, including reproductive healthcare.

4. Abortion has been criminalised in NSW for 119 years.

5. We have long advocated that abortion is a healthcare issue.

6. People should not fear being prosecuted and criminalised for seeking the healthcare they need.

7. The criminalising of abortion has also restricted doctors and health professionals from providing a full range of reproductive health services, making it difficult for women to access the healthcare they need.

8. We support the Bill as introduced into the Legislative Assembly. It was carefully considered, respects an individual's right to dignified and safe access to reproductive healthcare, is consistent with Victorian and Queensland law and the findings of the Victorian Law Reform Commission and Queensland Law Reform Commission reviews of termination of

pregnancy laws and was supported by medical bodies such as the Australian Medical Association (NSW) and Royal Australian and New Zealand College of Obstetricians and Gynaecologists.

9. We note several amendments have since been made to the Bill by members of the Legislative Assembly. We believe these amendments are unnecessary and, in some cases, could undermine access to abortion care for women, particularly women and people in rural and remote areas. However, we also recognise the need to urgently remove abortion from the *Crimes Act 1900 (NSW)* and the benefit to people in being able to access reproductive healthcare. We therefore recommend the Legislative Council pass the Bill as it is currently drafted with no further amendments.

10. In summary we recommend:

10.1 The Legislative Council pass the Bill as it is currently drafted with no further amendments.

10.2 The concerns raised in this submission be monitored and considered as part of the five year statutory review

10.3 That the statutory review includes the new criminal provisions introduced through the Reproductive Health Care Reform Bill 2019

10.4 That there is adequate funding to ensure safe, legal, compassionate and affordable access to abortion care.

Human rights obligations

11. In 2011 the United Nations Special Rapporteur on the right to health stated:

> *Criminal laws penalising and restricting induced abortion are the paradigmatic examples of impermissible barriers to the realisation of women's right to health and must be eliminated. These laws infringe women's dignity and autonomy by severely restricting decision-making by women in respect of their sexual and reproductive health. Moreover, such laws consistently generate poor physical health outcomes ... Creation or maintenance of criminal laws with respect to abortion may amount to violations of the obligations of States to respect, protect and fulfil the right to health.*[1]

12. In this same report the Special Rapporteur referred to strong concerns expressed also by the Committee on the Elimination of Discrimination against Women, the Committee on the Rights of the Child with respect to the "*impact of highly restrictive abortion laws on the right to health of adolescent girls*" and the the Committee against Torture which "*stated that*

[1] *Right of everyone to the enjoyment of the highest attainable standard of physical and mental health—Interim Report of the Special Rapporteur of the Human Rights Council*, (3 August 2011) 66th session, Agenda Item 69(b), UN Doc A/66/254, paragraph 21 accessed at https://documents-dds-ny.un.org/doc/UNDOC/GEN/N11/443/58/PDF/N1144358.pdf?OpenElement

punitive abortion laws should be reassessed since they lead to violations of a woman's right to be free from inhuman and cruel treatment".[2]

Unqualified person

13. The Bill creates an offence in Schedule 2 – by proposing a new Cl 82 in the *Crimes Act 1900*: termination of pregnancy performed by an unqualified person.

14. At Cl 82(2) this offence includes *"an unqualified person who assists in the performance of a termination on another person".*

15. At Cl 82(3) *"Assisting in the performance of a termination"* is defined to include –

    (a) Supplying, or procuring the supply of, a termination drug for use in a termination, and

    (b) Administering a termination drug

16. As outlined in Cl 82(5) Proceedings for an offence under this section can only proceed with the consent of the Director of Public Prosecutions.

17. We understand there are no other medical procedures which provide an offence by an unqualified person for a specific medical procedure. We therefore question the rationale for including such a provision only with respect to the termination of a pregnancy. It is unnecessary to include this as a criminal offence.

18. We recommend this be monitored and considered in the five year statutory review and that all provisions included in this Bill, including amendments to the *Crimes Act 1900 (NSW),* be considered as part of the statutory review.

Gestational limit

19. Clause 5 provides the gestational limit for a termination on request is 22 weeks after which Cl 6 requires two specialist medical practitioners to agree that in all the circumstances the termination should be performed.

20. Queensland has a limit of 22 weeks and Victoria, 24 weeks before two medical practitioners need to agree in all the circumstances that a termination should be performed.

21. The Australian Capital Territory and Canada do not have a gestational limit on termination of pregnancy.

22. Further, there is no evidence to suggest no gestational limits result in more late term abortions. For example, Millar refers to evidence that shows the proportion of abortions

[2] Ibid, paragraph 22.

performed after 20 weeks in Canada is half that in Queensland – 0.66% compared with 1.34%.[3]

23. We note there was debate in the Legislative Assembly that the period for on request termination be reduced to 20 weeks. We strongly oppose this.

24. The Queensland Law Reform Commission refers to the Royal Australian and New Zealand College of Obstetricians and Gynaecologists advocating for no gestational limits, noting "*non-availability of termination of pregnancy services has been shown to increase maternal morbidity and mortality in population studies*" and later termination *"must be an option available to women".*[4]

25. We prefer no gestational limits. However, we support this provision as currently drafted and recommend it pass the Legislative Council with no further amendment.

Amendments to the Bill made in the Legislative Assembly

Informed consent

26. Clauses 5(2) and 6(1)(c) of the Bill require the medical practitioner performing the termination to obtain the patient's informed consent to the termination. *"Informed consent"* is defined in Schedule 1:

> *In relation to a termination performed by a medical practitioner, means consent to the termination given –*
>
> *(a) freely and voluntarily, and*
>
> *(b) in accordance with any guidelines applicable to the medical practitioner in relation to the performance of the termination.*

27. Medical practitioners are already required to obtain a patient's informed consent for a medical procedure. These provisions are unnecessary. Further, these provisions may provide uncertainty and confusion given informed consent may be defined in a limiting way in guidelines only *"in relation to the performance of the termination".* A termination should be treated like any other medical procedure.

28. This provision should be closely monitored and considered as part of the five year legislative review.

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[3] Erica Millar, (12 August 2019) "Here's why there should be no gestational limits in abortion", *The Conversation*, accessed at: https://theconversation.com/heres-why-there-should-be-no-gestational-limits-for-abortion-121500

[4] Queensland Law Reform Commission, (2018) *Review of termination of pregnancy laws*, paragraph 3.71

Specialist medical practitioner

29. An amendment to cl 6 of the Bill now requires two specialist medical practitioners to consult and agree that in all the circumstances the termination on a person who is more than 22 weeks should be performed.

30. *"Specialist medical practitioner"* is narrowly defined in Schedule 1:

> *in relation to the performance of a termination means –*
>
> *(a) ' a medical practitioner who, under the Health Practitioner Regulation National Law, holds specialist registration in obstetrics and gynaecology, or*
>
> *(b) ' a medical practitioner who has other expertise that is relevant to the performance of the termination, including, for example, a general practitioner who has additional experience or qualifications in obstetrics.*

31. This does not include specialists, such as, for example, cardiologists or oncologists or other specialists who may be concerned about the health of the woman should the pregnancy continue but not hold "*specialist registration in obstetrics and gynaecology*" or *"additional experience or qualifications in obstetrics"*. In effect, this could mean that three specialists are required to consult and agree that in all the circumstances the termination on a person who is more than 22 weeks should be performed.

32. We note this issue was carefully considered by the Queensland Law Reform Commission in their recent inquiry.

33. The Queensland Law Reform Commission recommends a medical practitioner consult with another medical practitioner regarding a termination after 22 weeks and both medical practitioners must consider that, in all the circumstances, the termination should be performed.[5]

34. The Queensland Law Reform Commission specifically states:

> *The [legislative] requirement should not be unduly onerous or burdensome. It should reflect the minimum that is required, whilst leaving flexibility for service providers to adopt further measures in practice if deemed appropriate*.[6]

35. The Queensland Law Reform Commission further states:

> *It is unnecessary for the legislation to impose additional requirements about the qualifications, expertise or experience of the second medical practitioner. These are matters properly to be determined on a case by case basis in accordance with good medical practice.*[7]

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[5] Ibid, paragraph 3.218
[6] Ibid, paragraph 3.217
[7] Ibid, paragraph 3.219

36. Additionally,

> *The legislation should not require that the second medical practitioner must examine the woman, or that the consultation must occur in person. Such measures may be good medical practice, and would not be precluded. However, the draft legislation should reflect only the minimum that is required, recognising that, in some areas of the State, such steps may be impractical and could significantly delay or restrict access. In some cases, for example, it might be appropriate for the consultation to occur by telephone or video-conference to facilitate access in regional areas. It would still be necessary for the second medical practitioner to consider all the circumstances in reaching their view on the termination.*[8]

37. We are concerned this is an unnecessary burden on women in very distressing and vulnerable medical, psychological and social circumstances. Further, women in rural and remote areas will be particularly disadvantaged as access to specialists is more limited in rural and remote areas.

38. Our preference would have been *"medical practitioner"* without legislating a qualification requirement. Or in the alternative "*specialist medical practitioner"* should be more broadly defined to include all specialist medical practitioners and only one of the medical practitioners consulted should be required to be a *"specialist medical practitioner".*

39. However, we support this provision as currently drafted noting the importance of passing this legislation and the statutory review mechanism.

Information about counselling

40. The new provision about information about counselling at clause 7 is unnecessary.

41. It is not clear what is meant by a medical practitioner must "*assess whether or not it would be beneficial to discuss with the person accessing counselling about the proposed termination".*

42. The Queensland Law Reform Commission expressed concern that a legislative requirement regarding counselling could be *"an additional barrier to accessing services for some women"* and create uncertainty for health practitioners.[9]

43. The Queensland Law Reform Commission notes that there was generally support for counselling for women who wanted to access it. Furthermore, respondents advocated "*counselling services should be accessible, professional, independent, impartial, unbiased, evidence based, inclusive of all options (parenting, adoption and termination), non-judgmental and non-directive".* [10]

[8] Ibid, paragraph 3.220
[9] Ibid, paragraph 6.20
[10] Ibid, paragraph 6.12

44. Significantly, the Queensland Law Reform Commission recommends counselling should not be mandated and "*is better addressed as a matter of clinical practice, rather than by legislation.*"[11]

45. Counselling is already addressed in NSW Health Guidelines which state *"All women seeking a termination of pregnancy are to be offered counselling."*[12]

46. While we do not consider this provision necessary, it is important that *"counselling"* be understood to include the full range of pregnancy options, including termination.

47. This is work that can be undertaken by NSW Health and can also be considered as part of the statutory review.

Conscientious objection

48. We recognise some medical practitioners may have a conscientious objection to performing a termination.

49. It is important that conscientious objections do not impede access to reproductive healthcare. The Economic Social Cultural Rights Committee recommends:

> *States must appropriately regulate [conscientious objection] to ensure that it does not inhibit anyone's access to sexual and reproductive health care, including by requiring referrals to an accessible provider capable of and willing to provide the services being sought, and the performance of services in urgent or emergency situations.*[13]

50. The Bill as initially introduced into the Legislative Assembly respected this requirement with those with a conscientious objection required to "*refer the person or transfer the person's care*" to another registered health practitioner or health service provider "*who in the first practitioner's belief, can provide the requested service and does not have a conscientious objection to the performance of a termination*".

51. The original provision is supported by medical bodies such as the Royal Australian and New Zealand College of Obstetricians and Gynaecologists (*RANZCOG*)[14] and the Australian Medical Association (NSW).[15]

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[11] Ibid, paragraph 6.18

[12] Ministry of Health NSW (2014) *Pregnancy – Framework for Termination in New South Wales Public Health Organisations,* p3(7) accessed at:
https://www1.health.nsw.gov.au/pds/ActivePDSDocuments/PD2014_022.pdf

[13] Committee on Economic Social & Cultural Rights, (2016) *General Comment No. 22 on the Right to sexual and reproductive health,* paragraph 43.

[14] Royal Australian and New Zealand College of Obstetricians and Gynaecologists, (30 July 2019) "Reproductive Health Care Reform Bill 2019" accessed at: https://ranzcog.edu.au/news/Reproductive-Health-Care-Reform-Bill-2019)

[15] Australian Medical Association (NSW), (7 August 2019) "Unfounded Fearmongering on abortion puts women and doctors at risk"

52. Amended cl 9(3) requires the medical practitioner with a conscientious objection, without delay to

> *(a) Give information to the person on how to locate or contact a medical practitioner who, in the first practitioner's reasonable belief, does not have a conscientious objection to the performance of the termination, or*
>
> *(b) transfer the person's care to—*
>
> *i. another registered health practitioner who, in the first practitioner's reasonable belief, can provide the requested service and does not have a conscientious objection to the performance of the termination, or*
>
> *ii. a health service provider at which, in the first practitioner's reasonable belief, the requested service can be provided by another registered health practitioner who does not have a conscientious objection to the performance of the termination.*

53. We consider Cl 9(3)(a) to be vague. It does not require a referral *to an accessible provider capable of and willing to provide the services being sought,"* as proposed by the United Nations Special Rapporteur on the right to health.

54. We welcome clarification in the amended provision that the practitioner with the conscientious objection hold a *"reasonable belief"* that the registered health practitioner or health service provider to whom they refer, or transfer care does not have a conscientious objection to the performance of the termination.

55. We prefer the original provision requiring a medical practitioner with a conscientious objection to "*refer or transfer care*" to a registered health practitioner or health service provider they believe does not have a conscientious objection to the performance of the termination with the additional clarification the belief be a *"reasonable belief"*. However, we support the Bill passing with no further amendments noting the benefits to women in being able to access safe and legal abortion and the protection of the legislative review mechanism.

Review in relation to sex selection

56. We refer to clause 14 about the review in relation to gender selection.

57. There is no evidence establishing that sex selective abortions occur in Australia.

58. While we do not believe this provision is necessary, we note the 12 month legislative review.

Conclusion

59. We support the passing of the Reproductive Health Care Reform Bill 2019 through the Legislative Council without further amendment.

60. It is time to act to remove abortion from the *Crimes Act 1900 (NSW)* and to ensure safe, legal and compassion access to abortion care.

If you would like to discuss any aspect of this submission, please contact me or Liz Snell, Law Reform and Policy Coordinator on .

Yours faithfully,
Women's Legal Service NSW

Janet Loughman
Principal Solicitor