



issues backgrounder

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Abortion law and the Reproductive Health Care Reform Bill 2019

This Issues Backgrounder compares abortion law in all Australian States and Territories as at 5 August 2019, including both the current NSW regime and that proposed in the [Reproductive Health Care Reform Bill 2019](#) (the Bill). It also includes a brief summary of key developments since May 2017 when the last Bill proposing the decriminalisation of abortion in NSW was defeated in the Legislative Council (the [Abortion Law Reform \(Miscellaneous Acts Amendment\) Bill 2016](#)).

On 1 August 2019, Alex Greenwich MP introduced the Bill in the NSW Legislative Assembly as a co-sponsored Private Members' Bill. According to the [Second Reading speech](#), the Bill is based on Queensland and Victorian legislation. Comparisons with these regimes are included in the final section of this paper where the provisions of the Bill are discussed.

This paper updates a 2017 NSW Parliamentary Research Service paper [Abortion Law: a national perspective](#) which summarises the legal framework in Australia as it then was. It also covered topics not included herein such as discussion of the [reasons why women seek an abortion](#), relevant NSW [case law](#) and recent [public opinion surveys](#).

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KEY FEATURES OF ABORTION LAWS ACROSS AUSTRALIA

	Abortions performed with consent on a woman by a medical practitioner								
	Criminalised		Decriminalised						
	SA	NSW (current law)	NSW (2019 Bill)	QLD	ACT	NT	TAS	VIC	WA
Covers both surgical and drug-based abortions	✓	✓	✓	✓	✓	✓	✓	✓	✓
Abortion available on request	✗	✗	✓ (up to 22 weeks)	✓ (up to 22 weeks)	✓	✗	✓ (up to 16 weeks)	✓ (up to 24 weeks)	✓ (up to 20 weeks)
Abortion available if doctor(s) satisfied of certain matters	✓	✓	✓ (after 22 weeks)	✓ (after 22 weeks)	✗	✓ (up to 23 weeks)	✓ (after 16 weeks)	✓ (after 24 weeks)	✓ (after 20 weeks)
Conscientious objection by doctors recognised	✓	✗	✓	✓	✓	✓	✓	✓	✓
Doctors who conscientiously object must redirect woman to abortion services	✗	✗	✓	✓	✗	✓	✓	✓	✗
Counselling mandatory	✗	✗	✗	✗	✗	✗	✗	✗	✓
Safe access zones	✗	✓	✓	✓	✓	✓	✓	✓	✗

KEY DEVELOPMENTS SINCE MAY 2017

MAY 2017: ABORTION LAW REFORM (MISCELLANEOUS ACTS AMENDMENT) BILL 2016

The [*Abortion Law Reform \(Miscellaneous Acts Amendment\) Bill 2016*](#) was introduced in the NSW Legislative Council by Mehreen Faruqi MLC on 11 August 2016, with the Second Reading debate resuming on 11 May 2017. The Bill had [four main objectives](#):

- (1) The repeal of the abortion offences under the [*Crimes Act 1900*](#);
- (2) The abolition of common law rules criminalising abortion;
- (3) The establishment of requirements for medical practitioners with conscientious objections to notify the person of their conscientious objection, and refer on a person seeking abortion; and
- (4) The creation of safe access zones.

While the Bill was ultimately [defeated](#) 25 votes to 14, John Graham MLC [described](#) the Bill as “represent[ing] a start to this debate in New South Wales, not the end...”. Other Members [proposed](#) the creation of a cross-party working group or the [establishment](#) of a parliamentary committee to further legislative debate in this area.

AUGUST 2017: MOTION ON ABORTION LAW REFORM

On 10 August 2017, members of the Legislative Assembly debated a [motion](#) on abortion law reform moved by the Member for Newtown, Jenny Leong MP. Members from the Opposition, crossbench and Government spoke to the debate, with the Member for Newtown stating:

Women should have the right to make reproductive choices for themselves. Our laws and the policies of the Government should not restrict or prevent a woman's right to choose. It is absolutely shameful that in New South Wales abortion is still in the Crimes Act; that in this State we are part of the problem that criminalises women and people making reproductive choices about their own bodies and their own lives.

The then Minister for Women, Tanya Davies, also contributed:

I respect and support a woman's right to choose a path that is best for her. The decision to seek a termination is incredibly difficult and deeply personal. It is a decision that I believe should be made safely with the assistance of medical professionals and with all the information available to the woman concerned.

As amended, the motion was agreed to by the House:

That this House:

supports the right of women to make the choice that is right for them, which includes respecting their right to access safe, legal abortion.

JUNE 2018: QUEENSLAND LAW REFORM COMMISSION: REVIEW OF TERMINATION OF PREGNANCY LAWS

In June 2018, the Queensland Law Reform Commission (QLRC) released its [Review of Termination of Pregnancy Laws](#). As part of its review, the QLRC was asked to investigate options for the modernisation of Queensland's laws in relation to the termination of pregnancy. Key components of the Review include:

- An [overview of termination](#) in Queensland as at June 2018 including the legislation, clinical framework, incidence of terminations, availability of terminations and community attitudes;
- Discussion of the various approaches to lawful termination, including the “[on request](#)” approach and “[combined](#)” approach;
- A chapter on [conscientious objection](#) by health practitioners;
- A chapter on [safe access zones](#); and
- Information on the [provision of counselling](#).

The Review also proposed a [Draft Termination of Pregnancy Bill 2018](#).

JUNE 2018: PUBLIC HEALTH AMENDMENT (SAFE ACCESS TO REPRODUCTIVE HEALTH CLINICS) ACT 2018

The [Public Health Amendment \(Safe Access to Reproductive Health Clinics\) Act 2018](#) commenced operation in NSW on 15 June 2018, inserting [Part 6A](#) into the [Public Health Act 2010](#) to make provision for “safe access zones”. As summarised in [Key Issues for the 57th Parliament](#):

The definition of a “safe access zone” includes the area within 150 metres of the reproductive health clinic (s 98A). In the safe access zone it is an offence to interfere with a person's access to a clinic (s 98C(2)) and to obstruct or block, without reasonable excuse, a footpath or road leading to a clinic (s 98C(3)). It is also an offence in the safe access zone to communicate in a manner that is reasonably likely to cause distress or anxiety to a person accessing the clinic (s 98D), or to intentionally capture visual data of a person or publish or distribute a recording of a person without their consent (s 98E). Each of the offences carries a maximum penalty of a \$5,500 fine and/or imprisonment for 6 months for a first offence. A second or subsequent offence carries a maximum penalty of an \$11,000 fine and/or 12 months imprisonment.

Exemptions are permitted under s 98F. In the [Second Reading Speech](#), Penny Sharpe MLC clarified that these exemptions were intended “to ensure that the right to protest or campaign on the issue of abortion is not curtailed”. Consequently, the laws do not apply to prohibit conduct outside NSW Parliament House, or in a church or other building used for religious worship. Nor do the laws prohibit the carrying out of surveys and opinion polls, or the distribution of leaflets during the course of any election, referendum or plebiscite.

DECEMBER 2018: TERMINATION OF PREGNANCY ACT 2018 (QLD)

In August 2018, the [Termination of Pregnancy Bill 2018](#) (Qld) (the Queensland Bill) was introduced in the Queensland Legislative Assembly. The Queensland Bill

contained several changes from the Draft Bill proposed by the QLRC; where relevant, these are noted in the discussion of the NSW Bill below.

In the Second Reading speech for the Queensland Bill, Attorney-General Yvette D'ath [described](#) the Bill as “implement[ing] the Palaszczuk government’s commitment to modernis[ing] and clarify[ing] the law governing the termination of pregnancy based on the recommendations of the Queensland Law Reform Commission”. Both the Labor Party and the Liberal National Party granted its members a [conscience vote](#), with the Bill passing through the House 50 votes to 41.

The [Termination of Pregnancy Act 2018](#) (Qld) commenced operation on 3 December 2018.

DECEMBER 2018: STATUTES AMENDMENT (ABORTION LAW REFORM) BILL 2018 (SA)

On 5 December 2018, the [Statutes Amendment \(Abortion Law Reform\) Bill 2018](#) (SA) was introduced by the Hon Tammy Franks MLC in the South Australian Legislative Council as a Private Members’ Bill.

On 26 February 2019, the State Attorney-General [asked](#) the South Australian Law Reform Institute (SALRI) to consider a suitable legislative framework for the termination of pregnancy with the aim of modernising the law in South Australia. SALRI is due to [release](#) its report by the end of August 2019.

APRIL 2019: CLUBB V EDWARDS; PRESTON V AVERY

On 10 April 2019, the High Court [unanimously rejected](#) two challenges to two pieces of State legislation which prohibited certain communications and activities in relation to abortions in “safe access zones”. The Court held that the provisions creating these restrictions – section 185D of the [Public Health and Wellbeing Act 2008](#) (Vic) and section 9(2) of the [Reproductive Health \(Access to Terminations\) Act 2013](#) (Tas) – were both valid. This was based on the burden they imposed on the implied freedom of political communication being justified by reference to their legitimate purposes, including the protection of the safety, wellbeing, privacy and dignity of persons accessing lawful medical services.

On the decision, the Human Rights Law Centre [noted](#) the significance for other safe access zone laws throughout Australia:

The decision has reinforced the importance of creating a safe environment for women to act on private medical decisions and provides a solid foundation for moving towards a similar framework in South Australia and Western Australia – the only jurisdictions without safe access zone laws in place.

REPRODUCTIVE HEALTH CARE REFORM BILL 2019

On 1 August 2019, Alex Greenwich MP introduced the [Reproductive Health Care Reform Bill 2019](#) (the Bill) in the Legislative Assembly as a Private Member’s Bill. It is anticipated that the Bill will be debated in the sitting week commencing Tuesday 6 August 2019.

In the Bill's Second Reading speech, Mr Greenwich [stated](#):

The Reproductive Health Care Reform Bill 2019 recognises that the best outcomes in women's reproductive health care are achieved when abortion is treated as a health matter, not a criminal matter, and a woman's right to privacy and autonomy in decisions about their care is protected. In New South Wales it has been a criminal offence to procure an unlawful abortion since 1900, when the Crimes Act was first written. The law has not changed since then.

Mr Greenwich also noted that "provisions in the bill are based on those enacted in Queensland and Victoria, [both of] which came out of extensive Law Reform Commission processes". The NSW Bill largely reproduces the Queensland legislation, with the discussion below noting where it differs from both the Queensland Act and the QLRC Draft Bill.

Similarities and differences between the NSW Bill and the Victorian [Abortion Law Reform Act 2008](#) are also covered. The Victorian legislation was based on [one of the three legislative models](#) put forward by the Victorian Law Reform Commission in its 2008 report, [Law of Abortion](#).

OVERVIEW OF BILL

The [Explanatory Note](#) states that the objects of the Bill are:

- a) to enable a termination of a pregnancy to be performed by a medical practitioner on a person¹ who is not more than 22 weeks pregnant,
- b) to enable a termination of a pregnancy to be performed by a medical practitioner on a person who is more than 22 weeks pregnant in certain circumstances,
- c) to identify certain registered health practitioners who may assist in the performance of a termination,
- d) to require a registered health practitioner who has a conscientious objection to the performance of a termination on a person to disclose the objection and refer the person to another practitioner who does not have a conscientious objection,
- e) to repeal offences relating to abortion in the *Crimes Act 1900* and abolish any common law rules relating to abortion,
- f) to amend the *Crimes Act 1900* to make it an offence for a person who is not a medical practitioner otherwise authorised under the Act to terminate a pregnancy.

¹ The NSW Bill is distinct from the Queensland and Victorian legislation in that it uses the term "person" instead of "woman" throughout. On the reason for this approach, Mr Greenwich MP [stated](#) "this is best-practice drafting on the advice of Parliamentary Counsel, who drafted the bill". The NSW [Abortion Law Reform \(Miscellaneous Acts Amendment\) Bill 2016](#) also used the term "person" in place of "woman" throughout. Note that under section 8(a) of the NSW [Interpretation Act 1987](#), any "word or expression that indicates one or more particular genders shall be taken to indicate every other gender" in any NSW Act or instrument.

KEY PROVISIONS OF THE BILL

Termination of pregnancy by medical practitioner before 22 weeks

Clause 5 of the Bill allows a medical practitioner to perform a termination on a person who is not more than 22 weeks pregnant. On the reason for the 22 week threshold, the Second Reading speech [states](#):

Twenty-two weeks was chosen with the advice of the AMA and follows the recommendations of the Queensland Law Reform Commission and is in line with the Queensland Act. It is supported by Royal Australian New Zealand College of Obstetricians and Gynaecologists.

The QLRC report [states](#) the basis for including the 22 week threshold in the Queensland statute:

A gestational limit of 22 weeks:

- represents the stage immediately before the ‘threshold of viability’ under current clinical practice;
- aligns with the Queensland Health Clinical Services Capability Framework for Public and Licensed Private Health Facilities pursuant to which terminations from 22 weeks gestation are required to be performed at particular hospitals;
- aligns with the local facility level approval process adopted at the Royal Brisbane and Women’s Hospital; and
- reflects that terminations after 22 weeks involve greater complexity and higher risk to the woman.

Under the Victorian Act, terminations may be performed by a medical practitioner **up to 24 weeks**.

Termination of pregnancy by medical practitioner after 22 weeks

Under clause 6, a [medical practitioner](#) may perform a termination on a person who is **more than 22 weeks pregnant** provided that the medical practitioner:

(1)(a) considers that, in all the circumstances, the termination should be performed, and

(1)(b) has consulted with another medical practitioner who also considers that, in all the circumstances, the termination should be performed.

In considering whether the termination is appropriate in all the circumstances, a registered medical practitioner must have regard to:

(2)(a) all relevant medical circumstances; and

(2)(b) the person’s current and future physical, psychological and social circumstances; and

(2)(c) the professional standards and guidelines applicable to the performance of the termination.

In discussing these provisions, the QLRC [considered](#) that they achieve “a reasonable balance between concerns about the woman’s autonomy and calls for additional oversight for terminations after 22 weeks.”

A medical practitioner may perform a termination on a person more than 22 weeks pregnant without satisfaction of the conditions above if, in an emergency, they consider the termination necessary to save either the person’s life or to save another foetus.

Under the Victorian Act, a medical practitioner is not required to have regard to the professional standards and guidelines applicable to the performance of the termination when considering whether termination is appropriate after 24 weeks. However, all other conditions listed above must be satisfied.

The Victorian legislation does not expressly allow a medical practitioner to perform an abortion in the case of an emergency. However, section 8(3), which relates to conscientious objections, says that a medical practitioner is under a duty to perform an abortion in an emergency to preserve the life of a woman, and a registered nurse is to assist in an abortion in such circumstances (8(4)), despite a conscientious objection.

Assistance by registered health practitioners

Clause 7 of the Bill states that a number of persons may assist in the performance of a termination by a medical practitioner. These persons include:

- Another medical practitioner;
- A nurse;
- A midwife;
- A pharmacist;
- An Aboriginal and Torres Strait Islander health practitioner; or
- Another [registered health practitioner](#) prescribed by the Regulations.

The last two classes of persons – while initially exempt from the Draft Bill proposed by the QLRC – were added into the version of the Bill introduced to the Queensland Parliament. In the Second Reading speech for the Queensland Bill, the Minister [noted](#) that the addition was consistent with the Northern Territory legislation, and had been done to:

... ensure culturally safe and appropriate advice and support to women in rural and remote areas and to contribute to better health outcomes for Aboriginal and Torres Strait Islander people.

The allowance for expansion by regulation of the list of health practitioners who may assist in the performance of terminations was [introduced](#) to ensure flexibility when responding to future changes in clinical practice.

Assisting in the performance of a termination includes dispensing, supplying or administering a termination drug on the instruction of a medical practitioner (cl 7(3)).

Such a person may not assist where they know, or ought reasonably to know, that the termination is not being carried out in accordance with clauses 5 or 6.

The Victorian Act differs in two ways. [Section 6](#) provides that only a registered pharmacist or registered nurse:

...who is authorised under the Drugs, Poisons and Controlled Substances Act 1981 to supply a drug or drugs **may administer or supply the drug or drugs to cause an abortion in a woman** who is not more than 24 weeks pregnant [emphasis added].

Where the person seeking the abortion is more than 24 weeks pregnant, the Victorian Act contains stricter requirements. In this case, [section 7](#) states that a registered pharmacist or registered nurse may only administer or supply abortion-causing drugs to a person more than 24 weeks pregnant if:

- A registered medical practitioner has directed them in writing to do so; and
- The registered pharmacist or registered nurse is employed or engaged by a hospital; and
- The medical practitioner reasonably believes that the abortion is appropriate in all the circumstances and has consulted at least one other registered medical practitioner who also reasonably believes that the abortion is appropriate in all the circumstances.

Conscientious objection by registered health practitioners

Clause 8 of the Bill allows a registered health practitioner who has a conscientious objection to the performance of a termination to abstain from performing the termination or assisting in the performance of a termination, provided they comply with certain requirements. Where a registered health practitioner has a conscientious objection, they must inform the person seeking the termination of this fact as soon as is practicable after the request. They must also refer or transfer that person's care to:

- Another medical practitioner who is able to perform the termination and who they believe does not have a conscientious objection; or
- A health service provider who is able to perform the termination and who they believe does not have a conscientious objection.

The duty of a medical practitioner to provide a service "in an emergency" is not affected by these requirements.

The Second Reading speech elaborates on the interaction of this provision with the current [code of conduct](#) of the Medical Board of Australia, and [position statement](#) of the Australian Medical Association:

As is currently the case, doctors will not be forced to perform or participate in terminations if doing so would conflict with their values or personal beliefs, except in life-threatening emergencies. The right to conscientious objection is already provided for in a number of Australian codes of conduct and ethical standards for health practitioners and these standards are reflected in this bill. The bill recognises the right of doctors to practise in accordance with their values while providing provisions to ensure that women's health care is not impeded...

The existing Medical Board of Australia's *Good medical practice: a code of conduct for doctors in Australia* states that doctors must not use their objection to impede access to legal treatment, and the Australian Medical Association position statement *Conscientious Objection 2019* requires doctors to take whatever steps are necessary to ensure the patient's access to care is not impeded. It is well recognised that these codes mean doctors should refer patients to other doctors and services where patients can receive the care they need.

The NSW Bill contains two phrases not present in the Queensland legislation that emphasise that the practitioner must act as soon as possible. Clause 8(2) requires that a registered health practitioner disclose their conscientious objection “as soon as practicable after the first person makes the request”. Clause 8(3) then requires that any registered health practitioner unable to perform a termination on a person or advise about the performance of a termination due to such an objection refer that person “without delay”.

The Victorian Act is silent on any time constraints under which a referral must be made.

Professional conduct or performance of a registered health practitioner

Clause 9 states that, if considering a notification under the [Health Practitioner Regulation National Law \(NSW\)](#) or a complaint under the [Health Care Complaints Act 1993](#) against a medical practitioner, regard may be had to whether the medical practitioner:

- a) Performs a termination on a person other than as authorised under clauses 5 or 6;
- b) Assists in the termination on a person other than as authorised under clause 7; or
- c) Contravenes clause 8.

Performance of termination on self not an offence

Clause 10 states that, despite any other Act, a person who consents to, assists in or **performs a termination on themselves** is not guilty of an offence.

Review of legislation

Clause 11 of the NSW Bill requires that a review of the operation of the legislation be conducted within 5 years of its commencement, with any review being provided to the Presiding Officers of the NSW Parliament. Both the Queensland and Victorian Acts are silent on this requirement.

AMENDMENT OF THE CRIMES ACT 1900

The Bill also proposes a number of amendments to the [Crimes Act 1900](#) (the Crimes Act) with the key changes being the removal of the relevant offences within Part 3, [Division 12](#) and express abolition of common law rules criminalising abortion.

Repeal of Part 3, Division 12 – Attempts to procure abortion

Part 3, Division 12 of the Crimes Act creates three abortion-related offences (Table 2).

Table 2: Current abortion-related offences under the *Crimes Act 1900*

Section	Description
Section 82	<p>Prohibits a pregnant woman from:</p> <ul style="list-style-type: none"> unlawfully administering any drug or poison; or unlawfully using any instrument or other means; <p>with the intent of procuring her own miscarriage.</p> <p>An offence against this section carries a maximum penalty of 10 years imprisonment.</p>
Section 83*	<p>Prohibits any person from:</p> <ul style="list-style-type: none"> unlawfully administering to any woman, whether with child or not, any drug or noxious thing; unlawfully causing any woman, whether with child or not, to take any drug or noxious thing; or unlawfully using any instrument or other means; <p>with the intent to procure the woman's miscarriage.</p> <p>An offence against this section carries a maximum penalty of imprisonment for 10 years.</p>
Section 84	<p>Prohibits any person from:</p> <ul style="list-style-type: none"> unlawfully supplying or procuring any drug or noxious thing, or any instrument or thing whatsoever, knowing that it is intended to be unlawfully used with intent to procure the miscarriage of any woman, whether with child or not. <p>An offence against this section carries a maximum penalty of imprisonment for five years.</p>

*Section 83 is the central provision in the current abortion debate, as it relates to the situation where a woman seeks to obtain an abortion from a medical practitioner. For a detailed discussion of the interpretation of section 83 by the courts, see [Chapter 3](#) of the 2017 briefing paper.

Insertion of new Part 3, Division 12 – Termination of pregnancies by unqualified persons

Schedule 2 of the Bill proposes two new offences in place of the three current offences:

- **Performance of a termination by an unqualified person** – with a maximum penalty of 7 years imprisonment; and
- **Assistance by an unqualified person in the termination of a pregnancy** – with a maximum penalty of 7 years imprisonment.

Both offences must be read with clause 10 of the Bill, which states that a person who consents to, assists in or performs a termination on themselves is not guilty of an offence.

The offences and penalties under the Queensland Act are the same as the NSW Bill. However, the [Victorian Crimes Act 1958](#) contains a single offence with a maximum penalty of 10 years, which prohibits a person who is not a qualified person from performing an abortion on another person.

Schedule 2 Clause 2 of the Bill defines the following terms:

- **medical practitioner** means a person registered under the [Health Practitioner Regulation National Law](#) to practise in the medical profession, other than as a student.
- **perform** includes attempt to perform.
- **termination** means an intentional termination of a pregnancy in any way, including, for example, by— (a) administering a drug, or (b) using an instrument or other thing.
- **unqualified person** means— (a) in relation to performing a termination on another person—a person who is not a medical practitioner, or (b) in relation to assisting in the performance of a termination on another person—a person who is not authorised under section 7 of the Reproductive Health Care Reform Act 2019 to assist in the performance of the termination.

Abolition of common law rules criminalising abortion

A key distinction between the NSW Bill and Queensland Act is the **express abolition of any rule of common law** creating an offence in relation to procuring a person's miscarriage, under Schedule 3 of the NSW Bill.

This provision appears to be drawn from the Victorian legislation. On the reasons for recommending its inclusion in the Victorian legislation, the Victorian Law Reform Commission [stated](#):

As there is so much uncertainty surrounding the scope of the old common law offence of procuring an abortion, it would be prudent to stipulate that it has been abolished and cannot be revived.

Author: Laura Ismay

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For further information please contact the Research Service on 9230 2356

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