

A suitable legislative framework for termination of pregnancy in South Australia

Submission to South Australia Law Reform Institute

30 May 2019

CONTENTS

Who we are	3
Introduction	4
Availability of abortion services	4
Termination of pregnancy as a healthcare issue	4
Termination of pregnancy on demand	5
Late termination of pregnancy	7
Examination by medical practitioners	9
Residential requirements.....	9
Counselling.....	10
Providers of abortion services	11
Conscientious objection.....	12
Safe access zones	13
Conclusion.....	16

Who we are

The Australian Lawyers Alliance (ALA) is a national association of lawyers, academics and other professionals dedicated to protecting and promoting justice, freedom and the rights of the individual.

We estimate that our 1,500 members represent up to 200,000 people each year in Australia. We promote access to justice and equality before the law for all individuals regardless of their wealth, position, gender, age, race or religious belief.

The ALA is represented in every state and territory in Australia. More information about us is available on our website.¹

The ALA office is located on the land of the Gadigal of the Eora Nation.

¹ www.lawyersalliance.com.au.

Introduction

1. The ALA welcomes the opportunity to have input into the South Australia Law Reform Institute's inquiry into 'A suitable legislative framework for termination of pregnancy in South Australia'.
2. This submission focuses predominantly on how the current legal framework should be amended to ensure that:
 - (a) Termination of pregnancy services are treated as a health care issue rather than as a criminal matter;
 - (b) Women have increased autonomy to access termination of pregnancy services;
 - (c) Women are able to access safe termination of pregnancy services in both metropolitan and rural areas;
 - (d) Providers of termination of pregnancy services are appropriately regulated without impeding women's access to termination of pregnancy services;
 - (e) Medical and health practitioners are able to conscientiously object to their involvement in the provision of termination of pregnancy services without impeding a woman's access to termination of pregnancy services or endangering their life or the life of another unborn child;
 - (f) Women accessing termination of pregnancy services and providers of those services are adequately protected from those who object to the provision of such services through safe access zones;
 - (g) There are appropriate criminal offences for persons or organisations who do not comply with the legal framework for termination of pregnancy services.

Availability of abortion services

Termination of pregnancy as a healthcare issue

3. The ALA is of the view that termination of pregnancy should be treated as a health care issue rather than as a criminal law issue.

4. Health care in Australia has been strongly influenced by the principle of patient autonomy i.e. a patient's right to direct their own healthcare.² This principle is a fundamental part of Australia's common law. However, in the context of termination of pregnancies in South Australia, the decision-maker is the medical practitioner and can only be performed if certain criteria is met.³
5. Research in Australia demonstrates that most Australians support laws allowing women to access safe and legal abortions.⁴
6. The ALA is therefore of the view that the law should be amended so that termination of pregnancy is treated as a health care issue rather than as a criminal issue. Pregnant woman should be empowered to make their own decisions regarding whether or not to terminate a pregnancy, particularly in the earlier stages of pregnancy. In the later stages of a pregnancy, terminations should be available when it is appropriate in all the circumstances. These issues will be considered in further detail below.
7. The legislative framework should clearly set out who can provide termination of pregnancy services. This will also be discussed in further detail below. Criminal offences should remain in force to penalise persons or organisations that perform or assist in terminations of pregnancies in unlawful circumstances.

Termination of pregnancy on demand

8. The ALA acknowledges that there are a number of conflicting legal and ethical issues that arise when considering in what circumstances a woman should be able to request a termination of pregnancy on demand. The ALA also acknowledges that as a pregnancy progresses and a foetus becomes viable, there is greater community support for considering the interests of an unborn baby. For this reason, the ALA is of the view that a termination on demand should be available to all woman in the earlier stages of pregnancy.

² Ben White, Fiona McDonald and Lindy Willmott, *Health Law in Australia* (Thomson Reuters, 2nd ed, 2014), 28.

³ *Criminal Law Consolidation Act 1935 (SA)*, s82A.

⁴ Lachlan J de Crespigny, Dominic J Wilkinson, Thomas Douglas, Mark Textor and Julian Savulescu, 'Australian attitudes to early and late abortion' (2010) 193(1) *Medical Journal of Australia*, 9.

9. Terminations of pregnancy on demand are currently available in the following jurisdictions:

- (a) Australian Capital Territory;⁵
- (b) Queensland – up to 22 weeks gestation;⁶
- (c) Tasmania – up to 16 weeks gestation;⁷ and
- (d) Victoria – up to 24 weeks gestation.⁸

10. There is no gestational age limit that will be acceptable to all Australians as being an appropriate timeframe for women to request a termination of pregnancy on demand. This is evident by the variety in gestational ages that have been set as the upper limit for terminations on demand in other jurisdictions. However, in deciding where the gestational age limit should be set for terminations on demand, the following should be noted:

- (a) 1st trimester screening (nuchal translucency) is offered in South Australia from 11 to 13+6 weeks gestation to detect risk for Down syndrome.
- (b) If the 1st trimester screening demonstrates low risk, practitioners should consider offering 2nd trimester serum screening for neural tube defect detection between 14 to 20+6 weeks gestation.
- (c) Morphology ultrasound is offered to patients between 18 and 20 weeks gestation.⁹

11. If abnormalities are detected in the above tests, it may be necessary for the pregnant woman to undergo further testing before they can be provided with advice as to the likely results and what the consequences may be for their unborn baby. The baby's prognosis may remain uncertain and may not be capable of being fully known until after it is born. In order to make a decision, the woman may require advice and counselling from a variety of practitioners and

⁵ *Health Act 1993* (ACT).

⁶ *Termination of Pregnancy Act 2018* (Qld), s5.

⁷ *Reproductive Health (Access to Terminations) Act 2013* (Tas), s4.

⁸ *Abortion Law Reform Act 2008* (Vic), s4.

⁹ Department of Health, 'South Australian Perinatal Guidelines: Normal pregnancy, labour and puerperium management (7 September 2015) *Government of South Australia*, 5.

it is likely to be a difficult decision for the woman involved. The tests and counselling involved in reaching such decisions invariably take some time.

12. Late term terminations in South Australia are very rare. In 2016, only 9.8% of all pregnancy terminations occurred between 14 and 24 weeks gestation¹⁰ and only 2.8% of all pregnancy terminations occurred at 20 weeks or more gestation.¹¹ Of the 120 pregnancies that were performed at 20 weeks gestation or later, 52 were for congenital abnormalities, 10 were for specified medical conditions of the woman and 58 were for the mental health of the woman.¹² Therefore, it should be carefully considered whether preventing women from accessing termination of pregnancy services on demand up to a certain gestational age is warranted and whether imposing eligibility requirements will simply add to the social stigma and stress for women seeking to access termination of pregnancy services.

Late termination of pregnancy

13. Assuming that there is a gestational limit as to when women can access termination of pregnancy services on demand, the ALA is of the view that following this period of gestation, women should still be able to access termination of pregnancy services in appropriate circumstances.
14. Currently, in South Australia, women can lawfully access termination of pregnancy services up to 28 weeks gestation.¹³ However, clinical practice has resulted in terminations of pregnancy being available only up to 23 weeks gestation.¹⁴

¹⁰ Pregnancy Outcome Unit, 'Pregnancy outcome in South Australia 2016' (September 2018) *SA Health*, 48.

¹¹ *Ibid*, 49.

¹² *Ibid*.

¹³ Above n3.

¹⁴ SA Health, 'Abortions' (2012) *SA Health*, accessed 27 May 2019 at www.sahealth.sa.gov.au/wps/wcm/connect/public+content/sa+health+internet/health+topics/health+conditions+prevention+and+treatment/abortions#How%20early,%20or%20late%20in%20the%20pregnancy%20can%20I%20have%20an%20abortion?.

15. There are a number of circumstances in which a termination of pregnancy may be appropriate at a later gestational age, including:
- (a) Severe foetal abnormalities, including those that may only be capable of being detected at a later gestational age;
 - (b) If the woman's physical or mental health is at serious risk if the pregnancy continues;
 - (c) If another unborn baby's life is at serious risk if the pregnancy continues i.e. in a multiple pregnancy.
16. The laws relating to late termination of pregnancies differ in every jurisdiction. In Queensland, termination of pregnancies after 22 weeks gestation are available if it would be appropriate in all the circumstances or in an emergency situation.¹⁵ In Victoria, a termination of pregnancy after 24 weeks gestation is available if it is appropriate in all the circumstances.¹⁶
17. The ALA supports late termination of pregnancies in an emergency situation where it is necessary to save the life of the pregnant woman or the life of another unborn child. The ALA also considers that it would be appropriate to introduce legislation allowing late terminations of pregnancy if it would otherwise be appropriate in all the circumstances. This would ensure that there is enough flexibility provided in the legislation for women seeking access to late terminations in circumstances other than when severe foetal abnormalities have been detected or when there is a risk to the woman's life or health but which are nevertheless appropriate, for e.g. when a woman has been the victim of a sexual assault.
18. To ensure that late terminations of pregnancy are only being performed in appropriate circumstances, it could be a requirement that a medical practitioner consult with another medical practitioner before the termination can be carried out. In addition, it could be a requirement that one of the medical practitioners approving the termination is a specialist medical practitioner. When considering what requirements should be introduced, the ALA recommends that the impacts of such limits be carefully considered, in particular on women living in rural and remote communities and women who are already vulnerable and who face challenges in accessing termination of pregnancy services.

¹⁵ Above n6, s6.

¹⁶ Above n8, s5.

Examination by medical practitioners

19. Section 82A of the *Criminal Law Consolidation Act 1935 (SA)* requires a pregnant woman to undergo personal examinations with two medical practitioners before they can access termination of pregnancy services in South Australia.
20. The ALA submits that a woman should only be required to consult one practitioner before they can access termination of pregnancy services on demand. As medical termination of pregnancy services are only available in the early stages of a pregnancy and many women living in rural or remote areas may not be able to readily access a medical practitioner in person, the ALA submits that consideration should be given to authorising certain health practitioners, such as midwives, nurse practitioners, pharmacists and Aboriginal and Torres Strait Islander practitioners to provide medical termination of pregnancy services.
21. In addition, consultations should be allowed to occur via telehealth services rather than in person. This would reduce the burden on public hospitals to provide termination of pregnancy services and would benefit women living in rural or remote areas to access services more readily. It would also assist women accessing services with commitments that might prevent them from attending a consultation in person (such as childcare or work commitments) or who are vulnerable and could be placed at further risk if they are required to attend an examination in person (such as women who are victims of domestic violence).

Residential requirements

22. Section 82A of the *Criminal Law Consolidation Act 1935 (SA)* only authorises a termination of pregnancy in circumstances where the pregnant woman has resided in South Australia for a period of two months. The ALA is of the view that there should be no residential requirement to access termination of pregnancy services in South Australia, as it unduly restricts access to women who have recently moved to South Australia and prevents access to interstate and/or overseas visitors. In circumstances where some methods of termination are only available in the early stages of pregnancy and there are likely to be limits as to when termination of pregnancy services can be accessed on demand, the ALA is of the view that there should be no additional barriers for women who wish to access these services.

Counselling

23. The ALA supports the availability of counselling services for women wishing to access termination of pregnancy services. However, we do not consider that it should be a mandatory requirement for medical or health practitioners to offer access to counselling services or to compel a woman's participation in counselling before they can access termination of pregnancy services. This is for the following reasons:

- (a) As termination of pregnancy services should be treated as a health matter rather than as a criminal matter, there is no need to include legislative provisions requiring a medical or health practitioner to offer counselling services to a woman or to compel a woman to participate in counselling before a pregnancy is terminated.
- (b) Counselling is already an important aspect of clinical care in the delivery of termination of pregnancy services and forms part of good clinical practice. A woman contemplating a termination has to be provided with information about what her options are and supported to reach a decision that is right for her. She may also be counselled following a termination of pregnancy or following a decision to continue with a pregnancy.
- (c) Women should be regarded as being capable of making an informed decision following an initial consultation with a provider of termination of pregnancy services.
- (d) Mandatory counselling may act as a barrier for women seeking to access termination of pregnancy services. It would likely reinforce the social stigma around termination of pregnancy services, it would create an additional step before a termination could be provided, women in rural and remote communities would probably have difficulties accessing counselling services and it would disadvantage vulnerable woman who were unable to attend for counselling.
- (e) The legislation in other jurisdictions does not require practitioners to offer a referral for counselling (except in Western Australia¹⁷) or for a woman to attend counselling before or after a termination.

¹⁷ *Health Act 1911* (WA), s334(5)(b)–(c).

Providers of abortion services

24. In South Australia in 2016, 18% of abortions were provided for women residing in rural or remote regions.¹⁸ However, only 12.2% of women living in rural or remote areas were able to access a termination in their country area, with the remaining women required to travel to metropolitan areas to access the relevant services.¹⁹
25. The ALA is therefore of the view that termination of pregnancy services should not be limited to being provided in prescribed hospitals due to the impact on women living in rural or remote areas. Both the Queensland Law Reform Commission ('QLRC') and the Victorian Law Reform Commission expressed concern regarding women's access to termination of pregnancy services in rural, regional and remote areas.²⁰
26. The ALA is also of the view that medical practitioners should be able to provide termination of pregnancy services in a general practitioner setting. Health practitioners, such as midwives, nurse practitioners, pharmacists and Aboriginal and Torres Strait Islander health practitioners, should also be authorised to provide medical abortions (which are available until 9 weeks gestation), as it will increase the availability of services, particularly for women living in rural or remote areas. Authorised health practitioners should also be authorised to assist medical practitioners with surgical abortions.
27. Due to the number of women seeking to access termination of pregnancy services in rural or remote areas and the limited timeframe in which medical abortions can be accessed, medical and health practitioners should be authorised to provide consultations using telehealth services. The use of telehealth services could also be used for consultations before and after a surgical termination is performed.

¹⁸ Above n10, 47.

¹⁹ Ibid.

²⁰ Queensland Law Reform Commission, 'Review of termination of pregnancy laws' (June 2018) *State of Queensland*, 41, 44, 56, 105; Victorian Law Reform Commission, 'Law of Abortion Final Report' (March 2008) *Victorian Law Reform Commission*, 47.

28. The ALA is of the view that offences should be created for persons who provide or assist in the provision of termination of pregnancy services in contravention of the approved legal framework.

Conscientious objection

29. The ALA submits that medical and health practitioners should continue to be allowed to conscientiously object to performing, assisting or otherwise being involved in decisions regarding a termination of pregnancy. This is for the following reasons:

- (a) The ALA recognises that there is a wide range of personal views and beliefs that will determine whether individuals support termination of pregnancy in South Australia, including within the health profession. Practitioners who have a conscientious objection to termination of pregnancies should not have their own values devalued by forcing them to participate in the provision of those services.
- (b) Enabling medical and health practitioners to conscientiously object to termination of pregnancy services would also provide consistency with legislative schemes in other jurisdictions.²¹
- (c) Conscientious objection to termination of pregnancy services would provide consistency with codes of conduct and ethics of the medical and health professions. For example, the Medical Board of Australia's *'Good Medical Practice: A Code of Conduct for Doctors in Australia'*²² states that good medical practice involves *'Being aware of your right to not provide or directly participate in treatments to which you conscientiously object...'*²³

30. However, the ALA is of the view that those who hold a conscientious objection to termination of pregnancy services should be required to inform the woman that they have a conscientious objection and promptly refer the woman to another practitioner that can

²¹ *Health Act 1993* (ACT), s84; *Termination of Pregnancy Law Reform Act 2017* (NT), s11; *Termination of Pregnancy Act 2018* (Qld), s8; *Abortion Law Reform Act 2008* (Vic), s 8(1); *Health Act 1911* (WA), s334(2).

²² Medical Board of Australia, 'Good medical practice: A code of conduct for doctors in Australia' (March 2014) *Medical Board of Australia*.

²³ *Ibid*, [2.4.6].

provide the requested service and who does not have a conscientious objection to termination of pregnancies. This would ensure that a woman's access to termination of pregnancy services is not prevented or hampered because the practitioner that they seek advice from holds a conscientious objection. It would also ensure further consistency with other jurisdictions, the majority of which require a practitioner who holds a conscientious objection to refer the woman to another practitioner.²⁴

31. Finally, the ALA is of the view that medical and/or health practitioners that have a conscientious objection to termination of pregnancy services should be required to perform or assist in the performance of a termination in circumstances of emergency i.e. to save the life of the pregnant woman or the life of another unborn child. Again, a provision of this nature would be consistent with the majority of the Australian jurisdictions.²⁵

Safe access zones

32. The ALA recognises the importance of safe access zones to protect the safety and well-being and to respect the privacy and dignity of:

- (a) Women seeking to access services provided at termination of pregnancy premises; and
- (b) Employees at premises where termination of pregnancies are provided or others who need to access the premises in the course of their duties and responsibilities.

33. It is clear that persons who oppose termination of pregnancy services frequently attend premises where terminations of pregnancy are provided and engage in behaviours that impact on women seeking to access those services and on employees and other persons who

²⁴ *Termination of Pregnancy Law Reform Act 2017* (NT), s11; *Termination of Pregnancy Act 2018* (Qld), s8(3), *Reproductive Health (Access to Terminations) Act 2013* (Tas), s7(2), *Abortion Law Reform Act 2008* (Vic), s8(1)(b).

²⁵ NT, *Termination of Pregnancy Act 2018* (Qld), s8(4), *Reproductive Health (Access to Terminations) Act 2013* (Tas), s6(3)-(4), *Abortion Law Reform Act 2008* (Vic), s8(3)-(4).

have a legitimate reason for attending the premises. For example, the QLRC's review of termination of pregnancy laws²⁶ found that:

There is evidence that people who oppose termination of pregnancy sometimes engage in activities including protesting, holding prayer vigils, or providing 'footpath counselling' at or near premises at which a service of performing terminations on women is provided, and that such behaviour may impact on the safety, privacy and well-being of women who are accessing those premises and of service providers.²⁷

34. The QLRC report went on to find that:

'.....the purpose of safe access zone provisions is to protect the safety and wellbeing and respect the privacy and dignity of persons accessing services provided at termination services premises and employees and others who need to access those premises in the course of their duties and responsibilities.'²⁸

35. Following the QLRC's report, legislation was enacted in Queensland legalising termination of pregnancies and included provisions regarding safe access zones.²⁹

36. Similar legislation now exists in all jurisdictions, except in South Australia and Western Australia.³⁰ Two anti-abortion protestors sought to challenge the constitutional validity of the Victorian safe access zone legislative provisions. However, the High Court of Australia agreed with the respondent's submissions that laws to prevent such infringements of privacy, wellbeing and dignity within safe access zones constituted a legitimate restriction on freedom of expression.³¹

²⁶ Queensland Law Reform Commission, 'Review of termination of pregnancy laws' (June 2018) *State of Queensland*.

²⁷ *Ibid*, [5.1].

²⁸ *Ibid*, [5.128].

²⁹ *Termination of Pregnancy Act 2018* (Qld), Part 4.

³⁰ *Health Act 1993* (ACT), ss85-7; *Public Health Act 2010* (NSW), Part 6A; *Termination of Pregnancy Law Reform Act 2017* (NT), Part 3; *Reproductive Health (Access to Terminations) Act 2013* (Tas), s9(2); *Public Health and Wellbeing Act 2008* (Vic), s185D.

³¹ *Clubb v Edwards; Preston v Avery* [2019] HCA 11.

37. To ensure the safety and dignity of women accessing termination of pregnancy services and employees and other relevant persons in South Australia, the ALA is of the view that legislation should be enacted to establish safe access zones around premises that offer termination of pregnancy services.
38. The ALA submits that safe access zones should apply 24 hours a day, 7 days a week. This is to ensure that women seeking access to termination of pregnancy services feel safe attending those premises at all times. Employees should also be able to attend their place of employment outside of standard working hours without feeling harassed and intimidated from those who object to the provision of termination services.
39. The ALA submits that the safe access zone radius should also factor in potential attempts by protestors to stop women entering clinics by accosting them at pedestrian access points. To this end, we suggest that the legislation, or associated regulation, should specify that the safe access zone should extend a minimum of 150m of:
- (a) any part of the premises; and/or
 - (b) any pedestrian access point to a building that houses the premises.
40. The ALA is of the view that prohibited behaviours should include the following:
- (a) in relation to a person accessing, attempting to access, or leaving premises at which abortions are provided, besetting, harassing, intimidating, interfering with, threatening, hindering, obstructing or impeding that person by any means;
 - (b) communicating by any means in relation to abortions in a manner that is able to be seen or heard by a person accessing, attempting to access, or leaving premises at which abortions are provided and is reasonably likely to cause distress or anxiety;
 - (c) interfering with or impeding a footpath, road or vehicle, without reasonable excuse, in relation to premises at which abortions are provided;
 - (d) intentionally recording by any means, without reasonable excuse, another person accessing, attempting to access or leaving premises at which abortions are provided, without that other person's consent; or
 - (e) any other prescribed behaviour.

41. The ALA is of the view that criminal offences should be introduced for persons who engage in prohibited conduct in safe access zones.

Conclusion

42. The ALA welcomes the opportunity to have input into the South Australia Law Reform Institute's inquiry into 'A suitable legislative framework for termination of pregnancy in South Australia'. As discussed the above, the ALA strongly supports amendment of the current laws so that termination of pregnancies are treated as a health care issue rather than as a criminal law issue.
43. The ALA is of the view that women should be able to access termination of pregnancy services on demand in the earlier stages of pregnancy. In the latter stages of pregnancy, terminations should be available in emergency situations or if it would otherwise be appropriate in the circumstances.
44. To enable women living in rural or remote communities to access termination of pregnancy services, the ALA is of the view that personal examinations should not be mandatory. A variety of health practitioners should be authorised to provide or assist in the provision of termination services. Termination services should not be restricted to prescribed hospitals and medical and health practitioners should be authorised to use telehealth services.
45. For the reasons stated above, minimum residential requirements should be removed so that women who have recently moved to South Australia and interstate and overseas visitors can access termination services if necessary.
46. The ALA is of the view that referral for counselling or attendance at counselling should not be a legislative requirement, as it already forms part of the practitioner-patient relationship.
47. Although the ALA supports the ability of medical and/or health practitioners to conscientiously object to their involvement in the provision of termination services, they should be required to inform the patient of their conscientious objection and promptly refer the patient to another practitioner that does not hold such an objection. In addition, medical and/or health practitioners must not refuse to participate in termination services in an emergency situation.

48. Finally, the ALA is of the view that safe access zones are imperative to protect the safety and dignity of women seeking to access termination services and to protect employees and other persons attending premises where termination services are provided.



Sarah Vinall

SA State President
Australian Lawyers Alliance