



Human Rights  
Law Centre

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## Reproductive freedom in law

Human Rights Law Centre's submission to the review of abortion laws by the South Australian Law Reform Institute

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Freedom. Respect. Equality. Dignity. **Action.**

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## Human Rights Law Centre

The Human Rights Law Centre an independent and not-for-profit organisation that uses a strategic combination of legal action, advocacy, research, education and UN engagement to protect and promote human rights in Australia and in Australian activities overseas.

We have advocated for the decriminalisation of abortion, improved access to abortion care, and safe access zone laws around Australia. Most recently, we collaborated with pro-choice partners to secure abortion decriminalisation in Queensland and safe access zones in NSW, and successfully intervened in a High Court challenge to Victoria's safe access zone laws.

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# 1. Introduction

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1. 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. The Bill aims to modernise South Australia's abortion laws, which were last updated in 1969. The Attorney-General, the Hon Vickie Chapman MP, has since asked the South Australian Law Reform Institute (**SALRI**) to advise on the most appropriate way to modernise South Australia's abortion laws. This submission addresses questions posed in SALRI's factsheets.
2. We note that transgender men and gender diverse people experience pregnancy. This submission refers both to pregnant people and women, however all our recommendations should be understood as gender-inclusive. We urge SALRI to make recommendations that are gender-inclusive, including in law, and that promote equal access to abortion services.<sup>1</sup> References to women and pregnant people are inclusive of young people under 18 years.

# 2. Executive Summary

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3. South Australia has a unique opportunity to demonstrate its commitment to women's health and equality in law by comprehensively reforming the state's outdated abortion laws. We commend the South Australian Government for asking SALRI to advise on the modernisation of the state's abortion laws.
4. Although it is legal to access and provide abortions in South Australia in certain circumstances, abortion is still a criminal offence under the *Criminal Law Consolidation Act 1935 (SA)* (**Criminal Law Act**), punishable by life imprisonment. This is unacceptable.
5. Women's basic rights to non-discrimination, privacy, health and bodily autonomy are threatened by a system under which they risk criminal prosecution for making medical decisions about their own body. Restrictive abortion laws lead to worse health outcomes, particularly for women whose circumstances can make accessing health services more difficult – for example, a fear of being prosecuted and a lack of services in a regional town can lead to delayed treatment, a deterioration in health or resort to a medically unsafe option.
6. South Australia led the nation when it reformed its abortion laws in 1969. However, the laws have failed to keep up with modern community values and clinical practice. There is a critical lesson to learn from this – prescriptive laws about health procedures, which cannot be changed except by parliament, will not keep up with advances in medical practice.

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<sup>1</sup> SALRI has previously recommended removing references to unnecessarily gendered terms in Division 17 of the *Criminal Law Consolidation Act 1935 (Criminal Law Act)*: South Australian Law Reform Institute, *Discrimination on the grounds of sexual orientation, gender, gender identity and intersex status in South Australian legislation* (September 2015) 40.

7. No other health procedure has been regulated in law like abortion. It is time to start treating abortion like all other health procedures, which are regulated through professional regulations, guidelines and directives – documents that can be updated as medical practice evolves to ensure the best possible health outcomes for patients – as well as the framework of the *Health Practitioner Regulation National Law (South Australia) Act 2010*.
8. We applaud the Government for supporting access to abortion services through public funding, although we note that the law limits access to prescribed hospitals. It is critical that abortion law reform in South Australia expands affordable access to abortion, particularly for women in regional and remote areas who have, for too long, had to travel considerable distances to access the limited number of hospitals that provide abortion services.
9. South Australia should reform its abortion laws to ensure safe, respectful and equitable access to abortion services for years to come. In particular:
  - (a) Abortion should be decriminalised, thereby allowing it to be situated as a health issue to be determined by a pregnant person in consultation with the health professionals that they choose to consult.
  - (b) The law should respect the right of every person to make decisions about their body and health. It is not necessary or appropriate to impose, *in law*, gestational limits or any requirement for a woman to seek third party authorisation or to satisfy certain grounds in order to be granted access to an abortion.
  - (c) If it is deemed necessary to include criteria in law to guide medical decision-making, this should be limited to pregnancies of more than 24 weeks gestation and require consideration of all of the patient's circumstances. Women should not be required to comply with narrow criteria, nor seek out a second opinion, nor be forced to undergo counselling. It is only in rare and typically distressing circumstances that an abortion is required after 24 weeks – it is critical that the law promotes decision-making in a patient's best interests.
  - (d) Sensible and proportionate safe access zone laws should be introduced, modelled on the laws in Victoria that were recently upheld by the High Court. These laws are critical to preventing anti-choice harassment and intimidation of patients and staff outside facilities that provide abortion services.
  - (e) The law should facilitate access to safe, impartial and confidential reproductive healthcare. Laws that restrict access to abortion to certain hospitals or exclude the involvement of nurses, midwives, Aboriginal and Torres Strait Islander health practitioners, pharmacists and other registered health practitioners will make it harder for South Australian's to benefit from medical advancements as they happen.
  - (f) The law should make clear that any health practitioner who claims to have a conscientious objection has a legal duty to disclose that objection, transfer the care of

the pregnant person to a practitioner without an objection and perform or assist with an abortion in cases of medical emergency. The Health and Community Services Complaints Commissioner should monitor compliance with these duties.

### 3. Recommendations

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#### ***Recommendation 1:***

- a) Decriminalise abortion by repealing Division 17 of the Criminal Law Act.
- b) Amend the definition of “serious harm” in section 21 of the Criminal Law Act to include “the destruction, other than in the course of a medical procedure, of a foetus of a pregnant person, whether or not the person suffers any other harm”.
- c) The law must make clear that a pregnant person does not commit an offence by consenting to or assisting in an abortion on themselves.

#### ***Recommendation 2:***

- d) The law should not require pregnant people to obtain third party authorisation for an abortion, nor to satisfy criteria or grounds to be ‘eligible’ for an abortion.
- e) If it is deemed necessary to include criteria in law to guide medical decision-making in relation to abortion, this should be limited to pregnancies of more than 24 weeks gestation and allow for consideration of all of the patient’s circumstances (in line with the approach in Victoria). Women should not be required to comply with narrow criteria, seek out a second opinion or approval from a committee, nor forced to undergo counselling.

#### ***Recommendation 3:***

South Australian law should provide for sensible and proportionate safe access zones, modelled on Victoria’s safe access zone laws. Safe access zones should apply around all premises that provide abortion services and operate at all times.

#### ***Recommendation 4:***

Reform to South Australia’s abortion laws should ensure that women do not face additional legal barriers to accessing abortions. To this end, the law should not include:

- a) A requirement that abortions only be performed at prescribed hospitals or facilities.
- b) Inflexible restrictions on which registered health practitioners are permitted to perform, or assist with the performance of an abortion.
- c) A residency requirement.
- d) A requirement to undergo counselling.

#### ***Recommendation 5:***

- a) The law should impose a clear duty on health professionals, including counsellors and social workers, who claim a conscientious objection to abortion to:

- i. disclose their objection; and
  - ii. refer, or transfer the care, of the patient to a health practitioner known not to hold such an objection; and
  - iii. perform, or assist in, an abortion in cases of medical emergency, where an abortion is necessary to save a person's life or prevent serious harm.
- b) Patients should have a right to complain about non-compliance with the above duties, including to the relevant professional regulatory body, board, and state or federal statutory complaints bodies.
- c) The South Australian Health and Community Services Complaints Commissioner should be requested by the Minister for Health and Wellbeing to inquire into compliance with the above duties within 24 months after the law comes into effect.

## 4. Human rights law and abortion

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### Women's reproductive rights

10. The right of women to control if and when they have children is fundamental to their health and lives. South Australia has a duty to guarantee safe access to abortion services and post-abortion care.<sup>2</sup> The UN Committee on the Elimination of Discrimination Against Women has recommended the decriminalisation of abortion in all cases and noted that the abuse and mistreatment of women and girls seeking sexual and reproductive health information, goods and services is a form of gender-based violence.<sup>3</sup>
11. Laws that criminalise or restrict medical procedures needed by women discriminate against women<sup>4</sup> and threaten basic rights to life, health and bodily autonomy. The use of criminal laws to regulate abortion kills tens of thousands of women around the world each year by denying them access to safe healthcare.<sup>5</sup> Without access to quality abortion care, maternal mortality and illness increases as women are delayed medical treatment, and sometimes forced to turn to clandestine abortions in unsafe and unhygienic conditions. Such laws also perpetuate wrongful stereotypes of women as "reproductive instruments"<sup>6</sup> and as incapable of making decisions about their own bodies.

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<sup>2</sup> Committee on Economic, Social and Cultural Rights, *General comment No 22: Sexual and Reproductive health* E/C. 12/GC/22 (2016) [28].

<sup>3</sup> Committee on the Elimination of Discrimination Against Women. *General Recommendation No 35: Gender-Based Violence against Women, Updating General Recommendation No. 19*, UN Doc. CEDAW/C/GC/35 (2017).

<sup>4</sup> Committee on the Elimination of Discrimination against Women, *General Recommendation 24: Women and health*, A/54/38/Rev 1 (1999) [11]; United Nations Human Rights Committee, *Views adopted by the Committee under article 5(4) of the Optional protocol, concerning communication no.2324/2013*, CCPR/C/116/D/2324/2013 (9 June 2016) [7.9]-[7.11].

<sup>5</sup> Committee on Economic, Social and Cultural Rights, *General comment No 22: Sexual and Reproductive health* E/C. 12/GC/22 (2016), [40]; Juan Mendez, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment*, A/HRC/31/57, 5 January 2016, [44], (Mendez 2016 Report).

<sup>6</sup> Human Rights Committee, *Views adopted by the Committee under article 5(4) of the Optional Protocol, concerning communication no 2324/2013*, CCPR/C/116/D/2324/2013 (17 November 2016) [7.11]

12. Women forced to carry pregnancies to term against their will have suffered serious physical and psychological harm, to the extent that the UN Human Rights Committee has said that it violates the freedom from torture and cruel, inhuman or degrading treatment.<sup>7</sup>

### The limited interests of a foetus

13. The fundamental principles of equality and non-discrimination require that the human rights of a pregnant person – to life, health and bodily autonomy – be given priority over any interest in prenatal life.
14. A foetus has some interests as a potential person, however neither international law nor Australian law recognise a right to life in a foetus.<sup>8</sup> This is because protecting a right to life before birth conflicts with human rights protections for women. Or as the European Court of Human Rights has put it in relation to the right to life: “the unborn child is not regarded as a ‘person’” and that “if the unborn do have a ‘right’ to ‘life’ it is implicitly limited by the mother’s rights and interests”, including her rights to life, health and privacy.<sup>9</sup>
15. The Australian Government has said that the right to life under the *International Covenant on Civil and Political Rights*<sup>10</sup> was “not intended to protect life from the point of conception but only from the point of birth.”<sup>11</sup>

## 5. Responses to SALRI factsheet questions

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### Current regulation of abortion in South Australia

16. Access to abortion for women in South Australia is currently only lawful in the limited circumstances set out in section 82A of the Criminal Law Act. These circumstances include where two medical practitioners are of the opinion that:
  - (a) the continuation of the pregnancy involves greater risk to the life or physical or mental health of the pregnant woman than if the pregnancy were terminated; or

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<sup>7</sup> Human Rights Committee, *Views: Communication No 2425/2014*, 119<sup>th</sup> sess, UN Doc CCPR/C/119/D/2425/2014 (17 March 2017) ('Whelan v Ireland'). See also Juan Méndez, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment*, A/HRC/31/57 (5 January 2016) [43].

<sup>8</sup> *Vo v France*, App No 53924/00, Eur. Ct HR, 80 (2004). The drafters of the *International Covenant on Civil and Political Rights* rejected a proposal to extend the right to life to prenatal life: United Nations General Assembly Official Records, Annex, 12 Session, Agenda Item 33 [96], [113] [119], UN Doc A/C.3/L.654.

<sup>9</sup> *Vo v France*, App No 53924/00, Eur. Ct HR, 80 (2004); *A, B and C v Ireland*, App No 25579/05, Eur Ct HR 237-238 (2010).

<sup>10</sup> *International Covenant on Civil and Political Rights*, 16 December 1966, 999 U.N.T.S. 171 (entered into force 23 March 1976).

<sup>11</sup> Peter Arnaudo, Attorney-General's Department, Hansard - Joint Standing Committee on Treaties Reference: Treaties tabled 14 May and 4 June 2008 16 June 2008, 7,  
<https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;db=COMMITTEES;id=committees%2Fcommjnt%2F10940%2F0001;query=id%3A%22committees%2Fcommjnt%2F10940%2F0002%22>.

- (b) there is substantial risk that if a child were born to the pregnant woman, that child would “suffer from such physical or mental abnormalities as to be seriously handicapped.”
17. Abortions can only be performed at prescribed hospitals or hospitals of a prescribed class. Outside of section 82A, attempting to procure an abortion and procuring drugs to cause an abortion are offences with a maximum penalty of life imprisonment. These offences all fall under Part 3 Division 17 of the Criminal Law Act.

## **Decriminalising abortion**

- 18. South Australia should completely decriminalise abortion where it is performed with a pregnant person’s consent by an appropriately qualified professional. The use of criminal law to regulate access to abortion is harmful and discriminatory and inconsistent with contemporary community values and clinical practice.
- 19. In 2005, the Public Health Association of Australia observed that the legal status of abortion directly affects the planning, safety and quality of reproductive health services and called for all state and territory governments to remove abortion from criminal law.<sup>12</sup>
- 20. More recently, a Parliamentary inquiry in Queensland observed that since the decriminalisation and reform of abortion laws in Victoria in 2008, medical practitioners “can now focus on practicing in accordance with evidence based clinical standards to address women’s health care needs, free of the threat of criminal proceedings”.<sup>13</sup>
- 21. No person should ever have to fear criminal prosecution for seeking healthcare or trying to help their patients. The criminal law should not be used to regulate access to healthcare and medical procedures.

## **Limited use of criminal law**

- 22. It is necessary to ensure that where a woman loses a foetus as a result of a criminal act against her, for example an assault in the context of family violence, the law recognises that loss as a harm *to the woman*.
- 23. It is critical however, that the harm and the offence are attached to the pregnant person, not to the foetus, so as to avoid creating any personhood rights in a foetus that could conflict with the rights of women. Both New South Wales and Victoria have achieved this by including the destruction of a foetus in the definition of “grievous bodily harm” and “serious injury” in their respective criminal laws.<sup>14</sup> South Australia’s Criminal Law Act could similarly be amended to include, in the definition of “serious harm”, the destruction, other than in the course of a

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<sup>12</sup> Public Health Association of Australia, *Abortion in Australia: Public Health Perspectives* (2005) 12.

<sup>13</sup> Health, Communities, Disability Services and Domestic Family Violence Prevention Committee, *Abortion Law Reform (Women’s Right to Choose) Amendment Bill 2016 and Inquiry into Law Governing Termination of Pregnancy in Queensland* (Report No 24. August 2016) 63.

<sup>14</sup> Crimes Act 1900 (NSW) s 4; Crimes Act 1958 (Vic) s 15.

medical procedure, of the foetus of a pregnant woman, whether or not the woman suffers any other harm. As the Victorian Law Reform Commission noted, such an approach “appropriately reflects the seriousness of the offence and, most importantly, differentiates between abortions and criminal acts by third parties resulting in fetal death.”<sup>15</sup>

24. SALRI have asked whether it should be an offence for an “unqualified person” to perform an abortion, similar to provisions adopted in the reform of abortion laws in Victoria. This offence provision arose from a recommendation of the Victorian Law Reform Commission in 2008, and it was the history of “backyard abortionists” that led the Commission to make this recommendation. It is important to realise however, that it is the criminalisation of abortion and a lack of affordable abortion services that create a market for unqualified operators: if abortion services are affordable, confidential and accessible across South Australia, women will not need to turn to unqualified people to access the healthcare they need.
25. There does not appear to be an issue of unqualified people holding themselves out as qualified abortion providers in South Australia based on our inquiries. In any event, existing offence provisions in health laws such as the *Health Practitioner Regulation National Law (South Australia) Act 2010* (SA), as well as laws criminalising assault, would adequately address a situation in which an unqualified person holds themselves out as qualified to perform a medical procedure, including abortion. Further, the *Therapeutic Goods Act 1989* (Cth) restricts who can supply mifepristone and misoprostol.
26. If an ‘unqualified person’ offence is created, it is critical that the law is clear that a person does not commit an offence by consenting to or assisting in an abortion on themselves.

**Recommendation 1:**

- (a) Decriminalise abortion by repealing Division 17 of the Criminal Law Act.
- (b) Amend the definition of “serious harm” in section 21 of the Criminal Law Act to include “the destruction, other than in the course of a medical procedure, of a foetus of a pregnant person, whether or not the person suffers any other harm”.
- (c) The law should make clear that a pregnant person does not commit an offence by consenting to or assisting in an abortion on themselves.

**Respecting bodily autonomy in law**

27. Currently, the law in South Australia puts doctors in the position of gatekeeper over women’s access to abortion – women are required to obtain approval from two doctors. In doing so, women are effectively told that they cannot be trusted to make decisions about their bodies and lives. Any new law should be framed in a way that respects the autonomy of women and all pregnant people and their right to control what happens to their body.<sup>16</sup>

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<sup>15</sup> Victorian Law Reform Commission, *Law of Abortion: Final Report* (March, 2008), [7.74].

<sup>16</sup> Consistent with the requirements of the right to health in the *International Covenant on Economic, Social and Cultural Rights*: Committee on Economic, Social and Cultural Rights, *General Comment No 22: Sexual and*

28. In the ACT, abortion was decriminalised without any additional laws being introduced that require women to seek approval from two doctors, or to prove that their circumstances make them eligible to access abortion services.<sup>17</sup> In this way, abortion is regulated no differently in law to other medical procedures.<sup>18</sup> The Human Rights Law Centre supports this approach.
29. As with other medical procedures, professional guidelines and clinical directives tell medical practitioners how to manage a termination of pregnancy, and the *Health Practitioner Regulation National Law* provides a framework for the registration and accreditation of health practitioners.<sup>19</sup> Treating abortion like other health procedures in the law will allow doctors to focus on their patient's clinical interests, consistent with modern medical practice. In addition, and unlike laws, professional guidelines and directives can be updated promptly to keep up with advances in medicine that improve health outcomes.
30. The Royal Australian and New Zealand College of Obstetricians and Gynaecologists (**RANZCOG**) 2016 statement on late termination of pregnancy refers to the special circumstances, and medical realities, of late presentation or diagnosis of fatal foetal conditions. The statement supports the availability of legal abortion without an arbitrary gestational cut-off so that women can make decisions as late as necessary with the benefit of more accurate information about long term prognosis.<sup>20</sup>
31. As RANZCOG has noted, where a gestational cut-off is applied, access to termination of pregnancy becomes inequitable because it disadvantages the most vulnerable women – such as women living in remote areas, women with limited means and women who experience cultural or language barriers when accessing health services – more than those in privileged circumstances.<sup>21</sup>

## If provisions in law for later stage abortions are deemed necessary

32. If it is deemed necessary to include *in law* criteria to guide medical decision-making, this should be restricted to pregnancies of more than 24 weeks gestation and allow for consideration of all of a woman's circumstances in line with the approach in Victoria.
33. Victoria's laws allow a woman to seek an abortion without having to justify her decision or seek out third party approval up to 24 weeks gestation.<sup>22</sup> After 24 weeks, if a woman seeks an abortion, two doctors must determine that an abortion is appropriate, taking into account a

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*Reproductive Health E/C.12/GC/22 (2016) [28]. See also see Centre for Reproductive Rights, *Safe and Legal Abortion is a Woman's Human Right* (Briefing Paper, 2011).*

<sup>17</sup> *Health Act 1993 (ACT) pt 6.* This also aligns with the approach in Canada.

<sup>18</sup> There are provisions in the *Health Act 1993 (ACT)* that limit access to abortion to approved facilities and restrict the role of other registered health practitioners, such as nurses and pharmacists. These provisions should not be replicated in South Australia because they are likely to result in inequitable access to best practice abortion care, particularly for women in regional and remote areas.

<sup>19</sup> "Health practitioner" is a defined term in sch 2 s 5 of the *Health Practitioner Regulation National Law (South Australia) Act 2010 (SA)* and includes people in the medical, nursing, midwifery and pharmacy professions.

<sup>20</sup> RANZCOG, *Late termination of pregnancy* (May 2016) <<https://www.ranzcog.edu.au>>.

<sup>21</sup> Ibid.

<sup>22</sup> *Abortion Law Reform Act 2008 (Vic) s 4.*

woman's full circumstances, including medical, physical, psychological and social circumstances.<sup>23</sup>

34. The Victorian approach may neutralise community misconceptions about late-term abortions. It also reflects the reality that for those rare and complex cases in which an abortion is needed after 24 weeks, two doctors will typically be involved in a woman's care.
35. It is important to note however, that abortions after 24 weeks are rare (less than 2% of all abortions performed in South Australia) and are typically required in complex and distressing circumstances, such as a fatal foetal condition in the context of a much-wanted pregnancy.<sup>24</sup>
36. In addition, a legal requirement for two doctors to approve a woman's decision is inconsistent with an adult's usual role as the primary decision-maker about medical procedures to their own bodies. It situates women as incompetent decision-makers, in need of protection, and doctors as gatekeepers.<sup>25</sup> For this reason, any requirement for third party authorisation, should be strictly limited to pregnancies of more than 24 weeks.
37. The law must not impose a requirement for referral to an ethics committee at any gestation, or for consultation with a specialist or for the pregnant person to themselves seek a second opinion or counselling. Such requirements create barriers that cause distressing delays and deny women the right to the best possible health outcomes, particularly for women in regional and remote locations.
38. Recently reformed laws in the Northern Territory and Tasmania share similarities with the Victorian approach, however they should not be followed, as they unreasonably and arbitrarily set gestational limits of 14 and 16 weeks respectively.<sup>26</sup> The impact of this can be seen in the fact that as a result of the Tasmanian laws, women have had to fly to Victoria to access the healthcare they need.

**Recommendation 2:**

- (a) The law should not require pregnant people to obtain third party authorisation for an abortion, nor to satisfy criteria or grounds to be 'eligible' for an abortion.
- (b) If it is deemed necessary to include criteria in law to guide medical decision-making in relation to abortion, this should be limited to pregnancies of more than 24 weeks gestation and allow for consideration of all of the patient's circumstances (in line with the approach in Victoria). Women should not be required to comply with narrow criteria, seek out a second opinion or approval from a committee, nor forced to undergo counselling.

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<sup>23</sup> Ibid, s 5.

<sup>24</sup> SA Abortion Action Coalition, *Fact Sheet 4: Understanding the need for late gestation abortion* (2019).

<sup>25</sup> Rebecca Cook and Simone Cusack, *Gender Stereotyping: Transnational Legal Perspectives* (University of Pennsylvania Press, 2010) 86-87.

<sup>26</sup> *Reproductive Health (Access to Terminations) Act 2013* (Tas), s 4; *Termination of Pregnancy Law Reform Act 2017* (NT), pt 2. The NT laws are deeply problematic because they have different rules for different stages of gestation and deny access to safe abortion services after 23 weeks gestation except to save a woman's life.

## **Safe access zones**

39. No one should have to run a gauntlet of abuse to see their doctor. Until recently, this was a reality thousands of women around Australia faced when accessing abortion services.
40. Women seeking abortions and staff at clinics have been left feeling distressed, angry and upset by the intimidating and abusive behaviour of anti-abortion activists outside abortion clinics.<sup>27</sup> On occasion, anti-choice activists have been physically violent, including, most tragically, the 2001 murder of a security guard at a reproductive health clinic in Melbourne.<sup>28</sup>
41. Safe access zone laws have been enacted in every state and territory<sup>29</sup> except for South Australia and Western Australia.
42. We understand that anti-abortion activities have taken place every week for some 25 years outside the Pregnancy Advisory Centre in Adelaide. One group of up to 12 people stands outside the clinic every Tuesday and Wednesday morning. Another group attends on a weekly or fortnightly basis. In the 40 days leading up to Lent and Christmas each year, anti-abortion activities intensify. An on-site carpark creates a small buffer zone between the gate (at which anti-choice activists can gather) and the entrance to the clinic. Despite this buffer, people still have to pass anti-choice activists to drive or walk into the clinic and can hear them as they get in or out of their cars.
43. South Australia should introduce safe access zones around clinics and hospitals that provide abortion services, modelled on safe access zone laws in Victoria.

## **Sensible and proportionate safe access zones**

44. Safe access zone laws engage the freedom of expression of anti-abortion activists, including the implied freedom of political communication in the Constitution. However, the freedom is not absolute and may be subject to reasonable and proportionate limits.<sup>30</sup>
45. As the High Court has confirmed, Victoria's safe access zone laws are sensible and proportionate and serve a vital purpose – to protect patients, and health clinic staff, from violence, harassment, surveillance and obstruction when trying to access a specialist health service.<sup>31</sup> The High Court said that ensuring that women have access to abortion services in

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<sup>27</sup> See discussion in Victorian Parliament, 2 September 2015, referencing the evidence put before the Supreme Court by East Melbourne's Fertility Control Clinic: <<http://hansard.parliament.vic.gov.au>>.

<sup>28</sup> See Jamie Berry & Ian Munro, "Remorseless" recluse gets life' (*The Age*, 20 November 2002) <https://www.theage.com.au/articles/2002/11/19/1037697662403.html>.

<sup>29</sup> *Reproductive Health (Access to Terminations) Act 2013 (Tas); Public Health and Wellbeing (Safe Access Zone) Amendment Act 2015 (Vic); Health (Patient Privacy) Amendment Act 2015 (ACT); Termination of Pregnancy Act 2018 (Qld); Public Health Act 2010 (NSW); Termination of Pregnancy Law Reform Act 2017 (NT)* pt 3. A provision in Victorian law prohibiting communications about abortion that are "reasonably likely to cause distress or anxiety" upheld by the High Court of Australia in April 2019.

<sup>30</sup> *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966 (entered into force 23 March 1976) art 19(3). For the implied constitutional freedom, see *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520; *Coleman v Power* (2004) 220 CLR 1; *Brown v Tasmania* (2017) 261 CLR 328.

<sup>31</sup> *Kathleen Clubb v Alyce Edwards & Anor; John Graham Preston v Elizabeth Avery & Anor* [2019] HCA 11.

an atmosphere of privacy and dignity justifies a geographically-limited burden on the implied freedom of political communication.

46. Judges of the High Court also noted that the freedom of political communication does not entitle people to a captive audience, such as patients seeking health services that they may not be able to access elsewhere. When people cannot simply walk away, there is a greater imperative for protecting their rights. There is also a greater imperative in relation to abortion, given the intensely private and personal nature of these services and the stigma that has long been attached to abortion.
47. South Australia has a legitimate interest in protecting the privacy and safety of women seeking reproductive health information and treatment at the very moment when their privacy interests and wellbeing are most vulnerable. In doing so, it is critical that the laws are sensibly written and do not go too far.
48. South Australia should therefore follow Victoria's approach to safe access zone laws. Not only have Victoria's laws been upheld by the High Court, they are carefully drafted, clearly link the prohibited behaviour with the purpose that safe access zones seek to achieve, and impose a lesser burden on the freedom of political communication than Tasmania's laws (also upheld by the High Court).
49. Victoria's laws create zones of 150m around premises that provide abortion services. Within those zones, a range of behaviours are prohibited at all times, including harassment, threatening or intimidating conduct, footpath obstruction, communications reasonably likely to cause distress or anxiety, and recording persons entering or leaving clinics. A breach of the safe access zone prohibitions is an offence, punishable by up to 120 penalty units or 12 months imprisonment.
50. SALRI has asked whether the zones should be established in law or by Ministerial declaration. They should be established by law, similar to the approach in Tasmania, Victoria, New South Wales, Queensland and the Northern Territory. The law should provide certainty by enacting zones around all premises that provide abortion services, rather than listing the specific addresses of services that may change over time. Given the sensitive and highly politicised nature of abortion, leaving the creation of safe access zones to Ministerial declaration could see the intent of the law undermined.
51. We note that the safe access zone provisions proposed in the Statute Amendment (Abortion Law Reform) Bill 2018 are not supported because they impose too great a burden on the implied freedom of political communication. In particular, we are concerned that the combination of a prohibition on communications or attempts to communicate about abortion, together with the powers given to the police and a maximum penalty of two years imprisonment, go too far.

### **Recommendation 3:**

South Australian law should provide for sensible and proportionate safe access zones, modelled on Victoria's safe access zone laws. Safe access zones should apply around all premises that provide abortion services and operate at all times.

## **Facilitating equitable access to abortion in law**

### **Ensuring access to abortion outside hospitals**

52. The current South Australian laws, written at a time when abortion had to be a surgical procedure, do not reflect modern medical practice. The law restricts abortion to prescribed hospitals. But for the law, early medication abortion could be prescribed by a local GP, as is the case elsewhere around Australia. The hospital requirement has also precluded the use of telehealth services. Telehealth services are used in all other states and territories (except the ACT) to provide women with access to early medication abortions.<sup>32</sup> This severely disadvantages women in regional and remote South Australia, who have to travel long distances to hospitals at considerable financial, social and emotional cost.
53. Law reform should ensure that all South Australians can take advantage of developments in medicine as they happen. This means not limiting *in law* access to abortion services to prescribed hospitals or facilities. Recent reforms in Victoria, Queensland and the Northern Territory have all excluded such a requirement. Strict facility regulations already govern health service delivery and doctors who want to provide early medical abortion are required to register, undertake training, have insurance and satisfy other requirements.<sup>33</sup>

### **Professions that can perform or assist with the performance of an abortion**

54. The law currently requires two doctors to approve access to an abortion. As noted above, this treats women as incapable of making decisions about their bodies and should be excluded from South Australia's reformed abortion laws.
55. Recently reformed abortion laws, such as those in Queensland, allow nurses, midwives, Aboriginal and Torres Strait Islander health workers, pharmacists and other registered health practitioners to assist with an abortion, for example by dispensing medication authorised by a doctor. In the future, medical practice may evolve to allow a greater role for specially trained health practitioners who are not doctors, which may improve access to quality and affordable services. It is important that the law facilitate advancements in clinical practice, rather than restrict them through overly prescriptive rules.

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<sup>32</sup> Children by Choice, *Interstate Abortion Providers* (26 March 2019)

<https://www.childrenbychoice.org.au/forwomen/abortion/clinicsinterstate>.

<sup>33</sup> Children by Choice, *Becoming a Medical Abortion Provider* (4 July 2016)

<https://www.childrenbychoice.org.au/forprofessionals/becoming-a-medical-abortion-provider>.

## **Removing the residency requirement**

56. Currently, a woman seeking an abortion must reside in South Australia for at least two months. This residency requirement is arbitrary and out of step with normal practice. It also creates a barrier to the provision of health care to women from places like Broken Hill, Mildura, Alice Springs, Darwin and remote Northern Territory who cannot access care in their local area and could, if not for this law, seek treatment in South Australia.<sup>34</sup>

## **Counselling**

57. Counselling, when freely chosen, can be an important aspect of dealing with an unintended pregnancy. Accurate, confidential and impartial counselling about options should be available to all pregnant people. However, no one should be compelled to receive counselling.
58. In its extensive review of abortion laws, the Victorian Law Reform Commission found that the provision of counselling is a “clinical matter best left to professional judgment based on a woman’s circumstances”.<sup>35</sup> The Commission “did not find evidence that forcing women into counselling is necessary or advisable.”<sup>36</sup> It recommended that abortion laws not include a requirement for counselling or a referral to counselling.<sup>37</sup>

### **Recommendation 4:**

Reform to South Australia’s abortion laws should ensure that women do not face additional legal barriers to accessing abortions. To this end, the law should not include:

- (a) A requirement that abortions only be performed at prescribed hospitals or facilities.
- (b) Inflexible restrictions on which registered health practitioners are permitted to perform, or assist with the performance of an abortion.
- (c) A residency requirement.
- (d) A requirement to undergo counselling.

## **Conscientious objection**

59. Encountering a doctor with a conscientious objection to abortion can impede timely access to vital health services, which in turn can imperil a woman’s physical and psychological health.
60. Current law in South Australia unjustifiably prioritises a health professional’s right to religious expression over a woman’s right to bodily autonomy and healthcare. Subsections 82A(5) and 82A(6) of the Criminal Law Act allow a person to refuse to perform an abortion where they hold a conscientious objection, except where the procedure is necessary to save the woman’s life, or prevent grave injury to their physical or mental health.

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<sup>34</sup> SA Abortion Action Coalition, *Fact Sheet 7: How the current law affects services* (2019).

<sup>35</sup> Victorian Law Reform Commission, *Law of Abortion: Final Report* (March, 2008), [8.139].

<sup>36</sup> Ibid, [8.122].

<sup>37</sup> Ibid, recommendation 5.

61. Health professionals have a right to freedom of thought, conscience and religion, however this must be balanced against the right of women to life, health, autonomy and non-discrimination. Health practitioners are in a position of power and authority when people seek their assistance. Duties to disclose and refer are required to emphasise to health professionals the right of all patients to unbiased healthcare and information.<sup>38</sup> The duty to refer should extend beyond ‘health practitioners’ as defined by the *Health Practitioner Regulation National Law* and include counsellors and social workers, who are often the first port of call for help.<sup>39</sup>
62. South Australia’s laws should clearly set out the duty of a health practitioner, counsellor or social worker who claims to have a conscientious objection to:
  - (a) disclose their objection; and
  - (b) refer, or transfer the care of, the patient to a health practitioner who is known to not have a conscientious objection; and
  - (c) perform, or assist in, the termination of a pregnancy in cases of medical emergency where an abortion is necessary to save a person’s life or prevent serious harm.<sup>40</sup>
63. The enforceability of the above duties is a concern. In Victoria, participants in a recent study identified incidents of doctors subverting, misusing or directly contravening conscientious objection duties, with some reporting that it was ‘common practice’ for doctors in rural areas to refuse to refer women seeking an abortion to someone who could advise them.<sup>41</sup> The Human Rights Law Centre has also been provided with examples of women in different parts of Australia being obstructed by doctors who oppose abortion, for example by being told that “abortion is illegal”, that they were “meant to be a mother”, and that their baby would ask from heaven “why did you kill me?”
64. To address this, patients must have the right to complain about a breach of the above duties through existing health service complaint pathways, including relevant professional regulatory bodies and boards, as well as the South Australian Health and Community Services Complaints Commissioner and other statutory bodies authorised to take health complaints.<sup>42</sup> In addition, the Commissioner should be requested by the Minister for Health and Wellbeing to conduct an inquiry into compliance within 24 months after the laws come into force.<sup>43</sup>

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<sup>38</sup> This is consistent with Committee on the Elimination of Discrimination against Women, *General Recommendation 24: Women and Health A/54/38/Rev 1* (1999) [11].

<sup>39</sup> *Health Practitioner Regulation National Law (South Australia) Act 2010* (SA) sch 2 s 5.

<sup>40</sup> This aligns with the Tasmanian approach: *Reproductive Health (Access to Terminations) Act 2013* (Tas). Clearly, the duty to perform or assist in an abortion would not be relevant to counsellors or social workers.

<sup>41</sup> Louise Anne Keogh et al, ‘Conscientious objection to abortion, the law and its implementation in Victoria, Australia: perspective of abortion service providers’, *BMC Medical* (31 January 2019).

<sup>42</sup> See for example s 9 of the *Termination of Pregnancy Act 2018* (Qld) which refers to compliance with these duties being a relevant consideration when such a complaint is made.

<sup>43</sup> Section 9(1)(h) of the *Health and Community Services Complaints Act 2004* (SA) provides for the Commissioner to inquire into and report on any matter relating to health and community services on the Commissioner’s own motion or at the request of the Minister.

65. Such an approach strikes the appropriate balance between the rights of women to healthcare, non-discrimination and bodily autonomy and the freedom of conscience and religion.<sup>44</sup>

**Recommendation 5:**

- (a) The law should impose a clear duty on health professionals, including counsellors and social workers, who claim a conscientious objection to abortion to:
  - (i) disclose their objection; and
  - (ii) refer, or transfer the care, of the patient to a health practitioner known not to hold such an objection; and
  - (iii) perform, or assist in, an abortion in cases of medical emergency, where an abortion is necessary to save a person's life or prevent serious harm.
- (b) Patients should have a right to complain about non-compliance with the above duties, including to the relevant professional regulatory body, board, and state or federal statutory complaints bodies.
- (c) The South Australian Health and Community Services Complaints Commissioner should be requested by the Minister for Health and Wellbeing to inquire into compliance with the above duties within 24 months after the law comes into effect.

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<sup>44</sup> The freedom of religion can be limited in certain circumstances, including to protect health and to protect the rights and freedoms of others: *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966 (entered into force 23 March 1976) art 18(3).