



5 August 2019

State Parliamentary Labor Party  
Parliament House  
Macquarie Street  
Sydney NSW 2000

**By email**

Dear Member,

**Re: Reproductive Health Care Reform Bill 2019  
Open Letter from the NSW Society of Labor Lawyers**

We write to you regarding the *Reproductive Health Care Reform Bill 2019 (the Bill)*. The NSW Society of Labor Lawyers (**the Society**) was a member of the Roundtable process and provided input and insight to the drafting instructions that formed the basis of the Bill. For the below reasons, the Society endorses the contents of the Bill and encourages members of the State Parliamentary Labor Party to vote in favour of the Bill.

Firstly, there is no place in the criminal law of this state for abortion. New South Wales is the last remaining state to have abortion unamended in its criminal code. That law is antiquated. The provisions under the *Crimes Act 1900* (NSW) are based on a regime in the United Kingdom, over a century old, which was removed by the *Abortion Act 1967* (UK). All Australian states and territories have decriminalised abortion, except New South Wales, which continues to favour a penal approach over a regime of medical supervision. In our view, this penal approach does not align with community expectations, both within our state and around the country. The new Bill recognises this, removes the antiquated provisions from the *Crimes Act* and establishes a statutory system for medical supervision of abortions in New South Wales.

Secondly, the current sections 82 to 84 of the *Crimes Act 1900* (Cth) are rarely prosecuted and effectively have no practical application in New South Wales. Since *R v Wald*<sup>1</sup> it has been the case that a medical practitioner can perform a termination where they are operating under the honest belief, held on reasonable grounds, that the termination is necessary to avoid serious danger to the woman's life, or physical or mental health.<sup>2</sup> This has been interpreted broadly such that New South Wales courts may consider any "economic, social or medical ground" to determine a "serious danger".<sup>3</sup> It has also been interpreted to include not only serious danger to a woman's mental state during pregnancy, but also *after* pregnancy.<sup>4</sup> The result is that the provisions in the *Crimes Act* have been rarely prosecuted and are, in most respects, a nullity. Where successful convictions have occurred in recent cases, they target the vulnerable, and the outcome has been the application of a good behaviour bond rather

<sup>1</sup> *R v Wald* [1971] 3 DCR per Levine DCJ (**Wald**).

<sup>2</sup> *Wald*, at 29.

<sup>3</sup> *Wald*, at 29.

<sup>4</sup> *CES v Superclinics (Australia) Pty Ltd* (1995) 38 NSWLR 47 at 60.

than imprisonment.<sup>5</sup>

Thirdly, despite the criminal provisions being a nullity, they still create uncertainty for both the medical practitioner and the applicant because there is no authoritative appeal judgment on the principles set out in *Wald* and there remains ambiguity in the definition of “unlawful” under the provisions. *Wald* was a decision of a single District Court Judge, and there was no later confirming decision of the Court of Criminal Appeal, being the highest New South Wales criminal court. The new Bill provides more certainty for medical practitioners and their patients by deeming a termination prior to 22 weeks gestation legal. For a termination after 22 weeks, the common law position is substantively maintained in the Bill to ensure that appropriate safeguards are in place. It creates more stringent tests than are currently in place, as the involvement of two doctors is required under the Bill. The inclusion of the common law position creates certainty for medical practitioners who can conclusively rely on the statutory requirements as the standard their medical services must meet.

Fourthly, international data suggests that criminalising abortion does not reduce the rate of abortion, but does increase rates of maternal morbidity and mortality.<sup>6</sup> Decriminalising abortion, on the other hand, has been shown to reduce the rate of abortion.<sup>7</sup> A legal framework which can assist in reducing the abortion rate and allowing equity of access to healthcare is, in our view, appropriate and necessary.

Finally, the Bill is based on well-regarded Queensland legislation passed last year, which resulted from a Queensland Law Reform Commission inquiry involving public hearings and a large number of submissions, and is similar to the earlier Victorian reforms. Given the significant consultation which has already gone into similar inter-state reforms, our view is that the Bill is well-considered and adapted to address the uncertainty for women and medical practitioners who engage with these procedures.

For the above reasons, the Society supports the Bill and encourage all members of the State Parliamentary Labor Party to vote in favour. Please contact the undersigned if you require further information regarding this letter or if you would like to speak with a member of the Society prior to Tuesday's debate.

Yours faithfully,



### **NSW Society of Labor Lawyers**

**President:** Lewis Hamilton **Vice President:** Elise Delpiano **Treasurer:** Claire Pullen **Secretary:** Janai Tabbernor  
**Ordinary Committee Members:** Tom Kelly, Kirk McKenzie, Jade Tyrrell, Blake Osmond, Jamila Gherjestani and Miriam Makki.

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<sup>5</sup> See *Director of Public Prosecutions (NSW) v Lasuladu* [2017] NSWLC 11 and *R v Sood* [2006] NSWSC 1141.

<sup>6</sup> A Faundes, I H Shah, 'Evidence supporting broader access to safe legal abortion', *International Journal of Gynecology & Obstetrics*, October 2015, 131 supplement 1: s56-s59.

<sup>7</sup> R Piero, C Colomer, C Alvarez-Dardet, J R Ashton, 'Does the liberalisation of abortion laws increase the number of abortions? The case study of Spain', *European Journal of Public Health*, June 2001;11(2):190-4.