South Australia Law Reform Institute
Review of Abortion Laws

Submission from the Women's Electoral Lobby Australia

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1.0 About the Women’s Electoral Lobby

Women’s Electoral Lobby, established in 1972, is an independent, non-party political lobby group dedicated to creating a society where women’s participation and their ability to fulfill their potential are unrestricted, acknowledged and respected and where women and men share equally in society’s responsibilities and rewards.

The Women’s Electoral Lobby (WEL) is a national, independent, non-party political, feminist lobby group that has worked tirelessly for over 45 years to improve the position of women in Society.

The Women's Electoral Lobby is dedicated to creating a society where women’s participation and their ability to fulfill their potential are unrestricted, acknowledged and respected and where women and men share equally in society’s responsibilities and rewards.

WEL applies a feminist approach to all its work from policy analysis and development to campaigning. WEL has developed a Feminist Policy Framework, which sets out the values, which we use to measure fairness for women and fairness for society. WEL believes that good policies should address these indicators and work with governments at all levels on achieving better and fairer policy outcomes.

Our current strategic focus areas include:

- Violence against women including securing crucial funding for women's refuges
- Financial security for women
- Women's reproductive rights

2.0 Executive summary

WEL commends the South Australian Liberal government for referring the state's abortion laws to the South Australian Law Reform Institute. We recognise the tenacious and passionate work of South Australian pro-choice activists, over the past decades and today, that have made such a review possible.

While allowing for lawful terminations in certain circumstances, South Australia's current laws pertaining to termination of pregnancy are too restrictive and threaten women with life imprisonment. No other health procedure has been criminalised like abortion - it must be treated like the health procedure it is.

WEL recommend the following overarching reforms to abortion law are implemented:

1. Decriminalise abortion by repealing Divsion 17 of the *Criminal Law Consolidation Act 1935* (SA).
2. Ensure those who access an abortion are never criminalised.
3. Introduce a provision into the *Criminal Law Consolidation Act 1935* (SA) making it a crime for an unqualified person to perform an abortion on a pregnant person.
4. Abortion should be available on demand.
5. WEL does not consider it necessary to include gestational limits or specific grounds on which to terminate. If such an approach is established, we would recommend that a gestational limit of 24 weeks is implemented, and any termination conducted after this period occur once considered appropriate by two consulting medical practitioners.
6. Health practitioners may indvidually conscientiously object to performing or assisting with an abortion, but must refer a patient on in a timely manner to a service or other practitioner they know will assist. Conscientious objectors must perform or assist with a termination procedure in an emergency.
7. There should be no reference to counselling as a requirement for accessing an abortion within legislation. Offering counselling, and conducting informed consent counselling, is already a standard component of public and private termination of pregnancy services in Australia.
8. Safe access zones should be legislated as soon as practicable. No one should be subjected to bullying, harassment or intimidation tactics when attempting to access abortion care. Staff at facilities that provide abortions should not be subjected to those same behaviours.
9. Remove any residency requirements for those wanting to access an abortion.
10. Allow medical practitioners to provide terminations of pregnancy in any appropriate facility or via telehealth practice. There is no good reason for terminations of pregnancy to only occur in the current prescribed hospitals and facilities.

3.0 Introduction

Women's Electoral Lobby Australia is pleased to respond to the South Australian Law Reform Institute's review into the reform of the state's abortion laws.

Since WEL's foundation in 1972, it has consistently advocated for women's right to make well informed and autonomous decisions and choices regarding their bodies, including their reproductive lives.

WEL's support for women's right and capacity to make these decisions is based on the principle that sees women as equal to men in their decision making powers and their right to privacy, integrity and autonomy in relation to health and medical treatment.

WEL also sees achievement of reproductive rights, including access to family planning advice, contraception and abortion, as fundamental to the ongoing transformations in Australian life occasioned by the movement for women to achieve social, economic and cultural equality.

Women's Electoral Lobby's national policy on abortion calls for:

1. The decriminalisation of abortion in all states and territories, with abortion regulated by health legislation;
2. Legislative reform to allow women control over their bodies and reproductive choices at all times rather than requiring the approval of one or two doctors as in some states and territories;
3. Funding to health services to ensure the increased availability and accessibility of abortion, with a particular focus on the affordability of abortion and access in rural areas;
4. Commitment to the principle of all women's right to control their reproductive choices in making policies on foreign aid, Medicare funding, counselling, and all other areas;
5. Establishment of exclusion zones around providers of abortions, to ensure the safety of women seeking terminations and medical practitioners, and reduce the culture of harassment and stigmatisation; and,
6. Introduction of laws requiring truth in advertising for pregnancy counselling services.

4.0 Responding to the South Australian Law Reform Institute's survey on abortion law reform

4.1 The Role of the Criminal Law [Refer to Fact Sheets 4, 5 & 8]

- Should there be offences relating to qualified health practitioners performing abortions in the Criminal Law Consolidation Act 1935 (SA)?

No. Existing health legislation covers medical procedures undertaken without patient consent. Once abortion is removed from the *Criminal Law Consolidation Act* 1935 (SA), this should widen to cover abortion as a standard medical procedure, thus there is no need for further protection.

- Should there be offences relating to the woman procuring an abortion in the Criminal Law Consolidation Act 1935 (SA)?

No.

- Should a woman ever be criminally responsible for the termination of her own pregnancy?

Never. It should not be possible for a woman or pregnant person to be charged for accessing a termination of pregnancy, or consenting to someone else providing them with a termination of pregnancy.

This is clearly one of the most pernicious aspects of the criminalisation of abortion. Recent cases in Queensland and NSW demonstrate the punitive cruelty that underpins the provision, where extremely vulnerable and even desperate women can be charged when they most need to access support and advice without fear.

- Should South Australia have criminal offences for abortions not performed by an appropriate health practitioner?

Yes, WEL believes it appropriate that it should be a criminal offence for an unqualified person to perform a termination, given the potential serious cost to a woman's health that can occur from an unsafe abortion. Any criminal offence for an unqualified person performing a termination must ensure precise wording so as not to inhibit the role of health practitioners.

4.2 Who should be permitted to perform or assist in performing terminations [refer to Fact Sheets 4, 7 and 8]

- Should health practitioners (other than medical practitioners) be permitted to authorise or perform, or assist in performing, lawful terminations of pregnancy in South Australia?

Registered health and medical practitioners with appropriate qualifications and training should be permitted to perform, and assist in performing, lawful terminations of pregnancy. This includes, but is not limited to, doctors, nurses and midwives, ATSI health workers and pharmacists.

There is a need to 'future proof' legislation in this area, as medical advances increasingly allow for supervised prescription of medication and where the pregnant person could safely rely on assessment and oversight by an accredited clinical nurse practitioner. It is therefore recommended that instead of specifying what roles are qualified to provide termination of pregnancy in legislation, the terms 'health practitioner' and/or 'medical practitioner' be utilised as appropriate instead.

4.3 Gestational Limits and Grounds for Termination of Pregnancy [refer to Fact Sheets 4, 6 and 8]

- Should a woman be allowed to access lawful abortion on request at any state of pregnancy?

Yes.

- Should there be a gestational limit or limits for a lawful termination of pregnancy in South Australia?
- If there is a gestational limit for a lawful should it be related to:
    - The first trimester of pregnancy;
    - Viability of the fetus (approximately 22-24 week);
    - Other?

WEL does not believe a legislated gestational limit for lawful termination of pregnancy is necessary, and would note that this view aligns with that of most peak medical and legal groups.

Medical evidence indicates that there is no clear and certain consensus justifying establishment of a gestational limit. Despite this, WEL recognises significant pockets of concern regarding the rare occurrence of late termination. We would therefore support the introduction of a staged approach to decriminalisation, with one stage only at 24 weeks, after which the guidance would be that two medical practitioners confer, as with the law in Victoria.

- Should there be a specific ground or grounds for a lawful termination of pregnancy?
- If there is a specific ground or grounds for a lawful termination should they include:
    - All relevant medical circumstances;
    - Professional standards and guidelines;
    - That it is necessary to preserve a woman's life;
    - That it is necessary or appropriate having regard to the woman's social or economic circumstances;
    - That the pregnancy is a result of rape or other coerced or unlawful act;
    - That there is a risk of serious or fatal fetal abnormality (drawing on the terminology from the present law).
- Should different considerations apply at different stages of pregnancy?

No. WEL would warn against including any specific grounds for a termination of pregnancy in any legislation. The fact is, terminations of pregnancy are necessary for a myriad of reasons.

Restricting legislation so only women who meet set criterium can access abortion will create too many serious issues.

Gestational limits reverse the assumption, after a particular point in a pregnancy, that women are competent and conscientious decision makers.

An abortion in the second or third trimester will usually involve complex and unique characteristics particular to the woman involved, such as family violence, the health of the woman, failure to recognise a pregnancy, congenital abnormality, or co-morbidity of some other type. There should be sufficient flexibility to enable these difficult circumstances to be managed on a case by case basis, and this is not best achieved by legal regulation.

Most clinical practice limits the stage at which women will have an abortion performed, except in exceptional circumstances. Laws that impose different requirements for early and later term abortions arguably reflect current clinical practice in Australia.

Should South Australia wish to implement a staged approach in abortion law reform, WEL recommends following the example set in the *Abortion Law Reform Act 2008* (VIC) with terminations after 24 weeks being subject to the medical practitioner performing the abortion having a reasonable belief that abortion is appropriate in all circumstances and having consulted with at least one other medical practitioner who is of that view.

WEL notes that the Queensland Legislation, *Termination of Pregnancy Act 2018* (QLD) sets a limit of 22 weeks, after which the medical practitioner performing the abortion must consult with another medical practitioner and that this reflects expert advice on technical improvements since the Victorian legislation. WEL is also aware that tests determining grave fetal abnormalities are mostly reliable only after 19 weeks gestation. Women need to have time and be trusted to make a decision that follows a negative prognosis, including time to access to medical services from rural and regional South Australia.

4.4 Consultation by the medical practitioners [refer to Fact Sheets 4, 6 and 8]

- Should a medical practitioner be required to consult with one or more others (such as another medical practitioner or health practitioner), before performing a termination of pregnancy?
- If a consultation is required, should it include:
    - Another medical practitioner; or
    - A specialist obstetrician or gynaecologists; or
    - A health practitioner whose speciality is relevant to the circumstances of the case; or
    - Referral to an appropriate counsellor; or
    - Referral to a specialist committee?
- If there was a referral requirement should it apply:

    - For all terminations, except in an emergency;
    - For terminations to be performed after a relevant gestational limit or on specific grounds?

As discussed previously, WEL believes that it would not be fitting to introduce legislation that seeks to limit abortion access through gestational limits or specific circumstances. Similarly, WEL does not believe consultation should be required for a termination of pregnancy.

Should a staged gestational approach to law reform be pursued, however, WEL would find consultation with one other medical practitioner appropriate after 24 weeks gestation. This approach could follow the lines set out in the NSW Clinical Directions and Guidelines related to termination of pregnancy.

4.5 Conscientious objection [refer to Fact Sheets 4, 5 and 8]

- Should there be provision for health practitioners in South Australia to decline to provide and abortion related service for conscientious objection?
- If a medical practitioner had a conscientious objection are there circumstances where this objection should be overridden, such as:
    - In an emergency;
    - The absence of another health practitioner or termination of pregnancy service within a reasonable geographic proximity.
- Should a health practitioner who has a conscientious objection be obliged to refer or direct a woman to another practitioners or termination of pregnancy service?

There should be provision for health practitioners in South Australia to decline to provide abortion related services on the grounds of conscientious objection. The provision should only apply to individuals, and then only to registered medical and health practitioners undertaking or directly participating in a clinical or medical termination. The provision should not apply to administrative staff or to institutions.

As is the case with other states and territories which have already largely or decriminalised abortion and provide for conscientious objection, this provision should not apply in an emergency. The codes of conduct to which members of Colleges and professional associations accede also require that conscientious objection does not apply in an emergency.

Pregnancies are a time-sensitive condition and every day counts with relation to those considering an abortion. It is not acceptable for a conscientious objector to delay a woman's access to abortion. There should be a requirement that conscientious objectors should identify themselves as such to patients before referring them on in a timely manner to another practitioner or organisation that can assist them in accessing a termination of pregnancy.

4.6 Should there be any requirements in relation to offering counselling for the woman?

No. No state in Australia includes mandatory counselling as a legislated condition for a lawful abortion. Internationally, mandatory counselling is not a legislated requirement for lawful abortion in Canada, the UK or New Zealand. Mandatory counselling is typically a feature of legislation designed to restrict abortion access, such as in some US states.

In this context, ‘counselling services’ are separate from the best clinical practice and knowledge provided by a woman’s doctor and/or medical personnel, and refers to a service provided by someone (who may or may not be qualified in a relevant discipline) to a pregnant woman, prior to her being granted access to the abortion care she seeks.

The Victorian Law Reform Commission examined the issue of mandatory counselling in its inquiry into the state’s abortion laws in 2007 and found that mandated counselling would be unnecessary and ineffective. The Commission's report concluded that:

> Compelling a person who has already determined a course of action to attend counselling is unlikely to do much good, but has the potential to do harm. Mandating counselling may result in women having to travel long distances for multiple medical assessments and counselling sessions before they can proceed. This would exacerbate existing inequities.
>
> Any new abortion law should not contain a requirement for mandatory counselling or mandatory referral to counselling.

Credible scientific studies conducted internationally and in Australia indicate that abortion is experienced as a routine medical procedure by most women and that the vast majority do not wish to speak to a counsellor prior to making their decision.

From a professional perspective, the option of offering and referring a patient to counselling from a qualified, registered and impartial psychologist is considered part of the provision of a suite of termination services. RANZCOG’s policy on termination recommends that counselling be available if desired, but not required.

There is no need for legislation that addresses abortion provision to include mandatory counselling, nor a need for the legislation to stipulate mandatory offer of counselling by health practitioners.

There is a distinct lack of legislative requirements for transparency in pregnancy counselling, and there is no necessity for the offer of counselling to be from a professional with a university degree or any other further education, thus rendering any proposal of including counselling requirements in a bill to be particularly harmful.

Informed consent counselling is already a standard part of termination of pregnancy services. Most women and pregnant people have already thought long and hard about their choice and have consulted with their family and friends. If they wish to speak with a counsellor, this would already be provided for under the professional guidelines and frameworks all public and private facilities that offer health service operate under.

4.7 Protection of women and service providers and access zones [refer to Fact Sheets 5, 6 and 10]

- Should South Australia provide for safe access zones in the area around premises where terminations of pregnancy services are provided?

Yes. No one should have to pass by anti-choice groups bullying, harassing and bribing them in order to convince them to not enter a clinic. No staff member should have to experience the same behaviour when trying to get to work.

South Australia is one of the last two legal jurisdictions in the country without safe access zone legislation. Safe access zones are necessary and crucial to preserving the health, well-being and safety of women who access termination services, and those staff members that provide them.

Safe access zone laws in Victoria and Tasmania have both been upheld in the High Court of Australia. Ensuring women have unimpeded access to abortion care with privacy and dignity, the High Court ruled, justified the 'geographically-limited burden on the implied freedom of political communication'.

- If a safe access zone was established should it:
    - Automatically establish an area around the premises as a safe access zone?; or
    - Empower the responsible Minister to make a declaration establishing the area of each safe access zone?

Safe access zone legislation should automatically mandate a minimum of a 150m exclusion zone around clinics that offer abortion care where certain behaviours are prohibited. Empowering a Minister to make declarations about the establishment of each safe access zone may result in seeing the intent of the law subverted, or even disregarded.

- Should the prohibition on behaviours in a safe access zone apply only during periods of operation?

Most other jurisdictions that have legislated for Safe Access Zones apply the provisions at all times. This option avoids monitoring on site and protects clients and workers who may need to access facilities after hours or in emergencies.

- What type of behaviour or conduct should be prohibited in a safe access zone?
- Should it be an offence in South Australia to make or publish a recording of another person entering or leaving, or trying to enter or leave, premises where termination of pregnancy services are performed, unless the recorded person has given their consent?
- Should it be unlawful to harass, intimidate or obstruct:
    - A woman who is considering, or who has undergone, a termination of pregnancy;
    - A person who performs or assists, or who has performed or assisted in performing, a lawful termination of pregnancy?

The Victorian legislation defines behaviours prohibited within a safe access zone, in relation to 'a communication that relates to terminations and is reasonably likely to cause distress or Anxiety.'

The Victorian provisions are broad enough to capture actions intended to harass or intimidate; and avoid the risk of the legislation's constitutional validity being compromised by the inclusion of the word 'protest' in prohibited behaviours. They describe behaviours as 'Interfering, harassing, causing anxiety or distress or recording.'

WEL suggests that the wording in NSW's safe access zone act presents an equally concise description of behaviours as is the case with Victoria's. It forbids 'Harassing, interfering, obstructing, causing distress or anxiety or recording'.

Recording a person entering or leaving a reproductive and sexual health clinic is a serious invasion of privacy and presents a clear danger of further harassment and intimidation of women and workers who are captured in this way. All states and territories that have legislated exclusion zones include an offence under the category of photography but this should be enlarged to that of publication, including publication on social media.

4.8 Collection of data about terminations of pregnancy [refer to Fact Sheets 2, 4, 6 and 7]

- Should data about terminations of pregnancy in South Australia be reportable?

Yes. This an extremely important proposal that WEL strongly endorses for South Australia and indeed every other state and territory, through the process of harmonisation of legislation and with the leadership of the Commonwealth.

As is well known, South Australia is currently the only jurisdiction that collects such data. Without reliable national statistics it is very difficult to report on trends and plan and tailor services for abortion in the context of reproductive health.

WEL recommends any data collection should be based on geographical boundaries larger than Census Collection Districts, since isolated areas with few residents might enable easy identification of women who have had terminations.

4.9 Rural and Regional Access [refer to Fact Sheets 4, 6 and 7]

- Given the difficulties of access to medical services in rural areas of South Australia should there be different law to facilitate access in rural and regional areas?
- Should women be permitted to use telehealth or other electronic services to consult with medical and/or health practitioners?
- Where a woman would otherwise be able to have a termination but does not have local access to clinic able to do so (such as in rural South Australia), should another qualified health practitioner (such as a registered nurse or pharmacist) be permitted to undertake this procedure?

WEL does not support differing laws based on a woman's location. We support all women being able to access high quality abortion in South Australia. To improve access for rural women, including Aboriginal women and women from interstate or overseas, WEL would recommend the removal of the following clauses from South Australian laws governing abortion:

1. the requirement that only medical practitioners can perform abortions;
2. any requirement or limit for South Australia residency in order to access abortion services;
3. the requirement for an abortion to be provided in a prescribed hospital; and,
4. the requirement for women to see two doctors before being permitted to access an abortion.

WEL supports the removal of any barrier to access abortions, and recommends that all women should be able to use telehealth or other electronic services to consult with medical and/or health practitioners.

The provision of abortion services via telemedicine and locally by appropriately trained health care professionals in primary health care settings is a necessary condition for improving access. This would mean women could have a medical abortion at home or in their closest regional centre. They would only need to travel to metropolitan areas of South Australia for abortion procedures that are more complicated, thus necessitate specialist care.

4.10 Incidental

- Should there be a residency requirement to access a lawful abortion in South Australia [refer to Fact Sheets 6 and 7]
- Do you have any suggestions for incidental law changes to present law and/or practice in South Australia in relation to abortion? [refer to Fact Sheet 4, 6 and 8]
- Are there any other comments you would like to make in relation to this reference?

There should be no residency requirement to access a lawful abortion in South Australia. Anyone that wants to access abortion care should be permitted to, regardless whether their primary address is outside of the state, or they have only just recently moved to South Australia.