

POLICY NOTE, July 2019: *Reproductive Health Care Reform Bill 2019*

EXECUTIVE SUMMARY

The current abortion law in NSW is certain. It is lawful for a woman to undergo an abortion where it is necessary to prevent serious danger to her life, physical or mental health.

The *Reproductive Health Care Reform Bill 2019* seeks to remove abortion from the *Crimes Act 1900* (except in the case of an unqualified person performing an abortion) and regulate abortion 'like any other health issue'.

The Bill is counter-productive to women's health, removes protections for women, unborn children and health practitioners, and is a radical departure from the current law. The Bill:

- erases women, denying that they are the ones uniquely impacted by pregnancy and abortion.
- purports to make abortion a 'health issue' yet effectively treats it as a non-health issue, by making it an elective procedure, available 'on request', without any health/medical reason required, and ignores the negative health risks of abortion for women.
- makes lawful abortions for any reason, including discriminatory reasons such as disability or the child's sex.
- permits late term abortions, including abortions of viable babies up until full term.
- removes protections for women against abortion coercion. When abortion is permitted for any reason, women are even more vulnerable to pressure from their partners, family, or others.
- removes protections for women against incompetent/unscrupulous medical practitioners.
- fails to address the support women facing abortions really need.
- provides no safeguards to ensure that women are giving informed consent.
- erodes freedom of conscience.

Women who abort often cite reasons such as fear of intimate partner violence, coercion, study or career pressures, and a lack of financial and emotional support. Instead of more abortion, we would like to see the government address these issues through a formal, comprehensive program so that women facing an unplanned pregnancy feel empowered to have, and to raise their child, and don't feel as if abortion is their only choice.

Women's Forum Australia is, in principle, against the criminalisation of women who have had an abortion. On this point, a simple amendment could be made to the *Crimes Act* protecting women from criminal responsibility and this is something we would wholeheartedly support. The legalisation of abortion on demand under the current Bill is not the answer.

We do not support this Bill. In 2019, we must do better than this for women, children and our community.

Current law

In NSW today, it is legal for a woman to have an abortion to prevent serious danger to her life, physical or mental health. As one of the most common medical procedures in Australia, with 1 in 3 women experiencing an abortion, and 20,000-30,000 performed in NSW each year, it is also readily accessible.

Under sections 82-84 of the *Crimes Act*, abortion is a crime only if it is performed unlawfully. The *Crimes Act* does not define when an abortion would be considered lawful or unlawful and this has been left to the interpretation of the courts.

Under NSW case law, abortions are lawful if there is “any economic, social or medical ground or reason” upon which a doctor could base an honest and reasonable belief that an abortion was required to avoid a “serious danger to [the pregnant woman’s] physical or mental health” (Levine J in *R v Wald* [1971] 3 DCR (NSW), derived from Menhennitt J in *R v Davidson* [1969] VR 667 (Vic), and followed by Simpson J in *R v Sood* [No 3] [2006] NSWSC 762).

What amounts to “serious danger to a woman’s mental health” has been expanded to dangers that may be relevant after the birth of a child, as a result of economic or social circumstances (Kirby J in *CES v Superclinics* [1995] NSWSC 103).

Proposed law reform

The purposes of the Bill are (section 3):

- to reform the law relating to terminations of pregnancies (including repealing provisions of the *Crimes Act* relating to abortions and abolishing common law offences relating to abortion);
- to regulate the conduct of registered health practitioners in relation to terminations.

The Bill:

- repeals the offences relating to abortion in sections 82-84 of the *Crimes Act* (section 3);
- clarifies that despite any other Act, a person who consents to, assists in, or performs an abortion on themselves is protected from criminal responsibility (section 10);
- legalises abortion ‘on request’ up until 22 weeks gestation (section 5);
- legalises abortion up until full term with minimal safeguards (section 6);
- requires doctors with a conscientious objection to refer for abortion (section 8).

The Bill raises the following (non-exhaustive) issues:

1. it erases women, denying it is they who are uniquely impacted by pregnancy and abortion;
2. it purports to make abortion a ‘health issue’ yet effectively treats it as a non-health issue;
3. it makes lawful abortions for any reason;
4. it permits late term abortions, including abortions of viable babies up until full term.
5. it removes protections for women against abortion coercion;
6. it removes protections for women against incompetent/unscrupulous medical practitioners;
7. it fails to address the support women facing abortions really need;
8. it provides no safeguards for informed consent;
9. it erodes freedom of conscience.

Each of these will be addressed below.

1. Women erased in the Bill

It is deeply concerning that throughout the Bill, the term ‘woman’ has been erased and replaced with the term ‘person’, denying that it is women who are uniquely impacted by pregnancy and abortion and absurdly suggesting that men could be pregnant. It is difficult to take seriously a bill that refuses to even acknowledge the people it is apparently trying to help.

2. Abortion effectively treated as a non-health issue

Making abortions lawful for non-medical reasons fails to recognise that abortion itself carries with it risks of physical and psychological harm,¹ and unnecessarily puts women at risk. It also gives the green light for women to undergo an abortion based on their current circumstances – such as study or career pressures, lack of emotional or financial support, domestic violence and so on – without actually addressing these underlying issues.

The Bill is being promoted to further women’s health and yet is both counter-productive to women’s health and only seeks to reform the law to allow abortions for non-health related reasons. While the Bill purports to make abortion a ‘health issue’ it effectively treats it as a non-health issue by making abortion available on request without the need for any medical grounds at all.

3. Abortion lawful for any reason

Abortion is currently lawful on health grounds in NSW, to prevent serious danger to a woman’s life, physical or mental health.

As well as making abortion lawful for non-medical/social reasons, which poses harm to women for the reasons noted above, by allowing abortion ‘on request’ up until 22 weeks, the Bill makes abortion lawful for *any reason* whatsoever. This includes discriminatory reasons such as terminating children with disabilities or terminating children who are not the desired sex.

Disability selective abortion

A law that allows abortion on request to 22 weeks with minimal safeguards thereafter, permits abortion for any kind of disability, including Down syndrome or a cleft lip. There are countries like Iceland which have been celebrating nearly “eradicating Down syndrome”. In other words, they are nearing a 100% elimination rate for aborting every child who is diagnosed with the disability. In Australia, 93% of pregnancies end in abortion when a baby is given a Down syndrome diagnosis.

Stories of mothers being pressured to abort their children with Down syndrome are tragically becoming more and more common in Australia and internationally. In Perth, a mother was told to abort her daughter and simply “try again for a normal one”.² A NSW mother was told that her husband would leave her, that she would lose her job, and that the baby would have a poor quality of life as well as ruining the quality of life of her existing children.³ A Tasmanian mother was repeatedly

¹ Fergusson D.M., Horwood L.J. and Boden J.M. (2008), Abortion and mental health disorders: evidence from a 30-year longitudinal study, *The British Journal of Psychiatry* Vol 193, No 6, p 449.

² Gray, L., “Life with Lily: My doctor assumed we’d abort our baby with Down syndrome”, *The Australian Women’s Weekly* (21 March 2019): <https://www.nowtolove.com.au/parenting/family/world-down-syndrome-day-lily-mccain-45896>.

³ Bushnell, T., “Support for mothers of children with Down syndrome needed”, *The Macleay Argus*, (5 March 2018): <https://www.macleayargus.com.au/story/5078610/macleay-mother-calls-for-greater-down-syndrome-support-photos/#slide=29>.

pressured to have an abortion throughout her pregnancy, despite refusing one at the very outset.⁴ All the mothers complained that the information they received was either inaccurate, skewed or out of date and heavily prejudiced towards encouraging termination.

Mothers of children with Down syndrome and other disabilities already feel pressure from health practitioners and wider society to abort.⁵ If abortions are lawful for any reason, such pressure will only increase and unborn children with disabilities will be further targeted. In a society that is meant to be fighting against discrimination and working towards greater inclusiveness for persons with disabilities, this is a grave step backwards.

Sex selective abortion

Sex selective abortion is a well-known problem in China and India, where son-preference cultures have resulted in extremely skewed sex ratios. Sex discrimination carried out via abortion is well documented and has resulted in millions of “missing” girls in some societies.⁶ The number of girls and women missing from the global population is estimated to be more than 160 million, with sex selection being a major culprit.⁷ The practice of sex selection has been widely condemned.⁸

There is evidence that sex selective abortion is already occurring in some parts of Australia.

Take for example, the high-profile case of Dr Mark Hobart who refused to perform a sex-selective abortion in Victoria,⁹ or the investigation by SBS that found a higher number of boys than girls being born in some ethnic communities in Australia.¹⁰ There is also the more recent study from La Trobe University which indicates that in Victoria – a state which reformed its abortion laws to allow abortion on request for any reason in 2008 – sex selective practices are taking place within certain migrant communities, with a higher than expected number of boys been born than girls.¹¹

In a system where abortion is available on request for any reason, there is no protection against prenatal sex discrimination and amongst son-preference cultures residing in Australia, it is by and large females who stand to bear the brunt of discrimination, in keeping with international trends. This is patently anti-woman and sadly, many feminists have remained silent on this issue precisely because they believe that speaking out on it could threaten their ‘right to abortion’.

⁴ Aubusson, L., “Parents pressured to terminate pregnancy of their babies with Down syndrome”, Kidspot, (23 November 2016): <https://www.kidspot.com.au/parenting/real-life/in-the-news/parents-pressured-to-terminate-pregnancy-of-their-babies-with-down-syndrome/news-story/0b8335a1a9b67c77e80542591b68a736>.

⁵ Miller, B., “Down syndrome: Parents say they feel pressured to terminate pregnancy after diagnosis”, ABC News, (22 November 2016): <http://www.abc.net.au/news/2016-11-22/down-syndrome-parents-pressured-to-terminate-pregnancy/8033216>.

⁶ Hvistendahl, M., 2011, *Unnatural Selection: Choosing Boys Over Girls and the Consequences of a World Full of Men*, Public Affairs Publishing. See also: “It’s a girl”: <http://www.itsagirlmovie.com>; The Economist, “The War on Baby Girls”, 4 March 2010: <http://www.economist.com/node/15606229>; United Nations Population Fund, “Gender-Biased Sex Selection”: <http://www.unfpa.org/gender-biased-sex-selection>;

⁷ Above n6, Hvistendahl.

⁸ See for example: *Agreed Conclusions on the Elimination of All Forms of Discrimination and Violence Against the Girl Child*, Commission on the Status of Women, 51st Session (26 February – 9 March 2007), resolving that we should, “Eliminate all forms of discrimination against the girl child and the root causes of son preference, which results in harmful and unethical practices regarding female infanticide and prenatal sex selection, which may have significant repercussions for society as a whole.”: http://www.unwomen.org/~media/headquarters/attachments/sections/csw/51/csw51_e_final.pdf.

⁹ Devine, M., “Doctor risks his career after refusing abortion referral”, Herald Sun, (5 October 2013): <http://www.heraldsun.com.au/news/opinion/doctor-risks-his-career-after-refusing-abortion-referral/news-story/a37067e66ed4f8d9a07ec9cb6fd28cf5>.

¹⁰ SBS, “Could gender-selective abortions be happening in Australia?”, SBS, (28 August 2015): <https://www.sbs.com.au/news/could-gender-selective-abortions-be-happening-in-australia>.

¹¹ Edvardsson K., Axmon A., Powell R. and Davey M. (2018), Male-biased sex ratios in Australian migrant populations: a population-based study of 1 191 250 births 1999–2015, *International Journal of Epidemiology*: <https://doi.org/10.1093/ije/dyy148>; Dow, A., “The ‘missing girls’ never born in Victoria”, 12 August 2018: https://www.theage.com.au/national/victoria/the-missing-girls-never-born-in-victoria-20180811-p4zwx.html?_ga=2.153057081.1038406648.1539284571-2039037577.1506596324.

4. Removal of protections for women and unborn children against late terms abortions

The Bill removes protections for late term abortions, including abortions on viable babies up until full term.

Similar to radical abortion law reforms in Victoria and Queensland, section 6 of the Bill legalises abortion after 22 weeks (with no upper limit) where two medical practitioners consider that “in all the circumstances” the abortion should be performed, including “the person’s current and future physical, psychological and social circumstances”. This broadly expressed ground is not any *clearer* than the current law, it is just far wider. It is arguably so broad as to be meaningless, effectively allowing abortions up until full term for any reason, just like the highly criticised Faruqi Bill.¹²

Under the current law abortions can only lawfully be performed on health grounds when there is a serious danger to a woman’s life, physical or mental health. This would normally preclude late term abortions as not only do such procedures themselves pose serious dangers to women, but they would not be medically necessary if the baby was at a gestation where it could be delivered and born alive. Under the Bill, there is no legal reason not to perform an abortion right up until full term.

Regardless of how many women will actually seek late-term abortions and for what reasons – though there is evidence¹³ to suggest that late term abortions did increase after the law change in Victoria – the critical point is, that the Bill contains no concrete restrictions, contrary to what its advocates may claim.

Removing protections against late term abortions is dangerous for women and for a Bill that seeks to ‘modernise’ the current law, it is out of step with common practice in other jurisdictions,¹⁴ with medical knowledge of foetal viability and pain,¹⁵ and with medical advances including progress in neonatal care.¹⁶ Recently there was a viral video circulating on social media of a baby born at 22 weeks being discharged from a hospital in Alabama. The current Bill would allow babies of the exact same gestation to be aborted ‘on request’ and for even older babies to be aborted with minimal safeguards.

Advocates of abortion argue that late-term abortions are rare and undertaken only when a woman’s life or health is at risk or where the unborn child suffers from a fatal condition. Yet, a 2013 study undertaken as part of one of the largest studies on abortion in the US, suggests that only a very small proportion are for foetal anomaly or life endangerment.¹⁷

A 2004 study from the pro-abortion Guttmacher Institute found that the most frequent reasons cited for having an abortion *at all gestational ages* included: “that having a child would interfere with a woman’s education, work or ability to care for dependents (74%); that she could not afford a baby

¹² *Abortion Law Reform (Miscellaneous Acts Amendment) Bill 2016*.

¹³ Medew J., “‘Abortion tourism’ brings scores of women to Victoria for late terminations”, *The Age* (26 October 2015): <https://www.theage.com.au/national/victoria/abortion-tourism-brings-scores-of-women-to-victoria-for-late-terminations-20151026-6kiw6u.html>.

¹⁴ In many European countries, abortion is only allowed up until 10-12 weeks, after which there are strict conditions that need to be met for an abortion to be performed (<http://www.euronews.com/2016/04/14/europes-abortion-rules---no-single-policy/>). In the UK, abortion is only allowed up until 24 weeks to prevent physical or mental health risks to the woman or her other children. It is only allowed after 24 weeks under strict conditions (Abortion Act 1967 (UK), s 1(1)).

¹⁵ Doctors on Fetal Pain, www.doctorsonfetalpain.com.

¹⁶ Salter J., “Premature babies: How 24 week-old babies are now able to survive”, *The Telegraph* (17 November 2014): <http://www.telegraph.co.uk/women/womens-health/11121592/Premature-babies-How-24-week-old-babies-are-now-able-to-survive.html>; “Premature babies”, Better Health Channel, <https://www.betterhealth.vic.gov.au/health/healthyliving/premature-babies#>.

¹⁷ Foster D.G., and Kimport K. (2013), Who seeks abortions at or after 20 weeks?, *Perspectives on Sexual and Reproductive Health*, Vol 45, No 4, pp 210-218: <https://onlinelibrary.wiley.com/doi/epdf/10.1363/4521013>.

now (73%); and that she did not want to be a single mother or was having relationship problems (48%)."¹⁸

According to the 2013 study, other reasons women commonly sought an abortion later on in pregnancy included not knowing they were pregnant, not knowing where to go for an abortion, expense, insurance issues, travel considerations, indecision and disagreements with the father.

Such reasons are hard to square with the reality of late-term abortion.

Additionally, it should be noted that women who seek late-term abortions are often in vulnerable situations with a limited support system. The 2013 study described five profiles of such women: "They were raising children alone, were depressed or using illicit substances, were in conflict with a male partner or experiencing domestic violence, had trouble deciding and then had access problems, or were young and [experiencing their first pregnancy]."

Laws allowing late term abortions with minimal restrictions, put vulnerable women like this at even greater risk and do nothing to address the underlying issues that they are facing.

There are some who insist that allowing late-term abortions is important for women who are particularly vulnerable, such as those who are suicidal, those who are pregnant as a result of sexual violence, or those who have been unable to access support earlier due to family violence or other complex personal circumstances. However, these complex circumstances are not resolved by late-term abortion. If anything, they are exacerbated. Abortion in these circumstances potentially conceals or even legitimises acts of violence. Instead of offering women a traumatic procedure that puts their health and well-being at further risk, health practitioners and others involved in providing support should be attempting to address the root causes that lead women to seek an abortion in these situations.

5. Removal of protections for women against abortion coercion

Advocates of liberalised abortion laws often talk about how greater access to abortion will help women experiencing domestic violence. However, the Bill provides no protections for women who are coerced into having abortions. Moreover, abortion does not in any way undo or address domestic violence and in the case of women suffering domestic violence, abortion heaps further violence and trauma upon these women.

In fact, by making abortion lawful for any reason, the Bill removes protections for women against abortion coercion. Whereas now abortions can only lawfully be performed on health grounds, under the Bill where abortion is permitted for any reason, women are even more vulnerable to coercion from their partners, family or others. In light of the recent NRL scandals in Sydney where it was found that players had coerced their girlfriends into having abortions,¹⁹ we should be seeking to implement more protections for women, not to take away the limited ones that exist.

¹⁸ Finer L.B et al (2005), Reasons U.S. Women Have Abortions: Quantitative and Qualitative Perspectives, *Perspectives on Sexual and Reproductive Health*, Vol 37, No 3, pp 110–118: https://www.guttmacher.org/sites/default/files/article_files/3711005.pdf.

¹⁹ Wong, R., "Abortion coercion: the NRL still has a long way to go in its treatment of women", Online Opinion, (20 March 2017): www.onlineopinion.com.au/view.asp?article=18914.

6. Removal of protections for women from incompetent/unscrupulous medical practitioners

The Bill does not protect women against doctors who perform abortions unlawfully. Cases such as *R v Smart* (1981) and *R v Sood* [2006] NSWSC 1141, which involved unlawful late term abortions and the dangerous mistreatment of patients, affirm the need to retain the offences for unlawful abortions in the *Crimes Act* as a matter of justice, deterrence and protection for women. Without such protections, doctors like Dr Smart and Dr Sood may not face adequate penalties, will likely face less scrutiny, and will be less deterred from performing unsafe abortions that benefit them financially. Women would also have to bring their own proceedings, rather than have the protection of the criminal law.

7. Failure to address the real issues often facing women who seek abortion

The Bill seeks to 'modernise the law', yet does not make any attempt to understand and address the present-day societal issues, which might make women view abortion as their only choice. Women who abort often cite reasons such as fear of intimate partner violence,²⁰ coercion from their partner or others, study or career pressures, and a lack of financial and emotional support.²¹

Abortion under these circumstances is not choice, it is desperation.

Instead of simply providing women with the so-called "choice" of abortion on demand, we need to do far more as a society to address the underlying causes and provide them with positive alternatives that are not going to expose them to further harm.

This includes progressing real alternatives for women facing unplanned pregnancies, and addressing issues of domestic violence, access and affordability of child care, flexible workplace and study arrangements and access to pregnancy and counselling support. Instead of more abortion, we would like to see the government address these issues through a formal, comprehensive program so that women facing an unplanned pregnancy feel empowered to have, and to raise their child, and don't feel as if abortion is their only choice.

8. No safeguards for informed consent

Given the pressures and lack of support that often drive women to seek an abortion, as well as the physical and psychological risks inherent in abortion, safeguards to ensure women are giving fully informed consent are also palpably absent from a bill that seeks to modernise abortion laws.

Safeguards such as the provision of counselling independent of abortion providers; waiting periods, parental notification for minors; information about the risks of abortion and the support available to women who want to continue their pregnancies; information about foetal development and the opportunity to view ultrasounds – these are all critical to ensure that women can give fully informed consent when it comes to abortion. Such requirements are present in multiple US states and European jurisdictions. Some are also present in Western Australia's abortion law.

Obtaining informed consent from patients should be a standard part of all good medical practice, however there is anecdotal evidence that informed consent is nevertheless often not obtained from women seeking an abortion. This is an issue of such grave importance to women that it should be addressed by Parliament and enforced.

²⁰ Taft A.J. and Watson L.F. (2007), Termination of pregnancy: associations with partner violence and other factors in a national cohort of young Australian women, *Australian and New Zealand Journal of Public Health* Vol 31, No 2, pp 135-142.

²¹ Above n18, Finer.

9. Erosion of Freedom of conscience

Section 8 of the Bill requires a health practitioner with a conscientious objection to abortion to refer the patient or transfer their care to a health practitioner who will perform the abortion or to a health service provider with such a practitioner. However, not only would referral “contradict one’s very objection to the request in the first place” or cause a doctor to be “complicit in harm”, but it would rightly “cast doubt on the objector’s sincerity”.²²

The referral requirement is deeply concerning for health practitioners who will be forced to violate their conscience or lose their job, for women who will eventually only be able to see doctors for pregnancy care who don’t object to abortion (regardless of whether they have differing views on this issue), and for our society for which a fundamental right will be eroded.

Protection of women from criminal responsibility

Abortion is a very serious issue. Those on both sides of the abortion debate agree that it is not something women take lightly and that it is often one of the most difficult decisions they will make. Whether one respects the moral significance or human rights of the unborn child, the biological reality is that abortion deliberately ends the life of a developing human being in its mother’s womb. It is appropriate that the law includes deterrents for something as serious as this.

Women’s Forum Australia is, in principle, against the criminalisation of women who have had an abortion. We consider that there are systemic issues which mean that women are not provided with all the support or information available so that they can make a real choice, and due to various pressures, often feel like abortion is their only choice. In our view, it will generally be counter-productive and unjust to charge women under such desperate circumstances, particularly in light of the suffering that many women also experience after abortion.

However, for the reasons noted above, abortion on demand is not the answer.

If abortion is undertaken unlawfully, any prosecution should be directed at the abortion provider, not the woman seeking the abortion. A simple amendment could be made to the *Crimes Act* protecting women from criminal responsibility and this is something we would wholeheartedly support.

Conclusion

Advocates of the Bill claim that it clarifies the current law and aligns it with current clinical practice and other jurisdictions, promotes women’s health, and brings the law into the 21st century. In reality however, the Bill is a radical departure from the current law, is counter-productive to women’s health, and falls far short of legislation that is suitable for our society today. It removes important protections afforded to women, children and health practitioners under the current law and fails to address the very real issues women are struggling with.

In light of the points we have raised, we do not support this Bill. In 2019, we must do better than this for women, children and our community.

²² Gerrard J.W. (2009), Is It Ethical for a General Practitioner to Claim a Conscientious Objection When Asked to Refer for Abortion?, *Journal of Medical Ethics* Vol 35, No 10, pp 599–602.