



THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: HRC/CLC:GUak1188224

9 August 2016

Dr Mehreen Faruqi MLC
Greens NSW spokesperson for the Status of Women
Parliament House
Macquarie Street
SYDNEY NSW 2000

By email: mehreen.faruqi@parliament.nsw.gov.au

Dear Dr Faruqi,

Thank you for your letter dated 14 June 2016 regarding the Abortion Law Reform (Miscellaneous Acts Amendment) Bill 2016 ("Bill"). The Law Society welcomes consideration of reforms to decriminalise abortion, and to provide for safe access zones around abortion clinics.

The Law Society understands that experience in Victoria and other jurisdictions has shown that women seeking abortions, and staff providing abortion services have been severely affected by intimidating and abusive behaviour of anti-abortion protestors outside abortion clinics.¹ Examples of similar protests in NSW have also been recently documented.²

The Law Society recognises that the objectives of the Bill are controversial and that there are differing views within the legal profession and the community concerning those objectives. The analysis below is submitted from a legal and human rights perspective, without expressing a view on the merits of the Bill.

1. Existing legislation in NSW governing abortion

In NSW abortion is an offence contained in sections 82, 83 and 84 of the *Crimes Act 1900* (NSW) ("Crimes Act"), with penalties of up to 10 years imprisonment for women, doctors and anyone who assists. Under these provisions:

- Whosoever, being a woman with child, unlawfully administers to herself any drug or noxious thing; or unlawfully uses any instrument to procure her miscarriage, shall be liable to imprisonment for ten years.³

¹ Human Rights Law Centre, *Submission on Abortion Law Reform (Women's Right to Choose) Amendment Bill 2016 and Inquiry into laws governing termination of pregnancy in Queensland* (June 2016), <<http://hrlc.org.au/wp-content/uploads/2016/07/Qld-Abortion-Bill-submission.pdf>>, 7.

² Ben Rice, 'NSW debates exclusion zone laws for abortion protestors', *The Saturday Paper*, 5 March 2016, accessed at <<https://www.thesaturdaypaper.com.au/news/health/2016/03/05/nsw-debates-exclusion-zone-laws-abortion-protestors/14570964002962>>.

³ Section 82, *Crimes Act 1900*.

- Whosoever unlawfully administers to, or causes to be taken by, any woman, whether with child or not, any drug or noxious thing; or unlawfully uses any instrument or other means, with intent in such cases to procure her miscarriage, shall be liable to imprisonment for ten years.⁴
- Whosoever unlawfully supplies or procures any drug or noxious thing, or any instrument or thing whatsoever, knowing that the same is intended to be unlawfully used with intent to procure the miscarriage of any woman whether with child or not, shall be liable to imprisonment for five years.⁵

The Crimes Act specifies that abortion is a crime only if it is performed unlawfully. However, it does not define when an abortion would be considered lawful or unlawful.

Case law in NSW has provided some clarity around the definition of “unlawful”. In *R v Wald* Judge Levine established a legal precedent on the definition of “lawful”, which became known as the “Levine ruling”.⁶ In this case, Judge Levine held that an abortion should be considered to be lawful if the doctor honestly believed on reasonable grounds that “*the operation was necessary to preserve the woman involved from serious danger to her life or physical or mental health which the continuance of the pregnancy would entail*” and that in regard to mental health the doctor may take into account “*the effects of economic or social stress that may be pertaining to the time*”.⁷ This ruling also specified that two doctors’ opinions are not necessary and that the abortion does not have to be performed in a public hospital.

In a 1995 medical negligence case, *Ces v Superclinics*, Justice Michael Kirby (then of the NSW Court of Appeal) proposed an extension the original Levine ruling.⁸ Justice Kirby’s comments in that case allows consideration to be given, when determining whether a particular request for an abortion satisfies the legal requirements, to whether a serious danger would follow not only to the woman’s health during the pregnancy but also to her health after the child’s birth.⁹

While the Levine ruling provides an important exception to the Crimes Act, its ambit is nevertheless limited and uncertain. Termination clinics operate in NSW in the shadow of the law by relying on the police to apply a generous interpretation of the exception.¹⁰ While we understand that prosecutions are rare, this remains an insecure and problematic basis on which to operate and in particular, has led to many medical practitioners being reluctant to work in the area.¹¹

2. Human rights principles governing abortion

Australia has ratified all of the key United Nations (“UN”) human rights treaties, which equally apply throughout the states and territories. The Law Society notes that the decriminalisation of abortion and the introduction of safe access zones to abortion clinics is consistent with human rights law. In particular, the criminalisation and/or restriction of medical procedures

⁴ Section 83, *Crimes Act 1900*.

⁵ Section 84, *Crimes Act 1900*.

⁶ *R v Wald* (1971) 3 DCR (NSW) 25.

⁷ *R v Wald* (1971) 3 DCR (NSW) 25.

⁸ *Ces and Anor v Superclinics (Australia) Pty Limited and Others* [1995] NSWSC 103.

⁹ *Ces and Anor v Superclinics (Australia) Pty Limited and Others* [1995] NSWSC 103, 60.

¹⁰ George Williams, ‘NSW lags way behind in updating its abortion laws’, *Sydney Morning Herald*, 13 June 2016.

¹¹ George Williams, ‘NSW lags way behind in updating its abortion laws’, *Sydney Morning Herald*, 13 June 2016.

that are only needed by women is considered a form of discrimination against women.¹² Similarly, such restrictions undermine a woman's autonomy and right to equality and non-discrimination in the full enjoyment of their right to sexual and reproductive health.¹³ As submitted by the Human Rights Law Centre ("HRLC") to the Inquiry into laws governing termination of pregnancy in Queensland,¹⁴ restrictions on abortion may also place women in danger by denying them safe access and health care.¹⁵

The Law Society notes that arguments against the decriminalisation of abortion refer to a foetal right to life under international law. The right to life is protected by Article 6(1) of the *International Covenant on Civil and Political Rights* ("ICCPR").¹⁶ The right to life is absolute and cannot be derogated from. However, it is generally recognised that Article 6 is not applicable before birth.¹⁷ The HRLC also notes that the view of the Australian Government is that the right to life under the ICCPR was not intended to protect life from the point of conception, but only from the point of birth.¹⁸ In its submission to the 2008 Victorian Law Reform Commission's review of the law on abortion, the Castan Centre for Human Rights Law pointed out that:

*liberal abortion laws in France, Austria and the Netherlands have been subject to domestic challenges on the basis of alleged inconsistency with the right to life in article 2 of the European Convention. These challenges have all been unsuccessful.*¹⁹

The Law Society notes that removing abortion from the Crimes Act may contribute to the protection and promotion of women's rights to privacy, autonomy and non-discrimination. The Law Society notes the submission made by the HRLC on this matter,²⁰ that decriminalising abortion will mean that abortion is treated as a medical decision for a woman and her doctor. This is also consistent with the previously stated views of the Law Society's Criminal Law Committee, that laws relating to abortion should not be the subject of the criminal law.²¹

However, the Law Society notes that appropriate medical and ethical safeguards must be retained in relevant NSW health legislation to ensure sufficient safeguards to guard against improper or unethical medical treatment. The Law Society notes that it is not clear if the Bill retains these safeguards.

¹² 2 Committee on the Elimination of all forms of Discrimination against Women (CEDAW Committee), General Recommendation 24: Women and Health (1999) UN Doc A/54/38/Rev 1.

¹³ Committee on Economic, Social and Cultural Rights (CESCR), General Comment No 22: Sexual and Reproductive Health (2016), UN Doc E/C.12/GC/22, [34].

¹⁴ Human Rights Law Centre, *Submission on Abortion Law Reform (Women's Right to Choose) Amendment Bill 2016 and Inquiry into laws governing termination of pregnancy in Queensland* (June 2016), <<http://hrlc.org.au/wp-content/uploads/2016/07/Qld-Abortion-Bill-submission.pdf>>.

¹⁵ CESCR, General Comment No 22: Sexual and Reproductive Health (2016), UN Doc E/C.12/GC/22, [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].

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

¹⁷ Victorian Law Reform Commission, *Law of Abortion: final report, Appendix D – Human rights and abortion* (May 2008), 2.

¹⁸ Human Rights Law Centre, *Submission on Abortion Law Reform (Women's Right to Choose) Amendment Bill 2016 and Inquiry into laws governing termination of pregnancy in Queensland* (June 2016), <<http://hrlc.org.au/wp-content/uploads/2016/07/Qld-Abortion-Bill-submission.pdf>>, 5

¹⁹ Submission 383 to the Victorian Law Reform Commission review of the law on abortion (Castan Centre for Human Rights Law).

²⁰ Human Rights Law Centre, *Submission on Abortion Law Reform (Women's Right to Choose) Amendment Bill 2016 and Inquiry into laws governing termination of pregnancy in Queensland* (June 2016), <<http://hrlc.org.au/wp-content/uploads/2016/07/Qld-Abortion-Bill-submission.pdf>>, 4.

²¹ Law Society of NSW, *Submission on the Crimes Amendment (Zoe's Law) Bill 2013 (No 2)*, (October 2013), 4.

3. Safe access to abortion services

The Law Society supports the enactment of safe access zones at abortion clinics (referred to in the Bill as exclusion zones), which create a safe space in which it is unlawful to harass or intimidate women seeking access to abortion services. The safe access zones would also prohibit communication about abortion that may cause distress to the person. Importantly, the Bill also prohibits recording women in those zones, and the distribution of any such recordings.

While the Law Society acknowledges that the introduction of safe access zones may engage the right to freedom of expression of anti-abortionists, this right is not absolute. Rather, the right to freedom of expression may in some cases be limited to ensure respect for the rights or reputations of others, or to protect national security or public order, public health or morals.²²

The Law Society considers that the introduction of safe access zones around abortion clinics, which is limited to 150 metres around the premises, does not unreasonably limit the right to freedom of expression. The introduction of a limited safe access zone is necessary to protect a woman's right to privacy and access to health services and as such, is consistent with human rights.

The Law Society provides the following specific comments on the provisions of the Bill as it relates to exclusion zones around abortion clinics.

3.1 Definitions

The Law Society notes that the Bill does not include a definition of "abortion", for the purpose of the definition of "exclusion zone".²³ For clarity and to ensure that all health and reproductive services are covered by this provision, the Law Society suggests that the Bill includes a definition of abortion, with appropriate reference to the relevant NSW legal instrument, similar to the Victorian legislation.²⁴

3.2 Communications within an exclusion zone

The Law Society notes that the Bill provides that "*a person who is in an exclusion zone must not communicate disapproval of abortion by any means in a manner that...is reasonably likely to cause distress or anxiety to any such person*".²⁵ The Law Society considers that there may be situations where the communication may not constitute "disapproval of abortion", but may nonetheless be distressing to the person. As such, the Law Society submits that the Bill should consider adopting the Victorian equivalent provision, which prohibits communication "in relation to abortions".²⁶

²² Human Rights Law Centre, *Submission on Abortion Law Reform (Women's Right to Choose) Amendment Bill 2016 and Inquiry into laws governing termination of pregnancy in Queensland* (June 2016), <<http://hrlc.org.au/wp-content/uploads/2016/07/Qld-Abortion-Bill-submission.pdf>>, 7.

²³ Clause 11AB Abortion Law Reform (Miscellaneous Acts Amendment) Bill 2016.

²⁴ Section 185B(1) *Public Health and Wellbeing Act 2008* (Vic).

²⁵ Clause 11AD(1) Abortion Law Reform (Miscellaneous Acts Amendment) Bill 2016.

²⁶ Section 185B(1) *Public Health and Wellbeing Act 2008* (Vic). Prohibited behaviour includes communicating by any means in relation to abortions in a manner that is able to be seen or heard by a person accessing, attempting to access, or leaving premises at which abortions are provided and is reasonably likely to cause distress or anxiety.

Thank you for the opportunity to provide comments on the Bill. Any questions can be directed to Anastasia Krivenkova, Principal Policy Lawyer, on 02 9926 0354 or by email at anastasia.krivenkova@lawsociety.com.au.

Yours sincerely,

A handwritten signature in blue ink, appearing to read 'Gary Ulman', followed by a period.

Gary Ulman
President