

**LEGISLATIVE ASSEMBLY FOR THE  
AUSTRALIAN CAPITAL TERRITORY**

**HEALTH (PATIENT PRIVACY) AMENDMENT BILL 2015**

**EXPOSURE DRAFT**

**EXPLANATORY STATEMENT**

Circulated by  
Shane Rattenbury MLA

## **Introduction**

This explanatory statement relates to the *Health (Patient Privacy) Amendment Bill 2015* as presented by Mr Shane Rattenbury MLA in the Legislative Assembly. It has been prepared in order to assist the reader of the Bill and to help inform debate on it. It does not form part of the Bill and has not been endorsed by the Assembly.

The Statement must be read in conjunction with the Bill. It is not, and is not meant to be, a comprehensive description of the Bill. What is said about a provision is not to be taken as an authoritative guide to the meaning of a provision, this being a task for the courts.

## **Overview**

The Bill responds to community concerns about particular intimidating and harassing conduct that occurs outside the approved health facility that provides pregnancy terminations, or abortions, in the ACT. The Bill is concerned with preventing certain behaviours within a defined area and within defined times around relevant declared medical facilities. These behaviours may act to increase emotional distress, or at worst, prevent women from accessing a legal and medically recognised procedure. This Bill does not seek to engage in debate regarding a woman's right to access abortion services. The issue of legal, safe and medically supervised abortions was conclusively resolved by the Assembly many years ago, and is protected by the Act that this Bill seeks to amend. This Bill is rather about a woman's right to access those services in relative privacy and free from the intimidating conduct of others. It is also not intended to limit the right to protest, noting that there are many appropriate places to protest or stage vigils.

To achieve this, the Bill will effectively create a zone around approved medical facilities within which protests and other public displays regarding abortion, together with behaviours that may be described as harassment, hindering, intimidation, interference with, threatening, obstruction or filming of a person accessing approved abortion facilities will be prohibited. Importantly, this Bill seeks to create a "protest free zone" – meaning that all forms of protest, by any means, and from any side of the debate, will be prohibited. The intention of the Bill is to ensure that both staff and patients, may enter and exit the facility without prejudice.

## **Consultation Period: 20 July 2015 to 11 September 2015**

Shane Rattenbury MLA, ACT Greens Member for Molonglo, invites your feedback and submissions on the proposals in this paper and the exposure draft of the *Health (Patient Privacy) Amendment Bill 2015*.

We would like to hear feedback from all sectors of the community, including the medical and health profession, the general public, and people working in law reform and enforcement.

All comments received by Friday 11 September 2015 will be considered in preparation of the final version of the proposal.

This discussion paper and the exposure draft of the *Health (Patient Privacy) Amendment Bill 2015* are available from:

Office of Shane Rattenbury MLA  
Legislative Assembly  
Ph: 6205 0005 or email [rattenbury@act.gov.au](mailto:rattenbury@act.gov.au).

Submissions should be sent to [rattenbury@act.gov.au](mailto:rattenbury@act.gov.au).

### **Important note regarding your privacy:**

If you do not wish your submission to be published or would like it published without your name, please indicate this. Unless this is clearly indicated, it will be assumed that your comments can be made public.

## **Human Rights**

New sections 85-87 created by clause 5 of the Bill engages the rights to freedom of expression (protected by section 16 of the *Human Rights Act 2004*) and to privacy (protected by section 12 of the *Human Rights Act 2004*). The limitation on the right to freedom of expression is created by paragraphs (b) and (c) of the definition of ‘prohibited behaviour’ in new section 85(1). This limitation is created in order to protect the right to privacy of those seeking to access an approved health facility.

### Freedom of Expression

The Bill does create a minor limitation on a person’s right to freedom of expression protected by section 16 of the *Human Rights Act 2004* (HRA). This limitation is reasonable and demonstrably justified in a free and democratic society consistent with requirements of section 28 of the HRA.

#### *The nature of the right affected*

The right to express oneself and one’s views on any given issue is unquestionably a fundamental part of Australian democracy. Within this right is the right to protest one’s objection to a law, practice or other activity that they believe to be wrong. This right is affected by the new offence created in the Bill.

#### *The importance of the purpose of the limitation*

The limitation created on this right is intended to ensure that a person can access services that the community and the Legislative Assembly have deemed both legal and necessary, free from the unjustified interference of others. It is intended to ensure that women who have made a very difficult, significant and emotional decision, and/or as a result of medical advice, are able to exercise that well accepted choice unimpeded by the additional and unreasonable burden of other people’s questioning and interference with that choice. The decision to seek a pregnancy termination or exercising of the medical options to undertake an abortion that to some extent places them in a particular position of vulnerability for a variety of reasons can, it has been considered, be unduly influenced by the gathering of people opposed to the procedure, to such an extent that a woman may not undertake the medical procedure. It could also be said that “counter” protests also bring increased attention to the facility and the procedures performed within. This may in certain circumstances place that woman at considerable risk to her physical and emotional well-being during this vulnerable period.

#### *The nature and extent of the limitation*

The extent of the limitation created by the Bill is very minor as it is site-specific. It does not interfere with a person’s more general right to protest in relation to abortions. People will remain free to protest anywhere else they like (subject to other lawful limitations created by other Acts). The limitation only applies to a relatively small geographic area, declared by the responsible Minister under criteria that defines the least restrictive means to achieve the stated outcome. Further, the limitation only applies to a defined period allowing staff and patients safe and

private access to the approved facility, thereby allowing protests to occur outside of these times. This Bill in no way interferes with any person's ability to make their objections known to others in the community. This could occur either through a physical protest, for example outside the Legislative Assembly, which may be considered more appropriate as the seat of parliament responsible for approving the procedures in law, or by otherwise engaging in public debate for example by writing letters to newspapers or other publications.

*The relationship between the limitation and its purpose*

The limitation is restricted exclusively to its purpose. Conduct is only prohibited to the extent necessary to protect a patient's right to privacy at declared sites and the limitation only operates so far as is reasonably necessary to protect other members of the community from inappropriate and often distressing conduct.

Just as it is unlawful to engage in a protest or other public display in all manner of different circumstances, for example because of the risk and even mere inconvenience that it may create for others, the Bill will prevent certain conduct due to its unreasonable impact on others.

Everyone has the right to feel safe in their community and at a time when people may be particularly vulnerable to distress it is reasonable and proportionate that the community takes measures to ensure that the legal medical services are able to be accessed by all who need them.

*Any less restrictive means reasonably available to achieve the purpose the limitation seeks to achieve.*

The Bill is designed to protect members of the community from the unwanted and unreasonable interference of others. It does so in a manner that limits rights to the minimum extent possible to achieve this purpose. The offences created cover only clearly defined time and geographically limited classes of conduct. The behaviour relates only to a specific subject matter and corresponding health service/s.

The only matter that is reasonably open to debate in relation to whether it is the least restrictive means available, is the extent of the geographical limitation. This Bill provides the Minister responsible with criteria for determining this distance, being the reasonable space within which it is possible for a person to access the services without being subjected to the prohibited behaviour. This declared "protected area" will be subject to scrutiny from the Members of the Legislative Assembly as a disallowable instrument. To that extent it is the least restrictive means possible of achieving the purpose of protecting patient privacy and their right to access medical services.

## **Delegation of Legislative Power**

The Bill does not delegate legislative power to the executive.

## **Administrative powers created by the Bill**

The Bill provides the Minister responsible for the *Health Act 1993* powers to declare both a protected area and a protected period. To ensure these powers are exercised appropriately the declarations will have Legislative Assembly oversight as a disallowable instrument under section 85 subclause (3) and section 86 subclause (3). A disallowable instrument must be presented to the Legislative Assembly not later than 6 sitting days after notification and may be disallowed or amended by the Legislative Assembly.

This Bill outlines criteria that define what must guide a Minister in making these declarations. This has been considered to ensure that the powers conferred on the Minister are limited to only what is required to support the outcome of the Bill, namely unhindered and unimpeded access to medical treatment at approved medical facilities.

Section 48 of the *Legislation Act 2001* provides the Assembly power to make such statutory instruments, which includes power to make different provision in relation to different matters or different classes of matters, and to make an instrument that applies differently by reference to stated exceptions or factors.

## Notes on Clauses

### Part 1 Preliminary

#### Clauses 1-3

These are formal clauses setting out the name of the Act and its commencement date (the day after the Act's notification day) and providing that it amends the *Health Act 1993*.

#### Clause 4 New division 6.1 heading

This formal clause inserts a new division for *Part 6 – Abortions*, including a new heading *Abortions - generally* for sections 80 – 84, allowing for a new division in the Act to separate the issue of patient privacy from abortions generally.

#### Clause 5 New division 6.2, new sections 85-87

This clause creates a new division of *Patient privacy in protected areas*, and associated definitions and offences for conduct that interferes with a person's right to access medical services free from the harassment of others.

Section 85 creates broadly four offences for conduct engaged in within a protected area and protected time of operations of the approved medical facility:

- Harassing, intimidating, obstructing or in any other way attempting to stop a person attempting to access abortion services at an approved medical facility;
- Acts that can be seen or heard during a defined time in a defined area;
- Protesting or another similar public display by any means in relation to the provision of abortions in the approved medical facility; and
- Filming or transmitting images of people entering and leaving approved medical facilities and publishing recordings of people entering or leaving approved medical facilities.

The underlying intention behind prohibiting the described behaviour is to ensure that people who are attempting to access the medical services provided in the approved medical facility can do so in relative privacy and are not subjected to intimidating behaviour from others.

The types of prohibited behavior are also prohibited in other contexts (see for example section 35 of the *Crimes Act 1900*) and the ordinary meaning of each of the terms clearly conveys the behavior that the Bill seeks to prohibit.

The Bill uses the term ‘capturing visual data’ to ensure that the offence of in any way filming or recording a person seeking to access or leave an approved medical facility is as broad as possible. It is taken from section 61B (10) of the *Crimes Act 1900* and is intended to cover the live streaming of images for example through programs such as Skype where there may not be a more conventional recording but the type of behavior that the Bill is seeking to prohibit still occurs.

Section 85 (2) defines a protected period that is designed to ensure a period of time that staff and patients may freely access the approved facility unhindered, and is based on standard definitions of business working hours, with an additional period of one hour either side of these hours to ensure there can be little to no accidental overlap of permissible protests and access to the facility. The subsection further allows for the responsible Minister to change these hours, utilising a disallowable instrument, if the hours of operation change or fall outside the usual 9am to 5pm business hours.

Section 86 provides the responsible Minister with the power to declare a protected area around the approved facility in which the previously defined behavior is not permissible. This area cannot be bigger than is reasonably required to ensure that patients and staff can enter the facility unimpeded. Subsection (3) also requires this declaration to be presented to the Legislative Assembly for scrutiny as a disallowable instrument.

Section 87 outlines the penalty units that a person may attract for behaving in a prohibited manner in the declared area and period. For behavior outlined in section 85 relating to protests, (1) (a) to (c), the penalty is a financial fine equal to up to 25 penalty units (outlined in the *Legislation Act 2001*).

For behavior outlined in section 85 (d), and further detailed in section 87 (2) to (4) which relates to the capturing and publishing of visual data - e.g. photos or video footage – the maximum penalty is 50 penalty units, imprisonment for 6 months or both. This is higher than that for section 85 (1) (a) to (c) as a reflection of the seriousness of the infringements of privacy and reputation of staff or clients that may arise if the offence is committed.

This section allows for law enforcement agencies to undertake visual surveillance or digital recording of events if reasonably required in the normal course of their duties or investigations, but is subject to normal existing provisions to any use of that data.

Clause 6 Dictionary, note 2

This clause is a consequential amendment to add the term ‘police officer’ into the note to the dictionary indicating that the term is defined in the *Legislation Act 2001*.

Clause 5 Dictionary, new definitions

This clause provides definitions for the purposes of the Bill and the relevant new sections.