

**LEGISLATIVE ASSEMBLY FOR THE
AUSTRALIAN CAPITAL TERRITORY**

HEALTH (PATIENT PRIVACY) AMENDMENT BILL 2015

EXPLANATORY STATEMENT

Circulated by
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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 Health (Patient Privacy) Amendment Bill 2015 (the Bill) responds to community concerns about particular intimidating and harassing conduct occurring outside approved health facilities that provide pregnancy terminations, or abortions, in the ACT. The Bill will prevent certain behaviours within a defined area and within defined times around relevant declared medical facilities. These targeted behaviours may increase emotional distress, or at worst, prevent women from accessing a legal and medically recognised procedure.

The issue of legal, safe and medically supervised abortions was conclusively resolved by the Assembly many years ago, and is protected by the Act the Bill amends. The Bill seeks to protect a woman's right to access those services in relative privacy and free from the intimidating conduct of others. It does not target protest itself and it should be noted that there are many appropriate places that people can protest or stage vigils.

To ensure women can access the health facilities in privacy, and free from intimidating conduct, the Bill allows the creation of "privacy zones" around approved medical facilities. Within the privacy zone it will be an offence to conduct protests or other public displays about abortion, or to harass, hinder, intimidate, interfere with, threaten, obstruct or film a person, with the intention of preventing a person from entering the facility or accessing its services. The privacy zone will be 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 is to ensure that both staff and patients, may enter and exit the facility without prejudice.

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 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 creates 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 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 limited by the new offences created in the Bill.

The importance of the purpose of the limitation

The limitation to this right is intended to ensure that a person can access health 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 choice unimpeded. The decision to seek a pregnancy termination often places a woman in a vulnerable position. Harassment or intimidation by a gathering of people opposed to the procedure may influence a woman to avoid visiting the clinic, or undertaking the medical procedure which, in some cases, may even threaten her emotional or physical health. "Counter" (pro choice) protests also bring increased attention to the facility and the procedures performed within, which could similarly concern a person seeking to access them.

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 during a defined period of time, to allow staff and patients safe and private access to the approved facility. There is no prohibition on protest behavior at the approved facility outside of these times. This Bill does not interfere 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 to access declared sites and the limitation only operates so far as is reasonably necessary to protect other members of the community from

engaging in potentially distressing conduct that may stop that person from accessing medical treatment.

Everyone has the right to feel safe in their community and at a time when people may be particularly vulnerable to distress as a result of the actions of others 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.

This Bill provides the Minister responsible with criteria for determining the size of the geographical limitation; that is, the reasonable space within which it is possible for a person to access the services without being subjected to the prohibited behaviour. The 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.

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.

The Bill requires the Minister to be satisfied of certain criteria when making a declaration. This ensures the powers conferred on the Minister are limited to only what is required to support the outcome of the Bill; that is 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* (the Act).

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. The division creates four offences for conduct within a protected area:

- Filming or transmitting images of people entering and leaving approved medical facilities and publishing recordings of people entering or leaving approved medical facilities without that persons consent and with the intention of stopping a person from accessing or providing abortion services.
- Harassing, intimidating, obstructing or in any other way attempting to stop a person attempting to accessing or providing abortion services at an approved medical facility;
- Prohibited 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;

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.

Section 85 defines terms used in the offences.

The types of prohibited behavior are also prohibited in other contexts (see for example section 35 of the *Crimes Act 1900*). 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 filming or recording a person seeking to access or leave an approved medical facility is as broad as possible to allow for changes in the use of relevant technology. 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.

Section 85 (2) defines a ‘protected period’. This 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 health service operating hours, with an additional period 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.

Section 86 provides that the responsible Minister must exercise the power to declare a protected area around the approved facility in which the prohibited behavior is not permissible. This area cannot be bigger than is necessary 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 states the nature of the offences and the penalty units that a person may attract for behaving in a prohibited manner in the declared area. For behavior outlined in section 85 relating to prohibited behaviors (harassment, hindering, intimidation etc) the penalty is up to 25 penalty units (as outlined in the *Legislation Act 2001*).

Section 87 (2) (a) to (c) describes the specific offence relating to behavior outlined in section 85 and further detailed in section 87 (2) to (3) which relates to the capturing and publishing of visual data - e.g. photos or video footage in the protected area and in the protected times. The maximum possible penalty for this offence is 50 penalty units, imprisonment for 6 months or both. This is higher than the penalty for section 85 relating to other prohibited behaviors 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.

It also provides strict criteria and descriptions of intent to ensure that the area can be filmed or photographed by members of the broader community or the media, for example, without unintentionally committing an offence. It is not the intention of the Bill to create an offence for accredited media to take footage of the building for reporting, nor for members of the public to commit an offence by taking a photograph of the area for any genuine purpose not related to the services offered in the facility.

Clause 6 Dictionary, new definitions

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