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LEGISLATIVE ASSEMBLY FOR THE

AUSTRALIAN CAPITAL TERRITORY

HEALTH (IMPROVING ABORTION ACCESS) AMENDMENT BILL 2018

EXPLANATORY STATEMENT

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OUTLINE

This explanatory statement relates to the Health (Improving Abortion Access) Amendment Bill 2018 ("the Bill") as presented to 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 is to be read in conjunction with the Bill. It is not, and is not meant to be, a comprehensive description of the Bill.

Background

In 2002, the *Crimes Act 1900* was amended to remove the provision that a woman could be jailed for up to 10 years for procuring an abortion and so to any person or medical professional who carried out or supplied drugs to carry out an abortion. In 2016, legislation was introduced to allow women to access abortion services without fear of discrimination or harassment, with the implementation of an optional exclusion zone around facilities providing abortions.

Since 2002, various media reports[1] have shed light on the fact that while abortions are legal in the ACT, women are limited in their ability to access them due, in part, to restrictions in the legislation. The restrictions were originally put in place to ensure the safety of women in procuring abortion services from a regulated provider but, as stakeholders have identified, there is significant anecdotal evidence that some groups of women are struggling or unable to afford or access the existing options.

Furthermore, the situation in the ACT has not kept pace with advancements in how abortifacients are prescribed and administered in Australia. This legislation seeks to build on the reforms made in 2002 and 2016 to ensure that termination procedures can be carried out by all doctors and nurse practitioners, as is the case in other jurisdictions. As at March 2018, in New South Wales, Queensland, Western Australia, the Northern Territory, Victoria and Tasmania, medical abortion services are available to terminate a pregnancy without the person having to attend a designated clinic.

Purpose of the Bill

The Health (Improving Abortion Access) Amendment Bill 2018 provides amendments to reform the *Health Act 2003* in relation to persons authorised to provide termination services and to where terminations may occur. The Bill will make key improvements to access, availability and affordability to ensure safe, legal outcomes for persons procuring abortion in the ACT.

During the development of this Bill, feedback was received from the ACT Human Rights Commission, the Women's Centre for Health Matters, Sexual Health & Family Planning ACT, Marie Stopes Australia, the ACT branch of the

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[1] Alexandra Back, 'Canberra women travelling to Queanbeyan to access medical abortion drugs through mail', *The Sydney Morning Herald* (online) 23 May 2016 <http://www.smh.com.au/national/health/canberra-women-travelling-to-queanbeyan-to-access-medical-abortion-drugs-throughmail-20160511-gosf5q.html>.

Finbar O'Mallon, '"Urgently" needed abortion fund could help women in need in ACT region', *Canberra Times* (online), 8 October 2017 <http://www.canberratimes.com.au/act-news/urgently-needed-abortion-fund-could-help-quantify-women-in-need-in-act-region-20171004-gyu6uj.html>.

Samantha Maiden, 'Why the $12 abortion pill RU486 costs Australian women $500', *The Sunday Telegraph* (online), 7 December 2013 <http://www.dailytelegraph.com.au/news/opinion/news-story/cdc978b519914ffb5c6a1264b3fd4f80>.

Bridget Brennan, 'RU486: Medical abortion drug mifepristone now available over the phone', *ABC News* (online), 28 September 2015 <http://www.abc.net.au/news/2015-09-28/medical-abortion-drugs-now-available-over-the-phone/6810124>.

Australian Nursing & Midwifery Federation, Australian Medical Association ACT and the ACT Chapter of the Australian College of Nurse Practitioners.

In summary, the Bill will:

1. resolve a cross-border conflict whereby ACT health consumers are forced to access phone-based medical abortion services (also known as "tele-abortions") in NSW;

2. clarify the *Health Act* to ensure consumers of medical abortions by phone are not inadvertently criminalised for self-administration;

3. make medical abortions more accessible in the ACT by removing the requirement that all abortions take place in "approved facilities";

4. make medical abortions more accessible in the ACT by allowing health practitioners capable of prescribing medical abortions - doctors and nurse practitioners - legally able to do so, without the requirement to designate their place of work an "approved facility";

5. replace the Ministerial discretionary power to approve a medical facility with a mandatory power and give entities that apply for status as an approved medical facility recourse to appeal the decision via ACAT;

6. clarify and strengthen the "no obligation" provision to ensure that conscientious objectors to abortions state their objection and, in line with expected clinical practice, patients in emergency situations needing abortions as part of their emergency treatment are not discriminated against; and

7. adopt more clinically appropriate language in the Act.

Human Rights Implications

The proposed amendments have been carefully considered in the context of the objects of the *Human Rights Act 2003*. Any limitations on human rights are justifiable as reasonable limits set by laws in a free and democratic society, as required by section 28 of the Act. Importantly, the Bill also supports and strengthens several rights under the Human Rights Act. The human rights limitations that this Bill creates are proportionate to the improvement to other human rights and the overall policy objective of this Bill.

As a priority, the Bill intends to address parts of the ACT law where the following rights are lacking or where improvements could be made:

- **Recognition and equality before the law (section 8)**

  This Bill seeks to improve the second limb of this right - "everyone has the right to enjoy his or her human rights without distinction or discrimination of any kind".

  This right specifically notes discrimination on the grounds of sex, and has been interpreted to mean that laws, policies and programs should not be discriminatory and, further, the Government should not apply otherwise non-discriminatory laws, policies and programs in a discriminatory way.

Part 6 of the Health Act defines abortion as "causing a woman's miscarriage". This fails to recognise that persons who do not identify as women may be capable of being pregnant and seek an abortion. The Government has taken steps to recognise gender diverse parents in other legislation, such as amendments to the *Births, Deaths and Marriages Registration Act 1997* and *Parentage Act 2004*, which replaced the term 'mother' with 'birth parent'.

This Bill defines terminations to be a procedure or act, or supply or administration of a drug or substance that "causes a pregnancy to end prematurely", removing the gendered aspect of the provision.

- **Right to Privacy and Reputation (section 12)**

  This Bill seeks to improve both limbs of this right - "everyone has the right not to have his or her privacy, family, home or correspondence interfered with unlawfully or arbitrarily" and "everyone has the right not to have his or her reputation unlawfully attacked". The right to privacy has been defined widely to include "the right to be left alone" and to live free from interference.

  Part 6 of the *Health Act* as it stands requires people seeking to have an abortion to attend, in person, an approved medical facility - of which there is only currently one in the ACT - despite there being clinically appropriate termination services available that can be performed or supplied at a local GP, at a nurse-led walk-in centre, or via post. The Act already acknowledges the inherent risks to privacy and of harm to consumers in attending an abortion clinic through Division 6.2 establishing "protected areas", but fails to contemplate harm minimisation through the provision of alternative treatments.

  This Bill would allow individuals to self-administer abortions in the privacy of their own home without sacrificing after-care, and would allow other providers to operate who might provide discreet services.

Pursuant to section 28 of the *Human Rights Act 2004*, this Bill engages and places limitations on the following rights:

- **Right to life (section 9)**

  - Engaging with the limitations framework at section 28(2) of the *Human Rights Act 2004*, human rights are impacted in these ways:

    a) *the nature of the right affected*

    Section 9 of the *Human Rights Act 2004* reads: "Everyone has the right to life. In particular, no-one may be arbitrarily deprived of life. This section applies to a person from the time of birth."

    A number of decisions of the European Court of Human Rights are relevant to the right to life in the context of health-care (applicable in the ACT by operation of section 31(1) of the Act) being *Eriksson v Italy* (Application No 37900/97, 26 Oct 1999), *Calvelli and Ciglio v. Italy* (Application No 32967/96), *Netecki v Poland* (Application No 65653/01, 21 March 2002) and *Scialacqua v Italy* (1998) 26 EHRR. These decisions have determined that the right to life creates a positive obligation on Governments, hospitals and health authorities to "adopt appropriate measures for the protection of patients' lives" and "in certain limited circumstances require the State to fund a minimum level of health services or essential medication."

b) *the importance of the purpose of the limitation*

This limitation allows more people to access critical abortion services affordably and in private. The right to autonomy in health decisions and reproductive rights are important public policy objectives. Efforts to increase autonomy, access and affordability of abortion services, on the whole, improve health outcomes to women and non-binary Canberrans. Likewise, provision of services by phone or in-home services open up access to health consumers who might otherwise avoid or be hesitant to engage with the public nature of abortion services in the ACT.

c) *the nature and extent of the limitation*

The ACT Human Rights Commission raised a potential right to life complication arising from the liberalisation of medical abortions in the ACT. It was felt that medical abortions, especially "tele-abortions", may reduce the quality and provision of aftercare. As a result, the ACT Human Rights Commission felt that the obligation to adopt appropriate measures for the protection of patients' lives would be diminished by reduction of face-to-face contact and an on-going obligation for aftercare.

d) *the relationship between the limitation and its purpose*

While the Bill could theoretically result in reduced face-to-face contact and access to aftercare, it improves people's access to critical abortion services and helps overcomes obstacles such as affordability and lack of privacy. Under the Bill, medical abortions also need to be facilitated by a doctor or nurse practitioner, who have a pre-existing professional responsibility to provide adequate aftercare. In the specific instance of Marie Stopes as the primary provider of "tele-abortions" in other jurisdictions, Marie Stopes provides a free 30-day aftercare service as part of the procedure.

e) *any less restrictive means reasonably available to achieve the purpose the limitation seeks to achieve*

The overriding objective of this Bill is to liberalise access to medical abortions, including "tele-abortions". As a result, there is no less restrictive means to effectively achieve this Bill's overriding objective than the model proposed therein.

- **Freedom of thought, conscience, religion and belief (section 14)**
    - Engaging with the limitations framework at section 28(2) of the *Human Rights Act 2004*, human rights are impacted in these ways:

f) *the nature of the right affected*

The second limb of the freedom of thought, conscience, religions and belief reads "No-one may be coerced in a way that would limit his or her freedom to have or adopt a religious or belief in worship, observance, practice or teaching".

Reflecting on the test affirmed in *R v AM* [2010] ACTSC 149 (building upon the test in established in *Grainger PLC v Nicholson* [2009] UKEAT 0219/09/ZT) whereby, in order to be recognised, a conscientious belief must:

1. *Be genuinely held;*
2. *Be a belief and not … an opinion or viewpoint based on the present state of information available;*
3. *Be a belief as to a weighty and substantial aspect of human life and behaviour;*
4. *Attain a certain level of cogency, seriousness, cohesion and importance; and*
5. *Be worthy of respect in a democratic society, be not incompatible with human dignity and not conflict with the fundamental rights of others.*

It is reasonable to assume that conscientious objection to provision of an abortion would satisfy the test. As the Bill introduces a positive obligation on certain individuals holding such a belief to perform a termination in emergency circumstances, regardless of conscientious objection, it places a limitation on the right to freedom of thought, conscience, religion and belief.

g) *the importance of the purpose of the limitation*

The current construction of section 84(1) of the *Health Act* which reads: "No-one is under a duty (by contract or by statutory or other legal requirement) to carry out or assist in carrying out an abortion," inappropriately burden the right to life (s9) as the Act currently does not require a conscientiously objecting doctor or nurse perform an abortion in the case of an emergency to preserve the life of the patient or to inform a patient if they are conscientiously objecting to an abortion, leading to the patient mistakenly believing that an abortion procedure is not available to them.

h) The importance of saving the person's life is a justifiable reason for limiting the medical practitioner's right to conscientious objection, and likewise, it is reasonable to limit the practitioner's right by requiring them to state their reason for conscientious objection, so that it does not cause the pregnant person to belive the procedure is not available (which may result in a adverse health outcomes).*the nature and extent of the limitation*

Section 84A of the Bill replaces the previous "no obligation" provision, and creates a positive obligation on doctors and nurses to, in the first instance, not refuse to carry out a surgical abortion where that termination is "necessary to preserve the life of the pregnant person", and in the second instance, to tell the patient if they are exercising their right to conscientiously object under the new provision.

This limitation already exists in practice, by operation of clause 2.1.13 of the Australian Medical Association's *Code of Ethics* (2016) which reads "If you refuse to provide or participate in some form of diagnosis or treatment based on a conscientious objection, inform the patient so that they may seek care elsewhere. Do not use your conscientious objection to impede patients' access to

medical treatments including in an emergency situation." This legislation codifies this practice and extends it to nurses.

As this right has been interpreted to refer to individuals, corporations, including charities and not-for-profits, cannot exercise conscientious objection.

i) *the relationship between the limitation and its purpose*

The limitation on the right to freedom of thought, conscience, religions and belief achieves the purpose and objective of this Bill, namely, ensuring pregnant people are not endangered by a lack of treatment in a situation where they need an emergency abortion.

The provision does not create a positive obligation on doctors and nurses to refer patients to another doctor or nurse they know to not conscientiously object. Such a provision was specifically not included in the Bill after controversy in Victoria over such an obligation. The 2008 Victorian Reform Commission *Report on the Law of Abortion*[2] (which subsequently recommended implementing a positive obligation for referral) noted that a referral clause would help ensure that conscientious objection would never amount to "institutional or geographic barriers to the timely provision of safe services". The VLRC felt that a referral provision was necessary on the basis that relevant laws should be guided by professional standards, in this case the AMA *Code of Ethics*, which requires medical practitioners to provide patients "sufficient information" to seek treatment elsewhere in the event they refuse to provide treatment.

Based on feedback from the ACT Human Rights Commission, and subsequent commentary on the Victorian model, this Bill does not legislate an obligation to refer. Practitioners should consult with their relevant peak organisations for guidance on whether referral is required under their professional standards, and corporations should be mindful that they have an obligation under section 9 of the *Human Rights Act* to ensure a standard of care, including the provision of correct information.

j) *any less restrictive means reasonably available to achieve the purpose the limitation seeks to achieve*

The existing provision is less restrictive than the change proposed in this Bill, however it is an inappropriate burden on section 9 (right to life). This Bill is a conservative balance between the existing provision and the best-practice approach adopted by Victoria.

As a result, there is no less restrictive means to effectively achieve this Bill's overriding objective than the model proposed therein.

The substantive improvements to human rights this Bill affords, combined with the mitigation of the limitations on sections 22 detailed above, should ensure that this Bill is compliant with section 28 of the *Human Rights Act 2004* (ACT).

[2] Available at: http://www.lawreform.vic.gov.au/content/8-other-legal-and-policy-issues

DETAIL

Clause 1 - Name of Act

This is a technical clause that names the short title of the Act. The name of the Act would be the *Health (Improving Abortion Access) Amendment Act 2018.*

Clause 2 - Commencement

This clause provides that the Act commences the day after it is notified.

Clause 3 - Legislation Amendment

This clause identifies the legislation amended by the Act.

Clause 4 - Part 6 heading

This clause replaces the heading for Part 6 from "Abortions" to "Terminations" to reflect clinical language.

Clause 5 - Division 6.1

This clause replaces sections 80 to 84 of the *Health Act 1993* being Division 6.1 "Abortions---Generally" and the following sections:

- section 80 (Meaning of *abortion* for pt 6)
- section 81 (Only doctor may carry out abortion)
- section 82 (Abortion to be carried out in approved medical facility)
- section 83 (Approval of facilities)
- section 84 (No obligation to carry out abortions)

These are replaced by new Division 6.1 "Terminations---Generally" and these new sections:

Proposed section 80 (Definitions---pt6)

The new definitions adopt more appropriate clinical language, replacing 'abortion' with 'termination' throughout.

The definitions section also defines the two classes of termination - medical being "the supply or administration of a termination drug" and surgical being "a surgical procedure or any other procedure or act … that causes a pregnancy to end prematurely". Termination drug is in turn defined as "a drug or substance that causes a pregnancy to end prematurely".

The previous definition of abortion was not clearly drafted and used non-standard terminology.

The new definitions also adopt gender-neutral language, recognising that trans-men, non-binary people and people who might not otherwise identify as women can get pregnant and should not be discriminated against.

This section retains the definition of approved medical facility but moves it from previous section 85 (Definitions-Patient privacy in protected areas) and amends the reference to the new section 84.

Proposed section 81 (Offence---unauthorised supply or administration of medical termination)

This section replaces in part previous section 81 (Only doctor may carry out abortion).

It creates a new offence - the "unauthorised supply or administration of medical termination". By creating a new section specifically for medical terminations, the legislation can be constructed in such a way that allows medical terminations to occur in places other than "approved medical facilities".

The reading together of previous sections 81, 81 and 82 meant that a termination could only be performed by a doctor in an approved medical facility and all other terminations (including ones readily available) were criminalised. This was particularly problematic as ACT health consumers were accessing medical abortions by phone via NSW and self-administering the drug in their homes in the ACT, which, under the previous sections, may have resulted in a maximum sentence of 5 years, 6 months imprisonment and 50 penalty units.

Subsection 1 constructs the offence as:

1. "the person supplies or administers a termination drug to another person" - resolving the inadvertent criminalisation of self-administering medical terminations,
2. "the termination drug is supplied or administered by the person for the purpose of ending a pregnancy" - avoiding criminalising termination as an incidental effect of other treatments
3. "and the person is not a doctor or nurse practitioner" - which liberalising access by allowing doctors and nurse practitioners, who can both prescribe drugs available on the Pharmaceutical Benefits Scheme, be able to supply or administer termination drugs - rather than restricting it to doctors, as the current provision does.

Subsection 2 creates an exclusion that ensures pharmacists and pharmacy assistants fulfilling a script are not criminalised under subsection 1 for acting as a legal intermediary in the supply of the termination drug.

Subsection 3 section adds clarity to the offence by explicitly stating that actual pregnancy or effectiveness of the termination drug are irrelevant to a prosecution under subsection 1.

Subsection 4 is a consequential amendment adding a reference to the definition of prescription in the *Medicines, Poisons and Therapeutic Goods Act 2008*.

Proposed section 82 (Offence---unauthorised surgical termination)

This section replaces in part previous section 81 (Only doctor may carry out abortion).

The intent and objective of proposed section 82 is to clarify the operation of previous section 81 and adopt more modern drafting language - specifically construction as an offence and ordered list.

Subsection 1 constructs the offence as:

1. "a person…carries out a surgical termination"
2. "and is not a doctor".

Subsection 2 creates an exclusion to ensure that nurses and other people assisting a doctor in performing a termination are not inadvertently criminalised.

Proposed section 83 (Surgical abortion to be carried out in approved medical facility)

This section effectively replicates previous section 82 "abortion to be carried out in approved medical facility".

The main change from the previous section is specifying that this section only applies to "surgical terminations". This resolves the criminalisation of patients self-administering medical terminations at home, and allows other clinics - like GP's clinics, nurse-led walk-in centres, and community health centres - to provide medical termination services without having to apply to be an approved facility and having the name and location of all abortion providers in the ACT a matter of public record through the creation of the notifiable instrument designating a location an approved medical facility.

Proposed section 84 (Approval of facilities)

This section replaces previous section 83 "approval of facilities".

The previous section constructed the Minister's power to approve facilities as a discretionary power, with the only grounds for appeal being if the Minister "unreasonably refuse[s] or delay[s]" the approval. It is unclear in the circumstances what an unreasonable refusal would be, and whether political priorities would be adequate reason to refuse an application - in effect, the previous section may have operated in conflict with the objectives of the provision.

The proposed section is constructed as a mandatory power. If a person applies to have a medical facility approved, the Minister must approve the application if they are "reasonably satisfied" the medical facility is suitable.

Proposed clause 10 and new section 130 (2) gives applicants refused under this section standing to seek a review of decision, and therefore also reasons for a decision, at ACAT.

Subsection 3 replicates previous subsection 2 regarding notifiable instruments.

Proposed section 84A (Conscientious objection)

This section is a considerable shift from previous section 84.

As noted in the human rights commentary above, the construction of previous section 84 may inappropriately burden the right to life as the section does not require a conscientiously objecting doctor or nurse to perform an abortion in the case of an emergency to preserve the life of the patient or to inform a patient if they are conscientiously objecting to an abortion, leading to the patient mistakenly believing that an abortion procedure is not available to them.

The proposed section is an adaptation of the construction of section 8 of the *Abortion Law Reform Act 2008* (Victoria).

Subsection 1 creates a specific right for individuals to refuse to carry out a termination on religious or other conscientious grounds.

Subsection 2 qualifies subsection 1 by creating an obligation on "authorised persons" (defined in subsection 5) to perform a termination regardless of conscientious objection where the termination is "necessary to preserve the life of the pregnant person", partly resolving the inconsistency of the previous section with the right to life.

Subsection 3 restates the safeguards under previous section 84 being that "there is no breach of duty (by contract or by statutory or other legal requirement) or contravention of a territory law" in exercising the right under subsection 1.

Subsection 4 creates an obligation on "authorised persons" to tell people seeking terminations that they are refusing service on the basis of conscientious objection, and codifies current practice, partly resolving the inconsistency of the previous section with the right to life. This section is intended to be read in conjunction with the Australian Medical Association's *Code of Ethics*[3] and further *Position Statement on Conscientious Objection*[4], and the Australian Nursing & Midwifery Federation's *Policy on Conscientious Objection*[5], or any other relevant code of practice relating to conscientious objection.

Subsection 5 defines "authorised person" as a doctor or nurse. This section applies equally to doctors and nurses recognising the essential role of nurses in the provision of health-care, especially in emergency situation.

Clause 6 - Definitions---div 6.2 - Section 85(1), definition of *approved medical facility*

This clause is a consequential amendment as a result of moving all relevant definitions into new section 80.

Clause 7 - Section 85 (1), definition of prohibited behaviour, paragraphs (a) and (b)

This clause is a consequential amendment as a result of this Bill's terminology shift from "abortion" to "termination".

Clause 8 - Section 85 (1), definition of prohibited behaviour, paragraph (c)

This clause is a consequential amendment as a result of this Bill's terminology shift from "abortion" to "termination".

Clause 9 - Prohibited behaviour in or in relation to protected area Section 87 (2) (b)

This clause is a consequential amendment as a result of this Bill's terminology shift from "abortion" to "termination".

Clause 10 - Review of decisions - new section 130(2)

This clause allows applicants to apply to ACAT to seek a review of decision to refuse approval under section 84 (which is now a mandatory power). This change reflects the shift from section 84 being a discretionary to mandatory power, and the right for applicants to know reasons for refusing an application.

Clause 11 - Pt 10 obligations---no contracting out - Section 131

This clause is a consequential amendment as a result of Clause 10.

Clause 12 - New part 23

This clause inserts Part 23 "Transitional---Health (Improving Abortion Access) Amendment Act 2018" which ensures that previous and current approvals of facilities under current section 83 are not rendered invalid by renumbering to section 84.

Clause 13 - Dictionary, note 2

This clause inserts references to common terms defined in the *Legislation Act 2001* used in this Bill.

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3 Available at: https://ama.com.au/sites/default/files/documents/AMA%20Code%20of%20Ethics%202004.%20Editorially%20Revised%202006.%20Revised%202016_0.pdf

4 Available at: https://ama.com.au/position-statement/conscientious-objection-2013

5 Available at: http://anmf.org.au/documents/policies/P_Conscientious_Objection.pdf

Clause 14 - Dictionary, definition of *abortion*

This clause is a consequential amendment as a result of this Bill's terminology shift from "abortion" to "termination".

Clause 15 - Dictionary, definition of *approved medical facility*

This clause is a consequential amendment as a result of renaming a section.

Clause 16 - Dictionary, new definitions

This clause inserts references to the new definitions created by this Bill.