



POLICY NOTE, May 2017: *Abortion Law Reform (Miscellaneous Acts Amendment) Bill 2016*

EXECUTIVE SUMMARY

The current abortion law in NSW is certain. It is lawful for women to undergo an abortion with the aid of a doctor for economic, medical or social reasons to protect their physical or mental health. Women also have the protection of criminal law when abortion is carried out unlawfully.

The *Abortion Law Reform (Miscellaneous Acts Amendment) Bill 2016 (Faruqi Bill)* seeks to remove abortion from the *Crimes Act 1900 (Crimes Act)*, require doctors with a conscientious objection to refer for abortion and instate exclusion zones around clinics performing abortions.

The Faruqi Bill is fraught with uncertainties, is dangerous for women and is a radical departure from the current law. The Faruqi Bill:

- removes all prohibitions against unlawful abortions without proposing any regulation to fill the gaps or address the issues this creates. This is out of step with other states and overseas jurisdictions and is dangerous to women.
- makes lawful abortions for any reason, including for discriminatory reasons such as disability or sex selection or other social reasons.
- by allowing abortion for any reason, and not specifying any gestational restrictions as in other states, removes protections for 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, friends or family, employers, or health practitioners to have an abortion where it suits those individuals' personal agenda or beliefs.
- removes protections for women from incompetent and unscrupulous medical practitioners.
- removes protections for women against unqualified persons performing abortions, and does not like other states require that abortions be performed by a registered/qualified medical practitioner, returning women to the risks of backyard abortionists.
- purports to be about promoting women's health but fails to address the support women facing abortions really need.
- provides no safeguards to ensure that women are giving informed consent.

These issues are not exhaustive. There are no doubt more unseen and unintended consequences of the Faruqi Bill.

Current law

In NSW, under sections 82-84 of the *Crimes Act*, it is an offence to unlawfully procure an abortion or to unlawfully supply the means for the purpose of procuring an unlawful abortion.

Under the Act, abortion is a crime only if it is performed unlawfully. However, the 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)).

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 amendment: removal of abortion from the *Crimes Act*

The Faruqi Bill repeals the offences relating to abortion in sections 82-84 of the *Crimes Act*.

The Bill amends the *Crimes Act*:

- to repeal the offence of a woman unlawfully administering to herself any drug or noxious thing, or using any instrument or other means, with intent to procure her miscarriage (s82), and
- to repeal the offence of unlawfully administering to, or causing to be taken by, any woman, any drug or noxious thing, or unlawfully using any instrument or other means, with intent to procure her miscarriage (s83), and
- to repeal the offence of unlawfully supplying or procuring any drug or noxious thing, or any instrument or thing, knowing that it is intended to be unlawfully used with intent to procure the miscarriage of any woman (s84), and
- to abolish any rule of common law that creates an offence in relation to procuring a woman’s miscarriage.

This amendment raises the following issues:

- it removes all prohibitions against unlawful abortions without proposing any regulation to fill the gaps/address the issues this creates;
- it makes lawful abortions for any reason;
- it removes protections for women and unborn children against late term abortions and provides no gestational limits;
- it removes protections for women against abortion coercion;
- it removes protections for women from incompetent medical practitioners;
- it removes protections for women against unqualified persons performing abortions;
- it purports to be about promoting women’s health but fails to address the support women facing abortions really need;
- it provides no safeguards for informed consent.

Each of these will be addressed below.

No regulation of abortion

The Faruqi Bill removes all prohibitions against unlawful abortions without proposing any regulation to fill the gaps or address the issues this creates. Other states that have liberalised their abortion laws have all legislated for some level of regulation (the ACT under the *Health Act 1993*, Victoria under the *Abortion Law Reform Act 2008*, South Australia under an amendment to the *Criminal Law Consolidation Act 1935* at s82A in 1969, Tasmania under the *Reproductive Health (Access to Terminations) Act 2013*, Western Australia under the *Acts Amendment (Abortion) Act 1998*, the Northern Territory under the recently passed *Termination of Pregnancy Law Reform Bill 2017*).

Such regulation includes requiring:

- that only registered/qualified medical practitioners may perform abortions (ACT, Victoria, South Australia, Tasmania, Western Australia, Northern Territory);
- that abortions must be carried out in an approved medical facility (ACT, South Australia, Western Australia in relation to late term abortions);
- that gestational limits apply unless certain conditions are met (South Australia 28 weeks, Victoria 24 weeks, Tasmania 16 weeks, Western Australia 20 weeks, Northern Territory at 14 and 23 weeks dependant on circumstances);
- consultation with another medical practitioner (South Australia);
- consultation with another medical practitioner in relation to late term abortions (Victoria, Tasmania, Western Australia, Northern Territory);
- that the woman has given informed consent (Western Australia);
- parental notification for minors (Western Australia);
- reporting requirements (Western Australia).

The ACT is the only other state that has removed all criminal provisions for abortion.

The absence of any proposed regulation or protections in the Faruqi Bill is ill-conceived and dangerous to women. The specific gaps and issues arising from the Faruqi Bill will be addressed further below.

Abortion lawful for any reason

Abortion is currently only lawful on health grounds in NSW, where there is a serious danger to a woman's life, physical or mental. Such grounds are, however, interpreted broadly and allow the consideration of economic and social factors, including those which may apply after birth in the case of mental health concerns.

The Faruqi Bill would make lawful abortion for any reason including for discriminatory reasons such as terminating children with disabilities, terminating children who are not the desired sex or other social reasons such as work/study pressures or lack of support.

Disability selective abortion

Disability selective abortions are already performed in NSW but unless the child's disability poses a serious risk to the health of the mother, such abortions are not lawful on this ground alone. However, just because something is already happening, does not mean it should be enshrined in law. It is important for us to assess whether disability selective abortion is something we want as a state and for the NSW Parliament to legislate accordingly.

Mothers of children with Down syndrome and other disabilities already feel pressure from health professionals and wider society to abort.¹ 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.² 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.³ The practice of sex selection has been widely condemned.⁴

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,⁵ or the investigation by SBS that found a higher number of boys than girls being born in some ethnic communities in Australia.⁶

In a system where abortion is available on demand for any reason, there is no protection against antenatal 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.

Abortions for other social reasons

Making abortions lawful for other social reasons without any medical grounds is harmful to women in at least two ways. Firstly, it fails to recognise that abortion itself carries with it risks of physical and psychological harm,⁷ and that in the absence of medical grounds, women are being unnecessarily put at risk. Secondly, it gives the green light for women to undergo an abortion based on their current circumstances – work/study pressures, lack of support, domestic violence etc – without actually addressing these underlying issues. The Faruqi Bill is being promoted under the guise of women’s health and yet is both counter-productive to women’s health and only seeks to allow abortions for non-health related reasons.

¹ Miller, B., “Down syndrome: Parents say they feel pressured to terminate pregnancy after diagnosis”, 22 November 2016: <http://www.abc.net.au/news/2016-11-22/down-syndrome-parents-pressured-to-terminate-pregnancy/8033216>.

² 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>.

³ Above n2, Hvistendahl.

⁴ 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.

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

⁶ SBS, “Could gender-selective abortions be happening in Australia?”, 28 August 2015: <http://www.sbs.com.au/news/article/2015/08/17/could-gender-selective-abortions-be-happening-australia>.

⁷ Fergusson DM, Horwood LJ and Boden JM, “Abortion and mental health disorders: evidence from a 30-year longitudinal study” (2008) 193 *BJ Psych* 444 at 449.

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

By allowing abortion for any reason, and not specifying any gestational restrictions as in other states, the Faruqi Bill removes protections for late term abortions, including abortions on viable babies up until full term. 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 Faruqi Bill, and in the absence of child destruction laws in NSW, there is no legal reason not to perform an abortion right up until birth.

The NSW Health Policy Directive, "Pregnancy – Framework for Terminations in New South Wales Public Health Organisations",⁸ sets out a process to be followed in relation to abortions to be undertaken at various gestations of pregnancy based on an "assessment of need" (though it ultimately does not prohibit late term abortions). However, such regulation is not legally binding, only applies to public hospitals (when the majority of abortions are performed in private clinics) and does not attach the serious penalties that should attach to late term abortions of viable babies that are not grounded in concern for women's health. The gravity of late term abortions for both women and unborn children necessitates a ruling by Parliament on this issue and should not simply be delegated as policy.

Removing protections against late term abortions and effectively allowing abortion up until birth is both dangerous for women and their unborn children and is out of step with common practice in other states and overseas,⁹ with medical knowledge of foetal viability (23/24 weeks) and pain,¹⁰ and with medical advances including progress in neonatal practices.¹¹

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.

For example, abortion itself puts women at risk of psychological harm (not to mention physical harm), including depression, anxiety, suicidal behaviours and substance use disorders.¹²

The tragic circumstances of women who are victims of sexual, family or other violence, are also not alleviated by abortion. 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.

⁸ Ministry of Health, NSW Government, "Pregnancy – Framework for Terminations in New South Wales Public Health Organisations", 2 July 2014: http://www1.health.nsw.gov.au/pds/ActivePDSDocuments/PD2014_022.pdf.

⁹ 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)).

¹⁰ Doctors on Fetal Pain, <http://www.doctorsonfetalpain.com/>.

¹¹ 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#>.

¹² Fergusson DM, Horwood LJ and Boden JM, "Abortion and mental health disorders: evidence from a 30-year longitudinal study" (2008) 193 BJ Psych 444 at 449.

Removal of protections for women against abortion coercion

Of particular concern, is the fact that making abortion lawful for any reason would remove protections for women against being coerced into having an abortion.

Whereas now abortions can only lawfully be performed on health grounds, under the Faruqi Bill where abortion is permitted for any reason, women are even more vulnerable to pressure from their partners, friends or family, employers, or health practitioners to have an abortion where it suits those individuals' personal agenda or beliefs. In light of the recent NRL abortion coercion scandals,¹³ we should be seeking to implement more protections for women, not to take away the limited ones that exist.

Removal of protections for women from incompetent/unscrupulous medical practitioners

Cases such as *R v Smart* (1981) and *R v Sood* [2006] NSWSC 1141 affirm the need to retain the offences for unlawful abortions in the *Crimes Act* as a matter of justice, deterrence and protection for women. In the absence of 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 having the protection of the criminal law.

Removal of protections for women against unqualified persons (backyard abortionists)

Unlike all the other states that have liberalised their abortion laws, the Faruqi Bill does not require that abortions be performed by a registered/qualified medical practitioner. Attempts by an unqualified person to perform an abortion *may* fall under legal restrictions against performing surgery or prescribing drugs more generally in lieu of required medical training, or even under laws concerning assault in the case of botched or forced abortions (though this is arguably unlikely if the woman consented). However, there are ways to procure an abortion without surgery or prescription drugs such as applying force to a woman's stomach or supplying her some other concoction.

Sections 82-84 of the *Crimes Act* have kept untrained abortionists out of the industry and saved women's lives. Allowing unregulated abortions by unqualified persons returns women to the risks of backyard abortionists. The performance of an abortion by an unqualified person, risking the life of the woman, and likely for financial gain, presents such grave risks of harm for women that it should remain a clear, unambiguous and specific crime.

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

The Faruqi Bill does not make any attempt to understand and address the 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, coercion from their partner or others, psychological pressures due to the pregnancy or otherwise, study and career pressures, and/or a lack of financial and emotional support.

Instead of simply providing women with the so-called "choice" of abortion on demand, in an attempt to address the symptoms of their situation, 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 (including much needed adoption law reform), and addressing issues of domestic violence, access and affordability of child care, flexible workplace

¹³ Wong, R., "Abortion coercion: the NRL still has a long way to go in its treatment of women", 20 March 2017: <http://www.onlineopinion.com.au/view.asp?article=18914>.

and study arrangements and access to pregnancy and counselling support.¹⁴ A bill that seeks to reform abortion law should address these issues as a matter of priority.

No safeguards for informed consent

The Faruqi Bill does not include safeguards to ensure that women are giving fully informed consent. Safeguards such as the provision of counselling independent of abortion providers; information about the risks of abortion and the support available to women who want to continue their pregnancies; the opportunity to view ultrasounds; and mandatory waiting periods - these are all critical to ensure that women can give fully informed consent when it comes to abortion.

Given what we know about the reasons women seek abortion and the recent NRL scandals where both women were not only coerced by their partners but deeply regretted their abortions, informed consent provisions should be an integral part of a bill that seeks to reform abortion laws

Informed consent is briefly addressed in the NSW Health Policy Directive, but this does not apply to all facilities that perform abortions and there is anecdotal evidence that informed consent is nevertheless often not obtained from women. It is also an issue of such grave importance to women that it should be addressed by Parliament and enforced.

Conclusion

The current abortion law in NSW is certain. It is lawful for women to undergo an abortion with the aid of a doctor for economic, medical or social reasons to protect their physical or mental health. Women also have the protection of criminal law when abortion is carried out unlawfully.

The Faruqi Bill is fraught with uncertainties, is dangerous for women and is a radical departure from the current law. In light of the points we have raised, we do not support this Bill.

¹⁴ Wong, R., "Women deserve better than the proposed abortion law reform", 23 August 2016: <http://www.abc.net.au/religion/articles/2016/08/23/4524762.htm>.