



POLICY NOTE, May 2018: Public Health Amendment (Safe Access to Reproductive Health Clinics) Bill 2018

Executive summary

- The implementation of 150-metre “safe access zones” is unnecessary given the operation of current provisions in NSW with respect to the conduct of protestors, including violence and intimidation, harassment and obstruction.
- The Bill criminalises freedom of expression and dialogue around one of the most significant issues affecting women, and silences a particular point of view about abortion.
- The Bill may undermine the safety and well-being of women that it seeks to protect.
- The Bill denies support and informed choice to vulnerable women when they need it most by cutting them off from family, friends, or sidewalk counsellors who may seek to offer them information or support.
- Such support is crucial in a situation in which many women feel as if abortion is their only choice, and are often driven to make a decision to abort for the very reason that they are lacking in financial, emotional, physical or psychological support.
- The Bill restricts women’s choices while reinforcing a “choice” that is known to carry with it risks of physical and psychological harm.
- By making it a criminal offence to express views that might dissuade vulnerable women from going through with an abortion, the Bill benefits the abortion industry, which has a financial conflict of interest in women undergoing abortions.
- The Bill makes it a crime to say or do something which may not have actually caused any harm (“distress”) to anyone.
- There is no evidence justifying the imposition of criminal penalties against those who peacefully protest, or offer information or assistance to women outside abortion clinics.
- The penalties proposed by the Bill are ill-conceived, excessive, disproportionate and out of step with comparative legislation in NSW.

Current situation

NSW law already protects its citizens from threatening and violent conduct or harassment in public places (including conduct carried out by protestors) by:

- Making that behaviour criminal under the *Crimes Act 1900*,¹ the *Summary Offences Act 1988*² and the *Road Rules 2014*³; and
- Providing police with powers under the *Law Enforcement (Powers and Responsibilities) Act 2002* to deal with such situations, including managing the behaviour of disruptive protestors (s 197), move on powers (Part 14) and powers to deal with public disorder (Part 6A).

The ability for people to engage in peaceful protests or to freely engage in debate on political and moral issues is an intrinsic part of every Australian's implied right to freedom of political communication.⁴ In a democratic society, and on an issue like abortion which has such a profound impact on women, **it is critical to uphold the rights of women to both express and have access to all views and perspectives on the perceived advantages or harms of abortion.**

What the Bill does

The Bill creates "safe access zones" of a 150-metre radius around broadly defined "reproductive health clinics" at which abortions are provided. The Bill criminalises certain behaviour within those zones, including:

- Interfering with (including harassing, intimidating, besetting, threatening, hindering, obstructing or impeding) a person accessing or leaving the clinic (or attempting to do so) (proposed s 98C);
- Making any communication in relation to abortion that is reasonably likely to cause distress or anxiety to a person accessing, leaving or inside a clinic (proposed s 98D); and
- Capturing and distributing any visual data of persons in a safe access zone (proposed s 98E).⁵

The penalties for such behaviour include a fine of 50 penalty units (\$5,500) or 6 months imprisonment for a first offence and 100 penalty units (\$11,000) or 12 months imprisonment for a second offence.

¹ For example, see ss 545B (Intimidation or annoyance (hindering)), 545C (Unlawful assembly) and 93C (Affray).

² For example, see ss 6 (Obstruction), 4 (Offensive conduct), 4A (Offensive language) and 11A (Violent disorder).

³ For example, see clause 236 of the *Road Rules 2014*, which makes obstruction an offence.

⁴ *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520. See also Max Spry, 'Constitutional Free Speech and Defamation: *Lange v ABC*' (1997) 17(8) Proctor 17, 18.

⁵ S 98E proposes a fundamental shift in the status quo being that there are no specific laws preventing filming in a public place. Such a radical change should not be made without evidence justifying it, how it would interact with the *Surveillance Devices Act 2007* or why such a change, if required, must be isolated to reproductive health clinics. For a change so fundamental, a broader review of the *Surveillance Devices Act* should be carried out, and should cover all filming in all public places.

Problems with the Bill

The Bill criminalises freedom of expression and dialogue around one of the most significant issues affecting women. Specifically, the Bill:

1. Denies support and informed choice to vulnerable women when they need it most

The Bill claims to have as its object “the safety and well-being” of women seeking abortions, but there is reason to believe that it could in fact be counter-productive to such a goal.

The Bill would remove potential support systems for women, such as side-walk counsellors, who inform women of alternatives to abortion and offer practical assistance to women who may feel as if abortion is their only choice (including financial, emotional, medical, legal and other practical support such as housing or baby items). This would effectively reduce choice for women, while reinforcing a “choice” that is known to carry with it risks of physical and [psychological harm](#).⁶

By criminalising **any** communication about abortion in the safe access zones under the broadly drafted section 98D, the Bill prevents vulnerable women from accessing support or information in the very situation they might need it most. Discussions about the abortion between a woman and her partner, relative or friend, or a sidewalk counsellor close to the clinic becomes a crime. This isolates a woman intending to have an abortion by cutting her off from any support at all.

Support is crucial in a situation in which women are often driven to make a decision to abort for the very reason that they are lacking in financial, emotional, physical or psychological support. Research suggests that many women view abortion as their **only** choice.

Women who abort often cite reasons such as [fear of intimate partner violence](#),⁷ [coercion from their partner or others](#),⁸ psychological pressures due to the pregnancy or otherwise, [study and career pressures, and/or a lack of financial and emotional support](#).⁹ This Bill does not address the deeper societal issues that inhibit women’s choices – indeed, **it restricts their choices even further**.

⁶ Fergusson DM, Horwood LJ and Boden JM (2008), Abortion and mental health disorders: evidence from a 30-year longitudinal study, *The British Journal of Psychiatry*, Vol 193, No 6, p 444 at 449.

⁷ Taft AJ and Watson LF (2007), Termination of pregnancy: associations with partner violence and other factors in a national cohort of young Australian women, *Australian and New Zealand Journal of Public Health* Vol 31, No 2, pp 135-142.

⁸ Wong, R, “Abortion coercion: the NRL still has a long way to go in its treatment of women”, Online Opinion (20 March 2017), <http://www.onlineopinion.com.au/view.asp?article=18914>.

⁹ Finer LB, Frohworth LF, Dauphinee LA, Singh S and Moore AM (2005), Reasons U.S. women have abortions: quantitative and qualitative perspectives, *Perspectives on Sexual and Reproductive Health* Vol 37, No 2, pp 110-118.

2. Benefits the abortion industry, which has a financial conflict of interest

It is worth noting that employees or persons who provide services at the reproductive health clinic are exempted from section 98D and so could freely speak in favour of abortion. In other words, the Bill would silence only one point of view about abortion and restrict the freedom of expression of one particular group.

Indeed, the Bill effectively benefits the abortion industry, which makes substantial profits from vulnerable women in difficult situations, by making it a criminal offence to simply express views that might dissuade vulnerable women from deciding not to go through with an abortion.

3. Sets a dangerous precedent by making conduct that may cause “actual or potential distress” punishable by imprisonment

Making it a crime to say something that causes distress to a person in a situation that is inherently fraught with distress and anxiety tips the balance heavily against freedom of speech and public debate on an extremely important issue for women.

This Bill goes even further: proposed s 98D does not even require the communication to have actually caused any distress to a person, as long as it can be proved that it is “reasonably likely” to have done so. Causing distress to a person in any circumstance should not be a crime. However, it is nonsensical and heavy-handed to make it a crime, punishable by imprisonment, to say or do something which may not even have caused distress to anyone at all.

Furthermore, the threshold for what is “reasonably likely” to cause distress to a woman in the last moments prior to having an abortion would be very low and could effectively capture any communication whatsoever, even if it offered her support or assisted her to make an informed decision.

This Bill sets a dangerous precedent for Government to silence public debate and discussion and to restrict participation in peaceful protest in relation to any other important political and policy issues in the future.

4. Is not based on evidence of the issue it is apparently trying to address

Harassment and intimidation of women are unacceptable whether outside an abortion clinic or anywhere else. However, there is no evidence justifying the imposition of criminal penalties against those who peacefully protest, or who offer information or assistance to women outside abortion clinics. In particular, there is no:

- Evidence of intimidating, violent, harassing or threatening behaviour being carried out by peaceful protestors or sidewalk counsellors outside abortion clinics; or
- Evidence that the existing criminal law, privacy law and legislated police powers are not effective in protecting women from such behaviour.

Accordingly, it is not clear that the change in law is warranted. In any event, operational measures could be taken to better enforce the existing criminal or privacy provisions if necessary. This was the approach taken in the UK, which worked within the existing operational mechanism dealing with harassment.¹⁰

5. Seeks to impose disproportionately heavy penalties for the proposed offences that are out of step with similar legislation in NSW

For example, the current penalty under the *Law Enforcement (Powers and Responsibilities) Act 2002* for persons who engage in conduct which obstructs, hinders, intimidates or causes fear, *after* the issue of a direction from police, is 2 penalty units (\$220).¹¹

Under the *Crimes Act*, a person who uses intimidation by violence is liable to a fine of 50 penalty units, imprisonment for 2 years or both.¹² Under the Bill, a person simply “communicating” about abortion outside a clinic would be subject to the same fine.

It is clear that the penalties proposed in the Bill are ill-conceived, excessive, disproportionate and out of step with comparative legislation in NSW.

Further information

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¹⁰ Abortion Law Reform (Woman's Right to Choose) Amendment Bill 2016 and Inquiry into laws governing termination of pregnancy in Queensland, Report No. 24, 55th Parliament Health, Communities, Disability Services and Domestic Family Violence Prevention Committee, August 2016, p 93.

¹¹ Sections 197 and 199, *Law Enforcement (Powers and Responsibilities) Act 2002*.

¹² Section 545B, *Crimes Act 1990*.