



A suitable legislative framework for termination of pregnancy in South Australia

Fact Sheet 4 – Current health regulation of terminations

The criminal law regarding abortion, as it appears in the *Criminal Law Consolidation Act 1935 (SA)*, does not exist in isolation. Outside of South Australia's criminal law, existing health law, regulations, codes of conduct, and institutional policies, protocols and clinical procedures and practice provide a comprehensive regulatory framework to regulate abortion services. This includes ensuring that termination services can only be provided by appropriately qualified health professionals in appropriate facilities, with the informed consent of the patient.

SALRI's terms of reference is to make enquires in to abortion being approached as a regulated health issue as opposed to a criminal law issue but the question remains of if, or in what circumstances, does there remain a valid role for the criminal law, notably whether unqualified or unlicensed persons conducting medical or surgical terminations should be subject to appropriate offences.

Qualified health professionals

The Health Practitioner Regulation National Law¹ ensures that only health practitioners who are suitably trained and qualified to practice in a competent and ethical manner are registered and able to practice in South Australia. This includes medical practitioners, nurses and midwives, pharmacists and psychologists.

The National Law establishes the Australian Health Practitioner Regulation Agency, the Medical Board of Australia, the Nursing and Midwifery Board of Australia, the Pharmacy Board of Australia and the Psychology Board of Australia. These Boards establish registration and accreditation requirements, mandatory performance and professional standards and policies. Each Board also has extensive investigatory and disciplinary powers for non-compliance.

Proscribed facilities

The *Health Care Act 2008 (SA)* governs the incorporation of public hospitals and the licensing of private hospitals and clinics. SA Health establishes mandatory standards and procedures for these facilities.

Early medication abortion

Prior to 1969, abortions were largely conducted by a surgical procedure and when the criminal law was amended in 1969 in South Australia, it proceeded on the basis that abortions would continue to be on a surgical basis. There is now the wide availability and use of certain medications to administer what is called a 'medical abortion' at an early stage of gestation.² The pharmaceutical

¹ *Health Practitioner Regulation National Law (South Australia) Act 2010*.

² A 'medical termination' refers to the use of pharmaceutical drugs to induce a termination of pregnancy. Currently, mifepristone and misoprostol are used in combination as the preferred drug regime; however misoprostol alone is also

drugs generally administered for early medication abortion, namely mifepristone and misoprostol, are regulated under the *Therapeutic Goods Act 1989* (Cth). This national law controls the quality, safety, efficacy and timely availability of therapeutic goods. It also regulates the manufacture of and standards for therapeutic goods and creates criminal offences for importing, supplying or exporting goods that do not comply with these standards.

The Therapeutic Goods Administration approval of mifepristone and misoprostol was issued in 2012, and specifies the conditions under which they can be prescribed. These conditions include gestational length, dosage, training requirements, follow-up and access to emergency care and support.³

Informed consent

All patients must give informed consent for abortion services (as with any other medical procedure or treatment) under the *Consent to Medical Treatment and Palliative Care Act 1995* (SA). This is reinforced by clinical and professional practice. Medical practitioners are required to explain the nature, consequences and risks of treatment and any alternatives. This ensures that patients decide freely and on an informed basis whether or not to undergo medical treatment of any kind. These provisions are also designed to operate to protect patients from coercion by partners, parents or any other person by requiring health practitioners to rule out coercion and be satisfied of a patient's free will in order to meet their obligations.

Conscientious Objection

No person, including medical practitioners, is under a duty in South Australia to participate in an abortion procedure when they have a conscientious objection, unless such treatment is necessary to save the life of the woman or prevent grave injury to her physical or mental health.⁴

Some jurisdictions such as Victoria and Queensland provide that a health practitioner who has a conscientious objection to abortion, is obliged to refer or direct the woman to another health practitioner who is willing to provide the relevant information and to act.⁵

Unqualified persons conducting surgical or medical procedures

Any unqualified or unlicensed person who attempts to provide a surgical or medical abortion will commit an offence. An unqualified or unlicensed person performing a surgical abortion is potentially committing a criminal assault under the *Criminal Law Consolidation Act* (1935) SA. A person who imports abortion medications without a license commits an offence under the *Therapeutic Goods Act 1989* (Cth).

It is important to appreciate that the criminal law operates against this background of medical law, ethical and professional protocols and clinical practice. Even if medical and health practitioners are

common and other drugs may also be used. In Australia, mifepristone and misoprostol are available together as 'MS-2 Step', which is 'indicated ... for the medical termination of a developing intrauterine pregnancy, up to 63 days [nine weeks] of gestation'. Mifepristone is taken first, followed between 24 and 48 hours later by misoprostol. The clinical guidelines also provide that generally a woman may be cared for on an outpatient basis where her pregnancy is less than nine weeks. See Queensland Law Reform Commission, *Review of Termination of Pregnancy Laws: Consultation Paper* (WP 76) (December 2017) 16 [55]-[57].

³ Therapeutic Goods Administration, 2012, *Registration of medicines for the early termination of pregnancy*. <https://www.tga.gov.au/registration-medicines-medical-termination-early-pregnancy>.

⁴ See generally Queensland Law Reform Commission, *Review of Termination of Pregnancy Laws*, Report 76 (June 2018) 115-153 [4.1]-[4.176].

⁵ See Victorian Law Reform Commission, *Law of Abortion*, Report No 15 (March 2008) 112-115; Queensland Law Reform Commission, *Review of Termination of Pregnancy Laws: Consultation Paper* (WP 76) (December 2017) 63-64 [230]-[235].

exempted from the criminal law in certain circumstances, there would remain specific offences for abortions provided by unqualified health practitioners or other individuals.

QUESTIONS TO CONSIDER

SALRI is interested in your views on the regulatory framework which exists for termination of pregnancy in South Australia. Some matters you might consider are:

- Should South Australia have criminal offences for abortions not performed by an appropriate health practitioner?
- Should health practitioners (other than medical practitioners) be permitted to authorise or perform, or assist in performing, lawful terminations of pregnancy in South Australia?
- Should a woman be allowed to access lawful abortion on request at any stage of a pregnancy?
- Should there be a gestational limit or limits for a lawful termination of pregnancy in South Australia?
- If there is a gestational limit for a lawful termination should it be related to:
 - (a) the first trimester of pregnancy;
 - (b) viability of the foetus (approximately 22 – 24 weeks);
 - (c) other?
- Should there be a specific ground or grounds for a lawful termination of pregnancy?
- If there is a specific ground or grounds for a lawful termination should they include:
 - (a) all relevant medical circumstances;
 - (b) professional standards and guidelines;
 - (c) that it is necessary to preserve the life of the woman;
 - (d) that it is necessary to protect the physical or mental health of the woman;
 - (e) that it is necessary or appropriate having regard to the woman's social or economic circumstances;
 - (f) that the pregnancy is the result of rape or another coerced or unlawful act;
 - (g) that there is a risk of serious or fatal foetal abnormality (drawing on the terminology from the present law).
- Should different considerations apply at different stages of pregnancy?
- Should a medical practitioner be required to consult with one or more others (such as another medical practitioner or health practitioner), before performing a termination of pregnancy?
- If a consultation is required, should it include:
 - (a) another medical practitioner; or
 - (b) a specialist obstetrician or gynaecologist; or
 - (c) a health practitioner whose specialty is relevant to the circumstances of the case; or

(d) referral to an appropriate counsellor; or

(e) referral to a specialist committee?

- If there was a referral requirement should it apply:
 - (a) for all terminations, except in an emergency;
 - (b) for terminations to be performed after a relevant gestational limit or on specific grounds?
- Should there be provision for health practitioners in South Australia to decline to provide an abortion related service for conscientious objection?
- If a medical practitioner had a conscientious objection are there circumstances where this objection should be overridden, such as:
 - (a) in an emergency;
 - (b) the absence of another health practitioner or termination of pregnancy service within a reasonable geographic proximity.
- Should a health practitioner who has a conscientious objection be obliged to refer or direct a woman to another practitioner or termination of pregnancy service?
- Should data about terminations of pregnancy in South Australia be reportable?
- Given the difficulties of access to medical services in rural areas of South Australia should there be different laws to facilitate access in rural and regional areas?
- Should women be permitted to use telehealth or other electronic services to consult with medical and/or health practitioners?
- Where a woman would otherwise be able to have a termination but does not have local access to clinics able to do so (such as in rural South Australia), should another qualified health practitioner (such as a registered nurse or pharmacist) be permitted to undertake this procedure.
- Do you have any suggestions for incidental law changes to present law and/or practice in South Australia in relation to abortion?

Please note: SALRI does not, and cannot, provide legal advice to individuals. If you are in need of legal advice we encourage you to speak to a lawyer and/or contact a community legal service.

SALRI acknowledges the assistance of the SA Attorney-General's Department in providing grant funding for this project.

2 April 2019