



A suitable legislative framework for termination of pregnancy in South Australia

Fact Sheet 10 – Safe Access Zones

Introduction

The availability and regulation of medical services associated with the termination of pregnancy can provoke strong views in the community. Some individuals and groups are motivated to engage in activities that may include holding prayer vigils, intervening to offer ‘footpath counselling’, or protesting at or near premises performing terminations.

The behaviour of individuals or groups involved in these activities can at times impact on the safety, dignity, privacy and welfare of women seeking access to medical services or staff who are employed at these premises. There have been concerns that the safety and wellbeing of patients and staff have been jeopardised by intimidation and harassment from protestors.¹

The General Law

Depending on the behaviour or activity, the general criminal law may provide some protection to people who are entering or leaving these premises. Disorderly or offensive conduct, or obstructing the free passage in a public place may be an offence under the *Summary Offences Act 1953* (SA). South Australian law also prohibits individuals from unlawfully entering or remaining on private property.²

The criminal law also creates offences of ‘unlawful stalking’ were an individual, on at least two separate occasions, loiters or communicates or places under surveillance another person with the intention to cause serious physical or mental harm to them.³

There are civil remedies which may also be applicable such as the law of nuisance or intervention orders but there are no specific civil remedies proscribed.

The Role of Safety Zones

In response to the perceived limitations of the general law, several Australian jurisdictions such as Tasmania, Victoria, Queensland and the Australian Capital Territory have established specific safe access zones around premises providing termination services. The purpose of safe access zones is to provide clear legislative protection for the safety, dignity, well-being, privacy and autonomy for people accessing medical services at specified premises. Some of the women seeking terminations are especially vulnerable such as Indigenous women and ‘women who have experienced domestic violence, reproductive coercion and sexual assault [who] have often experienced significant trauma associated with the physical, emotional and psychological abuse of the perpetrator’.⁴ Safe access zones are also to provide protection for employees and others who wish to enter the premises.

¹ Queensland Law Reform Commission, *Review of Termination of Pregnancy Laws*, Report 76 (June 2018) 155 [5.1], 171-174 [5.64]-[5.82]; Victorian Law Reform Commission, *Law of Abortion*, Report No 15 (March 2008) 138-139 [8.257]-[8.261]

² *Summary Offences Act 1953* (SA) s 17.

³ *Criminal Law Consolidation Act 1935* (SA) s19AA.

⁴ Queensland Law Reform Commission, *Review of Termination of Pregnancy Laws*, Report 76 (June 2018) 173 [5.74]. See also at 173 [5.75].

However, any such laws, raise ‘several complex legal and policy issues’⁵ and raise implications such as freedom of religion and speech⁶ and especially freedom of assembly and political communication.⁷

Establishment of the Zones

Safe access zones around medical services providing termination services have been established by legislation in a number of Australian States and Territories (see Table 2 below). Some (Northern Territory, New South Wales, Tasmania and Victoria) automatically establish them within 150 metres of a service. An alternative is the Australian Capital Territory where safety zones are declared by the responsible Minister and subject to certain criteria including, access, privacy, a minimum of 50 metres from the relevant premises and only arising during work hours.

Behaviour

The various jurisdictions define the behaviour that is prohibited within the safe access zone. Generally it includes threatening, besetting, harassing, hindering, intimidating or obstructing a person from entering or leaving any premises which performs terminations. Other matters contained in State and Territory legislation include a prohibition on intentionally capturing visual images or data of persons entering or leaving premises where termination services are provided.

Political Communication and Freedom of Expression

The right to freedom of expression and assembly are recognised as essential in a democracy. However, this right must be balanced against other competing rights such as privacy or health.

The Australian Constitution does not contain a right to free expression. The High Court of Australia has since 1992 recognised an implied guarantee to political communication. This implication is connected with the system of representative and responsible government which the Constitution establishes. The implication is not absolute and must be balanced against other legitimate policy initiatives, such as public safety.⁸

The High Court is presently considering a challenge to the provisions of the Victorian *Public Health and Wellbeing Act 2018* (Vic) that establish safety zones. The central question being whether or not the law places an impermissible and disproportionate burden on political communication. The result of this decision may have implications for Victoria and similar laws in other States and Territories.

On 10 April 2019 the High Court dismissed the challenge to the Victorian and Tasmanian Legislation establishing safe access zones⁹.

QUESTIONS TO CONSIDER

SALRI is interested in your views on the establishment of safe access zones in South Australia. Some matters you might consider are:

⁵ Victorian Law Reform Commission, *Law of Abortion*, Report No 15 (March 2008) 139 [8.272]. See generally at 138-140 [8.257]-[8.273]; Queensland Law Reform Commission, *Review of Termination of Pregnancy Laws*, Report 76 (June 2018) 155-188;

⁶ Queensland Law Reform Commission, *Review of Termination of Pregnancy Laws*, Report 76 (June 2018) 175-177 [5.84]-[5.95].

⁷ *Ibid* 165-167 [5.31]-[5.41].

⁸ This is a complex constitutional area. See generally *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520; *Levy v Victoria* (1997) 189 CLR 579; *Coleman v Power* (2004) 220 CLR 1; *Wotton v Queensland* (2012) 246 CLR 1; *Brown v Tasmania* (2017) 91 ALJR 1089.

⁹ See *Clubb v Edwards* [2019] HCA 11

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- Should South Australia provide for safe access zones in the area around premises where termination of pregnancy services are provided?
 - If a safe access zone was established should it:
 - (a) automatically establish an area around the premises as a safe access zone?; or
 - (b) empower the responsible Minister to make a declaration establishing the area of each safe access zone?
 - What types of behaviour or conduct should be prohibited in a safe access zone?
 - Should the prohibition on behaviours in a safe access zone apply only during periods of operation?
 - Should it be an offence in South Australia to make or publish a recording of another person entering or leaving, or trying to enter or leave, premises where termination of pregnancy services are performed, unless the recorded person has given their consent?
 - Should it be unlawful to harass, intimidate or obstruct:
 - (a) a woman who is considering, or who has undergone, a termination of pregnancy;
 - (b) a person who performs or assists, or who has performed or assisted in performing, a lawful termination of pregnancy?

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.

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