Reproductive Health Care Reform Bill 2019

Legislative Assembly

Speech in Support

Brad Hazzard

Mr Speaker

Today, we the peoples' representatives here in the NSW Parliament have the opportunity to right a wrong enacted into law 119 years ago.

A law that no one has had the courage since to change. A law that put womens' reproductive rights into the Criminal Code. A law that was enacted when this Place had legislators that were all men. A law that came into being 25 years before the first woman, the first feminist, came into this Place.

I speak of Millicent Preston-Stanley – the first female MP who, amongst other topics, campaigned on womens' rights, sex education, family planning and maternal health.

I am particularly proud that Millicent Preston-Stanley was a member of the political party that was the precursor to the Liberal Party and she was one of the early members of the newly formed Liberal Party under Robert Gordon Menzies.

This legislation is for Millicent Preston-Stanley and all the women who have followed and fought for womens' reproductive rights, women from all political parties and from outside political parties,.

Accordingly I am pleased to speak in support of the Reproductive Health Care Reform Bill 2019, which represents an important and overdue reform to the law of NSW and most important to ensuring that womens' reproductive health issues are in a legislative framework that is appropriate for the 21st Century.

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Over the last twenty years or so all States and Territories across Australia have moved to reform laws on abortion but not in NSW – until now.

In all jurisdictions – other than NSW – there is now statutory recognition that the termination of a pregnancy is a lawful medical procedure. While there is some variation in the criteria applied, and the nature and timing of medical oversight, the starting point in all jurisdictions is to recognise abortion is legal.

As the NSW Minister for Health and as a former NSW Attorney General I strongly believe women in NSW are entitled to the same legal provisions that exist across Australia when it comes to having terminations being dealt with as a medical and health care practice rather than with a criminal lens.

All of us come here to this Parliament with opinions on abortion shaped by our own views and experiences.

Everyone of us know that termination of pregnancy is an incredibly difficult and challenging decision for individuals who find themselves facing this issue.

We all understand that some individuals' views are informed by a range of factors including religious or spiritual perspectives, as taught by their

particular church. Personally, I respect each individual's right to hold her or his opinion.

But as legislators our role is to govern for the whole population of NSW and in so doing, I can assure those with concerns about this Bill that nothing in this Bill will encourage women to have terminations.

This Bill simply sets a framework that allows women to make their own decision. It empowers women on a journey that started in this Parliament when Millicent Preston-Stanley was elected almost 95 years ago.

This legislation ensures a woman will be empowered to apply her own views to her own situation, but within a medical framework. Her views will be considered within a medical context in discussions with her doctor or doctors. These decisions will be untainted by the threat of criminal charges against her or her doctor.

Nothing in this legislation will stop a woman also applying her own value judgements including any religious or spiritual perspective that she may have.

I urge my colleagues in this place to support the Reproductive Health Care Reform Bill 2019. It is disturbing that in NSW the framework for abortion is currently still found in the Crimes Act 1900. No other state or territory in Australia has its abortion primary framework in the criminal law.

I ask all honourable members to consider whether it is acceptable, whether it is conscionable that in making this major life decision, women and their doctors have to do so with the threat of being charged with a criminal offence that could lead to jail for up to ten years.

I will now turn to the legal aspects of this Bill, and thereafter I will also address some of the concerns which some of my colleagues in this Place have raised and which some in the community have raised.

What is very clear is that under NSW law, terminations of pregnancy are potentially a crime. The criminal offences refer to "procuring a miscarriage". They remain the same as they were when the NSW Crimes Act commenced operation in 1900.

The criminal law treats terminations as potentially serious criminal offences. Penalties of between 5 and 10 years imprisonment apply to any person who performs an abortion procedure or supplies or procures drugs for an abortion. It also criminalises the conduct of a woman who obtains an abortion – the punishment for this offence is a term of imprisonment for up to 10 years.

The Reproductive Health Care Reform Bill will ensure terminations are regulated as a health service, not prosecuted as a crime. It will bring NSW in line with other jurisdictions. It will allow women in NSW to have the same rights of access to the full range of reproductive health services that are available to women in Victoria, Queensland, and other States and Territories.

I stress that NSW is the last jurisdiction in Australia to reform, to ensure women's reproductive rights are not framed in a criminal context.

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While reform is long overdue in NSW, there is one advantage of our tardiness in righting this wrong. It allows us the opportunity to reflect on and assess the previous reforms, and identify the best path forward.

To this end, the Bill broadly adopts the regime established in Victoria in 2008 and in Queensland in 2018. The schemes in those Acts have already been subject to extensive review and consultation, including – most recently – through the Queensland Law Reform Commission.

In adopting this model, NSW law will reflect these most recent Australian reforms and ensures there will be consistency of access for women across Queensland, NSW and Victoria

The key principles reflected in the Bill are:

- Recognition that termination is a health service, and that decisions about health services should be made between women and their doctors.
- Recognition that where a late term termination is sought, there should be further medical consultation and oversight, to consider all relevant medical and personal circumstances.
- Establishing provisions on conscientious objection for medical and other health practitioners that are consistent with current professional codes and ethical guidelines.
- Removal of offences that criminalise the conduct of a woman who obtains a termination and a doctor who provides that service.
- Recognition that there remains a need to ensure protections are in place against unqualified persons who perform or assist in performing a termination.

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I will now address some of the key elements of the Bill.

Consistent with approaching abortion as a health service, Schedule 2 to the Bill amends the NSW Crimes Act, to remove the provisions that currently criminalise the conduct of women and health practitioners.

This means that the risk of criminal penalties will no longer apply to women who obtain an abortion.

It also ensures health practitioners will not be judged under the criminal law for providing or assisting in termination services. Instead, as with any other health service they provide, they will be judged on the safety and appropriateness of the services they provide, in accordance with the rules of professional conduct – the same way as they are held to account for any other service they provide.

In supporting this change, I recognise that some may argue the existing Crimes Act provisions are sufficient to regulate abortion, and that they do not unreservedly prevent women obtaining a termination of pregnancy.

This is technically correct but in my view, woefully inadequate. . Since 1900, judicial interpretation of the Crimes Act has established principles for when a termination *might* be treated as lawful.

These principles have been in place since the decision in R v Wald, in 1971. In that District Court case, Judge Levine concluded that a termination was not "unlawful" under the Crimes Act,

> *"if a doctor honestly believed on reasonable grounds that the operation was necessary to preserve the woman involved from serious danger to her life or physical or mental health which the continuance of pregnancy would entail*"

It is on this relatively slim, common law commentary that the regime for lawful abortions in NSW has since relied. Womens' reproductive rights deserve better. They deserve complete clarity. Women have a right to be free of lingering doubts.

I acknowledge that while this common law interpretation does mean that, to date, convictions under the Crimes Act have been rare, the risk of charge and conviction remains. This threat inevitably impacts on women seeking these health services. It also impacts on medical and other health practitioners. They are left in a grey zone of the law, caught between the possibility of criminal action and their professional obligations to provide appropriate and safe care to their patients.

In 2017, a woman in NSW was prosecuted for taking a termination drug to abort her pregnancy. If the prosecution had chosen to take the matter to the District Court the potential penalty would have been ten years in prison.But the prosecution took the matter to the local court where the maximum penalty available was 2 years. The woman in this case had a conviction recorded and a 3 year good behaviour bond was imposed.

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I turn now to the concern for some members on the issue of late term abortions. I accept this will be an issue of some soul searching and genuine anguish.

I note however, that the terms of the Bill, that recognise 22 weeks as the point at which additional medical oversight is required, is consistent with the recommendations of the Queensland Law Reform Commission Report, reached after lengthy review and extensive consultation.

The Queensland Law Reform Commission determined that 22 weeks was the appropriate threshold because it represents the stage immediately before possible survival.

This is in line with NSW Health guidelines and is supported by the NSW AMA, the Royal Australian and New Zealand College of Obstetricians and Gynaecologists, and the Australian Council of Nursing.

On the 2nd of August RANZCOG issued a statement and its worth reading it onto the record in this house;

"A late abortion is only ever performed when there is a compelling clinical need and should follow extensive consultation with the woman and her treating practitioners.

"The incidence of late abortion is low and there is no evidence, and no reasons to believe, that removing abortion from the Criminal Code will change current clinical practice, nor the number of abortions that will be performed.

"Late terminations in NSW are currently performed in accordance with clear professional and ethical standards, with reference to the NSW Health framework.''

Most terminations take place during the first trimester. I note that the advice I have received is that 91 to 95 per cent occur before 14 weeks gestation. Second trimester terminations after 22 weeks gestation are uncommon, at around one per cent. Many of these one per cent of terminations occur because genetic and or other abnormalities only become apparent late in gestation.

I note that today's Sydney Morning Herald featured a story written by a woman who experienced the heartbreaking decision of a late term abortion due to the diagnosis of hypoplastic left heart syndrome.

She wrote about the agonising choice she and her partner made. "If you don't want an abortion then don't have one, but don't leave the crime lurking in the law. Women, including those in late term pregnancy – must have a chance to be informed and make a choice they do not take lightly or find easy. There was nothing easy about my decision; it was the hardest one I have ever made.''

Legislating for a 22-week gestational limit allows time for the diagnosis of foetal abnormalities, providing pregnant women and practitioners the opportunity to make an informed decision.

This Bill provides that after 22 weeks there is additional oversight by a second doctor. I stress this is a stricter provision than currently applies in NSW. Under the current common law provisions, there is no gestational threshold that requires the additional oversight of a second doctor.

And as RANZCOG stated: "A late abortion is only ever performed when there is a compelling clinical need." I absolutely refute the spurious arguments being put around about "abortion up until the day of birth'' for no reason at all. Doctors have ethical and professional obligations that ensure they will not facilitate late term abortions unless there is a compelling clinical need.

And for those arguing for amendments to this provision of the Bill, I say categorically that amendments are not required. Doctors will continue to meet their clear professional and ethical requirements regarding late term abortions, and this will continue to be medical practice in NSW, as it is across all other states and territories in Australia.

The Bill also recognises and addresses the ongoing risk arising from unqualified individuals who may seek to offer termination services without appropriate medical support. I note that with the passing of this Bill, there is a hope there will be less attraction or need for women to seek out the services of unqualified individuals.

But in any case, Schedule 2 to the Bill inserts a new offence into the Crimes Act of "Termination of pregnancies by unqualified persons".

Under this offence – which again reflects the law in Queensland and Victoria – an unqualified person who performs or assists in the performance of a termination will be subject to penalties of up to 7 years imprisonment.

I turn now to an issue that has been raised publically by some who oppose this Bill. It has been suggested that doctors should continue to be regulated under the Crimes Act in relation to their conduct pertaining to termination of pregnancies.

As the NSW Health Minister I can assure the House that in NSW, doctors are regulated by appropriate professional and statutory bodies in every aspect of the delivery of their medical services. If they breach their obligations, they can be dealt with through those avenues.

They can be de-registered, and indeed, depending on the extent of their activities, could be subject to civil proceedings and or criminal offences.

Another issue which has been raised by some in this Place, and in the community, relates to what is termed "informed consent''.

Nothing in this Bill changes the current requirements for informed consent. The AMA's Good Medical Practice Code of Conduct for Doctors in Australia states "informed consent is a person's voluntary decision about medical care that is made with knowledge and understanding of the benefits and risks involved".

The information that doctors need to give to patients is detailed in guidelines issued by the National Health and Medical Research Council.

The National Health and Medical Research Council's General (MH&MRC)Guidelines for Medical Practitioners on Providing Information to Patients lists several matters it believes treating doctors must discuss with their patients before conducting an examination and/or treatment: These include:

"1. The possible or likely nature of the disease or illness the doctor proposes to treat;

"2. The proposed approach to investigation, diagnosis and treatment: • What the proposed approach entails; • The expected benefits; • Common side effects and material risks (Test: Would a reasonable person in the patient's position attach significance to the risk if it were explained to them fully?); • Whether intervention is experimental or conventional; and • Who will conduct the intervention?

"3. The degree of uncertainty of any diagnosis arrived at;

"4. The degree of uncertainty as to any therapeutic outcome;

"5. The likely consequences of not choosing the proposed diagnostic procedure or treatment, or of not having any procedure or treatment at all;

“6. Any significant long term physical, emotional, mental, social, sexual or other outcome associated;

“7. The time involved;

‘8. The costs involved, including out of pocket costs (i.e. not just those covered by health insurance, if any).

“The National Health and Medical Research Council HMRC also recommends that treating doctors encourage patients to ask questions about what is being proposed and the financial implications of undergoing the treatment. This not only includes the patient in the decision-making process, but also enables the treating doctor to gauge the patient’s concerns and ascertain what the patient deems to be important. “

Similarly, NSW Health has a 40 page policy directive – Consent to Medical Treatment – Patient information.

Under the directive, “as a general rule, no operation, procedure or treatment may be undertaken without the consent of the patient, if the patient is a competent adult. Adequately informing patients and obtaining consent in regard to an operation, procedure or treatment is both a specific legal requirement and an accepted part of good medical practice.

“Consent to the general nature of a proposed operation, procedure, or treatment must be obtained from a patient. Failure to do this could result in legal action for assault and battery against a practitioner who performs the procedure.

“For a patient’s consent to be valid a number of criteria will need to be met.

“First, the person must have the capacity to give consent, that is, the person must be able to understand the implications of having the treatment.

“The second requirement is that consent must be freely given. The patient must not be pressured into giving consent. This would include pressure from hospital staff, a medical practitioner or family. Pressuring a patient into making a quick decision could be considered coercion.

“Thirdly, the consent must be specific, and is valid only in relation to the treatment or procedure for which the patient has been informed and has agreed to.

“Finally, the patient must be informed in broad terms of the procedure which is intended, in a way the patient can understand These criteria must be met irrespective of whether the consent is obtained in writing or orally. The mere mechanical signing of a consent form is, of itself, of limited value.”

There are also specific requirements regarding informed consent of minors.

Informed consent is not a new idea for doctors, and there is no need for it to be put into the Reproductive Health Care Reform Bill as it is already existing practice.

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I turn now to the issue of conscientious objection by medical practitioners. I acknowledge there are, of course, strongly held and differing views about the provision of termination services across the medical and other health professions.

It is therefore important to note that Clause 8 of the Bill will give statutory recognition to practitioners who have a conscientious objection to performing or assisting in a termination.

The clause provides for a practitioner who objects to advising on, performing or assisting in a termination to declare this objection to their patient, and refer them to another practitioner who they know, or believe, will provide such a service.

There is no compulsion to continue to provide care in these circumstances. The only exception is where the practitioner owes a separate professional duty to act in an emergency: the Bill makes it clear that this duty will continue.

I am extremely concerned at the claims by some organisations and some individuals opposed to the Bill that the Reproductive Health Care Reform Bill in some way imposes new conditions on doctors and health practitioners who have a conscientious objection.

Let me be clear. The Reproductive Health Care Reform Bill 2019 imposes no new requirements on doctors who have a conscientious objection.

Doctors do not even have to put the referral in writing. It can be as simple as giving the name of another medical practitioner.

Doctors are ALREADY required under their medical registration which is the national regulatory law of Australia, to inform a patient of any conscientious objection they hold and not use that objection to impede access to treatments that are legal, nor allow moral or religious views to deny patients access to medical care.

Similar policies are in place in the NSW Public Health System and the AMA Code of Practice. Further, this Bill does not alter in any way the existing provision that regardless of conscientious objection, in an emergency there is an obligation to provide care.

The Australian Medical Association *Statement on Conscientious Objection*, issued in March 2019, recognises the necessary balance between personal views and the professional obligation to act in an emergency, stating "*a doctor should always provide medically appropriate treatment in an emergency situation, even if that treatment conflicts with their personal beliefs and values*"

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As I have already said, the changes set out in the Reproductive Health Care Reform Bill 2019 are long overdue in NSW. If they pass, they will finally ensure that women in NSW are able to lawfully access the same range of reproductive healthcare services that are available to women in Queensland, Victoria and other Australian States and Territories.

The Bill represents a considered and sensible approach, sensitive to differing views and seeking a fair and appropriate compromise on these issues.

I believe that 119 years after an all male Legislative Assembly enacted the laws that currently regulate womens' termination of pregnancies in the Crimes Act 1900, this Reproductive Health Care Reform Bill reflects and is in step with the expectations and views of the majority of the public of NSW.

Recalling the fight that the first elected woman to the NSW Parliament, Millicent Preston-Stanley had, on a range of topics to support women's family planning almost 95 years ago, I note that she also had challenges in reforming womens health.

It wasn't easy then and it's not easy today. I note that she called for Sydney University at the time, to establish a chair of obstetrics, Instead the University established a course in veterinary obstetrics, leaving her to declare that the university had "horses rights for women".

Today, 95 years on, let us just simply ensure rights for women in their reproductive health are finally delivered. I want to thank the members of the cross party working group and independents who have worked to deliver this Bill for the 21st Century.

I commend the Bill to the House.