saaac
South Australian
Abortion Action Coalition
*Better abortion access*

# Regulation of abortion care

Currently, in the case of abortion care, women and their health care teams are constrained in their health care decisions by the *Criminal Law Consolidation Act 1935* (SA). Repeal of the criminal law in relation to abortion will remove stigma and the chilling effect of criminality on clinicians and health care organisations; and it will require only minor amendments to existing standards and guidelines for the overwhelming majority of abortions (about 98%).

Once abortion is removed from the criminal law, it will be regulated according to the normal standards and practices that govern all other health services, which include specific clinical guidelines for each area of care. All health procedures, practices and services are closely controlled and regulated by government, industry and professional bodies, and breaches are dealt with seriously.

In this way, existing health law, regulations, codes of practice, clinical protocols and institutional policies and procedures provide a comprehensive regulatory framework that protects patients, promotes good quality and safety in health care and ensures accountability.

Under these arrangements, women who need abortion care will be afforded the same safe, good quality care as all patients should be able to expect, and health care professionals will be able to deliver that care within the framework of health laws, standards and regulations as explained below.

This fact sheet is detailed and sometimes technical.
It covers the following:

- There are more than 20 South Australian and about 70 Commonwealth health statutes.
- Laws and professional practitioner regulatory boards ensure that only qualified professionals provide health care, and that they are held accountable for compliance with standards.
- Health care is provided in accordance with specific clinical standards and in appropriate facilities, with hospitals and day surgery centres regulated primarily by SA Health. Early Medication Abortion in the primary care setting is closely regulated under Commonwealth laws and regulations.
- Patients must give informed consent for all health care services, and health care providers who fail to secure informed consent are subject to heavy penalties.
- Standards and guidelines for the small number of abortions needed later in pregnancy (about 2% of all abortions) will be revised once criminal laws are repealed. Revisions will ensure that appropriate clinical decisions are made for these patients who are typically faced with the decision of whether to continue or terminate their pregnancy in distressing and complex situations such as a diagnosis of a fetal abnormality, serious maternal illness or in the context of family violence.

- Regulation under health law will help to ensure that patients can be treated promptly and that care is affordable.
- Health professionals are not required to provide abortion care if they have a conscientious objection. They are always required to refer patients to others who can provide care.
- Assaults on a woman that harm her fetus would still be punishable under criminal law of assault.

**Relevant law, standards and regulatory arrangements**

There are more than 20 health statutes in South Australia, and nearly 70 Commonwealth statutes,[1] covering virtually every aspect of health, aged and disability care and public health.

The material below addresses the main requirements for regulation of abortion care, briefly explains the existing laws and standards that apply, and the changes that will be made when abortion is no longer defined as a crime and regulated under criminal law.

**Abortion can only be provided by appropriately qualified health professionals**

*The Health Practitioner Regulation National Law*[2] applies in South Australia to all health professionals. The National Law provides for "the protection of the public by ensuring that only health practitioners who are suitably trained and qualified to practise in a competent and ethical manner are registered".

The National Law also establishes the Australian Health Practitioner Regulation Agency and national health practitioner boards, including the Medical Board of Australia, the Nursing and Midwifery Board of Australia, the Pharmacy Board of Australia and the Psychology Board of Australia, among others. These national boards set registration and accreditation requirements (including standards and programs of study) to ensure practitioners are suitably qualified and competent. They also establish mandatory performance and professional standards, as well as policies and guidelines. Each board has extensive investigatory and disciplinary powers, including suspension or withdrawal of registration, and maintains a national register.

The National Law also allows for the Minister to make further regulations and defines offences for unqualified persons practising inappropriately. Health practitioners can be disciplined for misconduct and unsatisfactory professional performance. The National Law is administered in South Australia by the South Australian Health Practitioners Tribunal.

**Abortion is provided in appropriate facilities, in accordance with relevant clinical guidelines and standards**

*Surgical abortion services*

Surgical abortions are provided in hospitals and day surgery centres. The *Health Care Act 2008* (SA) governs the incorporation of public hospitals and the licensing of private hospitals and private day procedure centres. SA Health specifies mandatory standards and procedures for these facilities.

*Early Medication Abortion (EMA) care*

EMA has been extensively used throughout Australia and internationally and its safety is proven (see Fact Sheet 6). Following decriminalisation, EMA will be provided in primary care, including by telemedicine, as well as in outpatient services. Medications for early abortion (mifepristone and misoprostol) are regulated under the *Therapeutic Goods Act 1989* (Cth), which controls the "quality, safety, efficacy and timely availability of therapeutic goods". It covers regulation of manufacture and standards for therapeutic goods, establishes the Australian Register of Therapeutic Goods, and creates criminal offences for importing, supplying or exporting goods that do not comply with such standards.

The Therapeutic Goods Administration approval of EMA medicines (issued in 2012) specifies the conditions under which they can be prescribed, including gestational length, dosage, training requirements, follow-up and access to emergency care and support.[3] Pharmaceutical Benefits Schedule regulations require that authority is requested from the Commonwealth Department of Human Services for each prescription for EMA. Two large studies of Australian experience found that EMA is safe and effective with the most common complication being incomplete abortion (in about 5% of cases) [4,5], for which surgical abortion is the back-up procedure.

*General standards and guidelines*

In addition to the regulatory arrangements outlined above, clinical standards and guidelines are established by SA Health [6] (mandatory for public hospitals), the Royal Australian and New Zealand College of Obstetricians and Gynaecologists,[7] the ANZ College of Anaesthetists,[8] the Australian Day Surgery Nurses Association [9] and other authorities.

**Patients must give informed consent**

All patients must give informed consent for treatment, including for abortion care. The potential problem of coercion of a woman to terminate a pregnancy is addressed by the informed consent requirement, as legislated in the *Consent to Medical Treatment and Palliative Care Act 1995* (SA). It aims to ensure that patients "decide freely for themselves on an informed basis whether or not to undergo medical treatment" of any kind. Medical practitioners are required to explain the "nature, consequences and risks" of treatment and alternatives. These provisions act to protect patients from coercion by parents, partners or others, because treating health professionals must rule out coercion in order to meet their obligations.

The *Health and Community Services Complaints Act 2004* (SA) enables patients who are not satisfied with any aspect of their care to complain to the Health and Community Services Commissioner. Grounds may include that the health practitioner acted unreasonably, inappropriately, without due skill, contrary to applicable standards, or in an unprofessional manner. In particular, patients may complain that a health practitioner failed to provide sufficient information to enable them to make an informed decision or failed to provide the patient with a reasonable opportunity to make an informed choice concerning treatment and services provided.[10] The Commissioner has extensive investigatory and disciplinary powers.

Ensuring proper consent on behalf of minors and other people unable to give their own consent is also regulated under both the *Consent to Medical Treatment and Palliative Care Act 1995* (SA) and the *Guardianship and Administration Act 1993* (SA). Informed consent must be sought from the parent or guardian. There are some exceptions, but the health practitioner must satisfy a number of conditions, with serious penalties for failure to do so.

**Institutional requirements ensure that abortions later in pregnancy are provided in accordance with clinical and professional standards**

Professional ethics and the *Health Professional Regulation National Law* require all health professionals to act in the best interests of their patients. All health care is provided on the basis of need, in the interests of the patient's health, well-being and quality of life, and within clinical standards and guidelines. Need is determined by patients and their health care teams.

Women facing the question of abortion above 20 weeks are always in distressing and complex situations. About half are confronting a diagnosis of fetal abnormality, a small number face serious maternal illness or injury, and the others are in a range of complex social and personal circumstances. These include reproductive coercion and other forms of family violence, rape, facing pregnancy as a child or when very young, experiencing an undiagnosed pregnancy, mental illness or substance abuse. These patients with complex needs are currently treated in specialised centres by multi-disciplinary teams, in compliance with institutional protocols and professional standards.

The current criminal law causes several problems for patients and their care providers, most commonly pressure to make a decision quickly because of looming cut-off times which vary across services from 22 to 24 weeks.[11] Women and families facing the distressing diagnosis of abnormality in a wanted pregnancy are sometimes required to make very difficult decisions within 24 hours, a requirement that rules out further diagnostic assessment that may have enabled them to make different decisions.

For some women, access is denied in Adelaide, and they travel interstate or overseas. Women who are not able to travel are forced to continue the pregnancy and birth a baby they do not want. There are immediate consequences for the woman's mental health affecting their capacity to bond with their baby, with generally poor outcomes for both the woman and the child.[12]

Critically, leading health bodies, including the Royal Australian and New Zealand College of Obstetricians and Gynecologists,[13] the Royal Australasian College of Physicians[14] and the Public Health Association of Australia,[15] do not support legislatively-prescribed gestational limits that set out different laws for different stages of pregnancy. This is because the health system and health professionals, working with individual patients, are equipped to make appropriate decisions in the best interests of patients regarding later terminations.

Once the criminal law is repealed, amendments will be required to two existing SA Health clinical standards for abortions later in pregnancy, governing termination of pregnancy[6] and fetal loss.[16] The corresponding hospital policies and procedures will then be amended accordingly. Regulation in other jurisdictions in Australia and internationally provides potential models for amending standards in South Australia. The standards will need to guide decision-making about care for each individual patient within a framework of appropriate principles and processes.

**Those needing care can receive it when it is needed in an appropriate setting**

Australia's health laws and policies are intended to ensure that patients can receive the treatment they need regardless of ability to pay. Timeliness is essential in abortion care, and regulation under health care law and protocols will assist to ensure that services are available in a timely manner by removing the chilling effect of treating abortion as a crime.

**Health professionals are not forced to provide care they are not willing to provide, and they are obligated to assist patients gain access to care**

Doctors, nurses and others are specifically protected from being required to provide care for which they are not skilled or have a conscientious objection. Protection for conscientious objection is specified in mandatory national codes of conduct for doctors,[17] nurses and midwives[18] and others, as well as in the AMA Code of Ethics.[19] These documents also specify the obligation on health professionals to ensure that patients have access to alternative sources of care and, in the case of doctors, to refer patients elsewhere, and not to allow their "moral or religious views to deny patients access to medical care".[20]

**What about unqualified operators and assault?**

There are other aspects outside the health system that are covered under health or other laws.

**Unqualified operators conducting medical or surgical abortions, and self-administration of medication**

Where there is adequate provision of quality abortion services, a 'market' for unqualified operators does not exist. Experience in SA following the amendments of 1969 proved this unequivocally.

Unqualified or unlicensed people attempting to provide abortions of any kind commit an offence under the *Health Professional Regulation National Law*. An unqualified or unlicensed person performing a surgical procedure is committing an assault under the *Criminal Law Consolidation Act (1935)* SA. Any person importing abortion medications without a license commits an offence under the *Therapeutic Goods Act 1989* (Cth).

**Assault that results in pregnancy loss**

It is important that assaults targeting the fetus, or reckless as to harming the fetus, be appropriately punished. Assault that results in the loss of a pregnancy or damage to a fetus is an offence under the *Criminal Law Consolidation Act 1935* (SA), sections 24 (serious harm) and 23 (harm). Harm is defined as any "physical or mental harm (whether temporary or permanent)" and assault causing harm carries a potential imprisonment penalty of 5 – 13 years. Victoria addressed concern that these assaults may not be appropriately punished when reforming their abortion law by explicitly changing the *Crimes Act 1958* (Vic) to include the destruction of the fetus in the definition of serious injury; as NSW had previously done.[21]

1 Howse G and Dwyer J, 2016, Legally invisible: stewardship for Aboriginal and Torres Strait Islander health. *Australian and New Zealand Journal of Public Health*, 40(S1), S14-S20. doi:10.1111/1753-6405.12358

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

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 Goldstone P, Walker C and Hawtin K, 2017, Efficacy and safety of Mifepristone-buccal misoprostol for early medical abortion in an Australian clinical setting. Australian and New Zealand Journal of Obstetrics and Gynaecology, 57(3), 366–371. doi: 10.1111/ajo.12608

5 Hyland P, Raymond EG and Chong E, 2018, A direct-to-patient telemedicine abortion service in Australia: Retrospective analysis of the first 18 months, *Australian and New Zealand Journal of Obstetrics and Gynaecology*, 58(3), 1–6. doi: 10.1111/ajo.12800

6 SA Health, 2014, *Standards for the Management of Termination of Pregnancy in South Australia*, CD076. https://www.sahealth.sa.gov.au/wps/wcm/connect/f5f8238043760683 90b0dfc9302c1003/Standards+for+Mgt+of+Termination+of+Pregnancy+in+SA_ppg_v1.0.pdf?MOD=AJPERES&CACHEID=ROOTWORKSPACE-f5f8238043760683 90b0dfc9302c1003-lYyvyLI

7 Royal Australian and New Zealand College of Obstetricians and Gynaecologists, 2005, Termination of pregnancy (Reviewed 2016). https://www.ranzcog.edu.au/RANZCOG_SITE/media/RANZCOG-MEDIA/Women%27s%20Health/Statement%20and%20guidelines/Clinical%20-%20Gynaecology/Termination-of-pregnancy-(C-Gyn-17)-Review-July-2016.pdf?ext=.pdf

8 Australian and New Zealand College of Anaesthetists (undated), Standards and Guidelines, http://www.anzca.edu.au/resources/endorsed-guidelines and Professional Documents, http://www.anzca.edu.au/resources/endorsed-guidelines

9 Australian Day Surgery Nurses Association, 2013, *Best Practice Guidelines for Ambulatory Surgery and Procedures*, ADSNA.

10 *Health and Community Services Complaints Act 2004* (SA), Section 25.

11 See Fact Sheet 7 for an explanation of the different upper limits under current abortion law.

12 David H P, 2006, Born Unwanted, 35 Years Later: The Prague Study. *Reproductive Health Matters*, 14(27), 181–190. doi:10.1016/S0968-8080(06)27219-7

13 RANZCOG, 2016, Queensland Parliament Health (Abortion Law Reform) Amendment Bill 2016 – RANZCOG Response (Submission 908). https://www.parliament.qld.gov.au/documents/Committees/HCDSDFVPC/2016/18-HealthAbortion/submissions/908.pdf#search=%22Termination%20of%20Pregnancy%20%22

14 Queensland Law Reform Commission, 2018, *Review of termination of pregnancy laws Report No. 76*. P63, Para 3.72. QLRC, Brisbane. https://www.qlrc.qld.gov.au/__data/assets/pdf_file/0004/576166/qlrc-report-76-2018-final.pdf

15 Public Health Association of Australia, 2018, *PHAA submission on Termination of Pregnancy Bill 2018* (Queensland) (Submission 600). https://www.phaa.net.au/documents/item/2962

16 SA Health (2014). *Clinical Guideline: Perinatal Loss*, CG119. https://www.sahealth.sa.gov.au/wps/wcm/connect/ca863c804ee5531ea858add150ce4f37/perinatal+loss_29042016.pdf?MOD=AJPERES&CACHEID=ROOTWORKSPACE-ca863c804ee5531ea858add150ce4f37-msqMXWw

17 Medical Board of Australia 2014, *Good medical practice: A code of conduct for doctors in Australia* (clause 2.4.6). https://www.medicalboard.gov.au/Codes-Guidelines-Policies.aspx

18 Nursing and Midwifery Board of Australia, 2018, Code of *Conduct for Nurses* (clause 4.4.b). http://www.nursingmidwiferyboard.gov.au/documents/defaultaspx?record=WD17%2F23850&dbid=AP&chksum=L8j874hp3DTlC1Sj4klHag%3D%3D

19 Australian Medical Association, 2004, Code of Ethics (Revised 2016) (clauses 2.1.11 and 2.1.12). https://ama.com.au/system/tdf/documents/AMA%20Code%20of%20Ethics%202004.%20Editorially%20Revised%202006.%20Revised%202016.pdf?file=1&type=node&id=46014

20 Medical Board of Australia, 2014, *Good medical practice: A code of conduct for doctors in Australia* (clause 2.4.7).

21 Rankin M J, 2013 The Offence of Child Destruction: Issues for Medical Abortion, *Sydney Law Review* 35(1), pp1–26.