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South Australian Law Reform Institute

A suitable legislative framework for termination of pregnancy in South Australia

Fact Sheet 1 - Background Information

About this reference

On 26 February 2019, the independent South Australian Law Reform Institute (SALRI), based at the Adelaide University Law School, was requested by the State Attorney-General, the Hon Vickie Chapman MP, to examine South Australia's abortion laws.¹

SALRI was asked to consider a suitable legislative framework for the termination of pregnancy with the aim of modernising the law in South Australia and adopting best practice reforms with a view to making abortion a regulated medical procedure under health laws as opposed to a criminal law issue.² SALRI's review and findings should also reflect current clinical practice. SALRI has been asked to provide a Report with recommendations about any potential law reforms by the end of August 2019.

Abortion raises sensitive legal, health, ethical, policy and practical questions. Often these questions are answered by recourse to deep personal commitments. South Australia's present law relating to abortion dates from 1969.³ The law should keep up with medical advances and changes in social and community attitudes and SALRI will look at three broad options for potential reform, drawing on the three models drawn up by the Victorian Law Reform Commission.⁴ These models reflect SALRI's terms of reference (which do not extend to preventing or precluding abortion in South Australia).

SALRI will be undertaking its consultation with respect to this reference in the first half of 2019. SALRI is committed to an active and inclusive consultation process and is keen to obtain views and comments from the community, interested parties and experts to this reference. SALRI is especially keen to involve, and hear from, rural and regional communities as particular issues are said to arise for these communities in relation to access to abortion services. SALRI has formulated a list of Consultation Questions (reflecting its terms of reference from the Attorney-General). There will be ample opportunities for the community and interested parties to provide their comments to SALRI by various means. Your views are important so please get in touch with us.

SALRI is well aware that abortion is a sensitive topic that gives rise to sincere, strong and often competing views. There is no simple, universal or straight-forward position.

SALRI will conduct its consultation process in an objective and respectful manner and requests that interested parties engage and provide their views in a co-operative and courteous manner.⁵ SALRI

¹ Vickie Chapman, 'Law Reform Institute to consider Abortion Law Reform', Press Release, 26 February 2019, <https://www.agd.sa.gov.au/newsroom/law-reform-institute-consider-abortion-law-reform>.

² See further Ibid.

³ *Criminal Law Consolidation Amendment Act 1969* (No 109 of 1969).

⁴ Victorian Law Reform Commission, *Law of Abortion*, Report No 15 (March 2008) 6-7.

⁵ Ibid 4.

emphasises that its review of South Australia's abortion laws is governed by its terms of reference from the Attorney-General and these do not extend to preventing or precluding abortion.⁶

SALRI has been asked to provide its Report by the end of August 2019 and though its consultation will necessarily take place over a short period of time, SALRI will undertake broad consultation on the issues raised by this review. Given the tight time span, SALRI will continue its established process of not issuing an Issues paper. Rather, SALRI will release a number of Fact Sheets about current law, practice and the main issues, along with targeted and accessible questions, to inform any party who may wish to make a submission.

We would be grateful for your input. Please do not feel obliged to answer every question suggested for consideration in the Fact Sheets. It may that a particular area is of interest. SALRI reiterates that your views are important so please get in touch with us to share your thoughts.

About SALRI

SALRI is an independent, non-partisan, law reform body based at the Adelaide Law School. SALRI was established in 2010 under an agreement between the Attorney-General of South Australia, the University of Adelaide and the Law Society of South Australia. SALRI conducts inquiries, also known as references, into areas of law. The areas of law are selected by the expert SALRI Advisory Board and are often at the request of the State Attorney-General. SALRI's reviews are governed by the relevant terms of reference. SALRI considers how the applicable law and practice work in South Australia and other places (both in Australia and overseas), the research and commentary available and speaks widely to the community, interested parties and experts. SALRI adopts a multi-disciplinary approach and looks at relevant disciplines beyond law. Based on its extensive research and consultation throughout an inquiry, SALRI then makes recommendations to the State Government so that the Government and Parliament can make informed decisions about any changes to law and practice. SALRI's recommendations do not automatically become law, but they may be acted upon and accepted by the Government and Parliament. Any decision on accepting a SALRI recommendation is for the Government and Parliament.

When undertaking its work, SALRI has a number of objectives. These include identifying law reform options that will modernise the law, fix any problems in the law, consolidate areas of overlapping law, remove unnecessary laws, or, where desirable, bring South Australian law into line with other States and Territories.

SALRI will draw on the existing extensive work in this area and recent developments elsewhere in Australia, especially the work of the Victorian⁷ and Queensland⁸ Law Reform Commissions.

⁶ The focus of this Review is not on whether abortion is 'right' or 'wrong'. 'The consideration of abortion in terms of whether the act itself is "right" or "wrong" is a matter of personal ethics upon which individual minds are free to differ': Tom Gotsis and Laura Ismay, 'Abortion Law: a National Perspective' (Briefing Paper No 2/2017, NSW Parliamentary Research Service, Parliament of New South Wales, 2017) 1. As the US Supreme Court has commented: 'We acknowledge our awareness of the sensitive and emotional nature of the abortion controversy, of the vigorous opposing views, even among physicians, and the deep and seemingly absolute convictions that the subject inspires. One's philosophy, one's experiences, one's exposure to the raw edges of human existence, one's religious training, one's attitude to life and family and their values, and the moral values one establishes and seeks to observe, are likely to influence and colour one's thinking and conclusion about abortion': *Roe v Wade* (1972) 410 US 113.

⁷ Victorian Law Reform Commission, *The Law of Abortion*, Information Paper (September 2007); Victorian Law Reform Commission, *Law of Abortion*, Report No 15 (March 2008).

⁸ Queensland Law Reform Commission, *Review of Termination of Pregnancy Laws: Consultation Paper* (WP 76) (December 2017); Queensland Law Reform Commission, *Review of Termination of Pregnancy Laws*, Report 76 (June 2018).

Background

On 5 December 2018, the Statutes Amendment (Abortion Law Reform) Bill 2018 (SA) was introduced by the Hon Tammy Franks MLC in the South Australian Legislative Council as a Private Members Bill.⁹ Ms Franks explained the rationale of her Bill as follows:

*... because our current abortion law, which was written in 1969 and was once progressive and leading the nation, is no longer fit for purpose. It acts as a barrier to the provision of best health care, a barrier to that care for women living in rural and remote areas, who are particularly disadvantaged, a barrier to women who are new to living in this state and have not been resident for the required two months, and a barrier to the medical profession, who deal with matters of health care every day, none of which, except for abortion, are placed within the criminal code, as this issue is.*¹⁰

There have been considerable recent developments in relation to the law regulating abortion¹¹ as well as major interstate legislative developments.

In 2002, abortion was decriminalised in the Australian Capital Territory through the *Crimes (Abolition of Offence of Abortion) Act 2002* (ACT). This law treats abortion as a health procedure and full-term abortions on request are legal in the ACT as there are no gestational limits. In September 2007, the Victorian Law Reform Commission (VLRC) was asked to provide legislative advice on the decriminalisation of the termination of pregnancy in Victoria. The VLRC published an Information paper in September 2007.¹² In June 2008, the VLRC after extensive consultation¹³ released its Report.¹⁴ This led to the *Abortion Law Reform Act 2008* (Vic) which liberalised Victoria's abortion laws.¹⁵ On 19 June 2017, the Queensland Law Reform Commission (QLRC) was asked to conduct a review and investigation into modernising Queensland's termination of pregnancy laws and to report, with draft legislation, by 30 June 2018.¹⁶ On 21 December 2017, the QLRC published a

⁹ South Australia, *Parliamentary Debates*, Legislative Council, 5 December 2018, 2420-2428.

¹⁰ South Australia, *Parliamentary Debates*, Legislative Council, 5 December 2018, 2420. See also South Australia, *Parliamentary Debates*, Legislative Council, 30 May 2018, 281-282; South Australia, *Parliamentary Debates*, Legislative Council, 27 February 2019, 2776-2791.

¹¹ See, for example, Rebecca Puddy, 'Adelaide's Catholic Archdiocese wants to stop "radical" changes to abortion laws', *ABC News*, 15 February 2019, <https://www.abc.net.au/news/2019-02-15/catholic-church-to-send-letter-on-abortion-law-reform/10816294>; AAP, 'SA Abortion Law Reform under Fire', news.co.au (online), 27 February 2019, <https://www.news.com.au/national/breaking-news/sa-abortion-law-reform-under-fire/news-story/3810830a3aa4534c0be02a41351975b7>; Judith Ireland, 'Labor pledges to tie hospital funding to abortion services', *Sydney Morning Herald* (online), 6 March 2019, <https://www.smh.com.au/politics/federal/labor-pledges-to-tie-hospital-funding-to-abortion-services-20190305-p511uk.html>; Lisa Visentin, Kate Aubusson and Esther Han, 'Abortion decriminalisation on radar for next NSW Parliament', *Sydney Morning Herald* (online), 6 March 2019, <https://www.smh.com.au/politics/nsw/abortion-decriminalisation-on-radar-for-next-nsw-parliament-20190306-p5122q.html>; Josephine Tovey, 'Abortion back on agenda in NSW as decriminalisation push gathers pace', *The Guardian* (online), 7 March 2019, <https://www.theguardian.com/world/2019/mar/07/abortion-back-on-agenda-in-nsw-as-decriminalisation-push-gathers-pace>.

¹² Victorian Law Reform Commission, *The Law of Abortion*, Information Paper (September 2007).

¹³ The VLRC held more than 30 meetings with people involved in abortion law reform. The VLRC received 519 written submissions, 433 from individuals and 86 from organisations. See Victorian Law Reform Commission, *Law of Abortion*, Report No 15 (March 2008) 72 [5.2].

¹⁴ Victorian Law Reform Commission, *Law of Abortion*, Report No 15 (March 2008).

¹⁵ In August 2008, a Bill was introduced to the Victorian Parliament that reflected Model B in the VLRC report. All parties allowed MPs a conscience vote. The *Abortion Law Reform Act 2008* (Vic) passed in October 2008. The new Act decriminalised abortion. Under the Act, a woman can access abortion up to a gestational limit of 24 weeks. Beyond the 24 weeks, a medical practitioner can provide a lawful abortion if another medical practitioner agrees that an abortion is appropriate in all the circumstances having regard to the effect the woman's mental and physical health. Medical practitioners who object to abortion are not compelled to act and do not have to provide information to a client, but are required to refer the patient to another medical practitioner who can provide the information.

¹⁶ In undertaking its review, the QLRC was to have regard to the evidence and submissions received by two recent Queensland parliamentary reviews. See further Health, Communities, Disability Services and Domestic and Family Violence

Consultation Paper, asking a total of 20 questions.¹⁷ The QLRC received submissions from a total of 888 parties.¹⁸ The following July, the QLRC released its Report into Queensland's abortion laws.¹⁹ This led to the *Termination of Pregnancy Act 2018* (Qld) which came into effect on 3 December 2018. The Queensland Act seeks to provide that terminations of pregnancy are treated as a health issue rather than a criminal issue, to enable reasonable and safe access by women to terminations of pregnancy and to regulate the conduct of registered health practitioners in relation to abortions.

On 26 February 2019, the South Australian Attorney-General, the Hon Vickie Chapman MP, announced that she had asked SALRI 'to consider changes to the State's abortion laws with a view to improve access and modernise the practice in the State and with a view to making abortion a regulated medical procedure under health legislation as opposed to a criminal law issue'.²⁰ The Attorney-General acknowledged the Hon Tammy Franks MLC's advocacy on this issue but noted her view that the Private Members Bill was 'too broad and failed to adequately regulate the relevant medical procedures'. The Attorney-General further noted that wide consultation was appropriate and her view that a referral to SALRI is the most appropriate way 'to determine how South Australian laws could best be updated and brought in line with those in other jurisdictions, particularly regional access and investigating the current outdated criminal law'.²¹

On 28 February 2019, the Attorney-General formally wrote to SALRI in respect of its terms of reference.

The Attorney noted that over 40 years have now passed since the present abortion laws were first enacted in South Australia. Since that time there have been significant changes to clinical practice including medical termination methods and modern health service provisions.

The Attorney raised that, as a result of these developments, there is now a concern that South Australia's termination laws no longer reflect best modern clinical practice and may well act as a barrier to equity of access to health services. The Attorney observed that it is appropriate that the relevant law is modernised to bring it in line with current clinical practice and to improve the efficiency of health service provision and access, particularly for women in regional and remote areas. Referral of the issue of abortion to SALRI for proper investigation and recommendations for reform based on best clinical practice in this area and with the guidance of other jurisdictions was therefore considered to be the most suitable way to achieve proper reform of the law in relation to abortion in South Australia.²²

The Attorney's formal terms of reference to SALRI are as follows:

Prevention Committee, Parliament of Queensland, Abortion Law Reform (Woman's Right to Choose) Amendment Bill 2016 and Inquiry into Laws Governing Termination of Pregnancy in Queensland, Report 24 (2016); Health, Communities, Disability Services and Domestic and Family Violence Prevention Committee, Parliament of Queensland, *Health (Abortion Law Reform) Amendment Bill 2016*, Report No 33a (2017).

¹⁷ Queensland Law Reform Commission, *Review of Termination of Pregnancy Laws: Consultation Paper* (WP 76) (December 2017) v-vii.

¹⁸ Queensland Law Reform Commission, *Review of Termination of Pregnancy Laws*, Report 76 (June 2018) 217-229. The strong interest in this area is also shown by the fact that the Queensland parliamentary reviews held numerous public hearings and received more than 2600 submissions. See Health, Communities, Disability Services and Domestic and Family Violence Prevention Committee, Parliament of Queensland, *Abortion Law Reform (Woman's Right to Choose) Amendment Bill 2016 and Inquiry into Laws Governing Termination of Pregnancy in Queensland*, Report (2016) [1.3]; Health, Communities, Disability Services and Domestic and Family Violence Prevention Committee, Parliament of Queensland, *Health (Abortion Law Reform) Amendment Bill 2016*, Report No 33a (2017) [1.2].

¹⁹ Queensland Law Reform Commission, *Review of Termination of Pregnancy Laws*, Report 76 (June 2018).

²⁰ Vickie Chapman, 'Law Reform Institute to consider Abortion Law Reform', Press Release, 16 February 2019, <https://www.agd.sa.gov.au/newsroom/law-reform-institute-consider-abortion-law-reform>.

²¹ Ibid.

²² Letter from the Attorney-General to SALRI, 28 February 2019.

Referral

I therefore seek the Institute's consideration of a referral in relation to the topic of abortion, with the aim of modernising the law in South Australia and adopting best practice reforms.

Scope

The Institute is asked to inquire into and report on recommendations on:

1. The effectiveness of current law, practices and services in South Australia relating to the medical termination of pregnancy, in particular the availability and safety of services, based on advice and information from SA Health; and

2. How the current legal position may be amended to:

- i. remove offences relating to the medical termination of pregnancy pursuant to Division 17 of the CLCA;*
- ii. make recommendations for legislative reform based on best clinical practice for the lawful regulation of medical termination of pregnancy;*
- iii. ensure reasonable availability and access to safe medical termination of pregnancy services.*

3. Any other relevant matters.

In providing advice and recommendations for legislative reform, SALRI is asked to have regard to the following:

- the termination of pregnancy should be treated as a health care issue rather than as a criminal matter;*
- existing practices and services in South Australia concerning termination of pregnancy including those provided by medical practitioners, counsellors and support services;*
- existing legal principles relating to termination practices in South Australia;*
- the South Australian Government's commitment to modernise and ensure safe and reasonable access to termination services for all women;²³*
- the law should be consistent with contemporary clinical practice and health regulation, including reasonable and safe access to termination services; and*
- the law should achieve reasonable consistency with other Australian jurisdictions and international jurisdictions that have modernised their laws relating to termination.²⁴*

²³ This is a major consideration for SALRI, especially in relation to rural and regional access in South Australia. The importance of proper access is important. The closure of Tasmania's main abortion provider, for example, forces women to travel to Melbourne, having particular impact on low income women. See Sue Bailey, 'Tasmanian women face big costs if they travel interstate for abortions', *Sydney Morning Herald* (online), 8 March 2018, <https://www.smh.com.au/national/tasmanian-women-face-big-costs-if-they-travel-interstate-for-abortions-20180308-p4z3il.html>; Rhiannon Shine, 'Abortion Rally at Tasmanian Parliament ups pressure on Hodgman Liberal Government', *ABC News*, 24 May 2018, <https://www.abc.net.au/news/2018-04-28/abortion-rally-at-parliament-puts-pressure-on-state-government/9707190>.

²⁴ The QLRC was 'guided by a number of key principles, including the following:

1. Generally, termination should be treated as a health issue rather than as a criminal matter;
2. Women's autonomy and health (including access to safe medical procedures) should be promoted, recognising that: at the earlier stages of pregnancy, a woman's autonomy has greatest weight, and termination is lower risk and safe for the woman; at the later stages of pregnancy, the interests of the fetus have increasing weight, and termination involves higher risk for the woman and creates more complex issues;

SALRI is aware that abortion is a complex issue that raises various sensitive legal, medical and ethical implications. Abortion gives rise to sincere, deeply felt and often conflicting views and it is impossible to reconcile the competing views which are held in this area.²⁵ SALRI notes that on occasion the debate has been marked by intemperate, even extreme,²⁶ language and expresses the hope that interested parties will provide their input to SALRI in a respectful manner. SALRI also reiterates that its review is governed by its terms of reference from the Attorney-General set out above and that preventing or precluding abortion are outside its terms of reference. Likewise, complex moral questions such as when does life start are outside this reference.²⁷

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.

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3. The law should align with international human rights obligations relevant to termination of pregnancy laws, including enabling reasonable and safe access to termination services;
 4. The law should be consistent with contemporary clinical practice and health regulation; and
 5. The law should achieve reasonable consistency with other Australian jurisdictions that have modernised their laws relating to termination': Queensland Law Reform Commission, *Review of Termination of Pregnancy Laws*, Report 76 (June 2018) v. See also at: 5-6.

²⁵ 'Some people have strong ethical views about abortion. Those views range from absolute opposition to abortion in all circumstances to respect for women's autonomy, and various points in between': Victorian Law Reform Commission, *Law of Abortion*, Report No 15 (March 2008) 148 [B.1].

²⁶ See, for example, the criticism directed at the Hon Tammy Franks. See South Australia, *Parliamentary Debates*, Legislative Council, 5 December 2018, 2427-2428; South Australia, *Parliamentary Debates*, Legislative Council, 27 February 2019, 2777-2779.

²⁷ See Victorian Law Reform Commission, *Law of Abortion*, Report No 15 (March 2008) 149-157 [B.15]-[B.86]; Queensland Law Reform Commission, *Review of Termination of Pregnancy Laws*, Report 76 (June 2018) 269-274.