ABORTION LEGISLATION REFORM BILL 2023

Receipt and First Reading

Bill received from the Assembly; and, on motion by **Hon Sue Ellery (Leader of the House)** read a first time.

Second Reading

HON SUE ELLERY (South Metropolitan — Leader of the House) [5.59 pm]: I move —

That the bill be now read a second time.

The Western Australian community provided its overwhelming support for this government to make important reforms to abortion laws. The bill before us today will place healthcare access and patient experience at the centre of those reforms. This bill will contemporise Western Australia's statutory framework, remove clinically unnecessary barriers to care, streamline care pathways and align WA with other Australian jurisdictions when it is in the best interest of WA.

Western Australia's laws pertaining to abortion have remained unchanged for 25 years. Many members will remember that in February 1998, two doctors were charged under the Criminal Code for conducting an abortion. It was the first time in 30 years that such charges were laid and for many people it was a stark reminder that abortion remained largely illegal in Western Australia. In response, Hon Cheryl Davenport, then Labor member for South Metropolitan Region, introduced a private member's bill in the Legislative Council, the Criminal Code Amendment (Abortion) Bill 1998. The bill sought to repeal sections of the Criminal Code that made it a criminal offence to procure an abortion. That bill then became the Acts Amendment (Abortion) Bill 1998, introducing amendments to the Health Act 1911 on the performance of abortions. This major reform forms the basis of WA's abortion provisions currently in the Health (Miscellaneous Provisions) Act 1911.

The 1998 abortion bill was groundbreaking at that time. I give thanks to those women and all those who supported them, whose dedication and hard work in this Parliament saw Western Australia become the first place in Australia to remove most criminal penalties for seeking and providing an abortion.

In the 25 years since the 1998 reforms, other Australian jurisdictions have caught up with WA and, in many cases, provided for more compassionate access to abortion that better reflects contemporary clinical practice. It is high on this government's agenda to ensure that Western Australians have access to abortion services in line with that provided in other jurisdictions. Members of the public, as well as health professionals, have provided clear feedback that our abortion laws are restrictive in the national context and prohibitive to the provision of the best healthcare services to the Western Australian community. Consequently, there have been some cases in which patients have chosen to travel interstate to access care that is either not lawful in Western Australia or immensely challenging to access locally.

This work is never done. We have seen what happens when opponents of reproductive justice chip away at the rights that generations of women have fought for. The overturning of Roe v Wade and Planned Parenthood v Casey in the US was a major setback for reproductive rights in that country, which refocused global attention on the varying legalities related to abortion access, including local attention on WA's outdated laws. It is now time to further enshrine access to abortion in our state's legislation.

Access to abortion is not only about legal barriers. The recent community consultation highlighted that persons living in regional communities or on lower incomes are disproportionately affected due to restricted access to a range of healthcare providers or lack of resources to travel interstate. This bill seeks to remedy many of those issues. This is something that I am extremely proud of and that this government should also be exceptionally proud of. It is my view that this bill reflects something that the majority of our community has wanted for a very long time.

I would ask members to remember that it is not the purpose of this bill, nor any consultation or stakeholder engagement, to review or debate arguments for or against abortion. Abortion has been lawful in Western Australia since 1998 and will remain so. This bill requires each and every member of Parliament to think beyond themselves and their own interests and to reflect the needs and wants of the community. This bill is the culmination of a thorough consultative process to ensure the specific needs of the community are addressed and to enable safe and compassionate processes for people seeking an abortion in Western Australia.

In September 2022, cabinet gave approval to draft the bill and commence public consultation regarding the provision of abortion care in Western Australia. On 21 November 2022, the Department of Health commenced a four-week public consultation on key abortion-related issues through the release of a discussion paper. The purpose of the discussion paper was to promote discussion and generate suggestions to help inform the policy settings for abortion reform. The bill reflects the outcome of the consultation process with all key issues largely supported by stakeholders.

In addition to the issues canvassed in the public consultation process, several additional positions were developed with the Department of Justice and key stakeholders. Those include the role of registered health practitioners other than medical practitioners in the provision of abortion care services, the collection and management of abortion information while ensuring the privacy of patients and practitioners, and a care model for adults and minors without capacity to provide informed consent.

The bill will introduce a new framework relating to abortion under the Public Health Act 2016, and will repeal all provisions related to abortion within the Health (Miscellaneous Provisions) Act 1911. This is to better reflect that abortion is a public health matter and the Health (Miscellaneous Provisions) Act 1911 is essentially a repository of residual provisions. This new framework will better align with clinical practice and will contemporise the practice of abortion care by practitioners by aligning disciplinary action to conduct requirements set out in their national registration.

The bill directly addresses clinical barriers to abortion, including time frames for patients accessing abortion, the use of multiple medical practitioners and a ministerial panel for late-term abortions and mandatory counselling requirements. The bill will remove the requirement for a referral for most abortions, increase the gestational limit at which additional requirements apply from 20 to 23 weeks, provide a clear framework outlining the rights and obligations of health practitioners who are unable to assist in abortion care, and abolish the ministerial panel process, instead providing for two medical practitioners to determine whether an abortion after 23 weeks is appropriate.

The new framework will consider the model of care for adults and minors without capacity to provide informed consent, including a substitute decision-making process. It will improve the information collection and management model for abortion by affording more protection to the patient and registered health practitioner, while still allowing the Chief Health Officer to collect information that will enable the provision, monitoring, planning and evaluation of health services, amongst other matters. Amendments will be made to the Freedom of Information Act 1992 to protect the privacy of individuals and health practitioners accessing and providing abortion services.

The bill will repeal the current offence in the Criminal Code leaving only an offence in the Public Health Act 2016 when an "unqualified person" performs an abortion. This will complete the decriminalisation of abortion in WA while ensuring that dangerous backyard abortions remain illegal.

The new framework recognises that the care and wellbeing of the patient should be placed first and foremost in the abortion process. Mandatory reporting to the coroner of live births following an abortion will be removed, as it obliges the coroner to investigate, including contacting the patient who underwent a lawful medical procedure. This can be unsettling and traumatic for the patients and their families. Clinicians involved in this process similarly report that the experience is distressing and unnecessary.

I turn to the specifics of the bill and the abortion process. The bill will introduce a new section 202MB that will set out the actions that constitute the performance of an abortion—namely, when a person acts with the intention of causing the termination of a patient's pregnancy. This includes when the person prescribes, supplies or administers an abortion drug to the patient or carries out a surgical or other procedure on the patient. This is a clearer definition than currently in the Health (Miscellaneous Provisions) Act. It was drafted in a way that reflects that the type of action required for an abortion will differ depending on the gestational age of the fetus and the patient's requirements, and may include oral medication, a surgical procedure or a combination of both.

It should be noted that abortions up to nine weeks' gestation can be conducted in a primary care setting with patients not required to attend hospital. Abortions after nine weeks will occur in a hospital setting, including at licensed private day hospitals, sometimes referred to as clinics.

The bill, at part 1, division 2, will reflect a change to the current gestational age limit for additional medical oversight for the termination of a pregnancy from 20 weeks to 23 weeks. The provision of general abortion access up to 23 weeks will better align Western Australia with other jurisdictions and ensure fewer patients feel they have no option but to travel interstate for medical care. This change will provide Western Australian families time to consider all options available and ensure greater continuity of care in often very difficult circumstances.

Community consultation reflected the overwhelming view that a 20-week limitation was manifestly restrictive. Importantly, key stakeholders with experience in the medical care of patients seeking and accessing termination of pregnancy were unanimous in their support to increase the gestational limit, with a 23-week gestational limit deemed most reflective of Western Australia's needs.

The bill will remove the requirement for an abortion to be considered by two medical practitioners, the medical practitioner performing the abortion and another. Rather, proposed section 202MC will authorise one medical practitioner to perform an abortion on a patient who is not more than 23 weeks pregnant. The community consultation showed that a majority of respondents are in favour of allowing access to an abortion after consulting with one health practitioner. This was supported by several key health stakeholders and addresses a key barrier to access faced by people living in regional, rural and remote communities.

Seeking a later term abortion is extremely rare, with abortions after 20 weeks accounting for less than one per cent of all procedures. It occurs most often due to the discovery of a serious fetal anomaly or because of a serious risk to the person's own health. It is almost always a very difficult decision to make and a challenging process for families to endure. The bill will remove the constraint that currently exists under the Health (Miscellaneous Provisions) Act on patients seeking late-term abortions. Currently, a patient must both seek approval from their original medical practitioner and then obtain joint authorisation from another two medical practitioners who are members of a statutory panel appointed by the Minister for Health. Instead, proposed section 202ME will enable the patient to access the abortion when a primary medical practitioner has consulted with another medical practitioner and they both agree that performing an abortion is appropriate in all the circumstances, including the person's relevant medical circumstances, and their current and future physical, psychological and social circumstances. The community consultation showed that a majority of respondents supported the removal of the statutory panel requirement, many viewing it as a significant barrier to accessing abortion care at later gestations.

The bill will introduce proposed section 202MD into the Public Health Act to allow other registered health practitioners, termed the prescribing practitioner, to perform a medical abortion on a fetus of no more than 23 weeks by prescribing, supplying or administering an abortion drug to the patient. A prescribing practitioner must be of a class prescribed by regulations and authorised under the Medicines and Poisons Act 2014 to prescribe the drug. The prescribing practitioner will be bound by the regular restrictions attached to prescribing abortion medication. For example, at not more than nine weeks of pregnancy, the medication may be taken at home, and at more than nine weeks, a hospital setting is required.

Currently, the abortion drugs mifepristone and misoprostol have been prescribed only by medical practitioners. The proposed provisions take into consideration ongoing discussions at a commonwealth level regarding the appropriateness of this limitation. Enabling classes of registered health practitioners to prescribe will futureproof WA's statutory framework, pending decisions from the commonwealth and the Therapeutic Goods Administration, and facilitate greater access for regional and remote Western Australians. It will provide the opportunity for trained nurse practitioners and endorsed midwives to prescribe medication conducive to abortion care.

The bill will introduce proposed section 202MF into the Public Health Act to enable a registered health practitioner other than a medical practitioner to perform a medical abortion upon the direction of a directing practitioner. When the fetus is not more than 23 weeks, either the medical practitioner or prescribing practitioner may give the direction. When the fetus is at more than 23 weeks, only a medical practitioner may give the direction. Under proposed new section 202MF, pharmacists will be authorised to perform a medical abortion by supplying the patient with an abortion drug. The pharmacist must act in accordance with the Medicines and Poisons Act to dispense the drug under a prescription issued by the directing practitioner or otherwise supply the drug to the patient on the direction of the directing practitioner. Other registered health practitioners will also be authorised to perform a medical abortion by supplying or administering the drug, in accordance with the Medicines and Poisons Act, on the direction of a directing practitioner.

The bill will introduce proposed section 202MG into the Public Health Act to authorise both registered health practitioners and students in a relevant health profession, acting in the course of the profession, to assist a medical or prescribing practitioner in the performance of an abortion. This provision has been included to offer a clear, explicit ability for persons to assist with the abortion and avoid any doubt that they may be considered as performing the abortion themselves. Assistance by a student can be given only under proper supervision and in the course of their study or clinical training. The new provision will also make clear that assistance is not authorised when the registered health practitioner or student knows that the abortion is not properly authorised.

The bill will introduce proposed sections 202MH and 202MJ into the Public Health Act to make clear that both registered health practitioners and students may refuse to participate in an abortion. Fundamental to the abortion process is that health practitioners have the right to not participate for any reason; whether due to a conscientious objection or otherwise. As such, referral may occur for reasons including the inability to meet essential requirements, such as qualifications or mandatory training, or unwillingness or inability to perform the duties. A practitioner who has a conscientious objection to abortion must immediately disclose their objection to the patient; in the case of a student, they must disclose to their supervisor. In any case, the bill makes clear that a refusal does not negate the duty to provide abortion care in an emergency.

Proposed section 202MI will place an obligation on certain practitioners to transfer care of the patient to a registered health practitioner or health service facility that the refusing practitioner reasonably believes can provide abortion services or provide information approved by the Chief Health Officer to enable the patient to access treatment elsewhere. This will ensure that a patient will still be able to access an abortion service, even when the original practitioner has refused. This approach was modelled on similar provisions in WA's Voluntary Assisted Dying Act. The Chief Health Officer will be required to ensure that the approved information is kept up to date.

At proposed section 202MK, the bill makes clear that the discipline and management of complaints relating to registered health practitioners who assist in or perform an abortion will fall to Western Australia's Health Practitioner Regulation National Law or the Health and Disability Services (Complaints) Act. There is a strong regulatory framework governing registered health practitioners, with serious consequences for unprofessional conduct or professional misconduct. Currently, section 199 of the Criminal Code provides that it is unlawful to perform an abortion unless by a medical practitioner performed in good faith and with reasonable care and skill and the abortion is justified under section 334 of the Health (Miscellaneous Provisions) Act. In turn, section 334, links back to the Criminal Code.

The bill before us today will repeal both the Criminal Code offence and the corresponding provision in the Health (Miscellaneous Provisions) Act. The bill will introduce proposed section 202MM into the Public Health Act to create an offence for an unqualified person to perform an abortion, with the penalty being seven years' imprisonment. The bill further makes clear at proposed section 202MN that it is not an offence for a person to perform an abortion on themselves. I inform the Western Australian community that these reforms will complete the decriminalisation of abortion, aligning Western Australia with other jurisdictions.

The bill will remove provisions in the Health (Miscellaneous Provisions) Act requiring patients to receive counselling in order to provide informed consent to an abortion. Currently, an assessing medical practitioner must provide the patient with counselling about the medical risks of a termination, continuing a pregnancy to term and the availability of ongoing counselling. This requirement does not reflect contemporary practice, and removing it will align Western Australia with other Australian jurisdictions and reduce barriers to accessing abortion in WA. Instead, medical practitioners will be able to obtain informed consent in line with existing standards of care and professional obligations. Clinical guidelines will provide further clarity on appropriate pathways for counselling.

Providing patients with information about a procedure or treatment and associated risks is standard medical practice, underpinned by professional standards and guidelines. Community consultation showed that a majority of respondents supported the proposed approach. Multiple key health stakeholder groups took the view that abortion should be treated like any other healthcare matter and should not be subject to additional requirements that may delay access to care.

The bill recognises that with the repeal of the informed consent provisions in section 334 of the Health (Miscellaneous Provisions) Act, a new model of care is required to address decision-making for abortion for persons without the capacity to provide consent.

The bill will introduce a substitute decision-making scheme into the Guardianship and Administration Act for these circumstances. Currently, under the Health (Miscellaneous Provisions) Act, an adult who is unable to give informed consent for an abortion is unable to access abortion except in emergency situations. The bill will enable relevant parties to apply to the State Administrative Tribunal to make the decision on behalf of a patient who is unable to make reasonable judgements in respect of an abortion proposed to be performed on them. In situations in which the patient has a guardian, an application to the SAT will still be required. This model is consistent with that in other Australian jurisdictions in which the consent of the guardian is replaced with that of a tribunal for certain medical procedures.

The bill will remove statutory provisions in the Health (Miscellaneous Provisions) Act and the Children's Court of Western Australia Act that require parental involvement when a dependent minor seeks an abortion. Under the existing legislation, a dependent minor is a person under 16 years of age who is supported by a parent or guardian. Currently, Western Australia is the only jurisdiction in which minors, regardless of their maturity, are required to meet a higher standard of informed consent for abortions compared with other medical care. The Health (Miscellaneous Provisions) Act prohibits dependent minors from giving informed consent unless their parent or guardian has been informed of their intent to access abortion and has been given the opportunity to participate in counselling and decision-making processes. Currently, the only pathway to access care for a dependent minor who is unable or unwilling to inform their parent or guardian is by making an application to the Children's Court. The bill will remove this statutory limitation, recognising the concept of the mature minor, also referred to as Gillick competence, whereby a young person has sufficient understanding and intelligence to consent to their own medical treatment.

Medical practitioners are well versed in processes to determine the decision-making capacity of children. Removal of the statutory limitation will ensure that WA's settings are aligned with those in other jurisdictions in which informed consent and decision-making capacity is considered for mature minors. It also recognises that there are a range of circumstances in which parental notification poses a safety risk to the child or is inappropriate or impractical. In the event that there is doubt about a child's competence to make a decision regarding abortion, the child will be able to choose to include their parent or guardian in the decision-making. The registered health practitioner or hospital involved will be able to obtain consent from the child's parent or guardian, pursuant to proposed section 202MM. Currently, parents are able to provide consent for a child for most medical procedures;

however, this ability is confirmed in the bill to avoid any doubt that may arise due to an unsettled position in the common law with regard to abortion. In situations in which the child does not wish for parental involvement, or the practitioner is of the view that the parent or guardian is not acting in the best interests of the child, the registered health practitioner can make an application to the Supreme Court or Family Court to determine the course of action. This is consistent with other jurisdictions.

Information management protection: The bill will introduce a new framework for the collection, use, management and disclosure of abortion information. Proposed sections 202MP and 202MQ of the Public Health Act will enable the Chief Health Officer to direct certain persons to provide information pertaining to abortions. The old reporting provisions under the Health (Miscellaneous Provisions) Act will be replaced with the new model, which will more appropriately reflect that although the collection of abortion information is necessary for certain purposes, it is not a means by which parties who are neither patients nor service providers can attempt to seek personal health information. It is intended that the information collected will be used to enable the provision, monitoring, planning and evaluation of health services; compile and publish general or statistical information relating to abortion; enable health research or education and training relating to abortion, including the use of abortion drugs or services; and monitor and enforce compliance with the Public Health Act. Under the new provisions, the Chief Health Officer may approve the type of information and means for the collection of information. Identifying particulars of the patient or registered health practitioner cannot be provided. The information would avoid specific details, with any demographic and medical criteria collected being broad so that patients and doctors cannot be identified.

The bill will amend the Freedom of Information Act to create an exemption from disclosure regarding the identity of a person on whom an abortion has been performed, or a person who has performed or assisted in the performance of an abortion. The amendment will preclude neither a patient from accessing their own health information, including the identity of the health practitioner who performed the abortion, nor a health practitioner from obtaining information about the procedure that contains their own identifying information. The purpose of these amendments is to guarantee exemption from disclosure without relying on the personal information exemption in clause 3 of schedule 1 of the Freedom of Information Act, which requires a decision to be made on whether disclosure is in the public interest and does not provide an exemption for health practitioners performing an abortion.

Reportable deaths: The bill will amend the Coroners Act to clarify that when a baby is born alive following a lawful abortion and then dies, the death will not be a reportable death under the act. It is not appropriate to require a coronial or police investigation of an expected and closely planned death, risking further traumatisation of families.

The reform of abortion laws in WA is long overdue. It is very important to not only me, but also, as the consultation shows, the people of Western Australia. I would like to add my thanks to those expressed by the minister to thank the public servants who have worked incredibly hard to develop this bill. I extend particular thanks to officers, almost all of whom are women, at the Departments of Health and Justice, Parliamentary Counsel's Office and the State Solicitor's Office.

This bill addresses a genuine and often incredibly difficult and personal choice. I ask each member of Parliament to keep the wishes of their constituents in mind when voting on this bill.

Pursuant to standing order 126(1), I advise that this bill is not a uniform legislation bill. It does not ratify or give effect to an intergovernmental or multilateral agreement to which the government of the state is a party; nor does this bill, by reason of its subject matter, introduce a uniform scheme or uniform laws throughout the commonwealth.

With that, I commend the bill to the house and table the explanatory memorandum. I also table a copy of the *Abortion legislation reform: Community consultation summary report* of April 2023, which was the outcome of the discussion paper proposal for reform of abortion legislation in WA.

[See papers 2449 and 2450.]

Debate adjourned, pursuant to standing orders.

House adjourned at 6.29 pm