

Report on the Statutory Review of the Abortion Law Reform Act 2019

September 2024

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1.0 Executive Summary

The *Abortion Law Reform Act*¹ (Act) commenced on 2 October 2019 and modernised the law of abortion in NSW by generally decriminalising abortion and instead treating abortion as a health issue. The Act establishes a health centred approach for pregnancy termination, supports a woman's right to reproductive health, and provides clarity and safety for health practitioners providing abortions.²

The Act requires the Minister to conduct a review of the operation of the Act (the Review) and provide the report to the Presiding Officer of each House of Parliament (the Report), within 5 years after the commencement of the Act.

In November 2023, the Minister for Health provided approval for the Ministry of Health (the Ministry) to commence the Review. The Review considered the operation of the Act since its commencement, with particular consideration given to the following:

- Eligibility and requirements of health practitioners to provide terminations, including:
 - who can perform a termination,
 - requirements to provide information about counselling, and
 - requirements related to conscientious objection.
- Notification requirements by health practitioners as outlined in section 15 of the Act.

The Review has been informed by 35 written submissions from key stakeholder groups, including local health districts and speciality health networks, NSW Health Pillars and non-government organisations (Appendix 2). This included organisations directly involved in the operation of the Act and organisations that support and represent health practitioners. The Review was also informed by expert advice from the NSW Health Safe Access to Abortion Care Working Group.

Analysis of the submissions indicates that overall, the Act is operating well with regards to improving legislative access and treating termination of pregnancy as a health issue. Respondents report that the Act has resulted in a more supportive environment for women to access abortion care, and for clinicians to provide abortion care, without the fear of criminal prosecution. This has led to a reduction in stigma in both community and healthcare settings.

It is noted that some submissions provided content that was outside the scope of the Review. The Ministry will consider this content in relation to access and pathways to abortion care.

Based on the analysis of the submissions that have formed this Report, it is recommended that:

1. The Government consider amending the Act to allow nurse practitioners, endorsed midwives and other prescribed registered health practitioners to perform medical terminations.
2. The Ministry of Health explore ways to increase understanding and awareness of section 9 of the Act¹ in order to balance the rights of practitioners with a conscientious objection, with the rights of women to receive timely care and treatment. This could include a review of current (and if necessary, the development of new) policy documents and training related to termination of pregnancy.
3. The Ministry of Health review the data notification requirements to consider how this may be improved to ensure data is consistently reported and of sufficient quality, to support service planning and, if necessary, update.

In this Report, the terms ‘woman/women’ are used. The use of these terms is not meant to exclude those who seek abortion care and do not identify as female. The Ministry of Health acknowledges that it is crucial to use the preferred language and terminology as described and guided by each individual person when providing care. The use of individualised language promotes the delivery of safe and respectful care.

2.0 Recommendations

No.	Recommendation	Requires legislative amendment
1	The Government consider amending the Act to allow nurse practitioners, endorsed midwives and other prescribed registered health practitioners to perform medical terminations.	Yes
2	The Ministry of Health explore ways to increase understanding and awareness of section 9 of the Act ¹ in order to balance the rights of practitioners with a conscientious objection, with the rights of women to receive timely care and treatment. This could include a review of current (and if necessary, the development of new) policy documents and training related to termination of pregnancy.	No
3	The Ministry of Health review the data notification requirements to consider how this may be improved to ensure data is consistently reported and of sufficient quality, to support service planning and, if necessary, update.	No

3.0 Introduction

The Act commenced on 2 October 2019.¹ The Act amended the *Crimes Act 1900* (Crimes Act) to repeal the provisions of that Act relating to termination of pregnancy and to abolish the common law offences relating to termination of pregnancy. The Act ensures termination of pregnancy is treated as a health issue. The Act establishes a health centred approach for pregnancy termination, supports a woman's right to reproductive health, and provides clarity and safety for health practitioners providing abortions.²

The NSW Health Policy Directive *Framework for Termination of Pregnancy in New South Wales* (PD2021_018), provides a framework to support registered health practitioners in the provision of termination of pregnancy services in NSW in accordance with the Act.³

Under the Act and the Crimes Act, it remains an offence in NSW for an unqualified person (being a person who is not a medical practitioner or certain registered health practitioner assisting a medical practitioner) to perform a termination on another person.^{1,4} However, the Review is being conducted during a time when the Commonwealth and other states and territories have recognised that terminations can be performed by certain registered health practitioners other than a medical practitioner.

- In August 2023, the Therapeutic Goods Administration (TGA) and Pharmaceutical Benefits Scheme (PBS) amended prescribing and dispensing restrictions of MS-2 Step® (a two-part medical abortion medication).^{5,6} The TGA and PBS changes:
 1. Removed the need for prescriber registration, mandatory training and certification for MS-2 Step® for medical abortions.
 2. Removed the requirement for pharmacists to be registered to dispense MS-2 Step®.
 3. Expanded registered health practitioners that can prescribe MS-2 Step®:
 - Subject to State and Territory legislative and regulatory requirements, registered health practitioners (other than medical practitioners) with appropriate qualifications, training and lawful authority (such as nurse practitioners and endorsed midwives) may be able to prescribe MS-2 Step® to perform a termination up to 63 days gestation.⁵
 - MS-2 Step® is now subsidised through the PBS for prescribing by nurse practitioners and endorsed midwives, in addition to medical practitioners.⁷
- Legislation in Queensland, Western Australia and the Australian Capital Territory has reflected this change (as of 25 July 2024).^{8,9,10}

4.0 Methodology of the Review

Section 17 of the Act¹ requires the Minister to conduct a review of the operation of the Act and provide the report to the Presiding Officer of each House of Parliament, within 5 years after the commencement of the Act.

In November 2023, the Minister for Health provided approval for the Ministry to commence the Review.

4.1 Scope

The review considered the operation of the Act to determine what has worked well, what has not, and what should be considered for change. This included:

- Eligibility and requirements of health practitioners to provide terminations, including:
 - who can perform a termination,
 - requirements to provide information about counselling, and
 - requirements related to conscientious objection.
- Notification requirements by health practitioners as outlined in section 15 of the Act¹.

The Review's scope did not include examination of issues related to access or policy documents.

4.2 Consultation process

To inform the Review, a comprehensive consultation process was completed. The Ministry designed the consultation process and questions in partnership with key internal and external stakeholders, including the NSW Health Safe Access to Abortion Care Working Group.

In accordance with the scope of the Review, written submissions were sought from key stakeholder groups directly involved in the operation of the Act and organisations that support and represent health practitioners. The Review was also informed by expert advice from the NSW Health Safe Access to Abortion Care Working Group.

The Ministry and the NSW Health Safe Access to Abortion Care Working Group identified 47 key stakeholders (Appendix 1) who were sent the consultation questions (Appendix 2). To ensure a strong participation rate, the Ministry sent reminder emails and provided an extension to several stakeholders upon request.

35 written submissions (74% participation rate) were received and analysed as part of the Review.

4.3 Analysis of submissions

Thematic and sentiment analysis was used to identify and interpret common themes and issues (in scope for consideration as part of the Review), as well as overall stakeholder sentiment in response

to these themes, that have emerged since the commencement of the Act.

This Report has been prepared to detail the findings of the Review. Written submissions received in response to the consultation questions, in collaboration with advice from the NSW Health Safe Access to Abortion Care Working Group, have been considered for the development of the Report. Direct quotations from submissions and the NSW Health Safe Access to Abortion Care Working Group have been used in this Report.

5.0 Stakeholder Feedback

5.1 Operation of the Act

The first consultation question considered how the Act has operated, as a whole, since its commencement. Overall, the Act ensures termination of pregnancy is treated as a health issue. This was achieved through amendments to the Crimes Act to repeal the provisions of that Act relating to termination of pregnancy and to abolish the common law offences relating to termination of pregnancy. The Act also establishes a health centred approach for pregnancy termination, supports a woman's right to reproductive health, and provides clarity and safety for health practitioners providing abortions.²

The vast majority of submissions noted that the Act has worked well in operation, by improving legislative access and having abortion treated as a health issue as opposed to a criminal issue, with all 35 respondents showing either neutral (27) or positive (8) sentiments. Most respondents reported that the Act has resulted in a more supportive environment for women to access abortion care, and for clinicians to provide abortion care, without the fear of criminal prosecution. This has reportedly led to a reduction in stigma in both community and healthcare settings.

However, almost all submissions noted that despite these positive changes, it has not always led to improvements in real and equitable access, particularly for women living in regional, rural or remote parts of NSW, Aboriginal women, culturally and linguistically diverse women and women who are socially and/or financially disadvantaged. This is best reflected by the quote:

'law reform has made it easier from a legal perspective to access abortion safely, however barriers to obtaining an abortion still exist'.

Many submissions provided suggestions to address these barriers through amendments to the Act (outlined in sections 5.2 and 5.3 of the Report).

It is noted, the majority of submissions provided feedback suggesting improvements to access through the implementation of strategic policies and programs. One submission articulated the following:

‘law reform has set the foundations for a much larger body of work which is required to now increase access to abortion services. This includes policy, practice and educational change to support a patient’s abortion care’.

These issues are out of scope for this Review; however, they will be considered by the Ministry in relation to access and pathways to abortion care.

After considering the submissions received, the Review has found the Act is operating well with regards to improving legislative access and treating terminations of pregnancy as a health issue. However, it is clear that significant barriers remain for women trying to access an abortion and that amendments to the Act could help reduce these barriers.

5.2 Eligibility and requirements of health practitioners to provide terminations

The second consultation question considered the operation of part 2 of the Act¹ (sections 5 to 11), to determine if it is operating effectively in relation to the eligibility and requirements of health practitioners to perform terminations (within their respective scope of practice).

Part 2 of the Act regulates the conduct of registered health practitioners and contains a range of legislative provisions with regards to the eligibility and requirements of health practitioners when performing a termination of pregnancy.

The majority of submissions noted that the following sections of part 2 of the Act have not worked well in operation, with 33 of the total 35 respondents showing negative (21) or neutral (12) sentiments:

- Section 5 of the Act¹ - limits performance of terminations to medical practitioners only. This is not aligned with recent TGA changes and limits access, particularly in rural and regional NSW (see 5.2a).
- Section 7 of the Act¹ - providing information about counselling (see 5.2b).
- Section 9 of the Act¹ - conscientious objection (see 5.2c).

5.2a - Performance of terminations by registered health practitioners

There was strong support among respondents that section 5 of the Act¹ should be updated in line with the TGA changes that allow registered health practitioners (other than medical practitioners) with appropriate qualifications, training and lawful authority including, but not limited to, nurse practitioners and endorsed midwives, to prescribe MS-2 Step[®] to perform a medical termination.

It was noted that the Act only allows medical practitioners to perform a termination, and respondents reported that it is a barrier to access in NSW. This is reflected in the quote:

‘[allowing] nurse practitioners and endorsed midwives to prescribe medical abortion would increase access significantly, particularly in rural areas’.

There were concerns raised by two stakeholders regarding business and safety risks related to these changes stating:

'we need to make sure [that the definition of who can perform a medical termination of pregnancy] is not watered down because of the obvious risk to businesses such as ours' and

'the diagnosis and exclusion of ectopic pregnancy prior to medical abortion is absolutely vital, but it can be difficult, and if missed prior to medical abortion being commenced, severe, potentially fatal complications may result. We believe that the clinical management of women undergoing medical abortion is beyond the scope of practice for nurses [and endorsed midwives]'

These concerns were not broadly shared, and with respect to clinical safety, other respondents noted that they were:

'not aware of any situations where expansion of eligibility of health practitioners to perform abortions within their scope of practice has led to any negative consequences',

Noting that several other State and Territory jurisdictions have amended their legislation, the NSW Safe Access to Abortion Care Working Group's feedback aligned with suggestions for legislative amendments to implement the TGA changes in NSW.

The Ministry considered the submissions received, advice from the NSW Health Safe Access to Abortion Care Working Group, and recent legislative change in other jurisdictions, Queensland, Australian Capital Territory and Western Australia (in response to the TGA changes). Based on these considerations, the Ministry recommends that the Government consider amending the Act to allow registered health practitioners (other than medical practitioners) with appropriate qualifications, training and lawful authority to be able to prescribe MS-2 Step® to perform a medical termination. The Report notes that consequential changes to section 82 of the Crimes Act will be required to support this recommendation.

In the Ministry's view, appropriately qualified and trained registered health practitioners include nurse practitioners and endorsed midwives. Nurse practitioners and endorsed midwives are registered health practitioners that work both autonomously and collaboratively with other health professionals, within their scope of practice. They are able to prescribe scheduled medicines and request diagnostic investigations, including ultrasounds and pathology.^{11,12,13}

Noting that the scope of registered health practitioners can change over time, there would also be a benefit in including a regulation making power in the Act to prescribe additional registered health practitioners to perform medical terminations. Where it was considered appropriate and in accordance with those practitioners' scope of practice. The ability to provide for additional

registered health practitioners to perform medical terminations in the future will also likely increase access to abortion services. It is noted however, that until such a regulation has passed, implementation of recommendation 1 of the Report would only allow medical practitioners, nurse practitioners and endorsed midwives to perform medical terminations.

Recommendation 1

The Government consider amending the Act to allow nurse practitioners, endorsed midwives and other prescribed registered health practitioners to perform medical terminations.

5.2b - Information about counselling

Section 7 of the Act¹ requires a medical practitioner, before performing a termination, to assess whether it would be beneficial to discuss access to counselling with the woman and, if considered beneficial and the woman is interested, provide information about counselling to the woman. For terminations after 22 weeks, a specialist medical practitioner must provide all necessary information to the woman about access to counselling.

The requirements of section 7 of the Act, related to counselling, were raised frequently throughout the consultation process; however, responses were mixed. Many respondents believe the existing requirements in the Act strike a balance between ensuring that counselling is available for those who need it, without mandating it for all women. This was best represented by one stakeholder who said that:

'mandatory counselling could introduce unnecessary barriers and delays for women seeking terminations, particularly for those who are confident in their decision and do not require additional support, or those who do not have access to it'.

Despite this, some stakeholders did recommend that counselling should be mandated for every woman accessing abortion care, while conversely, other respondents strongly advocated that section 7 of the Act be removed entirely, stating that:

'it is part of routine care'.

Given the mixed nature of submissions received in relation to the counselling requirements of the Act, and that a significant number of stakeholders provided anecdotal evidence that these provisions of the Act are working well, the Ministry considers section 7 of the Act to be operating well in practice and does not recommend any legislative changes. The Ministry considers section 7 of the Act to be balanced, providing clear advice and clarity for registered health practitioners performing terminations, while also minimising potential barriers to access that the provisions could pose if made mandatory.

5.2c - Conscientious Objection

Section 9 of the Act¹ is a provision that sets out the requirements for practitioners with a conscientious objection to termination of pregnancy and seeks to balance the rights of such practitioners with the rights of women to receive timely care and treatment.

The majority of stakeholder groups raised concerns that while the provisions in section 9 of the Act work in theory, they are not necessarily being implemented appropriately, adhered to consistently, and consequently can be a significant barrier to access.

Key stakeholders participating in the consultation process, along with the NSW Health Safe Access to Abortion Care Working Group, provided anecdotal evidence to the Review on the different ways and contexts these challenges have been impacting service delivery, which include (but are not limited to):

- Some providers not adhering to the referral requirements set out under section 9(3) of the Act (which requires the registered health practitioner with a conscientious objection to give information about how to locate a registered health practitioner without a conscientious objection or to transfer the woman to another practitioner without a conscientious objection). This was a particular concern in small regional areas where the only potential provider/s available have a conscientious objection.
- Instances where whole health services/facilities have claimed this section of the Act to avoid providing termination services and care, noting that the Act refers to individual 'registered health practitioners'.
- Cancellation and delays to procedures due to staff assisting a termination of pregnancy having an unknown/undisclosed conscientious objection, including anaesthetic, nursing, midwifery or other theatre staff.

Some stakeholders argued that section 9 of the Act should be amended to include additional detail regarding the duty of care for conscientious objectors, to ensure stronger protections and improved experiences for women accessing abortion care, and to improve compliance with the referral requirements, particularly in areas where another provider is not available.

The NSW Health Safe Access to Abortion Care Working Group agreed that while section 9 of the Act does not always operate well, they strongly advised that legislative change was not the most appropriate way to address this. The NSW Health Safe Access to Abortion Care Working Group believes that the provisions of section 9 of the Act itself are sensible and appropriate, and noted that most of the issues are related to how the Act has been implemented or adhered to by individuals and organisations. The NSW Health Safe Access to Abortion Care Working Group considered that the most effective way to manage the challenges related to conscientious objection is through improvements to policy documents and training rather than legislative amendments. This

is reflected by the quote:

'changes to the Act will not change attitudes towards conscientious objection. We need to put it in local context [to better understand] how we can improve access and support clinicians, rather than [changing] what the Act says about conscientious objection'.

After considering this issue and the need for an appropriate balance between the rights of registered health practitioners with a conscientious objection and the rights of women to receive timely care and treatment, this Report considers the provisions in section 9 of the Act to be sensible and balanced. While it is clear that section 9 of the Act may not always operate consistently, amendments to the Act are not recommended. It was noted that improved guidance for registered health practitioners may be useful to ensure that section 9 of the Act is appropriately understood and applied. It is therefore recommended that the Ministry explore ways to increase understanding and awareness of section 9 of the Act. This could include a review of current (and, if necessary, the development of new) policy documents and training (see Recommendation 2 below).

Recommendation 2

The Ministry of Health explore ways to increase understanding and awareness of section 9 of the Act¹ in order to balance the rights of practitioners with a conscientious objection, with the rights of women to receive timely care and treatment. This could include a review of current (and if necessary, the development of new) policy documents and training related to termination of pregnancy.

5.3 Medical practitioners to provide information about terminations

The final consultation question considered the operation of section 15 of the Act¹, which requires a medical practitioner who performs a termination of pregnancy to notify the Secretary of the Ministry within 28 days. Information provided to the Secretary must not include particulars that would allow the woman to be identified. The Ministry has a secure online notification form to assist compliance with this section.¹⁴

Most submissions noted that section 15 of the Act has not worked well in operation, with 34 of the total 35 respondents showing negative (17) or neutral (17) sentiments.

5.3a - Notifying NSW Health via secure online notification form

Almost all submissions received as part of the consultation process noted significant issues related to the reporting requirements of the Act. The key concerns raised were that the requirements are onerous to complete and add another unnecessary barrier to access, as there is no defined purpose or clear benefit to reporting. There was also substantial anecdotal evidence to suggest that

reporting is not being routinely completed, raising concerns about the accuracy and quality of the data. Furthermore, the data cannot be cleaned or verified against medical records to ensure data accuracy and validity. This is reflected in the following quotes:

‘the process is cumbersome and difficult to use for reproductive health facilities who see patients from all over NSW’ and

‘the accuracy of data on terminations is questionable, and it is not clear as to the benefit of reporting. In the absence of a defined purpose for reporting it is recommended that this requirement cease’.

The NSW Health Safe Access to Abortion Care Working Group agreed with the above and noted that even motivated clinicians struggle to see value in reporting, due to the known inconsistency of reporting across the system and given that the data is not actively being used to benefit service delivery. The group noted that access to timely and accurate data about terminations or any health procedure assists service providers with planning for future service needs.

It is noted that the collection of accurate termination data has historically been difficult due to a range of reasons, including:

- stigma associated with terminations, and
- the relevant clinical coding and Medicare Benefits Schedule (MBS) item numbers used for terminations of pregnancy are also used for other procedures, including pregnancy loss, evacuation of the contents of the gravid uterus and curettage of uterus for incomplete miscarriages.¹⁵

This makes it not possible to quantify the number of terminations based on MBS claims accurately. In addition, National Health Reform Data in public hospitals does not distinguish between medical and surgical terminations.¹⁵

These data issues were also identified in the 2022 Australian Government Senate Inquiry Report *Ending the postcode lottery: Addressing barriers to sexual, maternity and reproductive healthcare in Australia*, which recommended that the Australian Government:

commissions work to improve its collection, breadth, and publication of statistical data and information regarding sexual and reproductive healthcare, particularly in relation to pregnancy terminations, both medical and surgical, and contraceptive use across Australia (Recommendation 22).¹⁶

After considering the issues and the need for consistent data, this Report considers that the notification of termination of pregnancy remains an important mechanism for obtaining data about terminations in the absence of reliable data collection through other methods (for example, MBS item numbers or clinical coding). Therefore, no changes to the legislation are recommended.

However, it is recommended that the Ministry consider data requirements to ensure that data is consistently reported and of sufficient quality, to support service planning and, if necessary, update (see Recommendation 3 below). This should align with any work led by the Australian Government to improve the collection, breadth and publication of termination of pregnancy data.

Recommendation 3

The Ministry of Health review the data notification requirements to consider how this may be improved to ensure data is consistently reported and of sufficient quality, to support service planning and, if necessary, update.

6.0 Summary

The Report finds that overall, the Act is operating well with regards to improving legislative access and treating terminations of pregnancy as a health issue. However, access issues and barriers to care remain. The Report makes 3 recommendations (see below), including a proposal for legislative amendment to allow additional registered health practitioners to prescribe MS-2 Step® to perform a medical termination, to help improve access:

1. The Government consider amending the Act to allow nurse practitioners, endorsed midwives and other prescribed registered health practitioners to perform medical terminations.
2. The Ministry of Health explore ways to increase understanding and awareness of section 9 of the Act¹ in order to balance the rights of practitioners with a conscientious objection, with the rights of women to receive timely care and treatment. This could include a review of current (and if necessary, the development of new) policy documents and training related to termination of pregnancy.
3. The Ministry of Health review the data notification requirements to consider how this may be improved to ensure data is consistently reported and of sufficient quality, to support service planning and, if necessary, update.

7.0 Appendix 1 - Consultation questions

The objectives of the review are to consider the operation of the Act since its commencement, with particular consideration given to the following:

- eligibility and requirements of health practitioners to provide terminations, including:
 - who can perform a termination
 - requirements for information about counselling
 - requirements for conscientious objection.
- Notification requirements by health practitioners as outlined in Section 15 (s15) of the Abortion Law Reform Act 2019¹.

Relevant Part or Section/s of the Act	Question/s
All	With regards to the operation of the <u>Abortion Law Reform Act 2019¹</u> , what has worked well, what has not, and what should be considered for change?
Part 2: Performance of terminations by registered health practitioners <u>Sections 5-11¹</u>	Is <u>Part 2 of the Act¹</u> (s5-s11), in relation to the eligibility and requirements of health practitioners to perform terminations (within their respective scope of practice), operating effectively? Are there any suggested changes?
Part 4: Medical practitioners to provide information about terminations <u>Section 15¹</u>	Is the operation of <u>Section 15 of the Act¹</u> working in practice? Are there any suggested changes?

8.0 Appendix 2 - List of stakeholders engaged in the review of the operation of the Act

Local Health Districts	<ul style="list-style-type: none"> Chief Executives of all districts (14/15 responded*)
Speciality Health Networks	<ul style="list-style-type: none"> Chief Executive of St Vincent's Health Network Sydney Chief Executive of Justice Health & Forensic Mental Health Network
Clinical Excellence Commission	<ul style="list-style-type: none"> Chief Executive Officer
NSW Ministry of Health	<ul style="list-style-type: none"> Chief Nursing and Midwifery Officer Executive Director, Centre for Epidemiology and Evidence
Primary Health Networks (PHN)	<ul style="list-style-type: none"> Chief Executive Officers of each PHN*
Peak Bodies/Organisations	<ul style="list-style-type: none"> Australian Medical Association NSW Royal Australian College of General Practitioners Royal Australian and New Zealand College of Obstetricians and Gynaecologists NSW Nurses and Midwives Association Australian College of Midwives Australian College of Rural and Remote Medicine* Australian Primary Health Care Nurses Association Australian Women's Health Nurse Association Australian College of Nurse Practitioners* Rural Doctors Network* Women's Health NSW (peak body representing Women's Health Centres)* Australasian Sexual Health and HIV Nurses Association Aboriginal Health & Medical Research Council
Private Providers	<ul style="list-style-type: none"> Private hospitals: <ul style="list-style-type: none"> Ramsay Health Care* Healthe Care* Healthscope* Calvary Health Care* St Vincent's Private Hospitals* MSI Australia (formerly Marie Stopes Australia) Family Planning Australia (NSW) Clinic 66 Gynaecology Centres Australia (GCA) Macquarie Street Clinic (or Contraceptive Services Clinic) The Private Clinic Blue Water Medical Options Clinic*

*Did not respond to invitation to provide a submission despite reminder email and being provided with extensions to due dates.

9.0 References

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