



**LEGISLATIVE ASSEMBLY**  
FOR THE AUSTRALIAN CAPITAL TERRITORY

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STANDING COMMITTEE ON HEALTH AND COMMUNITY WELLBEING  
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## Submission Cover Sheet

Inquiry into Abortion and reproductive choice in the ACT

**Submission Number: 48**

**Date Authorised for Publication: 6 September 2022**



## Australian Nursing and Midwifery Federation – ACT Branch

### Submission for the ACT Legislative Assembly inquiry into abortion and reproductive choice in the ACT

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#### Introduction

In light of the US Supreme Court overturning of the decision of *Roe v. Wade*, the Australian Nursing and Midwifery Federation – ACT Branch (ANMF) recognises the prerogative of the ACT Legislative Assembly to review and consider the current ACT legislative framework governing abortion and reproductive choice in the ACT.

In the ACT, abortion is predominantly regulated under Part 6 of the *Health Act 1993* (ACT).

On our review, current ACT legislation is largely inconsistent with other Australian jurisdictions. In particular, the legal protections afforded to nurses and midwives who may assist in the provision of abortions appear limited, with nurses and midwives potentially at professional (and other) risk if found to be assisting with the relevant process or procedure.

The ANMF notes that the inquiry also has cause to review both accessibility and affordability of abortion and reproductive choice. As such, the ANMF provides its relevant findings, in respect of these matters, for consideration of the committee.

#### ACT Legislative Framework

We understand that abortion and reproductive choice is regulated in the various States and Territories as follows:

- **New South Wales:** *Abortion Law Reform Act 2019* (NSW); *Public Health Act 2010* (NSW) and Framework for Termination of Pregnancy in New South Wales [PD2021\_018] 2021
- **Northern Territory:** *Termination of Pregnancy Law Reform Act 2017* (NT); *Termination of Pregnancy Law Reform Regulations 2017* (NT) and NT Termination of Pregnancy Policy
- **Queensland:** *Termination of Pregnancy Act 2018* (Qld)
- **South Australia:** *Termination of Pregnancy Act 2021* (SA); *Termination of Pregnancy Regulations 2022* (SA); *Health Care Act 2008*
- **Tasmania:** *Reproductive Health (Access to Terminations) Act 2013* (TAS)
- **Victoria:** *Abortion Law Reform Act 2008* (VIC) and *Public Health and Wellbeing Amendment (Safe Access Zones) Act 2016* (VIC)
- **Western Australia:** *Criminal Code Act Compilation Act 1913* (WA); *Health (Miscellaneous Provisions) Act 1911* (WA) and *Public Health Amendment (Safe Access Zones) Act 2021* (WA)

In the ACT, abortion and reproductive choice is predominantly regulated under Part 6 of the *Health Act 1993* (ACT) (the Act).

On review, the ANMF considers that although the Act appears to provide the broadest right to access abortion of all Australian jurisdictions, the Act may not adequately protect the roles and rights of those who may provide such services, including nurses and midwives. The ANMF outlines its reasoning, in respect of the Act, below.

Further, the ANMF also notes that Abortions (Part 6) of the Health Act 1993 is the only specific lawful medical service that is considered and regulated by this Act.

As such, and consistent with other jurisdictions, the ANMF requests the committee genuinely review whether the existing legislative framework is appropriate and give thought to a separate recommendation of enacting a specific abortion and reproductive choice Act (having particular regard to the legislative practice of the majority of other jurisdictions).

### **Section 81 – Offence-unauthorised supply or administration of abortifacient**

Section 81(1) of the Act creates an offence for any person who is not a doctor to supply or administer medication (an abortifacient) for the purpose of ending a pregnancy, with a maximum penalty of five years imprisonment. Subsection (2) provides for an exemption for pharmacists supplying medication in accordance with a prescription.

On this drafting, it is not unreasonable to conclude that potential professional, or associated legal, consequences may arise for nurses and midwives in the ACT as the provision or administration of medication under the direction of a medical practitioner may fall within the scope of practice of both nurses and midwives.

In contrast, this issue appears to have been ameliorated within other jurisdictions (Northern Territory, Queensland, South Australia, New South Wales, and Victoria) where the role of nurses and midwives to assist in the provision and administration of medication is apparently protected.

For example, the NSW *Abortion Law Reform Act 2019* sets out the following:

#### (8) Registered health practitioners who may assist

- (1) A person who is a medical practitioner, nurse, midwife, pharmacist or Aboriginal and Torres Strait Islander health practitioner, or another registered health practitioner prescribed by the regulations, may, in the practice of the person's health profession, assist in the performance of a termination on a person by a medical practitioner.
- (2) However, subsection (1) does not apply in relation to a termination that the assisting registered health practitioner knows, or ought reasonably to know, is being performed other than as authorised under section 5 or 6.
- (3) A reference in this section to assisting in the performance of a termination includes dispensing, supplying or administering a termination drug on the instruction of the medical practitioner.

The provision or administration of medication on direction of a medical practitioner will, in general terms, fall under the scope of practice of a nurse or midwife. As such, it is arguable that the prohibition under section 81

not only renders the Act inconsistent with legislative reform in other jurisdictions but is incompatible with the professional practice of nurses and midwives.

Without derogating from the need to regulate the provision of abortion care, the ANMF submits that protections parallel to those afforded to healthcare professionals in other jurisdictions should be available to nurses and midwives in the ACT.

### **Section 82 – Offence-unauthorised surgical abortion**

Section 82(1) of the Act creates an offence for any person who is not a doctor to carry out a surgical abortion, with a maximum penalty of five years imprisonment. Subsection (2) provides that the offence does not apply to ‘a person assisting a doctor to carry out a surgical abortion’.

The ANMF notes that the Act fails to define who may constitute ‘a person assisting’, nor what acts constitute ‘assisting’ for the purpose of this section.

Whilst this section may be interpreted to assume nurses and midwives acting within their scope of practice will fall within the definition of ‘a person assisting’ and will therefore be exempt from the s82 offence, it is arguable that express legislative clarity is necessary to ensure appropriate protection for nurses and midwives.

### **Section 84A – Conscientious Objection**

The right of healthcare professionals to refuse to provide or assist in the provision of abortion services on religious or other conscientious grounds is protected by legislation in every Australian jurisdiction. However, the extent to whom these protections apply, and the onus on those objecting to take further steps, vary between jurisdictions. On our review, the availability of the right to conscientiously object in the ACT is among the most restricted within Australian jurisdictions, whilst the onus to take further steps appears among the most lenient.

The right to conscientiously object in the ACT is set out in s84A of the Act and permits an ‘authorised person’ to refuse to prescribe, supply or administer an abortifacient, or carry out or assist in carrying out a surgical abortion. Subsection (5) defines ‘authorised person’ as ‘a doctor or nurse’.

Given this closed definition, it is not unforeseeable that potential professional, or associated legal, consequences may arise for midwives (and other health professionals) in the ACT should they seek to exercise their right to conscientiously object.

Conversely, the right to conscientiously object appears to be significantly more readily available in other jurisdictions, often explicitly safeguarding the rights of nurses and midwives.

The ANMF notes the right extends to all ‘Registered Health Practitioners’ in New South Wales, South Australia, Queensland and Victoria, and all ‘Authorised Health Practitioners’ in the Northern Territory. We further note that Registered/Authorised Health Practitioner is expressly defined to include nurses and midwives in all the corresponding jurisdictions.

Understanding that, in the exercise of their duties, midwives and other health professionals may find themselves assisting in the provision of an abortion, we submit that, as a matter of equity, the right to conscientiously object ought to be prescribed to midwives and other registered health practitioners in the ACT.

### *Duty to inform*

Subsection (4) requires an authorised person who conscientiously objects to inform the person seeking treatment that their refusal to provide an abortion is due to their conscientious objection.

This duty to inform is consistent in all jurisdictions except Western Australia.

Tasmania further requires those conscientiously objecting to provide the person seeking an abortion with information as to where else they can access care, whilst New South Wales, South Australia, Queensland, the Northern Territory and Victoria mandate referral to a practitioner who the objecting practitioner reasonably believes (or, in the case of NT and Victoria, knows) does not conscientiously object to the procedure.

In respect of the duty to inform, the ANMF requests the committee genuinely review whether the existing provisions are appropriately expansive, contemporary, and reflective of both community expectations and clinical best practice (having particular regard to the legislative intent of the majority of other jurisdictions).

### *Emergency Procedures*

Section 84(2)(a) of the Act prevents an authorised person from refusing to perform or assist in the provision of an abortion where the procedure is deemed ‘necessary to preserve the life of the pregnant person’.

In all jurisdictions except Western Australia, the right to conscientiously object is overruled if the procedure is an emergency and necessary to preserve the life of the pregnant person. In Tasmania, the duty is further extended to encompass emergency circumstances where the procedure is required to prevent serious physical harm to the pregnant person, whilst New South Wales, South Australia, and Queensland place the broadest onus, preventing healthcare professionals from exercising a conscientious objection in any emergency.

In respect of conscientious objection, the ANMF acknowledges the legislative primacy given to the health of the pregnant person and requests the committee genuinely review whether the existing provisions are appropriately expansive, contemporary and reflective of both community expectations and clinical best practice (having particular regard to the legislative intent of the majority of other jurisdictions).

### **Section 86 – Protected Areas**

Section 86 of the Act mandates the declaration of a protected area around all approved medical facilities performing surgical abortions and allows the declaration of a protected area around facilities where abortifacients are prescribed, supplied, or administered. Subsection (3)(a) requires the declared protected area be at least 50 metres from any point of the protected facility.

Following recent legislative reform in South Australia and Western Australia, protected safe access zones around facilities providing abortion services are now legislated in every jurisdiction. We note that in every jurisdiction other than the ACT, protected areas are required to be set at a minimum of 150 metres from any point of the protected facility.

The ANMF understands that the declaration and imposition of protected safe access zones around facilities providing abortion services was recognised by the High Court as important in its protection of the safety, wellbeing, privacy and dignity of persons accessing premises at which abortions are provided and ensuring unimpeded access to lawful medical services (see *Clubb v Edwards; Preston v Avery* [2019] HCA 11).

## **Section 87– Offence-Prohibited Behaviour in or in relation to Protected Area**

Section 87 of the Act creates an offence to engage in prohibited behaviour in or in relation to a protected area, with a maximum penalty of six months imprisonment. Prohibited behaviour and protected area are defined in sections 85 and 86 respectively.

To constitute an offence under section 87, the person engaging in the prohibited behaviour must have done so with the intention of preventing a person from either having an abortion, providing a surgical abortion, or prescribing, supplying, or administering an abortifacient.

As aforementioned, the capacity to carry out an abortion is strictly limited to doctors (medical practitioners) in the ACT, with the exception of persons assisting a doctor in a surgical abortion.

On review of the current drafting, it is unclear (and reasonably open to argument) as to whether the protections against prohibited behaviour afforded under sections 85-87 apply to nurses and midwives (and other health professionals).

Although the ANMF would, where necessary, consider that such a matter may also be constituted as a work health and safety matter (and dealt with pursuant to the appropriate legislative framework), the ANMF strongly urges the committee (through recommendation) to ensure that the legislation is drafted to unequivocally afford nurses and midwives protection from prohibited behaviour.

### **Access and Affordability Matters**

#### **Gestational limits**

Dissimilar to other Australian jurisdictions, the Act does not set any gestational limitation on pregnant people seeking abortion services.

Whilst this appears to afford the broadest right of access within Australia, the actual gestational limitation until which abortion services can be accessed in the ACT remains unclear. According to the ACT Government – Health Directorate website, abortion services can be accessed in the ACT up to 16 weeks gestation.<sup>1</sup> After which, the website suggests pregnant people travel to Sydney to access the services unless they fall within one of the apparently undefined ‘specific cases’ which entitles people to later gestation treatment at Canberra Hospital. Unlike other jurisdictions, the ACT does not appear to have designated a Regulation governing the implementation of Part 6 of the Act and, hence, the genesis (and veracity) of the information available on the relevant website, relating to gestational limitation, is unclear.

In respect to other jurisdictions, Western Australia sets the strictest limitation, requiring any abortion sought up to 20 weeks gestation be approved by two doctors prior to being performed, and any abortion occurring from 20 weeks to be approved by six doctors. Tasmania sets the limit at 16 weeks, New South Wales, Queensland and South Australia at 22 weeks, and Northern Territory and Victoria at 24 weeks, however all may be accessed at later gestations (subject to constraints) with approval of a second doctor.

#### **Non-legal barriers to abortion**

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<sup>1</sup> ACT Government | Health. (2022). *Abortion Access*. Accessed 22 August 2022, from <https://www.health.act.gov.au/services-and-programs/sexual-health/abortion-access>.

The ANMF notes that a recent Monash University study<sup>2</sup> into the barriers to abortion access in Australia found that despite legislative reform dismantling many of the legal barriers to abortion, non-legal barriers continue to prevent pregnant people from accessing abortion services. The study highlighted three primary non-legal barriers: financial barriers, geographical barriers, and a lack of qualified practitioners. Interestingly, the ANMF understands that the study found that the COVID-19 pandemic had the effect of amplifying these barriers.

Following the implementation of the *Health (Improving Access to Abortion) Amendment Act 2018* (ACT), pregnant people may access medical abortions at minimal cost via telehealth consults and bulk-billing General Practitioners (GP). However, in practice these services can be difficult to access given the well-known local issues regarding bulk-billing, and that telehealth consults may require various paid consults before abortifacients will be prescribed. Further, the ANMF understands (on its own research) that there is no publicly available information outlining which medical practitioners/practices are able and willing to perform abortions.

### Recent ACT Government commitment

Finally, the ANMF recognises the recent announcement by the ACT Government of its intention to provide free access to medical and surgical abortions up to sixteen weeks gestation to all ACT residents from 2023. Whilst the ANMF applauds the Government's commitment to improving accessibility to health services in the ACT, the ANMF requests that the Government take care in the development of this program, by ensuring the program appropriately addresses current barriers (as outlined in the Monash study).

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### Conclusion and Recommendations

Upon review, the ANMF submits that the current regulation of abortion and reproductive choice under Part 6 of the *Health Act 1993* (ACT) is largely inconsistent with that of other Australian jurisdictions. Whilst the rights of pregnant people to reproductive choice appears relatively similar, the same cannot be said for those providing these services. In particular, the legal protections afforded to nurses and midwives who may assist in the provision of abortions may be limited, with nurses and midwives potentially at disproportionate professional (and associated legal) risk.

As such, and consistent with this submission, the ANMF submits that the Committee recommend the following:

- 1. Provide greater protection for nurses and midwives, particularly in respect of Sections 81, 82 and 87 of the Act, consistent with other jurisdictions; and***
- 2. Enact a dedicated Act to regulate abortion and reproductive services in the ACT.***

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<sup>2</sup> Sifris, R., and Penovic, T. (2021). Barriers to abortion access in Australia before and during the COVID-19 pandemic. *Women's Studies International Forum*, 86 [102470]. <https://doi.org/10.1016/j.wsif.2021.102470>.