Human Rights Law Centre

Safe access to abortion in Western Australia

Response to the Department of Health Discussion Paper on safe access zones

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Freedom. Respect. Equality. Dignity. Action.

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Human Rights Law Centre

The Human Rights Law Centre s an independent and not-for-profit organisation that uses a strategic combination of legal action, advocacy, research, education and UN engagement to protect and promote human rights in Australia and in Australian activities overseas.

We have advocated for the decriminalisation of abortion, improved access to abortion care, and safe access zone laws around Australia. Most recently, we collaborated with pro-choice partners to secure abortion decriminalisation in Queensland and safe access zones in NSW, and we intervened in the High Court challenge to Victoria's safe access zone laws

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1. Executive Summary

1. No one should have to run a gauntlet of abuse to see their doctor. Until the introduction of safe access zones, this was the reality for thousands of women around Australia trying to access abortion services. Western Australia is one of only two states without safe access zone laws.

2. Safe access zones protect the privacy, safety, dignity and wellbeing of patients and staff accessing abortion services by prohibiting the harmful behaviours of anti-choice activists outside health clinics. They work where other laws failed. In a recent landmark judgment, the High Court upheld the constitutional validity of safe access zone laws in Victoria and Tasmania.[1]

3. We welcome the Western Australian Government's commitment to introducing safe access zone laws and the opportunity to comment on the Department of Health's Discussion Paper.

4. We urge prompt action because every day that women are forced to run a gauntlet of intimidation and abuse to access healthcare is another day that the Government is failing in its duties to Western Australian women. The current attempt to manage harmful anti-abortion behaviour outside the Midland and Nanyara clinics through the *Public Order in Streets Act 1984* (WA) is not working.

5. Western Australia has a duty to guarantee safe access to abortion services and post-abortion care.[2] The UN Committee on the Elimination of Discrimination Against Women has recommended the decriminalisation of abortion in all cases. Relevantly, it has said that the abuse and mistreatment of women and girls seeking sexual and reproductive health information, goods and services is gender-based violence.[3]

6. **Western Australia should introduce laws that create 150m buffer zones around clinics and hospitals that provide abortion services, modelled on Victoria's laws, as soon as possible**. The zones should operate at all times and prohibit the same behaviours as the Victorian laws. Victoria's laws are sensible and proportionate and strike the right balance between freedom of expression and the right of women to access healthcare safely.

7. The Department's Discussion Paper is concerned only with safe access zones. However, **we urge the Government to also take steps to remove abortion from the criminal law and to amend provisions in health laws that treat women as incompetent decision-makers and act as barriers to the best possible reproductive health outcomes.** The minimum steps that need to be taken to ensure WA's laws better promote women's reproductive health and rights are outlined at the end of this submission.

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[1] *Clubb v Edwards; Preston v Avery* [2019] HCA 11.
[2] Committee on Economic, Social and Cultural Rights, *General comment No 22: Sexual and Reproductive health* E/C. 12/GC/22 (2016) [28].
[3] Committee on the Elimination of Discrimination Against Women. *General Recommendation No 35: Gender-Based Violence against Women, Updating General Recommendation No. 19, UN Doc.* CEDAW/C/GC/35 (2017).

8. We note that transgender men and gender diverse people experience pregnancy. This submission refers both to pregnant people and women at different points, however our recommendations should be understood as gender-inclusive. We urge the Department to make recommendations that are gender-inclusive.

2. Responses to consultation questions

Do you support safe access zones around premises that provide abortion services?

9. The Human Rights Law Centre supports safe access zones around premises that provide abortions and urges the Government to introduce laws as soon as possible, modelled on the Victorian laws.

10. No one should have to forgo their privacy, safety and dignity to see their doctor. But this remains a reality for patients and staff of clinics that provide abortions services in Western Australia. For example, at the Midland Marie Stopes Clinic, staff have been followed to their car. Patients are being forced to stop their cars by anti-abortion activists and withstand people trying to stuff medically misleading pamphlets, rosary beads and baby booties through car windows. Outside the Nanyara Clinic in Rivervale, groups of up to 20 people gather outside the clinic on a weekly, or more regular, basis. They chant, pray and display placards with graphic and disturbing images. Patients have been told they are murdering their baby.

11. Around Australia, women seeking abortions, those supporting them and staff at clinics have been left feeling distressed, angry and traumatised by the intimidating and extreme behaviour of anti-abortion activists outside clinics.[4] In Western Australia, patients of the Midland Clinic have described the behaviour of anti-choice activists as upsetting, "confronting" and "very intimidating". Patients have been left feeling "very upset", "threatened" and "very judged". Women dealing with a violent partners have entered the clinic "almost hysterical" because of the anti-abortion abuse outside the clinic.[5]

12. The management of harmful anti-choice behaviour through a permit system under the *Public Order in Streets Act 1984* (WA) is not working to protect the wellbeing and privacy of women and staff. At the Midland clinic, police recently altered the weekly permit issued to activists from a group called the Helpers of Gods Precious Infants. The permit now requires them to be 4 metres from the entrance of the carpark. This is unsatisfactory because staff and patients can still very much see and hear the verbal attacks against them, which we are told causes great distress. In addition, the graphic and misleading signage used by anti-abortion groups is permitted 1 metre from the entrance.

[4] See discussion in Victorian Parliament, 2 September 2015, referencing the evidence put before the Supreme Court by East Melbourne's Fertility Control Clinic: <http://hansard.parliament.vic.gov.au>.
[5] Register of patient reports compiled by the Midland Marie Stopes Australia Clinic.

13. The permit system under the *Public Order in Streets Act* is also unsatisfactory because it relies on the discretion of the Commissioner of Police or an authorised officer. This may change over time, and result in different and inconsistent permit conditions for different clinics and see clinics with less protection targeted. Further, health clinics have no right under the Act to appeal a permit or permit conditions, however the onus falls on health clinic staff to constantly monitor compliance, while managing the distress of their patients.

A proportionate and justified limitation on the freedom of political communication

14. Safe access zone laws have been enacted in every state and territory except for South Australia and Western Australia.[6] The laws engage the freedom of expression of anti-abortion activists, including the implied freedom of political communication in Australia's Constitution. However, the freedom is not absolute and may be subject to reasonable and proportionate limits.[7] The laws in Victoria and Tasmania were upheld by the High Court in 2019 as a justified limitation on the freedom of political communication.

15. As the High Court has confirmed in the 2019 judgment of *Clubb v Edwards*, Victoria's safe access zone laws are sensible and proportionate and serve a vital purpose – to protect women, and health clinic staff, from violence, harassment, surveillance and obstruction when trying to access a specialist health service.[8] The High Court said that ensuring that women have access to abortion services in an atmosphere of privacy and dignity justifies a geographically-limited burden on the implied freedom of political communication.

16. Judges of the High Court also noted that the freedom of political communication does not entitle people to a captive audience, such as patients seeking health services that they may not be able to access elsewhere.[9] When people cannot simply walk away, there is a greater imperative for protecting their rights. There is also a greater imperative in relation to abortion, given the intensely private and personal nature of these health services and the stigma that has long been attached to abortion.

During what times should safe access zones apply?

17. Safe access zones should apply at all times because people accessing abortion services may need to access the premises at any time – staff in particular may need access to their workplace at different times and should be able to feel safe doing so. Ensuring that the zones apply at all times gives people accessing these services much-needed certainty that they will not be harassed or intimidated by anti-choice activists with extreme views regardless of the

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[6] *Reproductive Health (Access to Terminations) Act 2013* (Tas); *Public Health and Wellbeing (Safe Access Zone) Amendment Act 2015* (Vic); *Health (Patient Privacy) Amendment Act 2015* (ACT); *Termination of Pregnancy Act 2018* (Qld); *Public Health Act 2010* (NSW); *Termination of Pregnancy Law Reform Act 2017* (NT) pt 3.
[7] *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966 (entered into force 23 March 1976) art 19(3). For the implied freedom of political communication in the Australian Constitution, see *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520; *Brown v Tasmania* (2017) 261 CLR 328; *Clubb v Edwards; Preston v Avery* [2019] HCA 11.
[8] *Clubb v Edwards* [2019] HCA 11.
[9] *Clubb v Edwards; Preston v Avery* [2019] HCA 11 [97] (Kiefel CJ, Bell, Keane JJ).

time that they enter or leave a clinic. It also gives anti-choice activists certainty about prohibited behaviour, which is important where criminal penalties apply.

18. This approach is consistent with the laws in Victoria, Tasmania, Queensland, New South Wales and the Northern Territory.

What behaviours should be prohibited within a zone?

19. Western Australia has a legitimate interest in protecting the privacy and safety of women seeking reproductive healthcare at the very moment that their privacy and wellbeing are most vulnerable. In doing so, it is critical that the laws are sensibly written and do not go too far.

20. Western Australia should follow the definition of 'prohibited behaviour' in Victoria's laws, including in relation to penalties.[10] Not only have Victoria's laws been upheld by the High Court, they clearly link the prohibited behaviour with the purposes that safe access zones seek to achieve, and impose a lesser burden on the freedom of political communication than Tasmania's laws (also upheld by the High Court).

21. The proposed definition of prohibited behaviour in the Department's Discussion Paper replicates that which exists in Victoria's laws, which include harassment, interference, threatening or intimidating conduct, hindering, besetting, communications likely to cause distress or anxiety, footpath obstruction and any type of filming or recording. A breach of the prohibitions is an offence, punishable by up to 120 penalty units or 12 months imprisonment.

How far should safe access zones extend?

22. Victoria's laws create zones of 150 metres around premises that provide abortion services. They ensure that patients cannot be harassed, obstructed, threatened or filmed as they walk towards and into health clinics, regardless of whether they drive into the clinic, park on the street or get off public transport and walk.

23. Research into the impact of Victoria's laws has identified that the 150 metre zones have been successful in stopping the individualised targeting of patients and the attempts by anti-abortion activists to influence or deter patients from acting on their private medical decision.[11] They have reduced the fear in staff of activists pretending to be patients and walking into clinics. The zones have also sent a powerful message to women that harassment and intimidation will not be tolerated, while helping to end the stigma long attached to abortion.[12]

24. The High Court, in considering the prohibition on communicating about abortions in Victoria's laws, noted that the prohibition did not stop people communicating their views about abortion in an effective way outside of the 150 metre zones; rather it stopped communications in a

[10] *Public Health and Wellbeing Act 2008* (Vic) s 185B (definition of 'prohibited behaviour').
[11] Ronli Sifris & Tania Penovic, 'Anti-Abortion Protest and The Effectiveness of Victoria's Safe Access Zones: An Analysis' (2018) 44(2) *Monash University Law Review* 317.
[12] Ibid.

zone, that can be seen or heard by a person entering a clinic, and that are reasonably likely to cause anxiety or distress.[13]

25. We note that anti-choice activists have already marked out 50 metres from the Nanyara Clinic, which has an open fence line. They can be clearly seen from the Clinic at the 50m mark and cause distress for staff and patients. It is clear that a 50 metre zone would be insufficient to adequately protect people accessing the clinic.

26. The 150 metre safe access zone should be established by law, which will ensure consistency with Tasmania, Victoria, New South Wales, Queensland and the Northern Territory. Given the sensitive and highly politicised nature of abortion, the creation of safe access zones should not be left to Ministerial declaration, as this could see the intent of the law undermined.

Should there be exemptions to the application of safe access zones?

(a) Conduct occurring at a church or other religious institution

27. Conduct that occurs *inside the building* of a church or other religious institution within a safe access zone could be exempt, however it would be unlikely to be captured within the above definition of 'prohibited behaviour'.

28. Conduct that occurs *outside* and is *visible* to patients seeking abortion services should *not* be exempt because there is a real risk that the intent of the legislation could be deliberately undermined.

29. This strikes the right balance between individuals being able to express their religion and the right of women and pregnant people to access the healthcare they need without being psychologically harmed or intimidated.

(b) Conduct occurring outside Parliament or government buildings

30. We are unaware of any services that provide abortion care that exist within 150 metres of Parliament House in Perth. If Parliament, or a footpath or road immediately outside of Parliament, did fall within a safe access zone, then an exemption should apply to allow citizens to communicate their views to their elected representatives in Parliament. Being able to communicate a desire for law reform to elected representatives is an important aspect of the constitutionally protected freedom of political communication.

31. However, 'government buildings' is a vague and unclear term, which could foreseeably include government health services and undermine the purpose of safe access zones. For this reason, we do not support an exemption for 'government buildings'.

[13] *Clubb v Edwards; Preston v Avery* [2019] HCA 11 [83] (Kiefel CJ, Bell, Keane JJ).

(c) Carrying out of an opinion poll or survey during an election, referendum or plebiscite

32. An exemption for opinion polls or surveys during elections, referendums or plebiscites is *not* appropriate or necessary for the following two key reasons:

    (a) People accessing abortion services should not be subject to opinion polls or surveys about topics related to abortion when trying to act on a private medical decision and enter a health service. An exception that allowed this would undermine the protective purpose of the legislation for weeks at a time during an election, referendum or plebiscite period.

    (b) If Western Australia adopts the approach of Victoria, the surveying or polling of households that fall within a safe access zone could still be carried out, so long as it is done in a manner that doesn't cause anxiety or distress to people accessing an abortion clinic or involve other behaviour prohibited within the zones.

33. If it is decided that such an exemption should be included in the law, it should be limited to opinion polls or surveys that are carried out *with the authority of a candidate* in a state or federal election, referendum or plebiscite only.

Are there other premises that should be protected by safe access zones?

34. The Department's Discussion Paper suggests that safe access zones could also be legislated for needle exchange facilities. In terms of the nature of the problem facing needle exchange facilities, we understand that there have been limited instances of isolated individuals protesting outside facilities in two locations in Western Australia. We have been advised that neither of these two individuals are part of a broader organised effort against needle exchange services, nor are either presently engaged in protesting.

35. The nature of the problem is therefore vastly different to the organised, systemic and long-term activities of anti-abortion groups outside abortion clinics.

36. As noted above, safe access zones do restrict the freedom of political communication, which is one of the few freedoms or rights that exist in the Australian Constitution. Any proposed restriction of the freedom of political communication must be robustly scrutinised, to ensure that it serves a legitimate and important purpose and is reasonably and appropriate adapted to serve that purpose. Aspects of Victoria and Tasmania's safe access zone laws, which are designed to protect people accessing *abortion* services, have withstood robust scrutiny by the High Court of Australia. The High Court's decision does not open the door to safe access zones around other health services without there being a demonstrable need for such laws to protect the safety, privacy, dignity and wellbeing of patients and staff.

37. Based on the information we have gathered about the very limited nature of protests outside needle exchange facilities in Western Australia, safe access zone laws for such facilities cannot be justified.

3. Respecting women's autonomy and removing abortion from the criminal law

Reform of the Criminal Code and Health Act

38. The Department's Discussion Paper asks only whether safe access zones should be put in place to support safe access to abortion services in Western Australia.

39. While we commend the steps being taken to legislate for safe access zones, we also urge the Government to take steps to remove abortion from the *Criminal Code Act Compilation Act 1913* (**Criminal Code**) and to amend the *Health (Miscellaneous Provisions) Act 1911* (**Health Act**) to better promote the autonomy women and pregnant people.

40. Abortion laws were last reformed in Western Australian in 1998. These reforms were an important milestone in the recognition of women's reproductive freedom at the time. However, they have not kept up with the evolution of medical practice, human rights and community values. The laws have become outdated and create a barrier to women accessing timely reproductive healthcare that respects their right to control their bodies.

41. There is an opportunity for the Government to demonstrate its commitment to women's health and equality by taking these minimum steps:

    (a) **Repealing section 199 of the Criminal Code**, which states that abortion is an offence subject to exceptions in the Health Act. While there are broad exceptions that allow abortion in a range of circumstances up to 20 weeks gestation, the use of the criminal law has a chilling effect of women's access to healthcare, particularly for the few needing an abortion after 20 weeks. Western Australia's reliance on the criminal law stands in stark contrast with recent abortion reforms around Australia.

    (b) **Removing the requirement for two doctors to be involved before a person can have an abortion**. The Health Act treats women as incompetent by requiring the involvement of a 'counselling doctor' in addition to the practitioner who performs or assists in an abortion. This is inconsistent with an adult's usual legal role as primary decision-maker about medical procedures to their own bodies. It is also out of step with more recent reforms, such as in Victoria and Queensland, where women are trusted as competent decision-makers and not forced to seek third party authorisation until after 24 and 22 weeks gestation respectively.

    In addition, a comprehensive review of abortion laws by the Victorian Law Reform Commission found no evidence "that forcing women into counselling is necessary or advisable."[14] No one should be compelled by law to receive counselling in order to access an abortion.

[14] Victorian Law Reform Commission, *Law of Abortion: Final Report* (March, 2008), [8.122].

(c) **Removing the requirement for two doctors from a panel of six to approve an abortion after 20 weeks gestation.** This process creates delays, denies pregnant people control over their bodies and is an acute threat to women's health. While only 1-2 per cent of all abortions are performed after 20 weeks, the circumstances of people who need an abortion at this time are typically distressing and complex, and family violence or a fatal foetal diagnosis is often a factor. The law makes it harder for doctors to act in their patient's best interests and is forcing vulnerable women to fly interstate, where they can afford it, at considerable physical, emotional and financial cost to access a health service that could, and should, be provided in their home state.

(d) **Respecting the decision-making capacities of young people who seek reproductive healthcare.** Where a young person under 16 is assessed to be a mature minor and capable of making medical decisions,[15] they should not be forced to get the consent of a parent or guardian or the permission of a court as the Health Act currently requires.

Forcing a teenager who is capable of making health decisions to disclose their pregnancy and get parental consent or go through court risks not only causing serious harm, but it could push them to resort to medically dangerous options, like self-abortion. This is a particular concern where they have a violent parent or where the pregnancy is the result of rape or incest. The law should facilitate decision-making in the best interests of a young person, and in some cases, this will mean not disclosing a pregnancy to their parents or guardians.

(e) **Promoting the right to access unbiased healthcare.** Staff at reproductive health clinics in Western Australia have expressed deep concern about the number of women who arrive at their clinic having attended multiple doctors who failed, or refused, to refer them to all-options services. Health professionals do have the freedom of thought, conscience and religion, however this must be balanced against the right of a woman to health, autonomy and equality. Health professionals who block access to unbiased information and healthcare imperil a woman's physical and psychological health. The law should therefore make clear that health practitioners,[16] counsellors and social workers who claim an objection, must disclose this, refer their patient to a health practitioner known not to have an objection, and in cases of medical emergency, perform or assist in an abortion.[17]

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[15] Also known as a '*Gillick* competent' child following the decision in *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112.

[16] Health practitioner is a defined term by the *Health Practitioner Regulation National Law (WA) Act 2010* (WA). It does not include counsellors and social workers, however they should have a duty to disclose and refer as they are often the first port of call for help.

[17] Consistent with Committee on the Elimination of Discrimination against Women, *General Recommendation 24: Women and Health* A/54/38/Rev 1 (1999) [11].