



Mr Shane Rattenbury MLA
ACT Legislative Assembly
Via email: rattenbury@act.gov.au

Dear Mr Rattenbury,

Exposure draft: Health (Patient Privacy) Amendment Bill 2015

The ACT Human Rights Commission welcomes the exposure bill as an important measure for protecting women's right to access reproductive health services. The Commission considers that the introduction of appropriately defined exclusion zones around abortion clinics will improve the ability of women to access legal medical services in safety and privacy, and strengthen protections against discrimination. Concerns about this issue have been regularly raised with the Health Services Commissioner.

The Explanatory Statement to the bill notes that the legislation seeks to protect the right to privacy (and potentially other rights) of those seeking to access an approved health facility. The submission attached seeks to address the human rights implications of the exposure bill, in particular its compatibility with the right to freedom of expression in section 16 of the *Human Rights Act 2004*, and related rights such as freedom of religion and freedom of peaceful assembly (sections 14 and 15 of the HR Act). Our analysis of the proposed measures has been aided by the human rights assessment contained in the Explanatory Statement accompanying the exposure bill. The provision of human rights justificatory material at the exposure stage of the bill's development is to be commended, and will assist to inform community understanding of the nature of the changes that are being proposed.

We have identified several areas where we consider the bill's overall compatibility with the HR Act could be enhanced and recommend that amendments be adopted prior to the bill being introduced into the ACT Legislative Assembly. The suggested amendments are intended to improve clarity and prevent any potential for the legislation to overreach beyond its stated objectives, that is, to secure safe and unimpeded access to an approved medical facility providing abortion services, which the Commission strongly supports.

We welcome the opportunity to discuss these matters further with you, should that be of assistance. The contact point in the Commission is Mr Sean Costello. For your information, we will place a copy of this submission on our website.

Yours sincerely



Helen Watchirs OAM

Human Rights and
Discrimination Commissioner



Alasdair Roy

Children and Young People
Commissioner



Mary Durkin

Health Services
Commissioner

31 August 2015

Submission of the ACT Human Rights Commission to Exposure draft: Health (Patient Privacy) Amendment Bill 2015

August 2015

Outline of the exposure bill

The bill proposes to amend the *Health Act 1993* to introduce criteria for creating a 'protected area' around an 'approved medical facility', that is, a facility which has been approved in accordance with section 83 of the *Health Act 1993* for carrying out abortions. The following types of behaviour will be prohibited in a 'protected area' during a declared 'prohibited period' (8am-6pm on the days the facility is open, or as otherwise declared by the Minister via a disallowable instrument, see item 5, new section 85(2)):

- Harassing, hindering, intimidating, interfering with, threatening or obstructing a person with the intention of stopping the person from entering the facility, or having or providing the abortion;
- Acts that are able to be seen or heard by a person accessing the facility that are intended to stop the person from entering the facility, or having or providing the abortion; and
- Protests in relation to the provision of abortions.

A person in a 'protected area' will also be prohibited from 'intentionally capturing the visual data' of a person accessing or leaving the facility without their consent.¹

It will be an offence to engage in 'prohibited behaviour' in a 'protected area' (25 penalty units). It will also be an offence (subject to limited exception) to publish visual data of a person accessing or leaving a facility without their consent (50 penalty units and/or 6 months imprisonment).

Human rights implications

The bill engages several rights in the *Human Rights Act 2004* (HR Act). The implementation of a safe access zone around approved medical facilities promotes various rights, including the right to non-discriminatory access to health services (s 8, HR Act), the right to privacy (s 12, HR Act) and the right to security of the person (s 18, HR Act). The proposal to prohibit protest behaviour within the protected area, however, also engages and limits rights, in particular s 16 of the HR Act, which provides that:

- (2) Everyone has the right to freedom of expression. This right includes the freedom to seek, receive and impart information and ideas of all kinds, regardless of borders, whether orally, in writing or in print, by way of art, or in another way chosen by him or her.

The right to freedom of expression protects not only favourable information or ideas, but also those that 'offend, shock or disturb'.² The right extends to the communication of information or ideas through any

¹ We have not considered how this bill might interact with other surveillance legislation, including the *Workplace Privacy Act 2011*.

² *Handyside v United Kingdom*, (5493/72) [1976] ECHR 5 (7 December 1976), para 49.

medium, including public protest, among other things. These measures may also limit other related rights, such as the right to freedom of religion (s 14, HR Act),³ and the right to freedom of peaceful assembly (s 15, HR Act).⁴

The HR Act, however, recognises that few rights are absolute and in accordance with established international human rights norms, reasonable limits may be placed on the right to freedom of expression (and related rights) with the aim of balancing competing interests. Limitations on human rights must meet the proportionality test under section 28 of the HR Act:

(1) Human rights may be subject only to reasonable limits set by Territory laws that can be demonstrably justified in a free and democratic society'.

To be consistent with the HR Act, therefore, any limitation of expression and related rights must pursue a legitimate objective and there must be a reasonable relationship of proportionality between the means employed and the objective that is sought to be realised. In essence, the inquiry under s 28 of the HR Act is two-fold:

- whether the amendments serve an important and significant objective; and
- whether there is a rational and proportionate relationship between that objective and the limitation on rights.

Under section 31 of the HR Act, international law and jurisprudence may be considered when interpreting human rights.

Important and significant objective

The stated objective of the bill is to ensure that women can safely access legally available abortion services in 'relative privacy and free from the intimidating conduct of others'.⁵ The Explanatory Statement states that the bill is a response 'to community concerns about particular intimidating and harassing conduct that occurs outside the approved health facility that provides pregnancy terminations, or abortions, in the ACT'.⁶ Concerns about this issue have also been regularly raised with the Health Services Commissioner. The impact of this type of conduct on women seeking to access these services is explained in the statement of compatibility:

The decision to seek a pregnancy termination or exercising of the medical options to undertake an abortion that to some extent places them in a particular position of vulnerability for a variety of reasons can, it has been considered, be unduly influenced by the gathering of people opposed to the procedure, to

³ The right to freedom of religion includes the freedom to manifest one's religion and belief, which may be exercised either individually or in community with others, and in public or private.

⁴ The right to freedom of peaceful assembly (which does not extend to intentionally violent protests) protects the right of people to gather as a group for a specific purpose, and is closely linked to the right to freedom of expression.

⁵ ES, p 2.

⁶ ES, p 2.

such an extent that a woman may not undertake the medical procedure. It could also be said that “counter” protests also bring increased attention to the facility and the procedures performed within. This may in certain circumstances place that woman at considerable risk to her physical and emotional well-being during this vulnerable period.⁷

The Commission commends the bill for recognising and seeking to remove some of the practical barriers women face in exercising their right to lawful reproductive services. In our view, the bill will assist to protect the ability of women to exercise autonomy and freely make important decisions without undue influence or coercion. It is well established that safe and accessible reproductive health services are an essential component of protecting and promoting women’s human rights.

The UN Committee on the Elimination of Discrimination against Women, for example, has recognised the ‘specific, distinctive health needs and interests of women’,⁸ and has emphasised the importance of equitable access to health care, including reproductive health, for ensuring that women can equally exercise their human rights. The Committee has repeatedly called on states to ensure that all health services are ‘consistent with the human rights of women, including the rights to autonomy, privacy, confidentiality, informed consent and choice’.⁹ The Beijing Declaration and Platform for Action (adopted at the UN Fourth World Conference on Women in 1995) similarly noted that ‘ability of women to control their own fertility forms an important basis for the enjoyment of other rights’,¹⁰ and includes ‘their right to make decisions concerning reproduction free of discrimination, coercion and violence’.¹¹

The obligation to protect women from threats to safety and security is also underlined in the provisions of numerous human rights instruments.¹² The imposition of criminal sanctions following a breach of the law is not always a sufficient remedy in these circumstances, and appropriate legislative measures to deter such behaviour can be an important means of preventing violence, abuse and harassment.

⁷ ES, p 4.

⁸ *Alyne da Silva Pimentel Teixeira (deceased) v Brazil*, CEDAW, UN Doc CEDAW/C/49/D/17/2008 (2011).

⁹ See, for example, UN Committee on the Elimination of Discrimination Against Women (CEDAW), CEDAW General Recommendation No. 24: Article 12 of the Convention (Women and Health), adopted at the Twentieth Session of the Committee on the Elimination of Discrimination against Women, in 1999, para 31(f).

¹⁰ Para 97.

¹¹ Para 96.

¹² For example, the definition of discrimination prohibited under the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) includes gender-based violence such as acts (or threats of acts) that inflict ‘physical, mental or sexual harm or suffering and other deprivations of liberty’ on women: see UN Committee on the Elimination of Discrimination Against Women (CEDAW), CEDAW General Recommendation No. 19: Violence against women, adopted at the Eleventh Session of the Committee on the Elimination of Discrimination against Women, in 1992, para 6. See also regional treaties such as the Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence (Istanbul Convention), and the Inter- American Convention on the Prevention, Punishment and Eradication of Violence Against Women (Convention of Belém do Pará). The Inter- American Convention defines violence against women as ‘physical, sexual and psychological violence’ that ‘occurs in the community and is perpetrated by any person’, which includes acts such as harassment at health facilities. The Istanbul Convention defines violence against women as ‘all acts of gender-based violence that result in, or are likely to result in, physical, sexual, psychological or economic harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life’.

The Commission considers that protecting the privacy, safety and dignity of women seeking to access health facilities that provide abortion services is an important and significant objective, consistent with the standards required by human rights principles.

Rational and proportionate relationship

There can be no doubt that the measures proposed in the bill will further the objective of facilitating safe and private access for women seeking reproductive health services. However, s 28 of the HR Act requires that even if the measures in question are aimed at a legitimate objective, and are rationally connected to that objective, it must still be shown that they will not have a disproportionate impact on individuals or groups. The inclusion of adequate safeguards, as well as ensuring that the relevant provisions are narrowly tailored, will be key factors in determining whether the bill imposes proportionate limitations on freedom of expression and related rights.

Currently Tasmania is the only Australian jurisdiction to have enacted legislation to provide for an exclusion zone around abortion clinics. The *Reproductive Health (Access to Terminations) Act 2013* (Tas) creates a safe access zone of 150 metres from premises providing abortion services. Tasmania does not have human rights legislation, but the Commission is aware that a private member's bill modeled on the Tasmanian Act has been recently introduced into the Victorian Parliament.¹³

Exclusion zone legislation has been successfully enacted in comparable human rights jurisdictions overseas, such as Canada,¹⁴ where such laws have been upheld to be compatible with freedom of expression.¹⁵ Other human rights jurisdictions such as the UK have relied on the use of injunctions as the primary means for controlling protest behaviour in the vicinity of abortion clinics. In our view, exclusion zone legislation would afford a more comprehensive approach than injunctive relief, as it would provide greater consistency, transparency and certainty for people to regulate their behaviour accordingly.

The Commission notes that exclusion zone legislation is also found in the USA, but the very narrow scope for restricting free speech under the US Constitution makes these laws more susceptible to successful challenge.¹⁶ The US experience, is also likely to be of limited value for assessing the current proposals because in contrast to the US Constitution, international human rights law (and the HR Act) permits greater leeway for restricting free speech in appropriate circumstances.

Notwithstanding the US example, and irrespective of the specific mechanism employed, the experience of comparable human rights jurisdictions overseas shows that measures to restrict protest behaviour in these circumstances involve permissible limitations on the right to freedom of expression (and related rights) if they:

- are designed to ensure the safety, security and privacy of individuals;

¹³ See Public Health and Wellbeing Amendment (Safe Access) Bill 2015, introduced on 18 August 2015.

¹⁴ See, for example, *Access to Abortion Services Act 1995* (British Columbia).

¹⁵ See, for example, *R v Spratt; R v. Watson*, 2008 British Columbia Court of Appeal 340; *R v Lewis*, 1996 CanLII 3559 (BCSC).

¹⁶ See, for example, *McCullen v Coakley* 53 U.S. (26 June 2014); cf *Hill v Colorado*, 530 U.S. 703 (2000).

- apply only to a limited area; and
- operate only during a specific and limited time.

All three of these features are present in the current bill. The Commission considers that the inclusion of time, place and manner restrictions in the bill are important safeguards that go towards ensuring that the right balance is struck between competing interests. In this respect, the bill improves on the Tasmanian and (proposed) Victorian models, which do not apply time restrictions to the operation of an exclusion zone. The Commission also notes that the bill is not directed at prohibiting expression of specific ideas, opinions and beliefs, but rather to protect women from the potentially harmful consequences of such expression occurring in a particular place, time and manner. The bill does not prohibit people from expressing their views anywhere else. The bill is also neutral about the type of protest that it is to be regulated, in that protest activity both for and against abortion will be captured. Human rights law generally considers time, place and manner restrictions to be less offensive to the values of freedom of expression than an outright ban on a particular kind of speech.

Measures restricting expression have also been found to be proportionate where they are designed to protect a ‘vulnerable group’.¹⁷ The case for compatibility is greater where the protected interest relates to a recognised human right, such as, in this case, the right to privacy or the right to security of the person. As noted above, the measures proposed in the bill will alleviate current restrictions on women’s rights to privacy and security of the person, and improve their ability to access medical services in safety and privacy. It also advances other HR Act values, including the right to equality and non-discrimination, by removing potential barriers to women’s access to equitable health care and reproductive choice.

The Commission is aware that some stakeholders are concerned that the bill does not expressly prescribe the dimensions of a ‘protected area’ around an ‘approved medical facility’. By contrast, the Tasmanian legislation specifies a zone of 150 metres from the relevant premises.¹⁸ The Victorian bill adopts a similar approach to the Tasmanian model.¹⁹ The exposure bill instead requires the specific details regarding the dimensions of a particular ‘protected area’ to be set out in a disallowable instrument (item 5, new s 86). The Commission considers that the approach adopted in the ACT bill is to be preferred. The alternative method of specifying fixed distances risks being considered arbitrary as it is unconnected to the geography and location of a particular health facility, and could result in disproportionate limitations on expression and other rights. The use of disallowable instruments is an important safeguard, which will assist to ensure that the measures are specifically and narrowly tailored to a particular location without sacrificing parliamentary oversight.

In the Commission’s view, subject to the improvements identified below being addressed, the bill as a whole is reasonably circumscribed to meet its objectives in a rational and proportionate way. In particular, the Commission notes that the inclusion of time, place and manner restrictions in the bill, combined with the use of disallowable instruments to specify the details of a protected area,

¹⁷ See, for example, the Canadian Supreme Court’s decision in *R v Keegstra* (1990), 61 C.C.C. (3d) 1 (SCC).

¹⁸ *Reproductive Health (Access to Terminations) Act 2013* (Tas), s 9(1).

¹⁹ *Public Health and Wellbeing Amendment (Safe Access) Bill 2015* (Vic), s 185A.

will assist to ensure that these measures are appropriately tailored to achieve their objectives without unnecessarily restricting rights.

Areas of concern

The Commission has concerns with the following aspects of the bill, and recommends that the identified issues be addressed to ensure overall compatibility with the HR Act:

'Reasonably necessary'

The bill provides that the Minister must declare an area around an approved medical facility to be a 'protected area'.²⁰ In making a declaration, the Minister must be satisfied that the declared area is (i) 'sufficient to ensure the privacy and unimpeded access for anyone entering, trying to enter or leaving an approved medical facility'; but (ii) 'no bigger than reasonably necessary to ensure that outcome'.²¹

It is questionable whether the standard of 'reasonably necessary' is an appropriate threshold for triggering an intrusion on human rights. International human rights standards require interferences with human rights, including the right to freedom of expression, to be 'necessary' for a legitimate objective. The standard of 'reasonably necessary' appears to be lower than the standard of 'necessary' and may not be fully consistent with human rights.

The Commission notes that the Explanatory Statement states that the bill 'provides the responsible Minister with the power to declare a protected area around the approved facility'.²² The Commission questions the accuracy of describing the new s 86 as conferring a power on the Minister. The use of the word 'must' in s 86(1) indicates that the bill will impose a duty on the Minister to make a declaration. The Commission is not opposed to the imposition of a duty in these circumstances; however, it would be helpful for the Explanatory Statement to clarify the mandatory nature of the provision.

The Commission recommends that the bill be amended to require that the Minister must be satisfied that the declared area is 'no bigger than necessary' to ensure the privacy and unimpeded access of individuals accessing or leaving an approved medical facility. Alternatively, the Explanatory Statement should provide a justification as to why it is considered that the lower standard of 'reasonably necessary' is appropriate in these circumstances. The Explanatory Statement should also clarify that the requirement to declare a protected area under the new s 86 is a duty, and not a power.

²⁰ New s 86 (1).

²¹ New s 86(2).

²² ES, p 7.

Prohibition on capturing and publishing images

Similar to the Tasmanian legislation, the bill makes it an offence to intentionally capture the visual data of persons accessing or leaving an approved medical facility in a protected area without their consent.²³ The bill also makes it an offence punishable by 6 months imprisonment to publish the visual data of persons accessing or leaving an approved medical facility in a protected area without their consent.²⁴ A limited exception is provided for law enforcement officers who undertake such activity in the course of exercising their functions.²⁵

The Commission is concerned that the provisions as currently drafted are overly broad and are likely to capture behaviour that is unconnected to the objectives of the legislation. In our view, confining the prohibited conduct to the *intentional* capturing of the visual data of a person accessing or leaving an approved medical facility in a protected area does not go far enough to strike the right balance with freedom of expression and other rights. There may be numerous reasons why a person may ‘intentionally’ but innocently capture such data for purposes that are unrelated to the objectives of the bill. To ensure that the measures are the least restrictive means of achieving the desired end, capturing the visual data of a person in a protected area should only be prohibited where it is done for a purpose that is related to the provision of abortion services, see, for example, *Access to Abortion Services Act 1995* (BC, Canada), s 3.

Even with such an amendment, it also appears that the draft provisions would prevent journalists legitimately reporting on events around the facility that are related to the provision of abortion services e.g. when anti abortion protesters are breaching the legislation.

The Commission recommends that the bill be amended to ensure that a person will not be guilty of an offence for capturing the visual data of a person in a protected area if such conduct is unrelated to the provision of abortion services. In addition, fair media reporting in the public interest related to the provision of abortion services should also be considered for exclusion from the current provisions, in certain circumstances eg about breaches of the legislation. In the case of the latter, such exception should not include the ability to publish photos of people attending the facility for the purposes of obtaining abortion services.

The offence of publishing the ‘captured visual data of another person ... who is entering or trying to enter, or who has left, an approved medical facility’ in new s 87(2) is also of concern as it appears to be broader than the prohibited conduct of *intentionally* capturing the visual data in new s 85(1)(d). As currently drafted, the offence provision in s 87(2) risks criminalising innocent behaviour beyond that which is already contemplated in s 85(1)(d), as the definition of ‘captur[ing] visual data’ in the new s 87(4) is not linked to any intention to capture the image (whether or not connected to the provision of abortion services). This may be simply a drafting error as the Explanatory Statement suggests that the two provisions are meant to be aligned:

²³ New s 85(1)(d).

²⁴ New s 87(2).

²⁵ New s 87(3).

For behavior outlined in section 85 (d) [sic], and further detailed in section 87 (2) to (4) which relates to the capturing and publishing of visual data - e.g. photos or video footage – the maximum penalty is 50 penalty units, imprisonment for 6 months or both. This is higher than that for section 85 (1) (a) to (c) as a reflection of the seriousness of the infringements of privacy and reputation of staff or clients that may arise if the offence is committed.²⁶

In addition to addressing the discrepancy between the new s 87(2) and the new s 85(1)(d), the Commission recommends that the bill be amended to ensure a person will not be guilty of an offence for publishing the visual data of a person in a protected area if such conduct is unrelated to the provision of abortion services.

Finally, the prohibited conduct of capturing the visual data of a person entering or leaving a facility in a protected area in new s 85(1)(d) does not appear to be subject to any time restrictions, for example the operating hours of the facility, in contrast to the other types of prohibited behaviour set out in ss 85(1)(a)-(c). The Explanatory Statement does not provide any explanation for this differential treatment and it is not apparent why this type of conduct should be subject to broader restrictions than that which will apply to the other behaviour prohibited by the bill.

If there are sound reasons for the difference in treatment, this should be set out in the Explanatory Statement. Otherwise, the Commission recommends that the conduct prohibited in new s 85(1)(d) should be subject to the same time restrictions as applies to the other prohibited conduct in ss 85(1)(a)-(c) (8am to 6pm)

²⁶ ES, p 7.