

END12 – A CAMPAIGN  
TO DECRIMINALISE  
ABORTION IN NEW  
SOUTH WALES

Mehreñn  
Faruqi

- 1 '12' is a reference to Division 12 (attempts to procure abortion) of the *Crimes Act 1900* (NSW).
- 2 Abortion Law Reform (Miscellaneous Acts Amendment) Bill 2016 (NSW).
- 3 *Crimes Act 1900* (NSW) div 12.
- 4 *R v Wald* (1971) 3 DCR (NSW) 25.

## I INTRODUCTION

Campaigners for abortion rights have been told again and again to wait for progressive governments to be in power before making any moves to reform the law on abortion. Indeed, during the recent three-year 'End12'<sup>1</sup> campaign around the bill to decriminalise abortion and create safe access zones in New South Wales,<sup>2</sup> its proponents were told numerous times and in no uncertain terms to not push for this change under a Liberal-National Government. They were told it was not the right time, and if these laws were opened up for debate, access to abortion could be further restricted under the conservatives.

Social change, especially for women, has always been hard fought for, and having a sympathetic government willing to change legislation for the better is only one part of this story. The likelihood of achieving reform increases immensely if there are proactive peoples' movements demanding action so that change becomes an inevitability.

Abortion law reform is no different. Not even putting the issue on the political or public agenda, for fear it may not be successful, simply misses the point. It is only through building awareness for the need for change and building momentum within the community that pressure can be put on elected representatives to overhaul outdated legislation. It is necessary to make it the right time for justice, not to simply wait for it to happen.

In the 21<sup>st</sup> century abortion is still a criminal offence in NSW.<sup>3</sup> While people have access to pregnancy terminations, these are only available through exceptions to the law made by a decision of the District Court more than 40 years ago.<sup>4</sup> This grey area of the law only contributes to the uncertainty surrounding the provision and procurement of abortion services in this state.

Laws need to be as clear and unambiguous as possible. For me and other advocates of decriminalising abortion it is unacceptable that we are asked to continue to remain silent when

women and all people who seek abortion risk criminal liability and are faced with limited access to a safe medical procedure.

## II CURRENT LAW AND ITS REPERCUSSIONS

In Australia, many jurisdictions have moved to repeal criminal penalties for abortion, including Tasmania,<sup>5</sup> the Australian Capital Territory,<sup>6</sup> Victoria<sup>7</sup> and most recently the Northern Territory.<sup>8</sup> These jurisdictions have also enacted safe access zones outside premises where abortion services are provided. Queensland and NSW are the only two states where abortion offences remain unchanged in their statute laws.<sup>9</sup>

In New South Wales, Division 12 of Part 3 of the *Crimes Act 1900* (NSW) is entirely devoted to ‘attempts to procure [an] abortion’ and includes offences that carry a five to ten-year prison term for women and those who provide abortions.<sup>10</sup> For women in NSW, access to abortion is available under the 1971 District Court ruling of Levine J in the *R v Wald* case, which established that abortions would be lawful if there was ‘any economic, social or medical ground or reason which in [the jury’s] view could constitute reasonable grounds upon which an accused could honestly and reasonably believe there would result a serious danger to her physical or mental health’.<sup>11</sup> Kirby J, in a higher court, later extended Levine J’s consideration of ‘serious danger’ to include social and economic factors affecting, or that could be reasonably expected to affect, the mother’s physical and psychological health.<sup>12</sup>

Despite the provision of these rulings, the undeniable reality is that abortion remains a crime in statute law. People accessing abortions in New South Wales, their doctors and health practitioners, remain vulnerable to the full force of criminal law, including up to a decade in jail, for attempting to procure one of the most common and safest medical procedures performed in our state.

Many doctors do not perform abortions due to fear of persecution and prosecution and it is not routinely provided in public hospitals, resulting in the procedure being hard to access and expensive, especially for rural and regional women.<sup>13</sup> Aboriginal and Torres Strait Islander women, immigrant women and those from low socio-economic backgrounds have less access to abortion because it is criminalised.<sup>14</sup>

Criminalisation contributes to the ongoing stigma and shame associated with abortion. This is only exacerbated by the continued harassment of patients by anti-choice groups protesting outside clinics,<sup>15</sup> putting at risk their health and safety. It is inconsistent that medical privacy is accepted for all procedures but so often breached for abortion.

## III ABORTION LAW REFORM (MISCELLANEOUS ACTS AMENDMENT) BILL 2016: A MATTER OF HEALTH AND RIGHTS

The Abortion Law Reform (Miscellaneous Acts Amendment) Bill 2016 (NSW) is the first ever bill introduced to the NSW Parliament to decriminalise abortion.<sup>16</sup> It was designed to bring archaic legal provisions in line with modern medical practice, modern expectations of reproductive health and the right to bodily autonomy. It was also about the rights of a patient to make their own healthcare choices with full certainty of the law and without the shadow of criminality. While positioning abortion law reform as a feminist campaign that responded to historical and entrenched sexism against women, this Bill was deliberately phrased in gender-neutral terms to acknowledge

5 *Reproductive Health (Access to Terminations) Act 2013* (Tas) ss 4–8.

6 *Health Act 1993* (ACT) ss 80–4.

7 *Abortion Law Reform Act 2008* (Vic) ss 4–8.

8 *Termination of Pregnancy Law Reform Act 2017* (NT) ss 6–13.

9 Tom Gotsis and Laura Ismay, ‘Abortion Law: A National Perspective’ (Briefing Paper No 2, NSW Parliamentary Research Service, Parliament of NSW, 2017) 11.

10 *Crimes Act 1900* (NSW) ss 82–4.

11 (1971) 3 DCR (NSW) 25, 29.

12 *CES v Superclinics Australia Pty Ltd* (1995) 38 NSWLR 47, 60.

13 Christine Forster and Vedna Jivan, ‘Abortion Law in New South Wales: Shifting from Criminalisation to the Recognition of the Reproductive Rights of Women and Girls’ (2017) 24 *Journal of Law and Medicine* 850.

14 *Ibid* 851.

15 Amelia Paxman, “‘Pretty Tense’: What it’s Like to Run the Gauntlet of Anti-Abortion Protesters’ *The Sydney Morning Herald* (online), 6 June 2017 <<http://www.smh.com.au/lifestyle/news-and-views/news-features/pretty-tense-what-its-like-to-run-the-gauntlet-of-antiabortion-protesters-20170605-gwkkqr.html>>.

16 Wendy Harmer, Interview with Mehreen Faruqi (Radio Interview, 8 May 2017) <<http://www.abc.net.au/radio/sydney/programs/mornings/abortion/8505930>>.

- 17 Children by Choice, *Australian Abortion Law and Practice* (5 July 2017) <<https://www.childrenbychoice.org.au/factsandfigures/australianabortionlawandpractice>>.
- 18 #END12, *Endorsements* <<http://www.end12.org.au/endorsements>>.
- 19 Loneragan Research, 'Public Views on Abortion – NSW' (Survey Report, September 2015) <<http://www.mehreenfaruqi.org.au/wp-content/uploads/2015/09/788-The-Greens-NSW-Abortion-Survey-Report-21.09.2014.pdf>>.

that a range of people need to access reproductive health care, including non-binary persons and transgender men.

The Bill proposed changes to three NSW statutes to address the problems of current law.

**A SCHEDULE 1:  
ABOLITION OF ABORTION OFFENCES IN  
CRIMES ACT 1900 (NSW)**

This Bill removes the entire Division 12 of Part 3 of the *Crimes Act 1900* (NSW) to ensure that abortion is no longer a crime.

This is also a necessary step towards addressing the myths and stigma associated with abortion and improving access and availability. Related amendments were also made to the *Criminal Procedure Act 1986* (NSW).

**B SCHEDULE 1.3:  
AMENDMENT TO HEALTH PRACTITIONER REGULATION  
(ADOPTION OF NATIONAL LAW) ACT 2009 (NSW)**

Abortion is undoubtedly a reproductive health and rights issue belonging not in the courts but in the medical arena. This amendment acknowledged and attempted to balance the right of a registered health practitioner to hold a conscientious objection to abortion and the right and expectation of the patient to be provided with full information about all options available to them. It clarifies that a registered health practitioner with a conscientious objection to abortion is required to advise the patient that they have such an objection and refer them to another doctor who does not have such an objection, or to a Women's Health NSW Centre.

**C SCHEDULE 2:  
AMENDMENT OF SUMMARY OFFENCES ACT 1988 (NSW)  
TO ENACT SAFE ACCESS ZONES**

The primary purpose of creating safe access zones – which are 150 metres in radius – outside places where abortions are provided is to protect the health, safety, dignity, well-being and medical privacy of those accessing these services. Similar to the safe access zone legislation in other states,<sup>17</sup> such as Victoria, Tasmania and the ACT, this section creates an offence to harass, intimidate, obstruct or threaten people within the buffer zone.

The Abortion Law Reform (Miscellaneous Acts Amendment) Bill 2016 (NSW) was a product of intense consultation and engagement with a broad range of stakeholders including experts in obstetrics and gynaecology, and health and criminal law. It had been reviewed and endorsed by many key organisations such as the Royal Australian and New Zealand College of Obstetricians and Gynaecologists (RANZCOG), the NSW Council for Civil Liberties, the NSW Nurses and Midwives Association, the Public Health Association, Community Legal Centres NSW, Australian Lawyers for Human Rights, the National Tertiary Education Union, Family Planning NSW and Marie Stopes.<sup>18</sup>

Importantly, all three main provisions of the Bill also had the support of the vast majority of the NSW public, across Liberal-National, Labor and Greens voters. Polling conducted on behalf of the Greens NSW in 2015 revealed that a majority of people (73 per cent) support abortion decriminalisation, 81 per cent support the enactment of exclusion zones and 78 per cent agree that medical practitioners should be required to provide unbiased and independent information on options for unplanned pregnancies, whatever their personal views on the question of abortion.<sup>19</sup>

## IV THE END12 CAMPAIGN

Repealing Division 12 of the *Crimes Act 1900* (NSW) has been the goal of many feminist activists for some considerable time. The recent End 12 campaign<sup>20</sup> was a response to the passing of the Crimes Amendment (Zoe's Law) Bill 2013 (No 2) (NSW) in the NSW Legislative Assembly in 2014. This Bill sought to create a new offence for harm done to a foetus in utero, a move which many people argued created Foetal Personhood and was unnecessary and dangerous. The concept of Foetal Personhood would inevitably have impacted women, as well as legal and health professionals. It would have dire consequences for late term abortions and could have led to other changes to criminal law that would have impacted further upon the already tenuous legality of abortion.<sup>21</sup>

Together, a broad coalition of women's rights advocates, medical and legal experts, professional organisations and the community built a strong campaign to convince enough Members of Parliament ('MPs') in the NSW Upper House to vote against the Bill. With its further passage doomed, it was never brought to the Legislative Council for debate and the Bill lapsed.<sup>22</sup>

The realisation of how close we had come to winding back what little gains had been made on reproductive rights ensured that a core group of activists and medical and legal professionals moved forward with a mission to decriminalise abortion and provide safe access.

Along with work on the Abortion Law Reform Bill, rallies, community actions and public forums were held across NSW at locations including Albury, Newcastle, Gosford, Bega, Wagga Wagga, Byron and Sydney. Doctors, lawyers, students, interest groups and individuals joined in. The campaign garnered significant support from across the community, many of whom were shocked and outraged to learn that abortion remained a criminal offence. Thousands of people signed petitions and postcards to their MPs demanding they vote for the Abortion Law Reform Bill. Hundreds of doctors,<sup>23</sup> and law and criminology academics<sup>24</sup> signed opened letters to NSW MPs urging them to support the Bill.

As the momentum built, social movements and activist organisations like the Women's March and GetUp<sup>25</sup> joined the ever-increasing calls to decriminalise abortion, while media attention on the issue intensified. I believe that attempts by other political parties to stop the Bill even being introduced in June 2016 were thwarted only because of the community campaign to push for change. This Bill would not have been debated inside Parliament without the grassroots activism outside of it.

## V THE VOTE

In May 2017, the NSW Legislative Council failed to pass the Bill that would have removed abortion from the *Crimes Act 1900* (NSW), where it has sat for well over one hundred years.<sup>26</sup> Disappointingly, it was voted down 14:25, with every single member of the Liberal and National parties voting against it in what was meant to be a conscience vote. They were joined by three Labor members, the Shooters, Fishers and Farmers Party and the Christian Democratic Party. In doing so, 25 members of the NSW Upper House chose to ignore the evidence for change and the view of an overwhelming number of their constituents.

In contrast, five Greens MPs, eight Labor MPs and one Animal Justice Party MP considered the Bill for what it was: a real opportunity to end the uncertainty around abortion law by

20 #END12, #END12 Decriminalise Abortion. Safe Access <<http://www.end12.org.au/#intro>>.

21 Mehreen Faruqi, 'Comment: Legislating Foetal Personhood is Misguided Public Policy' *SBS News* (online), 27 September 2013 <<http://www.sbs.com.au/news/article/2013/09/27/comment-legislating-foetal-personhood-misguided-public-policy>>.

22 James Robertson, "'Zoe's Law' Bill Lapses, Closing Controversial Chapter' *The Sydney Morning Herald* (online), 20 November 2014 <<http://www.smh.com.au/nsw/zoes-law-bill-lapses-closing-controversial-chapter-20141120-11qh5.html>>.

23 Doctors for Decriminalisation, *Open Letter to Members of the NSW Parliament from Doctors in Support of Decriminalising Abortion* <<https://doctorsfordecrim.squarespace.com/>>.

24 UNSW Law, *Law Academics Urge NSW Government to Take Abortion Off Criminal Code* (11 August 2016) <<http://www.law.unsw.edu.au/news/2016/08/law-academics-urge-nsw-government-take-abortion-criminal-code>>.

25 GetUp!, *Abortion is Illegal in NSW, That Could Change* <<https://www.getup.org.au/campaigns/rapid-response--2/nsw-legalise-abortion/abortion-is-illegal-in-nsw-that-could-change>>.

26 Ben Winsor, "'Completely Out Of Step': Abortion to Remain a Crime in NSW After Reform Bill Fails' *SBS News* (online), 11 May 2017 <<http://www.sbs.com.au/news/article/2017/05/11/completely-out-step-abortion-remain-crime-nsw-after-reform-bill-fails>>.

27 Ibid.

28 Catherine Sheehan, 'Thousands of Catholics Rally behind Petition to Defeat Radical Abortion Bill in NSW' *The Catholic Weekly* (online), 4 May 2017 <<https://www.catholicweekly.com.au/thousands-of-catholics-rally-behind-petition-to-defeat-radical-abortion-bills-in-nsw/>>.

29 David Ould, *NSW Abortion Bill* (2 May 2017) The Gospel Coalition Australia <<https://australia.thegospelcoalition.org/article/nsw-abortion-2017>>.

30 Caroline de Costa and Heather Douglas, 'Bills Will Bring Australia's Abortion Laws Out of the 19th Century', *Crikey* (online), 11 May 2016 <<https://www.crikey.com.au/2016/05/11/qld-abortion-law-reform/>>.

31 Victorian Law Reform Commission, *Law of Abortion: Final Report, Report No 15* (2008) [3.36].

32 Heather Douglas and Caroline de Costa, 'Time to Repeal Outdated Abortion Laws in New South Wales and Queensland' (2016) 205 *The Medical Journal of Australia* 353.

reforming an antiquated law out of step with community views and current medical practice.<sup>27</sup>

It is impossible not to recognise the influence of the anti-choice Catholic Church and the Australian Christian Lobby in keeping abortion a crime in NSW.<sup>28</sup> Their scare campaign was based on mistruths and misinformation, notably around the sensitive matter of late-term pregnancy terminations. The notion that if abortion was decriminalised, women would start having abortions right before birth<sup>29</sup> is offensive, deeply misogynistic, and bears no resemblance to reality.

The reality is that a vast majority of abortions (94 per cent) take place in the first 14 weeks of pregnancy, while only 5 per cent take place between 14 and 20 weeks<sup>30</sup> and only 0.7 per cent of all abortions take place after 20 weeks of gestation.<sup>31</sup> These are performed for severe foetal abnormalities or serious danger to the pregnant woman's health, sexual assault or other exacerbating circumstances.<sup>32</sup> Sadly, these facts were cast aside as inconvenient truths by those who voted against the Bill.

## VI ROOM FOR OPTIMISM

While the first-ever attempt to decriminalise abortion in the NSW Parliament was not successful, abortion rights and reproductive health have now been firmly placed on the political and public agenda. By supporters not remaining silent and bringing the issue to the forefront, the taboo of discussing abortion decriminalisation in a Parliament that has refused to consider it for well over one hundred years has been broken. By proving the critics wrong, we made it the right time to fight for women's rights.

In making a decision to vote 'for' or 'against' the Bill, every single MP and party room was forced to confront and consider reproductive rights. I know that there are supporters of this reform in each of the major parties which paves the way for ongoing conversations.

While I cannot be sure exactly when the people of NSW will get the same reproductive health rights that residents of many other Australian states enjoy, I am confident we are well on the way to achieving this much-needed and long-awaited change. The Abortion Law Reform (Miscellaneous Acts Amendment) Bill 2016 (NSW) and the End12 campaign mark the beginning, not the end, of the renewed push for decriminalising abortion in NSW.