

Abortion Legislation Reform Bill 2023

EXPLANATORY MEMORANDUM

The *Abortion Legislation Reform Bill 2023* (the Bill) provides for an Act to establish a new model for abortion care in Western Australia under the *Public Health Act 2016* (WA), amend powers in the *Health (Miscellaneous Provisions) Act 1911* (WA) regarding abortion processes, amend the *Criminal Code* and make amendments to other Acts to remove barriers to access and protect the privacy of individuals accessing abortion.

Please note the following acronyms used within this explanatory memorandum:

- BDM Act *Births, Deaths and Marriages Registration Act 1998* (WA)
- Code *The Criminal Code* (WA)
- FOI Act *Freedom of Information Act 1992* (WA)
- GA Act *Guardianship and Administration Act 1990* (WA)
- HMP Act *Health (Miscellaneous Provisions) Act 1911* (WA)
- PH Act *Public Health Act 2016* (WA)
- SAT State Administrative Tribunal

The Bill is set out as follows:

PRELIMINARY

Clause 1 **Short title**

The Act will be called the *Abortion Legislation Reform Act 2023*.

Clause 2 **Commencement**

This clause provides for the commencement of the Act, with sections 1 to 2 coming into operation on the day on which the Act receives the Royal Assent, and the rest of the Act on the day fixed by proclamation. It is not intended to allow for different days to be fixed for different provisions.

Time is required between the passage of the Bill and its commencement, in order to prepare for the implementation of the scheme.

THE CRIMINAL CODE AMENDED

Clause 3 Act amended

This clause provides for the amendment of the Code.

Clause 3 Section 199 deleted (Abortion)

Here the Bill repeals section 199 of the Code related to abortion. Currently, section 199 provides that it is unlawful to perform an abortion unless by a medical practitioner in good faith and with reasonable care and skill and justified under section 334 of the HMP Act. The HMP Act provision in turn links back to the Code.

The Bill repeals both the Code offence and HMP Act provision. Instead, contemporary provisions governing the carrying out of abortions will be introduced in the PH Act. While the offence for an 'unqualified person' to perform or assist with an abortion will remain at new section 202MN, the other amendments complete the decriminalisation of abortion, aligning WA with other jurisdictions.

PUBLIC HEALTH ACT 2016 AMENDED

Clause 5 Act amended

This clause provides for the amendment of the *Public Health Act 2016* (WA) [PH Act].

Clause 6 Section 4 amended (Terms used)

This clause amends section 4 of the PH Act and defines necessary terms for the purposes of the Bill. These terms apply to the whole PH Act.

Key definitions include:

Health profession has the meaning given in *Health Practitioner Regulation National Law (Western Australia)* section 5.

Student in relation to a health profession, has the meaning given in new section 202MA i.e. a person whose name is entered in a student register for the health profession as being currently registered under the *Health Practitioner Regulation National Law (Western Australia)*.

Clause 7 Part 12C heading replaced

This clause deletes the heading under Part 12C of the PH Act 'Safe access to premises at which abortions are provided' and replaces it with a new heading 'Abortion'.

The new Part amalgamates, but does not amend, existing provisions relating to safe access to premises at which abortions are provided.

Clause 8 Part 12C Divisions 1 to 5 inserted

This clause provides for the introduction of a new Part into the PH Act that deals with the provision and management of abortion and abortion care services in Western Australia.

Division 1 - Preliminary

202MA Terms used

New section 202MA sets out a suite of definitions pertaining to abortion, that are necessary for the purposes of the Bill. These terms apply to new Part 12C of the PH Act.

Key definitions include:

Abortion drug refers to a medicine of a kind used to cause the termination of a pregnancy of a person. *Medicine* has its meaning as given in section 3 of the *Medicines and Poisons Act 2014* (WA), being a substance that is a Schedule 2, 3, 4 or 8 poison.

Relevant person means a registered health practitioner who is authorised under Division 2 to perform an abortion, the chief executive of a health service provider that provides health services that include, or are related to, the performance of abortions under Division 2, or a private hospital service provider that provides health services that include, or are related to, the performance of abortions under Division 2. This definition has been included to give effect to the information collection provisions in the Bill.

Relevant health profession means any of the following health professions: Aboriginal and Torres Strait Islander health practice, medical, midwifery, nursing, pharmacy and a health profession that is prescribed by the regulations for the purposes of this definition. This definition has been included to give effect to provisions in the Bill that enable registered health practitioners and students in a relevant health profession to carry out particular acts when prescribed to do so e.g. to perform or assist in the performance of an abortion by supplying or administering an abortion drug.

Registered health practitioner, which means a person registered under the Health Practitioner Regulation National Law (Western Australia) to practise a health profession (other than as a student).

202MB Performance of abortion

New section 202MB sets out the actions that constitute the performance of an abortion, namely where a person does any act with the intention of causing the termination of the patient's pregnancy.

Subsection (2) makes clear that the 'act' under subsection (1) includes, but is not limited to, prescribing, supplying or administering an abortion drug to the

patient, or carrying out a surgical or other procedure on the patient. This is a clearer definition than currently in the HMP Act and has been drafted in a way that reflects the fact that the type of action required for an abortion will differ depending on the foetus' gestational age and patient's requirements.

Subsection (3) makes clear that a person who assists an act done under subsection (1) does not perform an abortion. This provision has been included to offer a clear, explicit ability for persons to assist with the performance of an abortion, without fear that they may be considered as performing the abortion themselves. New section 202MG enables certain registered health practitioners and students to assist in the performance of an abortion. By clarifying that assistance does not constitute an act by which an abortion is performed, subsection 202MB(3) removes the possibility that a person assisting in the performance of a lawful abortion could be captured by the section 202MN(1) offence.

The exclusion at subsection (3) also extends to situations where a person assisted in the performance of an unlawful abortion (i.e. where the performer of the abortion was unqualified). However, depending on the factual circumstances of the case, the person assisting could still be deemed to have taken part in the offence committed by the performer and be guilty of the offence as per sections 7(b) or (c) of the *Criminal Code* (whereby a person who does or omits any act for the purpose of enabling or aiding another to commit the offence, or who aids another in committing the offence, is deemed to be guilty of the offence).

Division 2 - Performance of abortion by registered health practitioners

202MC Performance of abortion by medical practitioner at not more than 23 weeks

New section 202MC enables one medical practitioner to perform an abortion on a patient with a foetus of gestational age of not more than 23 weeks.

This provision is a replacement of the requirement under the HMP Act for an abortion that is not a late term abortion to be considered by two medical practitioners. It also reflects an increase - from 20 weeks to 23 weeks - to the gestational age limit in the HMP Act whereby additional medical oversight is required for the abortion of a foetus.

202MD Performance of medical abortion by certain other registered health practitioners at not more than 23 weeks

New section 202MD sets out the framework for certain registered health practitioners (other than a medical practitioner) to perform medical abortions on a patient with a foetus of gestational age of not more than 23 weeks.

Subsection (2) enables a prescribing practitioner to perform the abortion by prescribing, supplying or administering an abortion drug to the patient. As per subsection (1), the prescribing practitioner is a registered health practitioner of

a class prescribed by regulations for the purposes of the definition and authorised under the *Medicines and Poisons Act 2014* (WA) to prescribe the abortion drug.

Enabling classes of registered health practitioner to be prescribed to perform an abortion will future proof WA's statutory framework, and recognises that certain classes of registered health practitioners may acquire the relevant skill and experience to perform medical abortions. This will facilitate greater access to abortion services for regional, remote and rural WA.

202ME Performance of abortion by medical practitioners at more than 23 weeks

New section 202ME sets out the framework for two medical practitioners to agree to the performance of an abortion on a patient with a foetus of gestational age of more than 23 weeks. This provision is a replacement of the requirement under the HMP Act for a late term abortion (at more than 20 weeks) where a patient must seek approval from both their original medical practitioner, and then joint authorisation from another two medical practitioners who are members of a statutory panel appointed by the Minister for Health.

Subsection (1) authorises a primary medical practitioner to perform the abortion where they reasonably believe that performing the abortion is appropriate in all the circumstances and have consulted with at least one other medical practitioner who also holds that reasonable belief.

Subsection (2) sets out the matters the primary and other medical practitioner(s) must have regard to before they can come to their decision under subsection (1), namely all relevant medical circumstances, the patient's current and future physical, psychological and social circumstances, and relevant professional standards and guidelines i.e. those commonly accepted by members of the medical profession that apply to the medical practitioner in relation to the performance of the abortion.

Section (3) makes clear that medical practitioners may have regard to matters additional to those listed under subsection (2) when considering whether performing an abortion on a person is appropriate under subsection (1).

Subsection (4)(a) makes clear that, when consulting with another medical practitioner pursuant to subsection (1)(b), the primary practitioner is not limited to medical practitioners located in Western Australia. This allows the primary practitioner to consult with medical practitioners outside of this State (as long as they are appropriately registered under the *Health Practitioner Regulation National Law (WA) Act 2010* in the medical profession (other than as a student).

Subsection 4(b) makes clear that the primary practitioner may consult with a number of medical practitioners i.e. they are not prevented from consulting further medical practitioners where the medical practitioner consulted has the view that performing the abortion is not appropriate.

Subsection (5) provides an exemption to subsection (1) in cases of emergency. Here a medical practitioner is authorised to perform an abortion on a patient

who is more than 23 weeks pregnant, if the medical practitioner considers it necessary to save the patient's life or the life of another foetus. The requirement of a primary medical practitioner consulting another medical practitioner to form a reasonable belief for the performance of an abortion (as required under subsection (1)) would not be appropriate in the circumstances of such an emergency.

202MF Performance of medical abortion by certain registered health practitioners on direction of medical practitioner or prescribing practitioner

New section 202MF sets out the framework for registered health practitioner (other than a medical practitioner) to perform a medical abortion upon the direction of a directing practitioner. Subsection (1) makes clear that where the patient has a foetus of not more than 23 weeks, either the medical practitioner or prescribing practitioner may be the directing practitioner; where the foetus is at more than 23 weeks, only a medical practitioner may be the directing practitioner. A *prescribing practitioner* is given the same meaning as given under new section 202MD(1) pursuant to the definition in new section 202MA.

Subsection (2) enables pharmacists to perform the medical abortion by supplying the patient with an abortion drug. The pharmacist must act in accordance with the *Medicines and Poisons Act 2014* (WA) (MP Act) to dispense the drug under a prescription issued by the directing practitioner, or otherwise supply the drug to the patient on the direction of the directing practitioner.

Subsection (3) enables other registered health practitioners in a relevant health profession to perform a medical abortion by supplying or administering the drug, in accordance with the MP Act, on the direction of a directing practitioner. The health profession of *Pharmacy* is specifically excluded from the relevant health professions under this subsection, as subsection (2) caters for pharmacists. This takes into the consideration the fact that pharmacists and other registered health practitioners have different roles in the performance of an abortion.

202MG Assistance by certain registered health practitioners or students in performance of abortion by medical practitioner or prescribing practitioner

New section 202MG sets out the framework for both registered health practitioners and students, subject to certain conditions, to assist a medical practitioner or prescribing practitioner in the performance of an abortion. A *prescribing practitioner* is given the same meaning as given under new section 202MD(1) pursuant to the definition in new section 202MA.

Subsection (1) authorises registered health practitioners in a relevant health profession, acting in the course of the profession, to assist in the performance of an abortion by a medical practitioner or a prescribing practitioner (in accordance with their authorisations under particular new sections of the PH Act). This recognises that a registered health practitioner is not expected to act outside their usual course of activities within their profession, when assisting the performance of an abortion.

Subsection (2) makes clear that the assistance is not authorised where the registered health practitioner knows that the abortion is not authorised in accordance with particular new sections of the PH Act.

Subsection (3) authorises students in a relevant health profession to assist in the performance of an abortion by a medical practitioner or a prescribing practitioner (in accordance with their authorisations under particular new sections of the PH Act).

Subsection (4) makes clear that assistance by a student can only be given under proper supervision (by the medical practitioner, prescribing practitioner, assisting registered health practitioner or the student's primary clinical supervisor) and in accordance with the student's program of study or clinical training. This recognises that a student is not expected to act outside their usual course of activities as a student, when assisting the performance of an abortion.

Subsection (5) makes clear that the assistance is not authorised where the student knows that the abortion is not authorised in accordance with particular new sections of the PH Act.

202MH Registered health practitioner with conscientious objection to abortion

New section 202MH enshrines the right of registered health practitioners to conscientiously object or otherwise refuse to participate in the steps reasonably related to abortion under the Act.

Subsection (1) enables a registered health practitioner to refuse to participate in abortion where the practitioner conscientiously objects to abortion. The practitioner may refuse to perform or assist in an abortion on a person, make a decision regarding the performance of an abortion (under section 202ME(1)(a) or (b)), or advise a person about the performance of an abortion on the person or another.

Subsection (2) makes clear that a practitioner who has a conscientious objection to abortion must declare the objection to the patient as soon as the patient requests that the practitioner perform, assist in or advise on the performance of an abortion, or make a decision as to the appropriateness of the abortion. This declaration is not dependant on whether the practitioner accepts or refuses the patients request i.e. the declaration must be made regardless of if the practitioner accepts or refuses to participate in any of the actions that may constitute the performance of the abortion.

Subsection (3) makes clear that a registered health practitioner is also able to object to participating in the participating in abortion for reasons other than conscientious objection.

Subsection (4) makes clear that the right to refuse to participate in an abortion does not limit or affect any duty of a registered health practitioner to perform, assist in or advise on the performance of an abortion, or make a decision as to

the appropriateness of the abortion, in an emergency. This subsection is a preservation of the existing duties the practitioner has under common law and other legislation.

202MI Obligations of medical practitioners and prescribing practitioners who refuse to participate in abortion

New section 202MI places obligations on certain practitioners who refuse to participate in an abortion to transfer care of the patient or provide information to the patient so that they may access the abortion service elsewhere.

Subsection (1) makes clear that the obligation only arises where a patient requests a medical practitioner or prescribing practitioner to perform or advise them about the performance of an abortion on them, or the patient makes a request that would require a medical practitioner to make a decision under 202ME(1) (regarding the performance of an abortion for a foetus at more than 23 weeks), and the practitioner refuses the request for any reason.

Subsection (2) sets out the obligations of the refusing practitioner. The refusing practitioner must transfer care of the patient to another suitable registered health practitioner or health facility, or provide particular information to the patient to enable the patient to access the abortion process elsewhere. The information given to the patient must be information that has been approved by the Chief Health Officer. It is intended that decision to transfer or provide information to the patient resides with the refusing practitioner.

Subsection (3) sets out the requirements for the information that the Chief Health Officer may approve for the purposes of this section. The information must be up-to-date, reviewed annually and not contain details of registered health practitioners or health facilities unless the Chief Health Officer has a reasonable belief that they can perform, assist in or advise on the performance of an abortion, or make a decision as to the appropriateness of the abortion.

Subsection (4) makes clear that section 202MI does not limit or affect any duty of a registered health practitioner to perform, assist in or advise on the performance of an abortion, or make a decision as to the appropriateness of the abortion, in an emergency. This subsection is a preservation of the existing duties the practitioner has under common law and other legislation.

202MJ Student with conscientious objection to abortion

New section 202MJ provides a framework for a student with a conscientious objection to abortion.

Subsection (2) sets out the right of refusal, specifically that a student in a relevant health profession who conscientiously objects to abortion is able to refuse to participate in the performance of the abortion.

Subsection (3) requires the student to disclose their conscientious objection to abortion to their supervising person immediately after the supervising person asks them to assist in the performance of an abortion on a person. *Supervising person* is defined in subsection (1).

202MK Compliance with this Division relevant to professional conduct or performance

New section 202MK makes clear the appropriate disciplinary mechanisms for a registered health practitioner involved in performing or assisting with an abortion, but who acts otherwise as authorised under the Bill.

This provision reflects the premise that practitioners should be subject to the same professional and legal consequences as those that apply to other medical procedures. There is a strong regulatory framework governing registered health practitioners, with serious consequences for unprofessional conduct or professional misconduct. This is more appropriate than a specific offence provision being crafted for registered health practitioners in regard to abortion.

Subsection (1) provides for the types of actions which may be regarded when considering a matter under written law about the registered health practitioner's professional conduct or performance. These include: the performance of an abortion or assisting in the performance of an abortion other than as authorised under particular provisions of the Act, or contravening the obligation to disclose a conscientious objection to abortion, or transfer the care of the patient or provide them with approved information where the practitioner has refused to participate in the abortion.

Subsection (2) sets out the matters to which subsection (1) applies, namely a notification under the *Health Practitioner Regulation National Law (Western Australia)* (WA) or a complaint under *Health and Disability Services (Complaints) Act 1995* (WA).

202ML The Criminal Code s. 177 does not apply

New section 202ML excludes the application of section 177 of the Code to a restriction or obligation under new Division 2 in Part 12C of the PH Act.

Section 177 of the Code provides that any person who (without lawful excuse) does or omits to do any act, which that person is forbidden to do or required to do (respectively), by legislation in force in Western Australia, is guilty of a crime. An exception to this applies where a mode of proceeding against the person for the crime is expressly legislated and is intended to exclude other punishment.

By excluding the application of section 177 of the Code, the performance of an abortion by a registered health practitioner will be excluded from penalties under the Code. This is consistent with the intent of new section 202MK for practitioners to be subject to the same professional and legal consequences as those that apply to other medical procedures, pursuant to the *Health Practitioner Regulation National Law (Western Australia)* (WA) and *Health and Disability Services (Complaints) Act 1995* (WA).

202MM Consent to performance of abortion on children who are not mature minors

New section 202MM makes clear the role of a child's parent or guardian in regard to the performance of an abortion on a child who is not a mature minor.

Subsection (1) defines the *guardian* of a child (the patient) in line with the definition of *parental responsibility* under section 68 of the *Family Court Act 1997* (WA); namely a person who has all the duties, powers, responsibilities and authority which, by law, parents have in relation to children.

Subsections (2) and (3) set out that where a registered health practitioner, authorised under the Act to perform an abortion on a child, is unable to ascertain if the child is competent to make a decision about the performance of the abortion, or who determines that the child is not competent to make a decision about the performance of the abortion, then the practitioner may defer to the decision of the child's parent or guardian if the child agrees to their inclusion in the decision making.

Imperative to the operation of this section is that the child first agrees to the involvement of their parent or guardian in the decision-making process for abortion. This recognises that there are a range of circumstances in which parental involvement may be inappropriate.

The subsection (2)(b)(i) reference to a child's capacity (or lack thereof) to consent is crafted to purposefully reflect the common law position as to when a child will be 'Gillick competent' or 'a mature minor'.

The subsection (3)(b) reference to the extent at which the common law would require the performance of the abortion on the patient by the practitioner to be authorised by a court, is to address the present situation at common law in WA, namely that there is no case law in WA pertaining to a parent or guardian's ability to give or withhold consent for their child to have an abortion. As such, this subsection provides legal clarity as to the ability for a parent or guardian to consent to the abortion of a non-Gillick competent child.

Subsection (4) makes clear that this section does not affect the inherent jurisdiction of the Supreme Court or the jurisdiction of the Family Court of Western Australia. Thus, for example, where the non-Gillick competent child does not wish for parental involvement, or the practitioner is of the view that the parent or guardian is not acting in the best interests of the child, the registered health practitioner can make an application to the Supreme Court or Family Court in order to determine the course of action.

Division 3 - Performance of abortion by unqualified persons

202MN Unqualified person must not perform abortion

New section 202MN sets the framework for an offence provision governing the performance of abortions by unqualified persons. It is a replacement of the section 199 offence provision of the Code (and its reference in the HMP Act), which Code applies to both medical practitioners and persons who are not medical practitioners.

This section is intended to address situations where a person is pregnant and is seeking termination services from a person not authorised under this Bill. This is colloquially termed a backyard abortion. In such cases, any act used to bring about the termination would constitute the performance of an abortion pursuant to 202MB and give rise to the offence provision under section 202MM.

This section is not intended to capture situations where termination or attempted termination of a pregnancy is without the consent of the patient, their legal guardian or by virtue of a court/tribunal order. For example, it is not intended to capture a situation where a pregnant person is assaulted or drugged without their consent. There are other more appropriate mechanisms under the Criminal Code to deal with such attempts.

Subsection (1) creates an offence for an unqualified person to perform an abortion; the penalty being 7 years imprisonment.

It is worth noting that a person does not commit a crime under section 202MN in circumstances where section 259 of the Code applies i.e. where the person has administered, not administered, or ceased to administer, in good faith and with reasonable care and skill, surgical or medical treatment (including palliative care to a patient for their benefit, or to an unborn child to preserve the mother's life, if the administration of the treatment is reasonable, having regard to the patient's state at the time and to all the circumstances of the case.

Subsection (2) provides that subsections (3) to (8) set out who an unqualified person is for the purpose of subsection (1). Subsections (3) to (8) specifically exclude certain types of registered health practitioners from the definition of a 'unqualified person'; the exclusions reflect the gestational age of the foetus being aborted and the type of act that constitutes the performance of the abortion.

Subsection (3) excludes a medical practitioner and prescribing practitioner from being an 'unqualified person' in circumstances where the abortion is performed by prescribing an abortion drug to the patient for a foetus of gestational age of not more than 23 weeks.

Subsection (4) excludes a medical practitioner, prescribing practitioner, pharmacist and registered health practitioner (other than a pharmacist) from being an 'unqualified person' in circumstances where the abortion is performed by supplying an abortion drug to the patient for a foetus of gestational age of

not more than 23 weeks. The supply must occur in accordance with relevant sections of the Bill authorising the supply.

Subsection (5) excludes a medical practitioner, pharmacist and registered health practitioner (other than a pharmacist) from being an 'unqualified person' in circumstances where the abortion is performed by supplying an abortion drug to the patient for a foetus of gestational age of more than 23 weeks. The supply must occur in accordance with relevant sections of the Bill authorising the supply.

Subsection (6) excludes a medical practitioner, prescribing practitioner and registered health practitioner (other than a pharmacist) from being an 'unqualified person' in circumstances where the abortion is performed by administering an abortion drug to the patient for a foetus of gestational age of not more than 23 weeks. The administration must occur in accordance with relevant sections of the Bill authorising the administration.

Subsection (7) excludes a medical practitioner and registered health practitioner (other than a pharmacist) from being an 'unqualified person' in circumstances where the abortion is performed by administering an abortion drug to the patient for a foetus of gestational age of more than 23 weeks. The administration must occur in accordance with relevant sections of the Bill authorising the administration.

Subsection (8) excludes a medical practitioner from being an 'unqualified person' in circumstances where the abortion performed does not fall within subsections (3) to (7).

<i>Division 4 - Protection from criminal liability</i>

202MO Person does not commit an offence of abortion on themselves

New section 202MO makes clear that it is not an offence for a person to consent to, assist with, or perform an abortion on themselves. This protection applies notwithstanding any other enactment.

Division 5 - Information about abortion

202MP Chief Health Officer may direct certain persons to give information about abortion

New section 202MP introduces an information collection model where the Chief Health Officer may direct certain persons to provide particular information pertaining to abortions. The information provided to the Chief Health Officer is distinct from information that the practitioner may hold as part of the patient's medical record during the course of providing treatment to the patient.

Subsection (1) enables the Chief Health Officer to direct a relevant person to give demographic or clinical information about abortions performed under Division 2 of Part 12C of the Act. The direction must specify what information is required to be given. Subsection 202MP(5) clarifies that the direction can be given to multiple relevant persons, including classes thereof. *Relevant person* is defined under section 202MA.

Subsection (2) clarifies that the direction may specify the type of information being requested by the Chief Health Officer, by reference to the class of information and the manner and form in which it must be given.

Subsection (3) makes clear that identifying particulars of the persons involved in the performance of an abortion, whether the patient, registered health practitioner or student, is excluded from the information that the Chief Health Officer may request under subsection (1).

Subsection (4) sets out the types of information that cannot be collected.

Subsection (6) requires a relevant person to comply with the direction they have been given.

Subsection (7) requires the relevant person to comply with the requirements of subsections (3) and (4) when providing information to the Chief Health officer. This means that identifying particulars of the persons involved in the performance of an abortion, whether the patient, registered health practitioner or student, must be excluded from the information that relevant person can give the Chief Health Officer.

Subsection (8) excludes the application of sections 177 and 178 of the Code to subsections (6) and (7). As such, a failure by a relevant person to comply with a direction from the Chief Health Officer to provide information, or where the relevant person provides information with identifying particulars, the relevant person will not be subject to criminal prosecution. However, the conduct of the relevant person may be subject to the *Health Practitioner Regulation National Law (Western Australia)* (WA) and *Health and Disability Services (Complaints) Act 1995* (WA).

202MQ Purposes for which Chief Health Officer may record, use or disclose information given under s. 202MP

New section 202MQ sets out the purposes for which the Chief Health Officer may record, use or disclose information given under section 202MP(6).

202MR Protection from liability

New section 202MR provides certain legal protections regarding the giving, recording, use and disclosure of information.

Subsections (1) and (2) operate together to protect a relevant person (defined under new section 202MA) regarding the giving of information to the Chief Health Officer, and the Chief Health Officer regarding the recording, use and disclosure of information. In all such cases, the relevant person and the Chief Health Officer must have acted in good faith.

The protections afforded are from civil and criminal liability. Furthermore, the giving, recording, use and disclosure of information cannot be regarded as breaches of any duty of confidentiality or secrecy imposed by law nor of professional ethics, professional standards or any principles of conduct to the person's employment, or be regarded as unprofessional conduct.

Division 6 - Safe access to premises at which abortions are provided

Clause 9 Part 12C Division 6 heading inserted

This clause inserts the heading 'Safe access to premises at which abortions are provided' before section 202N of the PH Act. The heading was previously under Part 12C of the PH Act but will now sit under Division 6 of Part 12C of the PH Act.

The new Division does not amend existing provisions relating to safe access to premises at which abortions are provided.

Clause 10 Section 202N amended

This clause is a technical amendment to reflect Division 6.

Clause 11 Section 202O amended

This clause is a technical amendment to reflect Division 6.

Part 18 - Liability, evidentiary and procedural provisions

Clause 12 Section 280 amended (Commencing proceedings)

This clause amends section 280 of the PH Act to enable proceedings for an offence under new section 202MN(1) (pertaining to the performance of an abortion by an unqualified person) to be commenced by certain persons only.

Subsection 280(1) is amended to exclude the Chief Health Officer, local government or an enforcement agency (as defined under the PH Act) from commencing proceedings for the abortion offence at new section 202MN.

Generally, offences under the PH Act are commenced by this cohort. However, new section 202MN is an indictable offence and as such, new subsection 280(3) ensures that only persons under sections 20(3)(a)(ii) or (iii) or (b) of the *Criminal Procedure Act 2004* may commence and prosecute the offence. These persons are the Attorney General, Solicitor-General, State Solicitor, a member of the State Solicitor's staff appointed in writing by the State Solicitor as an authorised officer, the DPP, a member of the DPP's staff appointed in writing by the DPP as an authorised officer, a police officer or person appointed by Governor pursuant to section 182 of the *Criminal Procedure Act 2004*.

New subsection 280(2) makes clear that section 280(1) is not a limitation for the purposes of subsection 20(2) the *Criminal Procedure Act (WA)*. Therefore, the power for persons referred to in subsection 20(3) of the *Criminal Procedure Act* to commence prosecutions for offences under the Act other than section 202MN is preserved.

Part 19 Division 2 – General

Clause 13 Section 297 amended (Protection from liability for wrongdoing)

This clause amends section 297 of the PH Act to make clear that the protection from liability afforded under this section does not affect the operation of other protections from liability under the PH Act. Section 297 is intended to operate as an additional protection; new subsection (6) is not a new application of the provision, but rather a clarifying clause.

Part 19 Division 3 – Provisions related to information

Clause 14 Section 299 amended (Information sharing)

This clause amends section 299 of the PH Act to ensure the general information sharing provisions under the PH Act take into consideration the new abortion information collection provisions under section 202MP and 202MQ.

Subsections 299(3) and (5) are amended to be subject to new subsection (5A). Thus any information disclosed to, or requested to be disclosed by, certain persons, may only occur if the requirements of section 202MP (where the Chief Health Officer may direct certain persons to give information about abortion) or 202MQ (which sets out the purposes for which Chief Health Officer may record, use or disclose abortion information) are met.

New subsection (5B) provides that (5A) does not prevent the disclosure under subsection (3) of information about a suspected offence under section 202MN(1) (unqualified person must not perform abortion) to a person referred to in section 280(3) (being a person authorised to commence proceedings for an abortion offence).

Part 19 Division 6 - Review of the Act

Clause 15 Section 306C inserted (Review of amendments made by the Abortion Legislation Reform Act 2023)

This clause inserts new section 306C to require the Minister for Health to cause a review of the operation of the Abortion Legislation Reform Act 2023 to be conducted, as soon as practicable after the fifth anniversary of the day the Reform Act becomes operational. A report of the review must be tabled before each House of the Parliament as soon as practicable, but no later than a year after the fifth anniversary.

Part 21 - Transitional provisions for Abortion Legislation Reform Act

Clause 16 Part 21 inserted (Transitional provisions for Abortion Legislation Reform Act 2023)

This clause provides for the introduction of a new Part 21 into the PH Act that deals with transitional provisions for the Abortion Legislation Reform Act 2023.

323 Term used: commencement day

New section 323 defines the term *commencement day* for the purposes of Part 21 of the *Abortion Legislation Reform Act 2023* to mean the day on which section 16 of the Act comes into operation. As such, the transitional provisions of the Act will come into operation when section 16 of the Act is proclaimed.

324 Decisions made under *Health (Miscellaneous Provisions) Act 1911* s. 334(7)(a) before commencement day

New section 324 makes clear that an agreement by two medical practitioners, pursuant to subsection 334(7)(a) of the *Health (Miscellaneous Provisions) Act 1911* (i.e. from the Minister appointed panel), to progress the performance of a post 20-week abortion on a person will meet the requirements under new section 202ME(1)(a) and (b) of the PH Act to perform that abortion (if it has not yet been performed following section 16 of the *Abortion Legislation Reform Act 2023* coming into operation) and a medical practitioner will be authorised to perform that abortion.

325 Applications made under *Health (Miscellaneous Provisions) Act 1911* s. 334(9) before commencement day

New section 325 makes clear that an application made to the Children's Court of Western Australia under subsection 334(9) of the *Health (Miscellaneous Provisions) Act 1911*, which has not yet been determined by that court when section 16 of the *Abortion Legislation Reform Act 2023* comes into operation, is to be discontinued on that day.

PART 5 — OTHER ACTS AMENDED

Children’s Court of Western Australia Act 1988 amended

Clause 17 Act amended

This clause provides for the amendment of the *Children’s Court of Western Australia Act 1988* (WA).

Clause 18 Section 20 amended (Non-criminal jurisdiction as regards children)

This clause amends section 20 to remove the exclusive jurisdiction of the Children’s Court of WA to hear and determine all applications made with respect to a child under section 334 of the HMP Act, which is being repealed. This change is consistent with the new framework for abortion being established by this Bill in regard to children deemed to be mature minors or non-mature minors.

Clause 19 Act amended

This clause provides for the amendment of the *Coroners Act 1996* (WA) (the Coroners Act).

Clause 20 Section 3B inserted (Death of live-born child following performance of abortion not reportable death)

This clause inserts new section 3B into the Coroners Act to exclude abortion from being a reportable death under that Act.

Subsection (1) makes clear that where a child has died as a result of a lawful abortion, then the death of that child is not a reportable death for the purposes of the Coroners Act. This reflects the fact that a death brought about by a legal abortion is an expected and closely planned death. It would not be appropriate to require coronial or police investigation and questioning of families for each of these deaths, unless there was a suspicion that the proper process for accessing the abortion was not followed.

Subsection (2) makes clear that the exclusion provision at subsection (1) applies to deaths occurring before, on or after the relevant section comes into operation. As such, section 3B will have retrospective effect.

Clause 21 Act amended

This clause provides for the amendment of the *Evidence Act 1906* (WA) (the Evidence Act).

Clause 22 The Second Schedule amended

This clause amends The Second Schedule of the Evidence Act to reflect the change to the abortion related offences being introduced by the Bill. The reference to the section 199 *Criminal Code* offence of 'abortion' is deleted from Part 1 of the Second Schedule. A new reference is inserted in new Part 6 of the Second Schedule to reflect new section 202MN(1) of the PH Act which creates an offence of the performance of abortion by an unqualified person.

As such, any of the provisions in the Evidence Act that apply to an offence listed in the Second Schedule, will apply to section 202MN(1). For example, section 9(1)(c)(i) of the Evidence Act provides that in an any criminal proceeding, the spouse of an accused shall be compellable to give evidence on behalf of the prosecution against the accused if the accused is charged with an offence listed under the Second Schedule.

Clause 23 Act amended

This clause provides for the amendment of the FOI Act.

Clause 24 Schedule 1 clause 13A inserted (Abortion information)

This clause inserts new clause 13A in Schedule 1 of the FOI Act to enable abortion information to be an exempt matter under that Act. This clause does not preclude a person from accessing their own health information.

Subclause (1) makes clear that a matter is an exempt matter if its disclosure would reveal or tend to reveal the identity of the person who received the abortion (the patient) or the person who performed the abortion (the registered health practitioner), pursuant to Part 12C Division 2 of the PH Act. This means that an agency (such as the Department of Health) may refuse third party access to abortion information where the disclosure of the abortion information would reveal or likely reveal these identities.

Subclause (2) makes clear that matter is exempt under subclause (1) if it contains an identification number, or other identifying particular that could identify a person who is referred to in subclause (1)(a) or (b).

Subclause (3) makes clear that abortion information is not exempt matter merely because its disclosure would reveal or tend to reveal: the applicant to the FOI request is the abortion patient, where disclosure would reveal the person performing or assisting with the abortion where the applicant to the FOI request is the abortion patient, or where disclosure would reveal that the applicant to the FOI request is the person performing or assisting with the abortion.

It is not intended that the exemption under new clause 13A will apply to information that would identify or tend to identify an unqualified person who performed or assisted in the performance of an abortion. This is addressed by limiting the exemption to abortions performed under Part 12C Division 2 of the PH Act i.e. abortions performed by registered health practitioners.

It should be noted that to the extent that an unqualified person performed an abortion the person would commit an offence under new section 202MN of the PH Act. Therefore, although clause 13A will not apply, to the extent that an agency has information relating to the commission of that offence, it may be considered an exempt matter pursuant to clause 5(1) of Schedule 1 of the FOI Act which deals with a matter being exempt for the purposes of law enforcement and maintaining public safety and property security.

Clause 25 Act amended

This clause provides for the amendment of the GA Act.

Clause 26 Section 3 amended (Terms used)

This clause inserts new subsection 3(1A) into the GA Act to explain the meaning of *performance of an abortion* within that Act. Performing an abortion is taken to refer to performing an abortion as per new section 202MB(2) of the PH Act, but does not include where a lawful procedure is performed on a patient without the intention of causing the termination of the pregnancy, although the procedure may result in a termination.

Clause 27 Section 13 amended (Jurisdiction of State Administrative Tribunal)

This clause inserts section 13(ea) into the GA Act to give the SAT jurisdiction to give or withhold consent to the performance of an abortion on adult persons who are unable to make reasonable judgments in respect of abortions proposed to be performed on them.

Clause 28 Part 3 Division 3 Subdivision 1 heading inserted

This clause inserts the heading 'Subdivision 1 – Preliminary' at the beginning of Part 3 Division 3 of the GA Act.

Clause 29 Section 18A inserted (Application of Division)

This clause inserts a new section 18A into the GA Act to make clear the application of new subdivisions 2 and 3 in Part 3 Division 3 of the Act.

Subsection (1) provides that new Subdivision 2 of the GA Act will provide for appeals, by leave as provided in the subdivision, from determinations of the SAT generally.

Subsection (2) provides that appeals from decisions of the SAT under section 110ZND to consent or refuse consent to the performance of an abortion on the person will be dealt with in Subdivision 3.

Subsection (3) provides that there is no appeal from a determination of the SAT other than as provided in Division 3.

Clause 30 Part 3 Division 3 Subdivision 2 heading inserted

This clause inserts the heading 'Subdivision 2 – Appeals by leave from determinations of SAT generally' before section 19.

Clause 31 Section 19 amended

This clause amends section 19 to account for the appeal provisions under the new subdivision 3. The section 19(3) phrase “but otherwise there is no appeal from a determination of the SAT” is moved to new subsection 18(3).

Clause 32 Part 3 Division 3 Subdivision 3 inserted

This clause inserts a new Subdivision 3 into Part 3 Division 3 of the GA Act which deals with appeals from decisions relating to consent to performance of abortion.

<i>Subdivision 3 – Appeals from decisions relating to consent to performance of abortion</i>

25A Appeal from Tribunal’s decision relating to consent to performance of abortion

New section 25A provides specific provisions for appeals from decisions of the Tribunal relating to consent to performance of an abortion.

Subsection (1) provides that a party to a proceeding for a decision of the SAT under section 110ZND to consent or refuse consent to the performance of an abortion on a person may appeal from the decision.

Subsection (2) provides that the appeal lies to the Court of Appeal.

Subsection (3) provides that the appeal must be instituted in accordance with the rules of the Supreme Court and within the period of 2 days after the day on which the SAT gives its reasons for the final decision under section 110ZND, unless the Court extends the period for making an application on the ground that there is good reason to allow it to be made outside that time. This subsection contains a Note which refers to the requirement under section 77 of the *State Administrative Tribunal Act 2004* for the Tribunal to give its reasons for a final decision.

Subsection (4) provides that the party instituting the appeal must notify the executive officer about the institution of the appeal, but makes clear that the Tribunal, including any member of the Tribunal, is not a party.

25B Grounds

New section 25B sets out the grounds on which an appeal can be made from a decision of the SAT under section 110ZND. The grounds are that the SAT made an error of law or fact, or of both law and fact; or acted without or in excess of jurisdiction; or did both of those things, or that there is some other reason that is sufficient to justify a review of the determination.

25C Status of State Administrative Tribunal's decision pending disposal of appeal

New section 25C deals with the status of the SAT's decision pending the disposal of the appeal. It provides that where an appeal from a decision of the SAT under section 110ZND is instituted under section 25A, the operation of the decision is stayed pending the disposal of the appeal. This will have the effect that if the Tribunal gave consent for an abortion procedure to take place and an appeal is instituted, the abortion may not take place until the appeal is finalised. If the Tribunal did not give consent for an abortion procedure to take place, the abortion will not be able to proceed in any case.

Clause 33 Part 3 Division 3 Subdivision 4 heading inserted

This clause inserts a new heading into Part 3 Division 3 of the GA Act that creates a Subdivision 4 relating to General provisions about appeals. This reflects that the provisions under subdivision 4 apply to appeals under subdivisions 2 and 3.

Clause 34 Section 26 amended (Notice to other parties)

This clause amends section 26 of the GA Act to provide more flexibility in regard to giving notice of an appeal. The additional provision allows an appeal to be determined if, in the opinion of the Court, sufficient notice of the appeal is given to each person who ought to be notified of the appeal.

Clause 35 Section 28 amended (Status of State Administrative Tribunal's determination pending disposal of appeal)

This clause inserts a note at the end of section 28, which is that section 25C applies in relation to the status of a decision of the SAT under section 110ZND pending disposal of an appeal from the decision. Section 25C makes clear that in that circumstance, the operation of the decision is stayed pending the disposal of the appeal (see section 25C above).

Clause 36 Section 30 amended (Powers of Court)

This clause inserts a new subsection (1A) which makes clear that the section applies to decisions under section 110ZND to consent or refuse consent to the performance of an abortion on a person, by defining the word 'determination' to include such a decision.

Clause 37 Section 31 amended (Want of form)

This clause makes clear that section 31 should be read to apply notwithstanding anything in section 25B, which sets out the grounds on which an appeal can be made from a decision of the SAT under section 110ZND.

Clause 38 Section 34 amended (Dismissal for want of prosecution)

Subclause (1) deletes the word 'he' in section 34(3), replacing it with the word 'the appellant'.

Subclause (2) inserts a new section 34(4) which provides that the section does not limit the power of the Court to determine an appeal under section 26(2), that is if the Court determines that sufficient notice of the appeal has been given to each person who ought to be notified.

Clause 39 Section 35 amended (Application for reinstatement of appeal)

Subclause (1) deletes the word 'he' in section 35(1), replacing it with the word 'the appellant'.

Subclause (2) inserts a new subsection (1A) which provides that subsection (1) does not apply to an appeal from a decision under section 110ZND to consent or refuse consent to the performance of an abortion on a person. This has the effect that an appeal of a decision under section 110ZND cannot be reinstated once dismissed.

Clause 40 Section 45 amended (Authority of plenary guardian)

Subclause (1) deletes the words 'he or they' in section 45(1) and inserts 'the person or persons.'

Subclause (2) deletes the word 'he' in section 45(2) and inserts 'the represented person'.

Subclause (3) inserts new subsection 45(3A) into the GA Act to make it clear that a plenary guardian cannot make a decision in respect of the performance of an abortion on the represented person. This provision works together with new s110ZD(6A) to make clear that an abortion decision is not to be made by a guardian or personal responsible, and is a decision for determination by the SAT.

Clause 41 Section 110G amended (Functions generally)

This clause makes clear that an enduring guardian is subject to the same limitation under new subsection 45(3A) in relation to the appointer as a plenary guardian.

Clause 42 Section 110U replaced (Priority of treatment decision in advance health directive)

This clause replaces section 110U. The new section makes clear that the priority to be given to a treatment decision in an advance health directive is determined in accordance with section 110ZJ where the treatment decision is not about the performance of an abortion on the maker of the directive, or in accordance with new section 110ZLA where the treatment decision is in respect of the performance of an abortion on the maker of the directive.

Clause 43 Section 110ZD amended (Circumstances in which person responsible may make treatment decision)

This clause inserts a new section 110ZD(6A) into section 110ZD, which makes clear that the person responsible for the patient cannot make a treatment decision in respect of the performance of an abortion on the patient.

Clause 44 Section 110ZH amended (Terms used)

This clause amends the definition of urgent treatment in section 110ZH to retain the current provision in relation to treatment that does not include the performance of an abortion, and to make clear that where the urgent treatment is the performance of an abortion on the patient, it may only be administered to save the patient's life or to prevent serious damage to the patient's health, or to save another foetus. Urgent treatment involving the performance of an abortion is not permitted 'to prevent the patient from suffering or continuing to suffer significant pain or distress'.

Clause 45 Part 9D Division 2 Subdivision 1 heading inserted

This clause inserts a new heading at the beginning of Part 9D Division 2 – Subdivision 1 – Urgent treatment.

Clause 46 Section 110ZI amended (Urgent treatment generally)

Subclauses (1) and (2) read together have the effect of retaining the current position in regard to any case that is not the performance of an abortion of the patient.

The new provisions provide that in the case of the performance of an abortion on the patient which is urgent treatment, where it is not practicable for the health professional to obtain a decision of the SAT under Division 3 Subdivision 2 in respect of the performance of the abortion, the health professional may provide the treatment to the patient in the absence of that decision.

Clause 47 Part 9D Division 2 Subdivision 2 heading inserted

This clause inserts a new heading after section 110ZIA – Subdivision 2— Other treatment.

Clause 48 Section 110ZIB inserted (Application of Subdivision)

This clause inserts a new section 110ZIB which provides that the Subdivision does not apply to the performance of an abortion on the patient.

Clause 49 Section 110ZJ amended (Order of priority of persons who may make treatment decision in relation to patient)

This clause deletes 'sections 110ZI and 110ZIA' and inserts 'Subdivision 1 and section 110ZIB'. It is a consequential change due to other amendments in the Bill and not a substantive amendment. It makes it clear that section 110ZJ is subject to the provisions relating to urgent treatment and that it does not apply to the performance of an abortion.

Clause 50 Part 9D Division 2 Subdivision 3 inserted (Performance of abortion)

This clause inserts a new Subdivision 3 into Part 9D Division 2, headed 'Performance of abortion'. This subdivision provides for the circumstances in which an abortion may be performed on a person who is unable to make reasonable judgments in respect of whether or not the abortion should be performed on them.

Subdivision 3 – Performance of abortion

110ZLA Treatment decisions in relation to performance of abortion

Subsection (1) makes clear that subject to Subdivision 1 (which relates to urgent treatment), this section applies if it is proposed to perform an abortion on a person who has reached 18 years of age, and is unable to make reasonable judgments in respect of whether or not the abortion should be performed on them.

Subsection (2) makes clear that if the person has made an advance health directive containing a treatment decision in respect of the performance of the abortion, whether or not the abortion is performed on the person must be decided in accordance with the treatment decision.

Subsection (3) makes clear that if the person has not made an advance health directive containing a treatment decision in respect of abortion, whether or not the abortion is performed on the person must be decided by the SAT under Division 3 Subdivision 2.

110ZLB Performance of abortion without advance health directive or State Administrative Tribunal consent an offence

New section 110ZLB is an offence provision.

The provision makes it clear that except where a person has made an advance health directive containing a treatment decision in respect of the performance of an abortion, a health professional may only perform an abortion on a person referred to in new section 110ZLA(1) (that is, who is over 18 years of age and is unable to make reasonable judgments in respect of whether or not the abortion should be performed on them) when they have the consent of the SAT; no appeal is instituted within the required time period, or if an appeal is instituted, it has been finally disposed, or is discontinued or dismissed (and is

not reinstated or capable of reinstatement); and the abortion is performed in accordance with any condition imposed by the SAT under section 110ZND.

The penalty for contravening the section is imprisonment for 2 years and a fine of \$4000.

110ZLC Effect of State Administrative Tribunal consent

New section 110ZLC provides for the effect of SAT consent to the performance of an abortion. It provides that a decision of the SAT under Division 3 Subdivision 2 in relation to the performance of an abortion on a person referred to in section 110ZLA(1) has effect as if it were a treatment decision made by the person, and the person were of full legal capacity.

110ZLD Reliance by health professional on treatment decision in respect of performance of abortion

New section 110ZLD provides for the circumstances in which a health professional may rely on treatment decisions in respect of performance of an abortion.

Subsection (1) defines abortion treatment decision, in relation to a person referred to in section 110ZLA(1)(a), as either a treatment decision in respect of the performance of an abortion on the person, contained in an advance health directive made by the person, or a decision of the SAT under Division 3 Subdivision 2 in respect of the person. It also defines 'take abortion action' as 'to perform, or not to perform an abortion on a person referred to in section 110ZLA(1)(a)'.

Subsection (2) provides that subsection (3) applies if a health professional takes abortion action reasonably believing that the person is unable to make reasonable judgments in respect of the abortion action, and relying in good faith on what is purportedly an abortion treatment decision in respect of the person. It also applies where the health professional takes abortion action in circumstances where it is reasonable for them to rely on some other health professional having ascertained whether the taking of the abortion action is in accordance with an abortion treatment decision in respect of the person; and reasonably assuming that some other health professional has ascertained that the taking of the abortion action is in accordance with an abortion treatment decision in respect of the person.

Subsection (3) provides that the health professional is taken for all purposes to take the abortion action in accordance with a treatment decision that has effect as if it had been made by the person and the person were of full legal capacity.

Subsection (4) provides that without limiting subsection (3), a health professional who takes abortion action as referred to in subsection (2) does not commit an offence under section 110ZLB.

Subsection (5) provides that for the purposes of subsection (2)(a)(ii) (reasonably assuming that some other health professional has ascertained that the taking of the abortion action is in accordance with an abortion treatment

decision in respect of the person), a health professional is taken to have relied in good faith on what was purportedly an abortion treatment decision if, after considering whether or not to rely on it, they acted honestly in relying on it.

Subsection (6) provides that for the purpose of determining under subsection (2)(b)(ii) whether the health professional's assumption was reasonable, the matters that must be taken into account are whether the health professional sighted any written evidence that some other health professional had ascertained that the taking of the abortion action was in accordance with the abortion treatment decision, as well as anything else relevant to the determination.

Clause 51 Part 9D Division 3 Subdivision 1 heading inserted

This clause inserts a new heading at the beginning of Part 9D Division 3 – Subdivision 1 — Declarations for purposes of s. 110ZJ.

Clause 52 Section 110ZM amended (Who may apply)

This clause deletes the word 'Division' and inserts the word 'Subdivision', having the effect that section 110ZM only applies to decisions that do not relate to the performance of an abortion.

Clause 53 Part 9D Division 3 Subdivision 2 inserted

This clause inserts a new Subdivision 2 at the end of Part 9D Division 3 – Decisions for purposes of s110ZLA. This Subdivision pertains to the functions of the SAT with regard to decisions on whether or not an abortion is to be performed on a person.

110ZNA Only Full Tribunal to act under this subdivision

New section 110ZNA provides that a Full Tribunal must perform the functions of the SAT under this Subdivision.

110ZNB Who may apply for decision under this subdivision

New section 110ZNB makes clear who may apply for a decision for the purposes of section 110ZLA(3).

Subsection (1) provides that the persons who may apply are the person on whom the abortion is proposed to be performed, the enduring guardian or guardian (where the person has one), a relative of the person, the Public Advocate, and a person who, in the opinion of the Tribunal, has a proper interest in the matter.

Subsection (2) makes clear that a relative of the person is any of the following relatives of the person who have reached 18 years of age (in no particular order): a spouse or de facto partner, a child, a parent or a sibling.

110ZNC Notice of hearing

Section 110ZNC makes clear who must be given notice of an application under section 110ZNB(1).

Subsection (1) provides that the SAT must provide reasonable notice in writing of the hearing of the application to the applicant, the person on whom the abortion is proposed to be performed, the nearest relative of the person (if there is one), the enduring guardian or guardian (if there is one), the Public Advocate and any other person who in the opinion of the SAT has a proper interest in the proceedings.

Subsection (2) makes clear that the nearest relative of the person is the first in order of priority of the following relatives of the person who are 18 years of age or older: a spouse or de facto partner, a child, a parent or a sibling.

Subsection (3) makes clear that a notice under subsection (1) must include particulars of the application and the time and place of the hearing. In the case of the notice given to the applicant or the person on whom the abortion is proposed to be performed, the notice must include a summary of the provisions of section 16 and Schedule 1 clause 13, the *State Administrative Tribunal Act 2004* sections 39, 87 and 88 as they affect that person, and the functions of the SAT under this Subdivision.

Subsection (4) makes clear that the SAT is not required to give notice to a person referred to in subsection (1) if the whereabouts of the person cannot be ascertained.

Subsection (5) makes clear that in circumstances of urgency the SAT may hear an application under section 110ZNB(1) without giving notice to the nearest relative, the guardian or enduring guardian, and any other person who in the opinion of the SAT has a proper interest in the proceedings (not including the applicant, patient and the Public Advocate).

110ZND State Administrative Tribunal consent to performance of abortion

New section 110ZND provides for the matters the SAT must take into account in determining whether to consent to the performance of an abortion on a person.

Subsection (1) provides that the SAT may consent to the performance of an abortion by order in writing if it is satisfied that the person has reached 18 years of age, is unable to make reasonable judgements in respect of whether or not the abortion should be performed on them, and has not made an advance health directive containing a treatment decision that is inconsistent with the performance of the abortion on the person. The performance of the abortion on the person must be in the best interests of the person.

Subsection (2) makes clear that in deciding whether the performance of the abortion is in the best interests of the person, the Tribunal must take into account whether the person is likely within the foreseeable future to regain the ability to make reasonable judgments in respect of whether or not the abortion should be performed on them, as well as any wishes of the person so far as they can be ascertained.

Subsection (3) provides that the consent of the SAT may be given subject to compliance with any condition that the Tribunal considers appropriate.

Clause 54 Section 110ZT amended (Particular medical research not permitted)

This clause inserts a new subsection (2)(c) into section 110ZT which makes clear that a research decision-maker for a research candidate cannot consent to the performance of an abortion on the candidate. It also inserts a new subsection (4) which provides that performing or assisting in the performance of an abortion on a research candidate for the purposes of medical research is an offence. The penalty for the offence is imprisonment for 2 years or a fine of \$10 000.

Clause 55 Act amended

This clause provides for the amendment of the HMP Act.

Clause 56 Section 331 amended (Terms used)

This clause amends section 331 of the HMP Act, to make clear the meaning of *birth*, *neonatal death*, and *still-birth* for the purposes of Part XIII of the HMP Act. It has been the practice in the WA Health sector for decades to align these terms with the definitions in section 4 of the BDM Act; as such the inclusion of the definitions of these terms in the HMP Act is to reflect this practice.

The term *perform an abortion* is also included to align with new section 202MB being introduced into the new PH Act pursuant to this Bill.

Clause 57 Section 332 inserted (Application of Part to abortion)

New section 332 makes clear that certain provisions within the HMP Act no longer apply in regard to abortion. A new framework relating to abortion has been drafted under the PH Act.

Subsection (1) provides that section 333 of the HMP Act does not apply in regard to abortions. Section 333 is a regulation making power for any purpose tending to protect the lives of mothers and infants. Should any regulations be required pertaining to abortions, these will be made pursuant to the new framework under the PH Act.

Subsection (2) removes the power for reports to be made to the Chief Health Officer or other persons in regard to abortions pursuant to sections 335 and 336A of the HMP Act. Rather, the head of power for the reporting and collection of abortion information will be provided under the new abortion provisions in the PH Act as set out below.

Subsection (3) makes clear that section 336 of the HMP Act still applies. Thus, if a patient dies following an abortion due to complications or as a result of the abortion, the death must be reported to the Chief Health Officer in accordance with section 336.

Subsection (4) makes clear that any obligations arising under the BDM Act are not affected by the application of new section 332. As such, any notifications or reports that a person may be required to give under the BDM Act (for example, to the Registrar of Births Deaths and Marriages), must still be made under that Act, which will enable the production of birth and death certificates as within the proper practice of the Registrar. Only reporting to the Chief Health Officer is limited pursuant to new section 332.

Clause 58 Section 334 deleted (Performance of abortions)

This clause deletes section 334 of the HMP Act pertaining to the performance of abortions. New provisions regarding the performance of abortions will be provided in the new framework under the PH Act.

Clause 59 Section 335 amended (Reports to be furnished)

This clause amends section 335 of the HMP Act pertaining to the types of reports to be furnished to the Chief Health Officer. The amendment reflects the exclusion at new section 332(2) by removing any reference for information about the performance of abortions to be reported to the Chief Health Officer under the *Health (Miscellaneous Provisions) Act*. Rather, provision for reporting abortion information will be provided under the new abortion provisions in the PH Act as set out below.

Subsection 335(4) regarding reporting by occupiers of any house at which a female not usually resident has been removed as this is a very out-of-date provision and not required.