



Submission to the

**Queensland Parliament
Health, Communities, Disability Services and
Domestic and Family Violence Prevention
Committee**

Termination of Pregnancy Bill 2018

by the

Anti-Discrimination Commission Queensland

Introduction

1. The Anti-Discrimination Commission Queensland is an independent statutory authority established under the Queensland *Anti-Discrimination Act 1991*.
2. The Commission's functions include promoting an understanding, acceptance, and public discussion of human rights in Queensland, and dealing with complaints alleging contraventions of the *Anti-Discrimination Act 1991* and of whistle-blower reprisal.
3. This submission focuses on the human rights principles and jurisprudence relating to the sexual and reproductive health and rights of women, including the laws that relate to abortion.

Human rights bodies' guidance on abortion

4. International human rights bodies¹ have provided clear guidance on when there is a need to decriminalise abortion, and have emphasised that access to abortion is a matter of human rights. Ensuring access to these services in accordance with human rights standards is part of State obligations to eliminate discrimination against women, and to ensure women's right to health, as well as other fundamental human rights.
5. The Office of the United Nations High Commission for Human Rights (OHCHR) works to promote and protect human rights that are guaranteed under international law. That Office has produced an information series on sexual and reproductive health and rights, the purpose of which is to provide detailed guidance for lawmakers, policymakers, judiciaries, and other stakeholders to support the adoption and effective implementation of laws, policies, and programs to respect, protect, and fulfil women's sexual and reproductive health and rights. The series includes a publication on abortion (OHCHR Abortion information).² The Abortion information was the main source for information in this submission, and the Anti-Discrimination Commission will quote extensively from it throughout this submission.

Discrimination against women

6. The OHCHR Abortion Information states:

Criminalization of health services that only women require, including abortion, is a form of discrimination against women

The Committee on the Elimination of Discrimination Against Women specifies that "it is discriminatory for a State party to refuse to legally provide for the performance of certain reproductive health services for women." It further establishes that "laws that criminalize medical procedures only needed by women and that punish women who undergo those procedures" are a barrier to women's access to health care. Most recently the Committee

¹ These bodies are described in the Appendix to this submission.

² United Nations Office of the High Commissioner for Human Rights, *Information series on sexual and reproductive health and rights: Abortion* [2015]
<http://www.ohchr.org/Documents/Issues/Women/WRGS/SexualHealth/INFO_Abortion_WEB.pdf>

has requested States to “remove punitive measures for women who undergo abortion.”

Similarly, the Special Rapporteur on the right to health has argued that laws criminalizing abortion “infringe women’s dignity and autonomy by severely restricting decision-making by women in respect of their sexual and reproductive health.” He called on States to “decriminalize abortion” and “consider, as an interim measure, the formulation of policies and protocols by responsible authorities imposing a moratorium on the application of criminal laws concerning abortion.” (citations omitted)

7. The *Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW), at Article 16, requires State Parties to ensure that women have equal rights to decide freely and responsibly on the number and spacing of their children, and to have access to the information, education, and means to enable them to exercise their rights. Article 10 requires that women have access to specific educational information to help ensure the health and well-being of families, including information and advice on family planning.
8. The above statements in the OHCHR Abortion information as well as the obligations under CEDAW, require serious consideration by the Queensland Parliament, particularly given the circumstances of the recent 2010 criminal prosecution under Queensland’s *Criminal Code* of Tegan Leach and Sergie Brennan.³ Ms Leach was charged with procuring her own abortion, and her boyfriend Sergie Brennan was charged with assisting. Both faced jail if found guilty. This was the first time a woman has ever been charged in Queensland for this offence. The jury returned not guilty verdicts.⁴

Right to health, privacy, and to be free from cruel, inhumane, and degrading treatment

9. The OHCHR Abortion information states that:

Treaty body jurisprudence has clearly indicated that denying women access to abortion where there is a threat to the woman’s life or health, or where the pregnancy is the result of rape or incest violates the rights to health, privacy and, in certain cases, to be free from cruel, inhumane and degrading treatment. (citations omitted)
10. In June 2016, the Human Rights Committee found that a woman in Ireland who was forced to choose between carrying her foetus to term (knowing it would not survive) or seeking an abortion abroad, was subjected to discrimination and cruel, inhuman, or degrading treatment as a result of Ireland’s legal prohibition of abortion.⁵
11. The Committee said that Ireland should amend its law on voluntary termination of pregnancy (including if necessary its Constitution) to ensure compliance with

³ *R v Brennan & Leach* [2010] QDC 329.

⁴ Wendy Carlisle, ‘Crown kicks own goal in Qld abortion trial’, *The Drum* (online), 15 October 2010; Kerry Petersen, ‘Abortion laws and medical developments (2011) 18 *Journal of Law and Medicine* 594-600.

⁵ United Nations Office of the High Commissioner for Human Rights, ‘Ireland abortion ban subjected woman to suffering and discrimination – UN Experts’ (online) Geneva, 9 June 2016.

the *International Covenant on Civil and Political Rights* (ICCPR), including effective, timely, and accessible procedures for pregnancy termination in Ireland, and take measures to ensure that health care providers are in a position to supply full information on safe abortion services, without fear of being subjected to criminal sanctions.

12. In a May 2018 referendum, 66.4 per cent of voters in Ireland voted to repeal a constitutional amendment that banned abortion in a vast majority of cases. Legislation is due to be brought before the Irish Parliament by the end of 2018.

Children's rights

13. The OHCHR Abortion information states that:

States should take steps to remove barriers to the provision of abortion services.

Third party authorization provisions are particularly common with respect to abortion, and other sexual and reproductive health services. The Committee on the Rights of the Child has especially emphasized the right of the child, in accordance with evolving capacities, to confidential counselling and to access to information without parental or guardian consent. It has also recommended that "States should review and consider allowing children to consent to certain medical treatments and interventions without the permission of a parent, caregiver, or guardian, such as HIV testing and sexual and reproductive health services, including education and guidance on sexual health, contraception and safe abortion." (citation omitted)

14. The recent Queensland case involving a 12-year-old child, who arguably had capacity to make her own informed decision, and sought an abortion is relevant in considering the human rights of this particular Queensland child in this difficult situation.⁶
15. In this case, the health authority felt obliged to apply to the Court in its *parens patriae* (parent of the nation) jurisdiction for authorisation of the termination of her pregnancy. As to the need for the Court's intervention, McMeekin J found there were two issues. The judge said:

The first relates to the issue of consent.... The second issue concerns the criminal law. As Wilson J said in *State of Queensland v B* (at [6]): "There are potentially difficult issues of criminal responsibility whenever the question of terminating a pregnancy arises. There may also be complex moral, ethical and religious issues, but these are beyond the province of the Court to determine." Criminal responsibility turns on the application of sections 224, 225, 226, 282 and 286 of the *Criminal Code*.

16. The judge had to consider whether the requested termination would be lawful. He said:

As Wilson J observed in *State of Queensland v B* the Court cannot authorise what would otherwise be criminal conduct and nor would it be in Q's best interests to subject her to an unlawful act, especially a criminal act (and see

⁶ *Central Queensland Hospital and Health Service v Q* [2016] QSC 89 (26 April 2016).

Chesterman J's observation in *State of Queensland v Nolan* [2001] QSC 174; [2002] 1 Qd R 454 at [10]).

17. This case again illustrates the difficulty for women and girls and their treating medical practitioners in the Queensland situation where abortions are criminalised. Health care providers in Queensland ought to be in a position to supply full information on safe abortion services, and to provide those services without the fear of being subjected to criminal sanctions.
18. Further, in accordance with the above recommendations of the Committee on the Rights of the Child, the Queensland Parliament should endorse the position that children who have the requisite capacity have the ability to consent to certain medical treatments and interventions, including a safe abortion, without the permission of a parent, caregiver, or guardian, or the Court.

Elimination of discrimination against persons with impairment

19. The OHCHR Abortion information states that:

Treaty bodies have also recommended ensuring access to abortion services in cases of severe foetal impairment, while also putting in place measures to ensure the elimination of discrimination against persons with disabilities. (citations omitted)

20. Prenatal testing is a procedure that is often offered to pregnant women. The existing attitudes, culture, and practice of prenatal testing can result in a wanted pregnancy ostensibly becoming an unwanted pregnancy, where potential impairments are detected, such as Down syndrome or other foetal chromosomal or structural abnormality.⁷ Down syndrome is one of the most common chromosomal foetal abnormalities currently detected antenatally. However, many people born with Down syndrome go on to live productive and independent lives.⁸ Other impairments that do not result in severe foetal impairment may also be detected.
21. The Anti-Discrimination Commission believes it is important that people with disabilities are involved in developing information that is given to, and assists women to make fully-informed decisions, before undergoing prenatal testing. The best experts on life as a person with disability are people with disability themselves. There is a widely-held assumption by people who live without impairment that living life with impairment is 'full of suffering' and a 'great economic burden on society'. Disability is mainly a social construct, and the main 'suffering' experienced by people with disability stems from social discrimination and prejudice, not from functional impairment itself.
22. In offering and undertaking prenatal testing, it is essential that there is genuine 'free choice'. Currently the notion of 'free choice' is a loaded one, and comes with the baggage of commonly-held, negative stereotypes about disability, implicit expectations, subtle influences, and restricted choices. An ethical

⁷ Heather Douglas, Kirsten Black and Caroline de Costa, 'Manufacturing mental illness (and lawful abortion): Doctors' attitudes to abortion law and practice in New South Wales and Queensland' (2013) 20 *Journal of Law and Medicine* 565.

⁸ *Ibid.*

process ought to be followed to ensure ‘informed choice’ is fully realised. As well as providing information to women before undertaking prenatal testing, it should also include providing support for women who wish not to have prenatal testing, as well as providing support for women who wish to carry a foetus with a disability to term. Such support should continue after birth, and government needs to actively work towards a society that is supportive of children and adults with disability. The Anti-Discrimination Commission has been informed of instances where these supports are withdrawn from women and their partners who refuse to have prenatal testing, or have received a prenatal diagnosis of impairment. When medical professionals portray disability to future parents as a hypothesis of ‘better off dead than disabled’, that is when prenatal diagnosis is discriminatory against people with disabilities.

Safety and accessibility

23. Legal abortion services must be safe, accessible, affordable, and of good quality.
24. The OHCHR Abortion Information states:

Where abortion is legal, States must put in place the procedures for making these services safe and accessible to women without discrimination.

The Committee on Economic, Social and Cultural Rights has established that the right to health—which comprises reproductive and sexual health—requires health services, including legal abortion services, which are available, accessible, acceptable and of good quality. The Committee on the Rights of the Child has recommended that “States ensure access to safe abortion and post-abortion care services, irrespective of whether abortion itself is legal.” (citations omitted)

25. In Queensland, abortions are very rarely performed by public hospitals.⁹ As a consequence, women in remote and rural areas have great difficulty in accessing legal abortion services, and can experience significant financial hardship if they do access such services, as well as suffering the emotional and physical hardships of being away from home and family while obtaining services. In order to adequately protect women’s rights to health, Queensland’s Parliament needs to consider how accessible and affordable services can be provided to women in rural and remote areas.

Right to life

26. Article 6 of the *International Covenant on Civil and Political Rights* states:
 1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.
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27. The United Nations Human Rights Committee is developing a General Comment on Article 6. The purpose of the General Comment is to provide appropriate and authoritative guidance to States Parties and other stakeholders

⁹ Heather Douglas, Kirsten Black and Caroline de Costa, above n7, 561.

on the measures to be adopted to ensure full compliance with the protected rights. Draft General Comment No. 36 on Article 6: Right to life was prepared by the Rapporteurs, and includes comment on when the right to life begins, providing at paragraphs 7 and 8:¹⁰

7. Unlike the American Convention on Human Rights, the Covenant does not explicitly refer to the rights of unborn children, including to their right to life. In the absence of subsequent agreements regarding the inclusion of the rights of the unborn within article 6 and in the absence of uniform State practice which establishes such subsequent agreements, the Committee cannot assume that article 6 imposes on State parties an obligation to recognize the right to life of unborn children. Still, States parties may choose to adopt measures designed to protect the life, potential for human life or dignity of unborn children, including through recognition of their capacity to exercise the right to life, provided that such recognition does not result in violation of other rights under the Covenant, including the right to life of pregnant mothers and the prohibition against exposing them to cruel, inhuman and degrading treatment or punishment. Thus, any legal restrictions on the ability of women to seek abortion must not jeopardize their lives or subject them to severe physical or mental pain or suffering. States parties whose laws generally prohibit voluntary terminations of pregnancy must, nonetheless, maintain legal exceptions for therapeutic abortions necessary for protecting the life of mothers, inter alia by not exposing them to serious health risks, and for situations in which carrying a pregnancy to term would cause the mother severe mental anguish, such as cases where the pregnancy is the result of rape or incest or when the foetus suffers from fatal abnormalities. Furthermore, States parties should not regulate pregnancy or abortion in a manner that would compel women to seek clandestine illegal abortions that could endanger their lives. For example, they should not criminalize pregnancies by unmarried women or apply criminal sanctions against women undergoing abortion or against physicians assisting them in doing so. Nor should States parties introduce excessively burdensome or humiliating requirements for seeking permission to undergo abortion, including the introduction of lengthy mandatory waiting periods before a legal abortion can be carried out. The duty to protect the lives of women against the health risks associated with the termination of undesirable pregnancies requires State parties to provide women, and, in particular, adolescents, with information about reproductive options, with access to contraception and with access to adequate prenatal health care.

8. Although, for reasons similar to those mentioned in paragraph 7, the Covenant does not directly regulate the questions relating to the right to life of frozen embryos, eggs or sperm, stem cells or human clones. State parties may regulate the protection of these forms of life or potential life, while respecting their other obligations under the Covenant. (citations omitted)

Freedom of thought, conscience and religion

¹⁰ Yuval Shany and Nigel Rodley, *Draft general comment No. 36: Right to life*, CCPR/C/GC/R.36, UN Human Rights Committee, 115th session (2 September 2015).

28. Both the *Universal Declaration of Human Rights* (Article 18) and the ICCPR (Article 18) recognise the right to ‘freedom of thought, conscience and religion’, including the freedom to manifest a religion or belief either individually ‘or in community with others and in public or private’.
29. In the context of the sexual and reproductive health rights of women and girls (and in relation to abortion specifically), treaty bodies have identified that the practice of conscientious objection by health professionals should be regulated to ensure that it does not inhibit access to services, including in emergencies, and by referral to alternative health providers. The UN Human Rights Committee has also observed that Article 18 of the ICCPR ‘may not be relied upon to justify discrimination against women by reference to freedom of thought, conscience and religion’. The World Health Organization (WHO) Safe Abortion Guidance recommends that health professionals who claim conscientious objection should be required to refer the person to another provider so that access to lawful abortion services is not impeded.¹¹

Conclusion

30. Abortion is a crime under Queensland’s *Criminal Code* for women who procure them and doctors who perform them. The substantive laws have not been reviewed since they were enacted in 1899.

Human rights bodies have provided clear guidance on when there is a need to decriminalise abortion, and have emphasised that access to abortion is a matter of human rights.

The Committee and the Parliament should consider and uphold the obligations under the international human rights instruments to which Australia is a signatory to:

- eliminate discrimination against women, and
- ensure women’s right to health and other fundamental human rights.

¹¹ Queensland Law Reform Commission *Review of termination of pregnancy laws* Report No 76 June 2018, p257

Appendix: Human rights bodies mentioned in this submission

Committee on Economic, Social and Cultural Rights: the Committee on Economic, Social and Cultural Rights (CESCR) is a body of independent experts that monitors implementation of the *International Covenant on Economic, Social and Cultural Rights* by its States parties.

Committee on the Elimination of Discrimination against Women: the United Nations Committee on the Elimination of Discrimination against Women, an expert body established in 1982, is composed of 23 experts on women's issues from around the world.

The Committee's mandate is very specific: it watches over the progress made by women in those countries that are States parties to the 1979 *Convention on the Elimination of All Forms of Discrimination against Women*. A country becomes a State party by ratifying or acceding to the Convention, and thereby accepting a legal obligation to counteract discrimination against women. The Committee monitors the implementation of national measures to fulfil this obligation.

Committee on the Rights of the Child: the Committee on the Rights of the Child (CRC) is a body of 18 Independent experts that monitors implementation of the *Convention on the Rights of the Child* by its State parties.

Human Rights Committee: the Human Rights Committee is a body of independent experts that monitors implementation of the *International Covenant on Civil and Political Rights* by its State parties.

All States parties are obliged to submit regular reports to the Committee on how the rights are being implemented. States must report initially, one year after acceding to the Covenant, and then whenever the Committee requests (usually every four years). The Committee examines each report and addresses its concerns and recommendations to the State party in the form of 'concluding observations'.

OHCHR: the Office of the High Commissioner for Human Rights (the OHCHR) works to promote and protect human rights that are guaranteed under international law, and the High Commissioner for Human Rights is the principal human rights official of the United Nations and part of the United Nations Secretariat.

Special Rapporteur: Special Rapporteurs are independent experts appointed by the Human Rights Council to examine and report back on a country situation, or a specific human rights theme. The position is honorary, and the expert is not a member of staff of the United Nations, nor paid for their work. They express their views in an independent capacity, and do not represent their Government.