Submission No. 834
Received 30 June 2016

Human Rights Law Centre

Ensuring human rights to reproductive health

Submission on Abortion Law Reform (Women's Right to Choose) Amendment Bill 2016 and Inquiry into laws governing termination of pregnancy in Queensland

30 June 2016

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Human Rights Law Centre

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Contents

1. Introduction

Thank you for the opportunity to participate in Queensland's Health, Communities, Disability Services and Domestic and Family Violence Prevention Committee's (the **Committee**) Abortion Law Reform Inquiry (the **Inquiry**).

The Human Rights Law Centre works to protect and promote women's reproductive rights. We have supported decriminalisation of abortion in Tasmania and Victoria and the development of the ACT's safe access zones around abortion clinics. We were also instrumental in the passage of Victoria's safe access laws, having acted for the East Melbourne Fertility Control Clinic in its legal bid to end the intimidation by anti-abortionists out the front of its premises.

Our submission addresses the following matters and terms of reference:

- the human rights law principles governing abortion (TOR 2);
- the merits of the Abortion Law Reform (Woman's Right to Choose) Amendment Bill 2016 (the **Bill**);
- legislative arrangements in other Australian jurisdictions including regulating terminations based on gestational periods, conscientious objection and safe access zones; (TOR 4); and
- the provision of counselling and support services for women (TOR 5).

2. Executive Summary

Queensland parliament should seize the opportunity to reform Queensland laws that criminalise abortion and thereby bring Queensland law into line with clinical practice and common sense.

Although it is legal to access and provide abortion in Queensland in some circumstances, abortion nonetheless remains a criminal offence. Women's basic rights to non-discrimination, privacy and bodily autonomy are threatened by a system under which they risk criminal prosecution for making medical decisions concerning their own body. The threat is not merely theoretical. In 2009, a Cairns couple were charged with procuring a miscarriage under Queensland's abortion laws.

The current law is unclear and creates unacceptable levels of clinical uncertainty over when a doctor can legally provide an abortion. Under the Queensland Criminal Code (sections 224-226) women and doctors risk jail terms for having or providing abortions "unlawfully", but the Code does not define "unlawful.". This uncertainty led to the recent case in which a 12-year-old girl required court orders in order for her to have a termination, in circumstances where the pregnancy was clearly unviable and causing emotional and physical distress to the girl.

Queensland should urgently reform its abortion laws that threaten women and girls' basic rights. The laws are out of date and hopelessly out of step with community values.

The reforms should strengthen women's rights to autonomy, privacy and non-discrimination in the full enjoyment of their right to sexual and reproductive health. The Bill is an important first step in that process. By removing abortion from the Criminal Code, abortion is properly situated as a clinical health issue to can be determined between a woman and her doctor.

Other Australian states have reformed their abortion laws by providing gestational limits in which women can choose to have an abortion without third party approval, and then after which the opinion of doctors becomes relevant. If Queensland decides to include gestational limits on when women can choose to have an abortion, the reform should stipulate that women can choose an abortion up until 24 weeks, as is the case in Victoria. This Victorian gestational limit scheme is consistent with international law.

As well as removing abortion from the Criminal Code, the Queensland government should also include two other important reforms to ensure women's practical realisation of their rights:

(a) provide for the right of doctors to conscientiously object to abortion, whilst ensuring that the exercise of that right does not hinder a woman's right to access safe and legal abortion;

(b) provide for safe access zones around abortion clinics;

Any new abortion law should not contain a requirement for mandatory counselling or a referral to counselling.

3. Recommendations

Recommendation 1: Queensland should decriminalise abortion in the manner set out in the Bill and, if it prefers to limit the gestational period in which women can freely choose an abortion, it should adopt a law that follows the gestational limits set out in the Victorian Act.

Recommendation 2: Queensland should include a conscientious objection provision in its abortion law reform, including a duty on doctor's to refer patients in a manner similar to the conscientious objection regimes in Tasmania and Victoria.

Recommendation 3: Queensland should enact safe access zones around clinics that provide abortions.

Recommendation 4: Queensland abortion laws should not require mandatory counselling or mandatory referral to counselling.

4. Human rights law governing abortion

4.1 Decriminalising abortion is consistent with human rights law

Queensland has a duty to guarantee women and girls safe access to abortion services.[1] The decriminalisation of abortion is consistent with international human rights law. Criminalising or restricting medical procedures that are only needed by women is a form of discrimination against women.[2] It undermines women's autonomy and right to equality and non-discrimination in the full enjoyment of their right to sexual and reproductive health.[3]

Restrictions on abortion place women in danger by denying them safe access and care.[4] Without access to safe abortion, maternal mortality and morbidity increases as women are forced to undergo clandestine abortions in unsafe and unhygienic conditions. Women who are forced to carry their pregnancies to term against their will are also vulnerable to the physical and psychological consequences of that experience.[5]

4.2 The limited rights of a foetus

Some anti-abortionists assert an absolute foetal right to life in support of the criminalisation of abortion. Such a right does not exist under international law. [6]

The fundamental principles of equality and non-discrimination require that the rights of a pregnant woman be given priority over an interest in prenatal life. Under international human rights law although a foetus has some rights as a potential person, it has not been found to have a right to life. This is because protecting a right to life before birth could conflict with human rights protections for women. Or as the European Court of Human Rights put it: "the unborn child is not regarded as a 'person' directly by Article 2 of the Convention [right to life] and that if the unborn do have a 'right' to 'life' it is implicitly limited by the mother's rights and interests", including her rights to life, health and privacy.[7]

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[1] Austra a s a party to a of the key UN human r ghts treat es. A though rat f ed by Austra a, the treat es app y throughout the states and terr tor es and app y to Queens and government under nternat ona aw. Comm ttee on Econom c, Soc a and Cu tura R ghts (CESCR), Genera Comment No 22: Sexua and Reproduct ve Hea th (2016), UN Doc E/C.12/GC/22, [28].

[2] Comm ttee on the E m nat on of a forms of D scr m nat on aga nst Women (CEDAW Comm ttee), Genera Recommendat on 24: Women and Hea th (1999) UN Doc A/54//38/Rev 1.

[3] CESCR, Genera Comment No 22: Sexua and Reproduct ve Hea th (2016), UN Doc E/C.12/GC/22, [34].

[4] CESCR, Genera Comment No 22: Sexua and Reproduct ve Hea th (2016), UN Doc E/C.12/GC/22, [40]; Juan Mendez, *Report of the Special Rapporteur on torture and other cruel inhuman or degrading treatmen*t, A/HRC/31/57, 5 January 2016, [44], (**Mendez 2016 Report**) See a so Juan Mendez, *Report of the Special Rapporteur on torture and other cruel inhuman or degrading treatment*, A/HRC/22/53, 1 February 2013, from [45] (**Mendez 2013 Report**) and c tat ons conta ned there n.

[5] Mendez 2016 Report, [43]; See a so Mendez 2013 Report from [45] and c tat ons conta ned there n.

[6] See Tan a Penov c, 'Book Rev ew of R ta Joseph, Human R ghts and the Unborn Ch d' (2011) 33 *Human Rights Quarterly*, 229.

[7] V*o v France*, App No 53924/00, Eur. Ct HR, 80 (2004); *A B and C v Ireland*, App No 25579/05, Eur Ct HR 237 238 (2010).

The view of the Australian Government is that the right to life under the International Covenant on Civil and Political Rights (ICCPR)[8] was 'not intended to protect life from the point of conception but only from the point of birth.'[9]

5. The Abortion Law Reform (Women's Right to Choose) Amendment Bill 2016

By removing abortion from the Criminal Code, the Bill protects and promotes women's rights to privacy, autonomy and non-discrimination, and treats abortion as a medical decision for a woman and her doctor. This form of decriminalisation of abortion is similar to the manner in which abortion was decriminalised in the ACT and is consistent with human rights law. We support the Bill.

5.1 Gestational limits in Victoria and Tasmania

Victoria and Tasmania have taken a different approach to decriminalisation of abortion and established gestational limits in which a woman can choose to have an abortion (24 weeks in Victoria, 16 weeks in Tasmania) and thereafter requiring the opinion of two doctors that the abortion is appropriate.

If Queensland reforms abortion laws using gestational limits, it should adopt the Victorian as it gives greater autonomy to women to make decisions about their pregnancy for a longer period that is, to some extent, reflective of the period at which a foetus is viable.

The Tasmanian requirement that two medical practitioners approve a termination after 16 weeks based on their assessment of the risk to the woman is inconsistent with international human rights law, particularly article 5(a) of CEDAW which required the elimination of practices based on the inferiority or superiority of women or men, or on stereotyped roles.[10] Cook and Cusack explain:[11]

> The fa se stereotype of women as ncapab e of mak ng rat ona dec s ons s pers stent n the hea th sector… Gender-paterna st c stereotypes have enab ed the deve opment of a women-protect ve rat ona e for m t ng access to therapeut c abort on. It has been exp a ned that these rat ona es are substant ated by narrat ve and emp r ca ev dence... Th s ev dence, however spec ous and ncorrect, has been used to buttress fa se stereotypes of women as weak and n need of protect on.

The requirement for a medical practitioner to assess the risk to a woman is inconsistent with adults' usual role as primary decision-maker in relation to their own medical procedures. The impact of the

[8] *International Covenant on Civil and Political Rights*, 16 December 1966, 999 U.N.T.S. 171 (entered nto force 23 March 1976).

[9] Mr Peter Arnaudo, Attorney Genera 's Department, Hansard Jo nt Stand ng Comm ttee on Treat es Reference: Treat es tab ed on 14 May and 4 June 2008 16 June 2008, p.7. http://www.aph.gov.au/hansard/jo nt/commttee/J10940.pdf

[10] CEDAW, art c es 2(f), 5(a) and 12.

[11] Rebecca J Cook and S mone Cusack, *Gender Stereotyping: Transnational Legal Perspectives* (Un vers ty of Pennsy van a Press) 86 87.

third party approval requirement is amplified because the requirement is enlivened at 16 weeks, which is relatively early in the pregnancy. While human rights jurisprudence has not yet recognised a right to access to abortion in all circumstances and at all stages of pregnancy, third party consent requirements at 16 weeks operate as impermissible barriers to accessing reproductive health services.

Recommendation 1: Queensland should decriminalise abortion in the manner set out in the Bill and, if it prefers to limit the gestational period in which women can freely choose an abortion, it should adopt a law that follows the gestational limits set out in the Victorian Act.

6. Other Victorian and Tasmanian regulations

Decriminalising abortion is a first step in the law reform process. The following matters are also necessary to include in order to ensure that abortion is not only legal, but also safe and accessible.

6.1 Conscientious objection and duty to refer

Abortion laws should ensure that where doctors hold an ethical, religious or moral objection to abortion, the patient is not disadvantaged.

Queensland should enact laws that allow doctors with a conscientious objection to abortion to refuse to perform an abortion, except in an emergency where it is necessary to save a woman's life or prevent serious injury. The provisions should also require doctors and counsellors with a conscientious objection to refer a woman to another practitioner who can provide advice. This is the form of the conscientious objection regimes established in Victoria and Tasmania.[12]

These kinds of conscientious objection provisions strike a balance between the medical practitioner's right to freedom of conscience and religion and the rights of women to bodily autonomy and non-discrimination. The provisions are consistent with international human rights law which protects freedom of religion, but provides that the right to act in accordance with religious belief is not absolute and may be limited to protect public safety, order, health, or morals or the rights and freedoms of others.[13] Medical practitioners are in a position of power and authority when women seek their assistance. Referral provisions ensure that women receive the treatment and advice they need and that their rights are realised in practice.

The Committee on the Elimination of Discrimination against Women has considered the issue of conscientious objection and stated that where doctors refuse to perform abortion services based on

[12] See *Abortion Law Reform Act* 2008 (V c), sect on 8 and *Reproductive Health (Access to Terminations) Act* 2013 (Tas), sect ons 6 & 7.

[13] ICCPR, Art c e 18(3)

their religious beliefs, measures should be introduced to ensure that women are referred to alternative health providers.[14]

Recommendation 2: Queensland should include a conscientious objection provision in its abortion law reform, including a duty on doctor's to refer patients in a manner similar to the conscientious objection regimes in Tasmania and Victoria.

6.2 Safe access to abortions

Abortion law reform in Queensland should also include the creation of safe access zones around clinics that provide terminations. Safe access zones were included in Tasmania's abortion law reform in 2013, and have since been legislated in ACT and Victoria in 2015.[15]

Experience in Victoria and other jurisdictions shows that women seeking abortions and staff providing abortion services may be severely affected by the intimidating and abusive behaviour of some anti-abortionists outside abortion clinics.[16] In some jurisdictions, protest outside clinics has also led to violence against patients or staff.[17]

Safe access zones create spaces in which it is unlawful to harass or intimidate women seeking abortion or to communicate about abortion in a way that would be likely to cause anxiety or distress. It is also prohibited to record women in those zones. Safe access zones engage the right to freedom of expression of anti-abortionists. However, that right is not absolute and may be limited in order to ensure respect for the rights or reputations of others or to protect national security or public order, public health or morals.[18]

Sensible safe access zones, enacted for a legitimate purpose such as to protect women's right to privacy and dignity whilst seeing their doctor, and in a form that is proportionate, will be consistent with human rights. Zones will be proportionate if they are not overbroad and do not unreasonably limit other rights.

Free speech rights do not extend to entitling people to a captive audience.[19] The intrusiveness of anti-abortionists outside of clinics is such that patients and staff cannot avoid their signs or unwelcome advances. As courts overseas have noted: "An important justification for permitting people to speak

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[14] Comm ttee on the E m nat on of D scr m nat on Aga nst Women, *General Recommendation 24 on Women and Health* 20th sess on, 1999; *See* CEDAW Comm ttee: Croat a, ¶ 109, U.N. Doc. A/53/38 (1998); S ovak a ¶ 43, U.N. Doc. A/63/38 (2008).

[15] *Reproductive Health (Access to Terminations) Act* 2013 (Tas); *Health (Patient Privacy) Amendment Act* 2015 (ACT); *Public Health and Wellbeing (Safe Access Zone) Amendment Act* 2015 (V c).

[16] See d scuss on n V ctor an Par ament, 2 September 2015, referenc ng the ev dence put before the Supreme Court by East Me bourne's Fert ty Contro C n c: http://www.par ament.v c.gov.au/ mages/stor es/da y hansard/Counc _2015/Counc _Aug Dec_2015_Da y_2_September_2015.pdf.

[17] Secur ty guard Steve Rodgers was murdered at the East Me bourne Fert ty Contro C n c n 2001. See a so summary of h story of v o ence outs de US abort on c n cs ava ab e at http://www.procho ce.org/about_abort on/v o ence/h story_v o ence.htm .

[18] ICCPR, Art c e 19(3).

[19] *R v Watson*, [84], agree ng w th Stevens J n *Hill v Colorado* and Adams J n *Ontario (AG) v Dieleman* (1994) 117 DLR (4th) 449 (Ont. Gen. D v.)

freely is that those to whom the message is offensive can simply avert their eyes or walk away."[20] When people cannot simply walk away, there is a greater imperative for protection of the rights of the audience.

Recommendation 3: Queensland should enact safe access zones around clinics that provide abortions.

7. Provision of mandatory counselling

The terms of reference ask for submissions on the provision of counselling and support services. We note that these issues were considered in some detail by the Victorian Law Reform Commission during its extensive review of abortion laws, including the experience in other jurisdictions.[21]

The Commission found that the provision of counselling is a clinical, service delivery matter rather than one that needs to be mandated by law. It did not find evidence that forcing women into counselling is necessary or advisable.[22]

The VLRC recommended that abortion laws should not require mandatory counselling or mandatory referral to counselling.

Recommendation 4: Queensland abortion laws should not require mandatory counselling or mandatory referral to counselling.

[20] *R v Watson* [84]; quot ng Adams J n *Ontario (AG) v Dieleman* (1994) 117 DLR (4th) 449 (Ont. Gen. D v.).

[21] V ctor an Law Reform Comm ss on, *Law of Abortion*, 2008.

[22] Ib d, 8.122.