Submission No. 851
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The Research Director
Health, Communities, Disability Services and
Domestic and Family Violence Prevention
Parliament House
George Street
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Dear Research Director,

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

Australian Lawyers for Human Rights (ALHR) thanks the Health, Communities, Disabilities Services and Domestic and Family Violence Prevention Committee for the opportunity to make this submission to the inquiry on the Termination Law Reform (Women's Right to Choose) Amendment Bill 2016 and Inquiry into laws governing termination of pregnancy in Queensland.

ALHR was established in 1993 and is a national network of Australian solicitors, barristers, academics, judicial officers and law students who practise and promote international human rights law in Australia. ALHR has active and engaged National, State and Territory committees and a secretariat at La Trobe University Law School in Melbourne. Through advocacy, media engagement, education, networking, research and training, ALHR promotes, practices and protects universally accepted standards of human rights throughout Australia and overseas.

It is ALHR's view that criminal provisions relating to termination of pregnancy should be repealed and that termination of pregnancy services should be safe, legal and accessible.

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If you would like to discuss this submission, please contact ALHR Qld Convenors Pree Sharma or Kate Marchesi at qld@alhr.org.au.

Yours faithfully,

Benedict Coyne
President
Australian Lawyers for Human Rights

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Executive summary

1. Australian Lawyers for Human Rights submits that the current laws regarding termination of pregnancy are inconsistent with international human rights standards. **We recommend that Queensland follow international guidelines and repeal laws criminalising termination procedures for patients and practitioners and that punitive measures be removed**. The Victorian model of regulating pregnancy terminations has proven to be effective and it is the submission of Australian Lawyers for Human Rights that Queensland should adopt this model, **including the proposed amendments to establish exclusionary zones around clinics**.

2. **Laws regulating termination of pregnancy procedures in Queensland are unclear and overly restrictive.** While cases have provided some limited guidance and have created a defence for practitioners, the legislation fails to reflect this, 30 years later. This means that practitioners providing termination of pregnancy services operate within a framework of legal uncertainty and are potentially criminally liable, and patients seeking terminations may face criminal charges.

3. **The law does not reflect international community values or human rights standards.** The right to reproductive autonomy has been recognised by international human rights bodies as it relates to pregnancy termination procedures. The forced continuation of an unwanted pregnancy has also been recognised, in some circumstances, to violate human rights. In particular, the United Nations Committee on the Elimination of All forms of Discrimination Against Women (CEDAW Committee) and the United Nations Human Rights Committee have provided guidance for states on the provision of termination services. International human rights law jurisprudence does not support the interpretation of either "the right to life" or "the rights of the child" as restricting the right to access pregnancy termination services.

4. **Access to health services is limited due to the inclusion of pregnancy termination procedures in the Criminal Code.** Most procedures are carried out in private clinics, meaning that affordability presents a significant barrier to access, as well as location. Most clinics are located in the Southeast corner of the state, meaning that patients living in rural and remote areas are at a significant disadvantage. Conscientious objection by doctors is also a barrier for access where there may only be one practitioner operating in a community.

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Recommendations

Australian Lawyers for Human Rights submits the following recommendations:

1) The Queensland Government repeal punitive measures:
    a. for women who seek to or have undergone pregnancy terminations,
    b. relating to the provision of pregnancy termination services by practitioners,

in accordance with our obligations under international human rights instruments. Specifically, we call for repeal of sections 224, 225 and 226 of the *Criminal Code 1899* (Qld).

2) The Queensland Government enact legislation to ensure the provision of affordable and accessible pregnancy termination procedures for all persons up to the 24th week of gestation and, with the agreement of two medical practitioners, after 24 weeks (Victorian legislative model).
3) In the event the above model is not adopted, legislation should provide for pregnancy termination to be legal in at least some circumstances (such as cases of rape, incest, where there is a risk to the patient's physical or mental health), in accordance with our obligations under international human rights instruments.
4) Practitioners should be free to conscientiously object to performing pregnancy terminations on religious or moral grounds including in accordance with Article 18 of the International Covenant on Civil and Political Rights (ICCPR).
5) Practitioners who choose to exercise conscientious objection must refer patients in a timely manner to a practitioner who is known not to object.
6) In emergency situations, practitioners and nurses have a duty to perform termination of pregnancy procedures if it is reasonably necessary to avoid a threat to the health of the patient.
7) Exclusion zones should be established at a distance of at least 150 metres around clinics to protect patients and staff from harassment and vilification.
8) Legislation and regulations should use gender-neutral language and ensure that termination of pregnancy services are available to all persons.

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Existing termination practices in Queensland

This term of reference falls outside our organisational scope and expertise. We refer to the expertise of medical professionals, providers and those working in the industry to address this point.

Existing legal principles that govern termination practices in Queensland

Currently there are only four relevant sections within the *Criminal Code 1899* (Qld) that govern termination practices in Queensland. The first three lay out offences for the patient and practitioner:

- Section 224 makes it an offence to attempt to procure any miscarriage of a woman by administering any poison or noxious thing, or by using force, attracting a penalty of 14 years imprisonment.
- Section 225 makes it an offence for a woman to procure her own miscarriage by administering any poison or noxious thing, or by using force, attracting a penalty of 7 years imprisonment.
- Section 226 makes it an offence to supply drugs or instruments to procure a miscarriage, attracting a penalty of 3 years imprisonment.

Section 282 contains a defence for practitioners, where a surgical operation or medical treatment is provided in good faith and with reasonable care and skill for the patient's benefit or to preserve the mother's life.[1]

These statutory provisions have rarely been applied in Queensland; the most significant case is the 1986 case of *R v Bayliss and Cullen*.[2] This case involved a young woman who complained about a termination of pregnancy at a Greenslopes Fertility Control Clinic. In this case, McGuire J, relied on Victorian and UK decisions and held that s 282 may be used as a defence for termination procedures, where the procedure was:

- Necessary to preserve the woman from a serious danger to her life, or physical or mental health (not including the normal dangers of pregnancy and childbirth); and

[1] Ibid s 282.
[2] [1986] QDC 011.

- Not out of proportion to the danger to be averted.[3]

McGuire J went on to state that the law governing terminations in Queensland was uncertain and that either the Court of Appeal or Parliament would need to effect changes in order to clarify this law.[4]

The decision in *R v Bayliss and Cullen* remained largely untested until the 2010 case of *R v Leach and Brennan*. This case involved a young couple from Cairns, charged with procuring a termination using misoprostol and mifepristone.[5] The couple had consulted three doctors prior to using the drugs and an OB/GYN stated that the drugs procured were not in fact harmful to the person taking them and were taken by thousands of women around the world every year. Therefore, the jury's doubts as to the noxious nature of the drugs resulted in a 'not guilty' verdict after less than an hour of deliberation.[6]

Legislative amendments to section 282 of the *Criminal Code 1899* (Qld) were enacted as a result of this case, extending the scope of the defence to include, not only the performance of a surgical operation to terminate a pregnancy but also the provision of medical treatment in general. This was a result of widespread concern by medical professionals in relation to the case of *R v Leach and Brennan*, as there was cause to believe doctors who prescribed similar medication to assist women in medically terminating their pregnancy would fall outside the defence, even if the termination was otherwise lawfully performed.[7]

The amendments also provided that if a person has been lawfully supplied (or believes they have been lawfully supplied) with a substance to terminate a pregnancy, then it is legal for them to use it. This has resulted in a small amount of practical protection to women seeking medication terminations.[8] The Hon. Grace Grace MP commented on these amendments, stating:

> "We cannot stand by and allow existing out-of-date laws to continue for any length of time that have the potential of making, unintentionally, criminals of both health professionals and the public. These people deserve to be protected and we need to

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3 *R v Davidson* [1969] VR 667; *R v Bourne* [1938] 3 All ER 615.
4 Above, n 2.
5 *R v Leach and Brennan* [2010] QDC 329.
6 Ibid.
7 Brigid Andersen, 'Qld women forced interstate for terminations', *ABC News* (online), 8 September 2009 <http://www.abc.net.au/news/2009-08-31/qld-women-forced-interstate-for-terminations/1412338>.
8 Children by Choice, *Children By Choice - Fact Sheet: Queensland Termination Law* (2016) Childrenbychoice.org.au <http://www.childrenbychoice.org.au/info-a-resources/facts-and-figures/queensland-termination-law>.

> provide certainty as far as is possible for both the highly trained health professionals and the public caught up in the current uncertainty that comes from old and/or out-of-date laws." [9]

These views mirrored the sentiments of Justice Menhennit expressed 40 years previously in relation to the ambiguity and uncertainty of these statutory provisions and the need for clarification by the Queensland Parliament.[10] The current law must be amended to ensure certainty for patients and practitioners.

The need to modernise and clarify the law

The current law does not reflect international community values, nor does it reflect international human rights standards on access to healthcare and discrimination against women and girls.

The right to reproductive autonomy

Laws criminalising terminations are inconsistent with international human rights standards, which recognise the right to reproductive choice. The prohibition on sex discrimination is reflected in most international human rights treaties, including the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW),[11] signed by Australia on 17 July 1980 and ratified by Australia on 28 July 1983.[12] The Convention prohibits discrimination on the basis of sex, which affects the enjoyment of human rights by women. The Convention recognises a range of rights including bodily autonomy and reproductive choice. Article 3 of the Convention requires States parties to take appropriate measures to guarantee the enjoyment and exercise of these rights.

Denying women the right to access pregnancy termination services violates the rights of the woman. The CEDAW Committee has stated that that forcing women to continue a pregnancy, especially in circumstances where the pregnancy is a result of rape or incest, or where there is a threat to the woman's health, violates the right to health, and right to be free from cruel, inhuman and degrading treatment.[13] The consequences of being forced to continue an unwanted pregnancy are also likely to impact on the enjoyment of other economic and social rights. Having to continue an unwanted pregnancy is likely to infringe

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9 Queensland, *Parliamentary Debates*, Legislative Assembly, 3 September 2009, 2123-3 (Grace Grace).
10 *R v Davidson* (1969).
11 Entered into force on September 3, 1981.
12 See: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en
13 Committee on the Elimination of Discrimination Against Women, *LC v. Peru*, CEDAW/C/50/D22/2009, para 8.15.

on the right to the highest attainable standard of physical and mental health, which is provided for in Article 12 of the International Covenant on Economic and Social Rights (ICESCR). The ICESCR's supervisory committee has interpreted the right to health to include 'the right to control one's health and body, including sexual and reproductive freedom'.[14]The Special Rapporteur on the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health has also argued that the criminalisation of pregnancy terminations 'infringes women's dignity and autonomy by severely restricting decision-making by women in respect for their sexual and reproductive health'.[15]

Access to termination services in Queensland

Queensland has a dispersed population, with a large number of people living in rural and remote areas. While there are a number of pregnancy termination clinics currently operating in Queensland, few of these are located outside of the South East region of the state. Data indicates that the overwhelming majority (approximately 99%) of pregnancy terminations are performed in private clinics.[16] This poses a substantial barrier to access for poorer women and especially those living in regional communities. Article 14(2)(b) of the CEDAW requires States to ensure women in rural areas have access to adequate health care facilities, including information, counselling and services in family planning. The UN Human Rights Committee has expressed concerns about terminations (while being legally available), being practically inaccessible due to the operation of conscientious objection and practitioners' refusal to perform legal terminations. The CEDAW Committee has considered the refusal to treat women based on conscientious objection was an infringement of women's reproductive rights.[17] The UN Human Rights Committee has made the following comment in relation to laws that limit the rights of those who may hold different religious beliefs:

> "If a set of beliefs is treated as official ideology in constitutions, statutes, proclamations of ruling parties, etc, or in actual practice, this shall not result in any impairment of the freedoms under article 18 [ICCPR] or any other rights recognised

[14] Committee on Economic, Social and Cultural Rights, General Comment No. 14: The right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights) UN Doc E/C.12/2000/4, 11 August 2000.
[15] A/66/254, para 21.
[16] Dr Tony O'Connell, Chief Executive of Qld Health Centre for Healthcare Improvement, 2010,
[17] Committee on the Elimination of Discrimination against Women, Concluding Comments on Croatia UN Doc. A/53/38, Part 1 (1998) para 103.

> under the Covenant nor in any discrimination against persons who do not accept the official ideology or who oppose it."[18]

The issue of religious beleif is of particular concern to rural and remote communities, which may only have one medical practitioner operating in the area. While practitioners should have a right to refuse to perform a termination on the basis of conscientious objection, the state has an obligation to ensure such refusals do not amount to a barrier to access. Therefore, the decriminalisation of pregnancy termination is consistent with the right to freedom of religion pursuant to Article 18 ICCPR. While the ICCPR provides that everyone shall have the right to freedom of religion, this right is qualified and limited by subsection (3), which provides that the right to freedom of religion may be subject to limitations prescribed by law necessary to protect public safety, health or the fundamental rights and freedoms of others.[19] Therefore, as accessing safe and affordable pregnancy termination is a matter of public health and safety and the fundamental human rights of women and girls, the limited and qualified nature of the right to the freedom of religion must be emphasised.

Lack of access to pregnancy termination services in public hospitals also disadvantages women on low incomes. According to data from the non-government organisation Children by Choice, first trimester termination services can cost between $470 and $950 depending on the location of the clinic, with procedures costing approximately $350 more for those who live in rural areas.[20] Decriminalising pregnancy termination procedures would allow for a larger number of services to be provided affordably through the public health system. The CEDAW Committee also called on state parties to secure the enjoyment of reproductive rights by guaranteeing access to termination services in public hospitals.[21]

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[18] Human Rights Committee, General Comment No. 22: The right to freedom of thought, conscience and religion (Art. 18) UN Doc CCPR/C/21/REV.1/Add 4 (30/07/93) para 10.
[19] International Covenant on Civil and Political Rights, 999 U.N.T.S. 171, entered into force Mar. 23, 1976.
[20] Children by Choice Annual Report, 2015, Available at http://www.childrenbychoice.org.au/images/downloads/AnnualReport1415.pdf.
[21] Committee on the Elimination of Discrimination against Women, Concluding Comments on Croatia, UN Doc. A/53/38, Part 1 (1998) paragraph 117.

Recommendations of international human rights bodies

It is of utmost importance to note that in 2014 the United Nations Human Rights Commission has recommended that States remove all punitive provisions for women seeking pregnancy terminations and permit pregnancy terminations under certain circumstances.[23] Article 16(1)(e) of the CEDAW requires states to:

> 'take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations, and in particular shall ensure on a basis of equality of men and women… the same 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 these rights'.

Article 2(g) requires States to repeal provisions, which constitute discrimination against women. The CEDAW Committee has stated that 'it is discriminatory for a State party to refuse to legally provide for the performance of certain reproductive health services for women'.[24] The CEDAW Committee has also, in its general recommendations, called on parties to 'ensure that measures are taken to prevent coercion in regard to fertility and reproductive, and to ensure that women are not forced to seek unsafe medical procedures such as illegal termination because of lack of appropriate services in regard to fertility control'.[25] Recently, the UN Human Rights Committee has called on Ireland to remove its ban on terminations, and to compensate a woman who was refused a termination after the foetus was diagnosed with a congenital heart defect.[26]

The CEDAW Committee's General Recommendations also reflect concern for the consequences of unsafe termination procedures. The criminalisation of terminations leads to unsafe procedures, which threaten the health of women. The World Health Organisation reports that annually, 22 million unsafe terminations are estimated to take place and that complications from unsafe terminations account for 47, 000 pregnancy related deaths every

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[23] Committee on the Elimination of Discrimination Against Women, Concluding Observations on Peru, CED/C/PER/CO/7-8 [2014], para 36; Statement on sexual and reproductive health and rights: Beyond 2014 ICPD Review [2014].

[24] General Recommendation 24 [1999] on women and health, para 11.

[25] Committee on the Elimination of Discrimination against Women: Zambia UN Doc A/49/38 (1994).

[26] United Nations Office of the High Commissioner of Human Rights, 'Press release: Ireland termination ban subjected woman to suffering and discrimination – UN experts', 9 June 2016. See press release http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20077&LangID=E and findings of the Committee http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR/C/116/D/2324/2013&Lang=en.

year.[27] The ICCPR includes the right to life, liberty and security of person.[28] The UN Human Rights Committee has called on a number of States to review laws prohibiting termination in order to secure the right to life, as a result of the number of preventable deaths caused by unsafe terminations.[29] There has been a particular concern about lack of access to termination services by minors.[30] A Queensland example highlights this need for access, with the 2016 case of 'Q', the 12-year-old girl who was forced to seek an order from the Supreme Court, to access a termination, causing her significant delay and distress.[31]

Termination and the right to life

The right to life, contained in Article 6 of the ICCPR, has been argued to be inconsistent with reproductive choice and pregnancy termination. Article 6(1) states that 'every human being has the inherent right to life'. However, international human rights law and jurisprudence does not support the view that the right to life prohibits or is contrary to lawfully performed pregnancy terminations. The law has recognised 'live birth' as marking the point at which the life of a human being begins and therefore does not apply to the unborn and is not contrary to the right of reproductive choice.[32]

The preamble of the Convention on the Rights of the Child (CRC) (which Australia signed on 22 August 1990 and ratified on 17 December 1990)[33] has also been argued to protect the rights of foetuses, in favour of the right of reproductive choice; specifically, paragraph nine of the preamble, which reads, '*Bearing in mind that, as indicated in the Declaration on the Rights of the Child, the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after*

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27 World Health Organisation, *Safe Termination: technical and policy guidance for health systems* (2012), p. 17.

28 International Covenant on Civil and Political Rights, 999 U.N.T.S. 171, entered into force Mar. 23, 1976.

29 Concluding Observations of the Human Rights Committee, Kenya CCPR/CO/83/KEN, 29 April 2005, paragraph 14; Sarah Joseph, Jenny Schulz and Melissa Castan, The International Covenant on Civil and Political Rights (Oxford University Press, 2004) at 189-191.

30 Concluding observations of the Human Rights Committee: Ecuador. UN Doc CCPR/C/79/Add.92, 18/08/98 paragraph 11.

31 Mark Schliebs, Sarah Elks, (27 April 2016) 'Girl, 12, wins Queensland Supreme Court backing for termination', *The Australian* (online), at http://www.theaustralian.com.au/business/legal-affairs/girl-12-wins-queensland-supreme-court-backing-for-termination/news-story/e12a68c9bb14b0350c9faadbf51c5581.

32 Rebecca Cook, 'International Protection of Women's Reproductive Rights' 24 NYU International Journal of Law and Politics 545- 727 at 647; Louis Waller, 'Any Reasonable Creature in Being' (1987) 13 Monash University Law Review 37-55.

33 See: https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-11&chapter=4&lang=en.

birth'.[34] However, evidence on the history of the drafting of the preamble shows that it was not intended to preclude terminations, and does not alter the definition of child.[35]

The inclusion of 'before as well as after birth', was intended as a compromise, as negotiations on Article 1 found difficulty in defining a child.[36]

Interpreting the Convention to include rights of the unborn would be in direct conflict with the rights guaranteed to a pregnant girl, such as the right to health,[37] to life,[38] and to consider her best interests,[39] and if the pregnancy threatens her physical or mental health.[40] A child is defined in Article 1, which provides that a child is 'every human being below the age of 18 years'.[41] While the Committee on the Rights of the Child has never extended this definition to include unborn children, it has found that safe access to terminations for young girls is necessary for the right to enjoyment of the highest standard of health.[42] The Committee has urged Panama to reconsider its prohibition on abortion 'in view of the conflict between children's right to survival (Article 6) and the constraints imposed by early parenthood'.[43]

The Committee on the Rights of the Child has called for decriminalisation of abortion in response to the health consequences of unsafe terminations.[44] There have been a number of international cases consistent with the view that subordinating a person's right to life in favour of the unborn is contrary to the purpose of the Convention on the Rights of the Child.[45] Therefore, the passage of the current Bill before Parliament would be consistent

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[34] United Nations Commission on Human Rights, Report of the Working group on a Draft Convention on the Rights of the Child, 45th Session, E/CN.4/1989/48.

[35] Philip Alston, The Unborn Child and Abortion Under the Draft Convention on the Rights of the Child, 12 *Human Rights Quarterly*. 156, 173 (1990).; Janoff AF, Rights of the pregnant child vs. rights of the unborn under the Convention of the Rights of the Child, *Boston University Law Journal, 22*(1), 2004, 163-188 at 171. Available at http://www.bu.edu/law/journals-archive/international/volume22n1/documents/163-188.pdf; Luisa Blanchfield, The United Nations Convention on the Rights of the Child: Background and Policy Issues, Congressional Research Service, 2010. Available at http://fpc.state.gov/documents/organization/153279.pdf.

[36] Cynthia Price Cohen, A Guide to Linguistic Interpretation on the Convention of the Rights of the Child, in *Children's Rights in America*; *Convention on the Rights of the Child Compared with United States Law,* Cynthia Price Cohen and Howard A. Davidson ed., American Bar Association, 1990, 42.

[37] Convention on the Rights of the Child, U.D. Doc A/44/49 (1989), Article 24, 1577 U.N.T.S. at 52.

[38] Convention on the Rights of the Child, U.D. Doc A/44/49 (1989), Article 6, 1577 U.N.T.S. at 47.

[39] Convention on the Rights of the Child, U.D. Doc A/44/49 (1989), Article 3, 1557 U.N.T.S. at 46.

[40] Convention on the Rights of the Child, U.D. Doc A/44/49 (1989), Articles 1, 24, 1577 U.N.T.S. at 46, 52.

[41] Convention on the Rights of the Child, U.N. Doc. A/44/49 (1989), entered into force Sept.2 1990.

[42] Convention on the Rights of the Child, U.D. Doc A/44/49 (1989), Article 24, 1577 U.N.T.S. at 52.

[43] Summary Record of the First Part (Public) of the 356th Meeting: Initial Report of Panama, U.N. Committee on the Rights of the Child, 14th Sess., at 5, U.N. Doc. CRC/ C/SR.356 (1997).

[44] Committee on the Rights of the Child, Concluding Observations on Chad, UN Doc CRC/C/15/Add107 (1999); Committee on the Rights of the Child, Concluding Observations on Nicaragua, UN Doc CRC/C/15/Add.108 (1999).

[45] *Paton v United Kingdom* Application No. 8416/78, 3 EHRR 408 (1980); *Vo v France*(2005) 10 EHRR 12 at para 80.

with Australia's binding international obligations under the Convention on the Rights of the Child.

Regulatory arrangements in other Australian jurisdictions including regulating terminations based on gestational periods

Victoria

The *Abortion Law Reform Act 2008* (Vic) makes terminations legal in Victoria. A woman of any age can legally access a termination in Victoria until the 24th week of pregnancy.[46] After 24 weeks' gestation, termination is available but only where a medical practitioner reasonably believes that the termination is appropriate and has the agreement of a second practitioner (for example, where there are severe foetal abnormalities).[47] The Act also imposes obligations on practitioners who have a conscientious objection to performing termination procedures.[48] The practitioner must inform the woman about the objection and refer the woman to another practitioner who is known not to have a conscientious objection.[49] However, practitioners and nurses have a legal duty to perform an abortion in an emergency where the procedure is necessary to preserve the life of the woman, regardless of any conscientious objection.[50]

In 2015, Victoria also introduced an Act to amend the *Hleaht and Wellbeing Act 2008* (Vic), to provide exclusion zones (of 150 metres) to provide for safe access to reproductive health clinics.[51] The Act prohibits anyone harassing, protesting, interfering with the movement of, or recording anyone accessing reproductive health clinics.[52] The explanatory memorandum provides that the new offence is:

> "Designed to eliminate behaviour detrimental to the health and wellbeing of individuals seeking reproductive health services, to protect the wellbeing of staff and clients, and the health and wellbeing of the wider Victorian community. Targeting such behaviour at individuals accessing such premises is a direct detriment to the health and wellbeing both of individuals, and the wider public. Clients and staff

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46 *Abortion Law Reform Act 2008* (Vic) s 4, 6.
47 *Abortion Law Reform Act 2008* (Vic) s 5, 7.
48 *Abortion Law Reform Act 2008* (Vic) s 8 (1).
49 Ibid.
50 *Abortion Law Reform Act 2008* (Vic) s 8 (3), (4).
51 *Public Health and Wellbeing Amendment (Safe Access) Bill 2015* (Vic).
52 *Public Health and Wellbeing Amendment (Safe Access) Act 2015* (Vic) ss 185D, 185E.

> report being traumatised by these encounters, and they have the wider community impact of dissuading people from seeking medical assistance."[53]

The Act has been found to be consistent with the right to freedom of expression,[54] as contained in section 15 of the Victorian *Charter of Human Rights and Responsibilities Act 2006*.[55] The limitation contained in s 15(3) allows for the right to be limited where reasonably necessary to respect the rights and reputation of other persons, or for the protection of national security, public order, public health or public morality.

Western Australia

Termination in Western Australia is regulated by the *Criminal Code 1913* (WA) and *Health Act (Termination) Amendment Act 1998* (WA). Pursuant to those laws, terminations are available to a woman over the age of 16 in the first 20 weeks of pregnancy provided she has given informed consent.[56] Women that are seeking a termination must be advised that counselling is available.[57] Women under the age of 16 cannot give informed consent, a parent must be involved in the counselling process, or a court order to proceed must be obtained from the Children's Court.[58] Terminations after 20 weeks' gestation is available, however, only at some facilities and after two medical practitioners from a statutory panel of six appointed by the Minister for Health agree that the woman or her fetus has a "severe medical condition" that justifies termination.[59]

South Australia

By virtue of the *Criminal Law Consolidation Act 1935* (SA) and 1969 amendments,[60] pregnancy terminations are lawful in South Australia in certain circumstances. Terminations are available up to the 28th week of pregnancy and two doctors must agree that the termination is justified on the grounds of maternal health or foetal abnormality.[61]

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53 *Public Health and Wellbeing Amendment (Safe Access) Bill 2015* (Vic), Explanatory Memorandum. Available at http://www.legislation.vic.gov.au/domino/Web_Notes/LDMS/PubPDocs.nsf/ee665e366dcb6cb0ca256da400837f6b/98A1F30BCE0E1B51CA257EA5007BE99D/$FILE/581PM6exi1.pdf.

54 F. Patten (2015) 'Statement of compatibility: Public Health and Wellbeing Amendment (Safe Access) Bill 2015', *Debates,* Victoria, Legislative Council, 19 August, p. 2544.

55 The right to freedom of expression and these associated exceptions are also contained in Article 19 of the *International Covenant on Civil and Political Rights* (United Nations), to which Australia is a signatory.

56 *Health Act (Termination) Amendment Act 1998* (WA) s 7.

57 *Health Act (Termination) Amendment Act 1998* (WA) s 5 (a).

58 *Health Act (Termination) Amendment Act 1998* (WA) s 8 (a).

59 *Health Act (Termination) Amendment Act 1998* (WA) s 7 (a).

60 S 81, 82.

61 *Criminal Law Consolidation Act 1935* (SA) s 82A, 82A (8).

Further, the termination must only take place in a hospital or approved clinic.[62] The woman seeking a pregnancy termination must have resided in South Australia for a minimum of two months for the termination to be deemed lawful,[64] except in the case of foetal abnormalities or immediate threat to the life or health of the woman.[65]

Northern Territory

The Northern Territory represents one of the most conservative jurisdictions in Australia with respect to pregnancy termination laws. Both the *Criminal Code 1983* and the *Medical Services Act 1974* (NT) regulate termination of pregnancy. The laws provide that pregnancy termination is allowed in approved clinics or hospitals and with the approval of two doctors in the first 14 weeks of a pregnancy.[66] Between 14 and 23 weeks, termination is available if a doctor deems that it is necessary to prevent grave injury to the woman's physical or mental health.[67] Terminations that are sought beyond 23 weeks' gestation will only be undertaken to save a woman's life.[68] Parental consent is required for women under the age of 16.[69] Terminations are required to be undertaken in hospitals and not clinics,[70] which gives rise to an accessibility issue as there are fewer hospitals in the Northern Territory.

New South Wales

Pregnancy terminations in New South Wales are regulated by the *Crimes Act 1900* (NSW).[71] Termination of a pregnancy is a criminal offence under the Act, however, case law in New South Wales has established that in certain circumstances, a termination would not be unlawful.[72] In considering whether continuing the pregnancy poses a serious danger to the woman's mental health and whether termination is justified or not, economic and social factors are also considered.[73]

Tasmania

Until 2013, the *Criminal Code Act 1924* the 'unlawful termination' of a pregnancy was prohibited. The *Reproductive Health (Access to Terminations) Act 2013* reformed the law,

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[62] *Criminal Law Consolidation Act 1935* (SA) s 82A (1).
[64] *Criminal Law Consolidation Act 1935* (SA) s 82A (2).
[65] *Criminal Law Consolidation Act 1935* (SA) s 81A (1) (b).
[66] *Medical Services Act 1974* (NT) s 11 (1) (a).
[67] *Medical Services Act 1974* (NT) s 11 (1) (b).
[68] *Medical Services Act 1974* (NT) s 11.(1) (b) (i).
[69] *Medical Services Act 1974* (NT) s 11 (5).
[70] *Medical Services Act 1974* (NT) s 11 (1) (c)
[71] Ss 82 and 84.
[72] *R v Wald* [1971] 3 DCR 25.
[73] Ibid.

decriminalising termination. Termination may be performed by a medical practitioner with the woman's consent, up to 16 weeks' gestation.[77] After 16 weeks, a termination can be performed if two medical practitioners (one of whom must be an specialist gynaecologist) reasonably believe the continuation of the pregnancy would involve greater risk of injury to the physical or mental health of the pregnant woman than if the pregnancy were terminated.[78] Practitioners may conscientious objective to performing terminations but must refer patients and advice the woman regarding the full range of pregnancy options.[79]

It is noted that the Tasmanian legislation also includes restrictions on the harassment of women seeking pregnancy termination services by mandating exclusion zones around clinics, the only legislation so far to do so.[86]

Australian Capital Territory

Terminations were decriminalised in 2002 with the *Medical Practitioners (Maternal Health) Amendment Act 2002* (ACT). Abortion is not a criminal offence in the ACT. The only restrictions on termination services is that abortions must be carried out in an approved medical facility.[87] Practitioners are not under a duty to carry out an abortion.[88]

Provision of counselling and support services

While this term of reference falls outside our organisational scope and expertise, we primarily refer to the expertise of medical professionals, providers and those working in the industry to address this point. However, we also note the following:

While most people who terminate a pregnancy do not require counselling to help with the decision,[93] provisions must be made for those who do wish to seek assistance. Independent counselling and support services are necessary, to not only assist patients with the decision to terminate a pregnancy or not, but to also assist partners and families through the difficult process as well. Equally important is post termination counselling that aids with the recognition of the loss of a pregnancy, where required. While there are organisations that provide help line assistance over the telephone, what is more crucial, effective and necessary is the provision of face-to-face counselling services. Aside from women in

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[77] *Reproductive Health (Access to Terminations) Act 2013 s 4*.
[78] *Reproductive Health (Access to Terminations) Act 2013 s 5*.
[79] *Reproductive Health (Access to Terminations) Act 2013 s 7*.
[86] *Reproductive Health (Access to Terminations) Act 2013* s 9.
[87] *Medical Practitioners (Maternal Health) Amendment Act 2002* (ACT) s 55C.
[88] *Medical Practitioners (Maternal Health) Amendment Act 2002* (ACT) s 55E.
[93] Marie Stopes, What women want when faced with an unplanned pregnancy', 2014, p. 8. Available at http://www.mariestopes.org.au/wp-content/uploads/2014/07/KeyFindings.pdf.

regional areas experiencing difficulty accessing termination centres in Queensland, women in regional areas are also less likely to be able to access counselling for support pre- and / or post- termination. Reasons for this include geographical barriers, cost and access to information.

There are considerable benefits to enabling terminations to take place in publically accessible hospitals as well as adequately equipped expert clinics where both can provide associated counselling and support.

Conclusion

Once again Australian Lawyers for Human Rights (ALHR) would like to express its gratitude to the Health, Communities, Disabilities Services and Domestic and Family Violence Prevention Committee for the opportunity to make this submission to the inquiry on the Termination Law Reform (Women's Right to Choose) Amendment Bill 2016 and Inquiry into laws governing termination of pregnancy in Queensland. If ALHR can be of any further assistance to the Committee, please do not hesitate to contact us.