AUSTRALIAN LAWYERS FOR HUMAN RIGHTS

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Dear Secretary

Queensland Law Reform Commission Review of Termination of Pregnancy Laws

Australian Lawyers for Human Rights (**ALHR**) is grateful for the opportunity to provide this submission in relation to the Queensland Law Reform Commission's current review of termination of pregnancy laws.

1. Summary

1.1 Abortion is currently a criminal offence in Queensland, punishable by up to 14 years imprisonment for those who "attempt" to procure it and 7 years for women who intend to procure their own miscarriage. While abortion providers operate in Queensland, they exist within an ambiguous legal space, and as a result, access to services is limited which has the effect of endangering Queensland women and girls. Queensland and New South Wales are the only remaining States that do not provide for legal abortions. These laws are archaic, have not changed for more than a century and are not reflective of the majority of community values or of internationally-recognised human rights principles.

1.2 ALHR strongly supports the decriminalisation of abortion in all Australian jurisdictions and supports domestic, regional and international measures that uphold sexual and reproductive health rights, and that allow women and girls autonomy over their own bodies and health.

1.3 United Nations Human Rights bodies have provided States with clear guidance on when there is a need to decriminalise abortion and have emphasised that ensuring access to safe and legal abortion services in accordance with human rights standards is part of States' obligations to eliminate discrimination against women and girls and ensure their right to health as well as other fundamental human rights.

1.4 Those who seek abortions should not be treated as criminals and the majority of Australians recognise that our laws need to change to reflect this. Data from the

Australian Survey of Social Attitudes found that 82 per cent of Australians believe a woman should have the right to choose to have an abortion.[1] A survey conducted by Auspoll in 2009 of over 1000 Queenslanders found that almost 4 out of 5 voters wanted the law changed so abortion is no longer a crime.[2] A poll of 1200 Queenslanders commissioned by national campaign group Fair Agenda in February 2017 found that 82% agreed it should be legal for a woman, in consultation with a medical professional, to terminate her pregnancy.[3]

1.5 It is estimated that 1 in 3 women in Australia have at least one abortion in their lifetime. Over 92% of these occur in the first 14 weeks of pregnancy. Based on limited available data, the highest rate of induced abortion occurs in women aged 20-24 years, although this has declined, and the rate in women aged 35 years or more has increased slightly in the period 1995 to 2008.[4]

1.6 Of the 14,000 abortions performed in Queensland every year, only 1% take place in a public hospital. Without the provision of safe and legal abortion, vulnerable women and women living in remote and rural areas face significant barriers in accessing health services. These women are effectively being denied their human rights.

1.7 The United Nations Economic and Social Council noted in 2016 that "*the full enjoyment of the right to sexual and reproductive health remains a distant goal for millions of people, especially for women and girls, throughout the world.*" [5] A representative democracy like Australia should not feature in this statistic.

1.8 Bodily autonomy is an essential human right and women must have the power to decide whether and when they will have children and the manner of their birth and upbringing.

1.9 They must have free access to family planning education and services, including effective contraceptive and abortion. These services must be readily available, within safe physical and geographical reach, affordable, medically appropriate and up to date.[6]

1.10 In light of the above, we make the following observations in response to the Queensland Law Reform Commission Consultation Paper and questions issued in December 2017.

2. International Human Rights Law and Termination of Pregnancy Laws

2.1 Reproductive rights are recognised in multiple human rights instruments. They are protected by the rights to life (including the right not to die from preventable, pregnancy-related causes), health, personal freedom, security and integrity, to privacy, equality and non-discrimination, consent in marriage and equality, to education and information, and the right to benefit from academic/scientific progress.[7]

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[1] K Betts "Attitudes to Abortion in Australia: 1972 to 2003" *People and Place* 22, 2004. Available online at http://tapri.org.au/wp-content/uploads/2016/02/v12n4_3betts.pdf.

[2] *Queensland voters' attitudes towards abortion* Report prepared by Auspoll, May 2009. Polling commissioned by Children by Choice. https://www.childrenbychoice.org.au/factsandfigures/attitudestoabortion#r1.

[3] *Queensland abortion law reform poll; February 2017*. Polling and report carried out by Essential Media, and commissioned by Fair Agenda. Report available in full at http://www.fairagenda.org/blog_abortion_polling.

[4] Family Planning NSW (2011) Reproductive and sexual health in New South Wales and Australia: Differentials, trends and assessment of data sources. FPNSW: Sydney

[5] United Nations Economic and Social Council, 'General comment No. 22 (2016) on the right to sexual and reproductive health (Article 12 of the International Covenant on Economic, Social and Cultural Rights)', E/C.12/GC22, 2nd May 2016, 2.

[6] General Comment No 22, above n 4, 4-6.

[7] See *Universal Declaration of Human Rights [1948],* Arts 2-3, Arts 5-6, Art 25,Art 27(1); *International Covenant on Civil and Political Rights [ICCPR],* Art 2, Art 6, Art 7, Art 17 *International Covenant on Economic, Social and Cultural Rights [ICESCR],* Art 1, Art 3, Art 11(2), Art 12, Art 15; Julia Gebhard and Diana Trimiño Mora, Reproductive Rights, International Regulation, Max Planck Encyclopedia of Public International Law (Oxford Public International Law Online, August 2013).

2.2 The United Nations Human Rights Committee (**UNHRC**) has stated that the denial of access to safe and legal abortion is a breach of the fundamental human rights of women and girls, specifically under several articles of the *International Covenant on Civil and Political Rights (ICCPR)*[8] including the right to an effective remedy, the prohibition on torture and cruel inhuman and degrading treatment, the right to a private life and the rights of minors to measures of protection.

2.3 Reproductive rights are explicitly recognised under the *Convention for the Elimination of Discrimination Against Women* in Article 16 (1) (e) which recognises:

> *"the basic right of all couples and individuals to decide freely and responsibly the number, spacing and timing of their children and to have the information and means to do so, as well as to attain the highest standard of sexual and reproductive health."*[9]

The Convention also prohibits practices which harm women and girls, including women and girls' reproductive rights.[10]

2.4 The Committee on the Elimination of Discrimination Against Women has said that "*it is discriminatory for a State party to refuse to legally provide for the performance of certain reproductive health services for women.*" The Committee has also more recently requested that States "*remove punitive measures for women who undergo abortion*" and has stated that the criminalisation of practitioners who provide abortion services also violates women's rights.[11]

2.5 Similarly, the Special Rapporteur on the right to health has argued that laws criminalising abortion "*infringe women's dignity and autonomy by severely restricting decision-making by women in respect of their sexual and reproductive health*". The Rapporteur has called on States to decriminalise abortion.[12]

2.6 The United Nations Committee on Economic, Social and Cultural Rights has also established that the right to health – which includes reproductive and sexual health – requires health services, including legal abortion services, which are available, accessible, acceptable and of good quality.[13]

2.7 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.*"[14]

2.8 There is significant and consistent domestic and international jurisprudence that establishes that the right to life is not inconsistent with the provision of abortion services. Indeed, the view of the Australian Government is that the right to life under the ICCPR

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[8] International Covenant on Civil and Political Rights, 16 December 1966, 999 U.N.T.S 171 (entered into force 23 March 1976).
[9] *Convention for the Elimination of Discrimination Against Women [CEDAW]*, Art 16.
[10] *CEDAW* Art 2(f) and 5(a); see also *Convention on the Rights of the Child*, Art 24(3).
[11] Concluding Observations on Peru, CEDAW/C/PER/CO/7-8 (2014), para. 36; Statement on sexual and reproductive health and rights: Beyond 2014 ICPD Review (2014).
[12] UN Secretary-General, *Right of everyone to the enjoyment of the highest attainable standard of physical and mental health*, A/66/254 (2011), para. 21.
[13] General Comment 14 (2000) on the right to the highest attainable standard of health, paras. 8, 12. 27.
[14] General Comment 15 (2013) on the right of the child to the enjoyment of the highest attainable standard of health, para. 70.

was "*not intended to protect life from the point of conception but only from the point of birth.*"[15]

2.9 Legislation should represent an **appropriate and proportionate response** to the problems and issues addressed by that legislation, and adherence to international human rights law and standards is an important indicator of such proportionality. [16]

Answers to the Consultation Paper Questions

3. Who should be permitted to perform or assist in performing terminations?

Q1: Who should be permitted to perform or assist in performing lawful terminations of pregnancy?

Abortion should be primarily considered by legislators, policymakers, the legal system, the medical profession and health administrators as a health and human rights issue. As such it should be treated as any other medical procedure – that is as a personal health matter for the patient to direct as a person with inherent dignity and with the advice and guidance of her treating medical professional.

ALHR supports any changes to legislation that protect practitioners and health professionals from criminal charges for lawfully performing a surgical abortion or supplying and administering abortion-inducing drugs. This policy will increase safe access to abortion.

Pursuant to the *Medical Practitioners (Maternal Health) Amendment Act 2002 (ACT)* termination of a pregnancy is lawful in the ACT if carried out by a medical practitioner in a government approved medical facility. ALHR submits that, in the case of surgical abortion, the requirement that abortions be carried out by a medical practitioner in a medical facility that has been deemed suitable on medical grounds is appropriate. ALHR notes that a requirement for medical termination of pregnancy up to 9 weeks gestation to occur in a hospital setting is not necessary according to clinical best practice and we expand on this below.

ALHR supports the provisions of the *Abortion Law Reform Act 2008* (Vic)[17] whereby only a qualified medical practitioner may perform a surgical abortion on another person.[18] ALHR also supports the provisions of the *Abortion Law Reform Act 2008* (Vic) whereby registered nurses and registered pharmacists are authorised to administer a drug or drugs to medically terminate a pregnancy.[19] However, ALHR does not support the imposition of additional requirements for termination of a pregnancy of more than 24 weeks gestation (as is the case in the *Abortion Law Reform Act 2008* (Vic). As explained in further detail at section 5 of this submission, ALHR recommends that there be no requirement for one or more medical practitioners to approve a woman's choice to have an abortion, irrespective of the gestation period.

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[15] Mr Peter Arnaudo, Attorney–General's Department, Hansard - Joint Standing Committee on Treaties Reference: Treaties tabled on 14 May and 4 June 2008 16 June 2008, p.7. http://www.aph.gov.au/hansard/joint/commttee/J10940.pdf.

[16] See generally Law Council of Australia, *"Anti-Terrorism Reform Project"* October 2013, <http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/a-z-docs/Oct%202013%20Update%20-%20Anti-Terrorism%20Reform%20Project.pdf> .

[17] *Abortion Law Reform Act 2008* (Vic) available at http://www5.austlii.edu.au/au/legis/vic/consol_act/alra2008209/.

[18] *Abortion Law Reform Act 2008* (Vic) S.4.

[19] *Abortion Law Reform Act 2008* (Vic) s.6.

Integral to the issue of who should be permitted to perform terminations is that all abortion services must be accessible. Geographic accessibility is one component of this. However, consideration must also be given to affordability. Where a woman is permitted by law to have an abortion, cost should not be a barrier to her having one. For these reasons ALHR believes that all abortion services should be publicly available.

ALHR proposes that termination both within and outside hospitals be explicitly authorised in any new legislation. However, due to the remoteness of some areas in Queensland, we recommend against hospitalisation being required for certain gestation periods. Instead, we recommend that the circumstances of the woman and the pregnancy be taken into account so that, if it is deemed safe by a suitably qualified medical practitioner, any termination can occur in a non-hospital setting. If the Government does not adopt this approach, ALHR would support a legislative presumption that for gestation periods after 24 weeks, a hospital setting is preferred, where the presumption can be rebutted after considering the time and cost of travelling to a hospital, the effect of travel on the woman, and any risks for the woman if she receives abortion services in a non-hospital setting.

You may know of the Australian Medical Association NT's advice that a woman be within two hours of a hospital when she takes medication to terminate a pregnancy. To manage this requirement in a state as vast as Queensland, ALHR supports the further development of professional standards and guidelines to be followed by medical practitioners, as this would increase safe access to abortions by providing valid options for women in remote areas.

ALHR supports the development of plain English and culturally appropriate resources to inform women of available services and where they can be accessed.

ALHR is concerned that Aboriginal women are disproportionately affected in accessing health services, largely because of the number of Aboriginal women that live in remote and very remote communities.[20] When developing guidelines to support any new legislative framework, such as guidelines for practitioners, the Government must specifically consider the nature of the barriers that Aboriginal women face in accessing services, and work towards minimising the burden of those barriers to Aboriginal women.

Q2: Should a woman be criminally responsible for the termination of her pregnancy?

ALHR submits that the complete decriminalisation of termination of pregnancy is important in order to protect the human rights of women and girls.

Abortion services must be safe, accessible and affordable, including in remote areas of Queensland.

Information on how to access reproductive health services should be widely available to all women and girls living in Queensland, in a variety of languages and in accessible forms such that women and girls living in remote areas, from diverse cultural backgrounds or living with disabilities are not disadvantaged in accessing information.

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[20] According to Queensland Health 47% of Indigenous Queenslanders live in outer regional or remote areas compared to 16% of the non-Indigenous population see https://www.health.qld.gov.au/__data/assets/pdf_file/0030/627690/indigenous-health-factsheet.pdf and see also http://www.abs.gov.au/ausstats/abs@.nsf/mf/3238.0.55.001

Health professionals who have a conscientious objection to abortion should be legally obliged to immediately refer women and girls requesting access to such health services to another suitably qualified professional who does not share the objection. Where such a situation arises in regional and remote areas, distance and cost should not become a further barrier to women and girls seeking access to abortion.

ALHR submits that if abortion services are accessible, safe and legal, then circumstances where a woman terminates her own pregnancy would be extremely rare. If a woman or girl terminates her own pregnancy in circumstances whereby she has access to safe, legal and affordable abortion services it would appear likely that she is affected by other complex factors at play and these are unlikely to be resolved by criminalising her conduct. ALHR submits that notwithstanding the availability of mental health orders in substitution of the criminal law, in such rare cases of self-procurement of abortion, Queensland should be providing medical and psychiatric support services rather than engaging in the criminal prosecution of women and girls.

Similarly, women and girls should never be criminally responsible for the termination of their pregnancy by another person. Again, we submit that if abortion services are accessible, safe and legal, then circumstances where a woman unlawfully procures an abortion would be extremely rare and are better dealt with outside of the criminal law.

4. Gestational Limits and Grounds

Q3: Should there be gestational limits or limits for a lawful termination of pregnancy?

Q4: If yes to question 3, what should the gestational limit or limits be? For example:

- ***a) an early gestational limit, related to the first trimester of pregnancy;***
- ***b) a later gestational limit, related to viability;***
- ***c) another gestational limit or limits?***

Q5: Should there be a specific ground or grounds for a lawful termination of pregnancy?

Q6: If yes to Q-5, what should the specific ground or grounds be? For example:

- ***a) a single ground to the effect that termination is appropriate in all the circumstances, having regard to:***
  - ***(i) all relevant medical circumstances;***
  - ***(ii) the woman's current and future physical, psychological and social circumstances; and***
  - ***(iii) professional standards and guidelines;***
- ***b) one or more of the following grounds:***
  - ***(i) that it is necessary to preserve the life or the physical or mental health of the woman;***
  - ***(ii) that it is necessary or appropriate having regard to the woman's social or economic circumstances;***

(iii) that the pregnancy is the result of rape or another coerced or unlawful act

(iv) that there is a risk of serious or fatal fetal abnormality?

Q7: If yes to Q-5, should a different ground or grounds apply at different stages of pregnancy?

In ALHR's view there should not be a prescribed approach for different gestation periods. Specifying criteria for termination according to different gestation periods is arbitrary, and fails to consider the individual circumstances of each case. It should be a matter for medical practitioners to assess each case according to its circumstances, best practice and clinical guidelines and the circumstances and wishes of the woman involved, in order to support her decision-making.

Foetal abnormalities account for a small but important proportion of abortion requests. Indeed, modern prenatal diagnosis is predicated on the availability of legal abortion should an abnormality be detected. The evidence suggests that many women will terminate a pregnancy before 20 weeks of gestation.[21] Very few pregnancies are in fact terminated after 20 weeks, but when they are, the circumstances are more likely to be distressing. Pregnancies after 20 weeks of gestation often occur as a result of factors such as foetal abnormalities or rape.[22] This evidence indicates that having a limit on termination prohibits all parents' access to choices that can be made around unwanted pregnancies.[23] Further, abortion is needed as a pregnancy countermeasure. Other studies suggest that 'more than half of unintended pregnancies occurred despite the use of contraceptive measures being taken.[24] This indicates that abortion provides the means for many women and couples to prevent pregnancies for a variety of reasons. These reasons can include women and couples being too young and not in a position to maintain the care of the child.[25] A gestational limit may prevent the woman and couple from having an abortion once discovering the pregnancy. Gestational limits as part of abortion laws have become obsolete. A gestational limit has no purpose because it does not decrease the rates of abortion. In 2005, 83210 induced abortions were performed.[26] The statistics indicate that Australia has high rates of abortion compared to other countries where abortion is legal.[27] This indicates that having a limit on what is legal or illegal does not change the rate of abortions. However, what is indicated is that better community legal education, and access to other methods of contraception, as well as abortion, decreases the rate of abortions.

The current law would force a woman to continue with a pregnancy where she is 24 weeks pregnant and has been told the foetus has a serious or fatal foetal abnormality, or where she is pregnant because of rape. ALHR submits that legislation should allow abortion after 24 weeks in a broad range of circumstances.

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[21] Katherine Kerr '*Queensland Abortion laws: criminalising one in three women'* (2014) 14 QUT Law Review 1, 17; Womens Health Victoria *'Fact sheet:Abortion after 24 weeks'* <http://whv.org.au/static/files/assets/639c6f2c/Abortion_after_24_weeks_Q_A_.pdf>.
[22] Katherine Kerr '*Queensland Abortion laws: criminalising one in three women'* (2014) 14 QUT Law Review 1, 17.
[23] Jenny Morgan *'Abortion Law Reform: the importance of democratic channels'* (2012) 35 UNSW Law Journal 1, 149.
[24] Marie Stopes Australia *'the truth about abortion'* 13 November 2017 < https://www.mariestopes.org.au/your-choices/truth-about-abortion/>.
[25] George Williams and Ngaine Watson 'Abortion Laws: Time to Reform?' (2011) 102 Precedent 38.
[26] Children by Choice Association, 'Australian Abortion Statistics' < https://www.childrenbychoice.org.au/factsandfigures/australian-abortion-statistics> (19 September 2017).
[27] Children by Choice Association, 'Australian Abortion Statistics' < https://www.childrenbychoice.org.au/factsandfigures/australian-abortion-statistics> (19 September 2017).

The requirement for medical practitioners to consider psychosocial matters and complete a holistic assessment is not problematic in itself, but when such an assessment empowers a practitioner to effectively override a woman's wishes, it is not supported by ALHR. Any such proposed decision making process by a practitioner usurps a woman's decision making capacity. Allowing practitioners to have a right of veto in respect of a woman's choice to terminate undermines a woman's right to make a decision about her own body. Interference with these rights should – as is the case with any proposed limitation on a human right – be contextual and proportionate. It is a disproportionate limitation on the human rights of the woman concerned to allow such an interference on the basis of satisfaction of psychosocial criteria as assessed by another person or persons.

ALHR submits that the informed consent of the person undergoing a termination of pregnancy should be the only criterion for providing treatment. The definition of informed consent to the termination of a pregnancy should be in line with current medical practice in Queensland for all other medical procedures and medical procedures associated with termination of pregnancy should not require a different threshold. As outlined in paragraph 2 of this submission, international human rights bodies explicitly recognise the rights of women and girls to have safe access to lawful abortion. Regard need not be had to the pregnant woman's social, economic, or physiological circumstances provided she can assert informed consent to the termination. It is against the spirit of international conventions to force a pregnant woman to describe to medical professionals the social or economic circumstances of why she cannot proceed with the pregnancy. Instead, the focus should be primarily on informed consent, and only when informed consent cannot be given, then consideration should be given to the woman's mental or physical health.

ALHR strongly supports application of the *Gillick* principle[28] so that the issue of whether girls under 18 can give informed consent is determined by establishing a certain level of understanding. As such a child is deemed capable of providing consent to medical treatment if she fully understands the medical treatment that is proposed. As a matter of law the parental right to determine whether or not their minor child below the age of sixteen will have medical treatment terminates if and when the child achieves sufficient understanding and intelligence to understand fully what is proposed. If this principle is not applied, girls will have to seek consent from their parents or legal guardians to have an abortion. This undermines their ability to make decisions about their own health, and can also put both their mental and physical health at risk.

5. Consultation by the medical practitioner

Q8: Should a medical practitioner be required to consult with one or more others (such as another medical practitioner or health practitioner), or refer to a committee, before performing a termination of pregnancy?

If yes to Q-8:

Q9: What should the requirement be? For example:

[28] The standard is based on the 1985 decision of the House of Lords in *Gillick v West Norfolk and Wisbech Area Health Authority* AHA [1985] UKHL 7". *British and Irish Legal Information Institute*. 1985. The case is binding in England and Wales, and has been adopted to varying extents in Australia, Canada and New Zealand. See for example, Lennings, Nicholas J. (13 July 2015). "Are competent children autonomous medical decision makers? New developments in Australia". *Journal of Law and the Biosciences*. **2** (2): 459–468. doi:10.1093/jlb/lsv028 and Gillick and the Consent of Minors: Contraceptive Advice and Treatment in New Zealand" (PDF). *Victoria University of Wellington Law Review*. 2009. Retrieved 19 February 2017.

(a) consultation by the medical practitioner who is to perform the termination with:

(i) another medical practitioner; or

(ii) a specialist obstetrician or gynaecologist; or

(iii) a health practitioner whose specialty is relevant to the circumstances of the case; or

(b) referral to a multi-disciplinary committee?

Q-10 When should the requirement apply? For example:

(a) for all terminations, except in an emergency;

(b) for terminations to be performed after a relevant gestational limit or on specific grounds?

ALHR recommends that there be no requirement for one or more medical practitioners to approve a woman's choice to have an abortion. Certainly that requirement should not apply to gestations under 24 weeks.

The Queensland reforms should follow the recent Victorian reforms and move towards the 'on request' approach.[29] The Victorian *Abortion Law Reform Act 2008* establishes a regime under which abortion is a private decision for a woman in consultation with her medical practitioner when she is 24 weeks pregnant or less (section 4). After 24 weeks, abortion is only available where two registered medical practitioners believe that an abortion is appropriate in all the circumstances (section 5). ALHR recommends that there be no requirement for one or more medical practitioners to approve a woman's choice to have an abortion, irrespective of the gestation period. As set out in the Consultation Paper, ALHR recommends that doctors regulate termination in the same way as any other medical procedure, leaving consultation and referral in appropriate cases to clinical practice.[30] We believe this would accord greater respect for the autonomy, dignity and privacy of the woman, and avoids the perceived need and difficulty for the woman to 'persuade' others of her need for termination.[31] The World Health Organisation has recommended that authorisation from hospital authorities should not be required for access to terminations, noting that it may violate women's rights to privacy and non-discrimination in access to health care.

Moreover, there is a serious question of equity for women across Queensland. An 'on request' approach avoids the delay, uncertainty and associated burden on the woman that might be involved in consulting with a second practitioner or referring to a committee in every case. As Professor Heather Douglas notes:

> The requirements for panels and specialists to be involved is expensive, may cause delays and would risk developing a two tiered system where wealthier women in the more populated parts of Queensland have much greater access to abortion services

[29] See further page 53, Queensland Law Reform Commission Working Paper 76.
[30] Heather Douglas and Katherine Kerr, 'Abortion, Law Reform and the Context of Decision-making.' (2016) Griffith Law Review Vol. 25, Iss. 1, 2016
[31] Christina Zampas and Jaime M. Gher, 'Abortion as a Human Right - International and Regional Standards' (2008) 8 Human Rights Law Review 249.

than their poorer sisters in the rural and remote parts of the state where access to numbers of doctors and specialists is more difficult.[32]

ALHR specifically considers any requirement for the approval of up to two medical practitioners, including a specialist, to be excessive. Medical practitioners have a duty of care to their patients and are bound by professional medical obligations. Medical practitioners must refer to specialists in certain circumstances, for example for reasons such as level of expertise and complexity of a case.

6. Conscientious objection

Q11: Should there be provision for conscientious objection?

Q12: If yes to Q-11:

(a) Are there any circumstances in which the provision should not apply, such as an emergency or the absence of another practitioner or termination of pregnancy service within a reasonable geographic proximity?

(b) Should a health practitioner who has a conscientious objection be obliged to refer or direct a woman to another practitioner or termination of pregnancy service?

ALHR recognises the right of persons involved in decision-making about abortion or the delivery of treatment itself to conscientiously object and be relieved of any duty to terminate a pregnancy. However, we are of the view that legislative and regulatory frameworks must specifically require that in such circumstances the objecting practitioner be required to provide an immediate referral to another practitioner who does not hold the same objections.

Laws should also ensure that in medical emergencies, where an abortion is required to save a woman's life or prevent serious harm, doctors and nurses with a conscientious objection are still compelled to perform or assist with an abortion.

ALHR submits that Section 8 of the *Abortion Law Reform Act 2008* (Vic)[33] achieves an appropriate balance of the rights of professionals with a conscientious objection and the internationally recognised human rights of women and girls to health and bodily autonomy:

ABORTION LAW REFORM ACT 2008 - SECT 8

Obligations of registered health practitioner who has conscientious objection

1) *If a woman requests a registered health practitioner to advise on a proposed abortion, or to perform, direct, authorise or supervise an abortion for that woman, and the practitioner has a conscientious objection to abortion, the practitioner must—*
    a) *inform the woman that the practitioner has a conscientious objection to abortion; and*
    b) *refer the woman to another registered health practitioner in the same regulated health profession who the practitioner knows does not have a conscientious objection to abortion.*
2) *Subsection (1) does not apply to a practitioner who is under a duty set out in subsection (3)*

[32] https://law.uq.edu.au/files/9020/Douglas-final-submission.pdf
[33] *Abortion Law Reform Act 2008* (Vic) available at http://www8.austlii.edu.au/cgi-bin/viewdoc/au/legis/vic/consol_act/alra2008209/s8.html

or (4).

3) *Despite any conscientious objection to abortion, a registered medical practitioner is under a duty to perform an abortion in an emergency where the abortion is necessary to preserve the life of the pregnant woman.*
4) *Despite any conscientious objection to abortion, a registered nurse is under a duty to assist a registered medical practitioner in performing an abortion in an emergency where the abortion is necessary to preserve the life of the pregnant woman.*

7. Counselling

Q13: Should there be any requirements in relation to offering counselling for the woman?

ALHR objects to legislative and regulatory frameworks that impose mandatory counselling on choices and contraceptive options in order for women to access abortion services. Medical practitioners already have a duty to provide advice on current options and risks because informed consent is a requirement of medical treatment. There are also situations where such counselling may be irrelevant and/or inappropriate, for example where a woman has used contraception but it has failed, or where a pregnancy has occurred as a result of rape. Specifically legislating for counselling is redundant.

On the other hand, every provision should be made to facilitate and enable a woman who wishes to access appropriate counselling to do so, in an accessible and timely manner.

8. Protection of women and service providers and safe Access Zones

Q14: Should it be unlawful to harass, intimidate or obstruct:

a. a woman who is considering, or who has undergone, a termination of pregnancy; or
b. a person who performs or assists, or who has performed or assisted in performing, a lawful termination of pregnancy?

Q15: Should there be provision for safe access zones in the area around premises where termination of pregnancy services are provided?

If yes to Q15:

Q16: Should the provision:

(a) automatically establish an area around the premises as a safe access zone? If so, what should the area be; or

(b) empower the responsible Minister to make a declaration establishing the area of each safe access zone? If so, what criteria should the Minister be required to apply when making the declaration?

Q17: What behaviours should be prohibited in a safe access zone?

Q18: Should the prohibition on behaviours in a safe access zone apply only during a particular time period?

Q-19 Should it be an offence to make or publish a recording of another person entering or leaving, or trying to enter or leave, premises where termination of pregnancy services are performed, unless the recorded person has given their consent?

ALHR submits that it should be unlawful to harass, intimidate or obstruct women and girls attempting to access or who have accessed reproductive health services as well as persons who perform or assist in performing lawful terminations of pregnancies.

Generally, behaviour should not be protected by Australian law where that behaviour itself infringes other human rights. There is no hierarchy of human rights – they are all interrelated, interdependent and indivisible. Where protection is desired for particular behaviour it will be relevant to what extent that behaviour reflects respect for the rights of others.

ALHR supports legislation to establish safe access zones around abortion clinics as essential to protecting and promoting the human rights and safety of women and girls and the staff who care for them. The right to freedom of religion does not mean those who object to abortion on religious grounds should be free to prevent the safe passage of women and girls into abortion clinics. "Silent" protests comprising prayer outside abortion clinics are just as harmful to women and girls seeking treatment as, say, violent protests.

Relevant human rights include the right to non-discrimination (whether on the basis of gender, property or other status), the right not to be subjected to cruel, inhumane or degrading treatment, and rights to privacy, personal autonomy and the highest attainable standard of physical and mental health.

Women seeking abortions and staff working at clinics providing reproductive services report routinely experiencing harassment and intimidation from anti-abortion protesters outside the clinics. Such behaviour is potentially criminal and also clearly infringes women's right to privacy and dignity when accessing health services.

UN human rights bodies as well as courts in similar countries such as America and Canada have all found that sensible measures to ensure safe access to women's health services do not unreasonably limit the rights to freedom of expression and assembly.

Victoria[34], Tasmania[35], the ACT[36] and the Northern Territory[37] have all successfully introduced safe access zones around reproductive health clinics. These important legislative measures make it unlawful to harass and intimidate people or to communicate about abortions in a manner that is likely to cause anxiety or distress within proximity to a medical clinic that provides these services. In Victoria, Tasmania and the Northern Territory a safe access zone is set as an area within a radius of 150 metres from the premises at which abortions are provided. ALHR would recommend that this should be automatically adopted as the minimum safe access zone and no declaration by the responsible minister should be required.

Safe access zones do not deny groups or individuals the opportunity to express their views.

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[34] *Public Health and Wellbeing Amendment (Safe Access Zones) Act 2015* (Vic).
[35] Rep*roductive Health (Access to Terminations) Act 2013* (Tas) – section 9.
[36] *Health Act 1993* (ACT) - Div 6.2, sections 85-87.
[37] *Termination of Pregnancy Law Reform Act 2017* (NT) – Part 3 sections 14-16.

Under international law and under most jurisdictions, the right to freedom of speech has never been an unqualified right. By contrast, access to safe and legal abortion services, in accordance with human rights standards, is part of a State's obligations to eliminate discrimination against women and girls, and to ensure their right to health and other fundamental human rights.

Claims that safe access zones interfere with freedom of speech or religion misunderstand the very concrete terms, standards and norms enshrined in international human rights law, particularly the interdependent and indivisible nature of *all* human rights.

In accordance with other Australian jurisdictions, behaviours that should be prohibited in a safe access zone should include besetting, harassing, intimidating, interfering with, threatening, protesting, hindering, obstructing or impeding that person by any means, as well as intentionally recording, by any means, a person accessing or attempting to access premises at which terminations are provided without that person's consent.

It is noted that the ACT has limited its provisions to a protected period, namely "the period between 7am and 6pm on each day the facility is open or any other period declared by the Minister." However, other Australian jurisdictions have not found it necessary to limit safe access zones to particular time periods in this manner and there does not seem to be any convincing rationale for this approach.

Making a recording of a person in these circumstances would constitute harassment and/or intimidation and would interfere with an individual's rights including the right to non-discrimination, the right not to be subjected to cruel, inhumane or degrading treatment and the right to privacy. ALHR would recommend that Queensland follow the lead of other Australian jurisdictions and make it an offence to make or publish a recording of a person in these circumstances, unless the individual has given their consent.

9. Collection of data about terminations of pregnancy

Q20 Should there be mandatory reporting of anonymised data about terminations of pregnancy in Queensland?

ALHR submits that there should be mandatory reporting of anonymised data about terminations of pregnancy in Queensland.

There is currently no standard data collection in Queensland, nor any national, uniform data collection across Australia regarding the number of pregnancies terminated each year, nor about pregnancy outcomes other than recorded births.[38] Existing data does not distinguish between induced abortion for foetal abnormality or death, incomplete miscarriage, or other reasons.[39]

Mandatory reporting of data would improve service delivery and facilitate targeted, well-informed policy making for abortion, reproductive services and education. ALHR further submits that there should be guidelines regarding the collection of data to ensure that the privacy and identify of women are protected.

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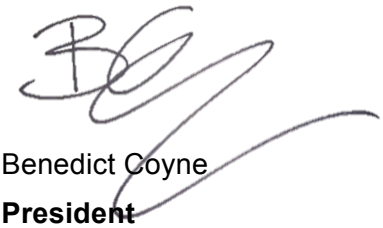
[38] AIHW NPSU: Grayson N, Hargreaves J & Sullivan EA 2005. *Use of routinely collected national data sets for reporting on induced abortion in Australia*. AIHW Cat. No. PER 30. Sydney: AIHW National Perinatal Statistics Unit (Perinatal Statistics Series No. 17); Angela Pratt, Amanda Biggs and Luke Buckmaster, *How Many Abortions are there in Australia? A Discussion of Abortion Statistics, Their Limitations, and Options for Improved Statistical Collection* (2005) 2.

[39] Bateson, D "Contraception and options for unintended pregnancy" (Ch 11) in Sexual Health: A Multidiscplinary Approach (2014) Temple-Smith, M (ed.) IP Communications: Melbourne

ALHR is happy to provide any further information or clarification in relation to the above if the Committee so requires.

If you would like to discuss any aspect of this submission, please email me at: president@alhr.org.au

Yours faithfully



Benedict Coyne

President

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ALHR

ALHR was established in 1993 and is a national association 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 specialist thematic committees. Through advocacy, media engagement, education, networking, research and training, ALHR promotes, practices and protects universally accepted standards of human rights throughout Australia and overseas.

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