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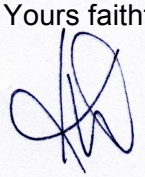
To whom it may concern

A Suitable legislative Framework for Termination of Pregnancy in South Australia

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

ALHR is very happy to provide any further information or clarification in relation to any issues raised if the Institute so requires. If you would like to discuss any aspect of this submission, please email me at: president@alhr.org.au

Yours faithfully,



Kerry Weste

President

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Background

Current status of abortion in South Australia

South Australia was the first Australian state to liberalise access to abortion through amendments to the *Criminal Law Consolidation Act 1935* (SA) ('**CLCA**') passed in 1969. However, since then the jurisdiction has not kept pace with the majority of Australian states and territories by removing criminal penalties prescribed by law for unlawful abortion.

Section 81 of the *CLCA* stipulates that it is an offence for a pregnant woman to procure her own miscarriage or for an unqualified person to perform a termination.

Section 82A outlines the circumstances in which a lawful abortion may be obtained. For an abortion to be legal, it must be carried out within 28 weeks of conception in a prescribed hospital by a legally qualified medical practitioner, provided he or she is of the opinion, formed in good faith, that either the 'maternal health' or the 'fetal disability' ground is satisfied.[1]The maternal health ground permits abortion if more risk to the pregnant woman's life, or to her physical or mental health (taking into account her actual or reasonably foreseeable environment), would be posed by continuing rather than terminating the pregnancy.[2] The 'fetal disability' ground permits abortion if there is a substantial risk that the child would be seriously physically or mentally handicapped.[3]

A second qualified medical practitioner, who has also examined the pregnant woman, must share the medical practitioner's opinion that either of these grounds is satisfied.[4]

Terminations after 28 weeks may be performed to preserve the life of the mother.[5] A conscientious objection clause enables medical practitioners to elect not to participate in an abortion,[6] except in cases of an emergency.[7]

The pregnant woman must have been a resident in South Australia for at least two months before the abortion is performed.[8]

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[1] *CLCA* s 82A(1)(a).
[2] Ibid s 82A(1)(a)(i).
[3] Ibids 82A(1)(a)(ii).
[4] Ibid s 82A(1)(a).
[5] Ibid s 82A(7).
[6] Ibid s 82A(5).
[7] Ibid s 82A(6).
[8] Ibid s 82(2).

Executive Summary

South Australia and New South Wales are the only remaining Australian States that prescribe criminal penalties for termination of pregnancy. These laws are not reflective of the majority of community values or of internationally-recognised human rights principles.

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 pregnant people autonomy over their own bodies and health.

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 to ensure their right to health and other fundamental human rights.

It is estimated that one in three Australian women have at least one abortion in their lifetime. 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 shows that Australians overwhelmingly believe a woman should have the right to choose an abortion.[9]

In 2016 the United Nations Economic and Social Council noted 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.*"[10] As a modern representative democracy, Australia should not feature in this statistic.

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. 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 consistent with best practice.[11]

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[9] 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; *Queensland voters' attitudes towards abortion* Report prepared by Auspoll, May 2009. Polling commissioned by Children by Choice; *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.

[10] 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.

[11] Ibid 4-6.

International Human Rights Law and Termination of Pregnancy

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, privacy, equality and non-discrimination, consent in marriage and equality, to education and information, and the right to benefit from academic/scientific progress.[12]

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***'*).[13] This includes 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.

Reproductive rights are explicitly recognised under the *Convention for the Elimination of Discrimination Against Women* (*'***CEDAW***')* 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.'*[14]

The Convention also prohibits practices which harm women and girls, including women and girls' reproductive rights.[15]

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

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[12] See; *Universal Declaration of Human Rights [1948],* Arts 2-3, 5-6, 25,27(1); *International Covenant on Civil and Political Rights* ('ICCPR')*,* Arts 2,6, t 7, 17 *International Covenant on Economic, Social and Cultural Rights* ('ICESCR') Arts 1, 3, 11(2), 12, 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).
[13] *ICCPR* , 16 December 1966, 999 U.N.T.S 171 (entered into force 23 March 1976).
[14] *Convention for the Elimination of Discrimination Against Women* (*'CEDAW'*)Art 16.
[15] *CEDAW* Arts 2(f) and 5(a); see also *Convention on the Rights of the Child*, Art 24(3).

the criminalisation of practitioners who provide abortion services also violates women's rights.[16]

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.[17]

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.[18]

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.*"[19]

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 was "*not intended to protect life from the point of conception but only from the point of birth.*"[20]

In light of the above, we make the following observations in response to the South Australian Law Reform Institute Consultation Paper and questions issued in April 2019.

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[16] 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).

[17] 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.

[18] General Comment 14 (2000) on the right to the highest attainable standard of health, paras. 8, 12. 27.

[19] General Comment 15 (2013) on the right of the child to the enjoyment of the highest attainable standard of health, para. 70.

[20] 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.

Answers to the Consultation Paper Questions

Role of the Criminal Law

Should there be offences relating to qualified health practitioners performing abortions in the *Criminal Law Consolidation Act 1935* (SA)? (Question 1)

ALHR submits that it is inappropriate for qualified health practitioners performing abortions to be subject to any potential criminal penalty, or for abortion to be treated differently to other medical procedures in South Australia. ALHR recognises the application of the *Civil Liability Act 1936* and the need for abortions to be undertaken in accordance with appropriate medical regulation.

Abortion should be treated as a health and human rights issue, not a criminal issue.

Should there be offences relating to the woman procuring an abortion in the *Criminal Law Consolidation Act 1935* (SA)? (Question 2)
Should a woman ever be criminally responsible for the termination of her own pregnancy? (Question 3)

ALHR submits that a person who consents to, assists in or performs a termination on themselves should not commit a criminal offence.

If abortion services are accessible, safe and legal, then the circumstances where a woman chooses to terminate her own pregnancy are likely to be extremely rare. Statistics from the World Health Organisation reflect that a decision to independently procure the termination of a pregnancy is unlikely to occur where safe abortions are accessible. For example, in countries where abortion is legal on broader grounds nearly 9/10 abortions have been shown to occur safely.[21]

If a person terminates their own pregnancy in circumstances where they have access to safe, legal and affordable abortion services it would appear likely that they would be affected by other complex factors which are unlikely to be appropriately resolved by criminalising their conduct.

ALHR submits that notwithstanding the availability of mental health orders in substitution of the criminal law, in cases of self-procurement of abortion, South Australia should be providing

[21] World Health Organization, *Women and girls continue to be at risk of unsafe abortion* (28 September 2017) <https://www.who.int/reproductivehealth/topics/unsafe_abortion/abortion-safety-estimates/en/>.

medical and psychiatric support services rather than engaging in the criminal prosecution of women and girls.

The *Termination of Pregnancy Act 2018* (Qld) expressly provides protection from criminal responsibility for women. Section 10 provides that *'despite any other Act, a woman who consents to, assists in, or performs a termination on herself does not commit an offence.*' ALHR submits that a similar provision would be appropriate for South Australia.

Should South Australia have criminal offences for abortions not performed by an appropriate health practitioner? (Question 4)

ALHR notes that legislation adopted in other Australian states provides that an unqualified person who performs or assists in a termination of pregnancy commits a crime. ALHR notes the importance of such provisions in protecting people, particularly vulnerable people, from unsafe medical procedures.

For example, the *Termination of Pregnancy Act 2018* (Qld) prescribes that unqualified person who performs or assists in a termination on a woman commits a crime that is punishable by 7 years imprisonment.[22] Comparatively in Victoria, the *Abortion Law Reform Act 2008* (Vic) provides that a person who is not a qualified person must not perform an abortion on another person, with a penalty of 10 years imprisonment. ALHR would support the inclusion of such legislative provisions in South Australia to uphold the right of all pregnant persons to obtain safe and credible medical services.

[22] Termination of Pregnancy Act 2018 (Qld) s 25.

Who should be permitted to perform or assist in performing terminations

Should health practitioners (other than medical practitioners) be permitted to authorise or perform, or assist in performing, lawful terminations of pregnancy in South Australia? (Question 5)

ALHR submits that health practitioners, other than medical practitioners, should be permitted to authorise or perform or assist in performing lawful terminations of pregnancy. ALHR 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.[23]

ALHR submits that, in the case of surgical abortion, the requirement that abortions be carried out by a medical practitioner in an approved medical facility is appropriate. However, 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. Health practitioners other than medical practitioners being able to provide medical terminations would greatly improve access for South Australians living in rural and remote locations.

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

Gestational Limits and Grounds for Termination of Pregnancy

Should a woman be allowed to access lawful abortion on request at any stage of a pregnancy? Should there be a gestational limit or limits for a lawful termination of pregnancy in South Australia? (Questions 6 and 7)

ALHR submits there should be no gestational limit set by legislation. ALHR supports the law reform model adopted in the Australian Capital Territory, that is, the complete removal of provisions relating to abortion from the criminal law and for abortion to be treated as a health issue.

Any gestational limit set by legislation is arbitrary and fails to consider the individual circumstances of each case. The decision of whether to terminate a pregnancy should be a private matter of consultation between a patient and their doctor, assessed in each case according to its circumstances, best practice and clinical guidelines.

If there is a gestational limit for a lawful termination should it be related to:

a) **the first trimester of pregnancy;**
b) **viability of the foetus (approximately 22 – 24 weeks);**
c) **other?**

(Question 8)

ALHR acknowledges the politicised and controversial nature of the issue of gestational limits. Whilst we submit that gestational limits should not be prescribed by legislation, if a gestational limit is to be legislated, ALHR submits that allowing for terminations of pregnancy to be performed on request until 24 weeks' gestation and thereafter with a greater level of medical oversight for terminations performed after 24 weeks gestation would be appropriate.

Should there be a specific ground or grounds for a lawful termination of pregnancy? If there is a specific ground or grounds for a lawful termination should they include:

a) **all relevant medical circumstances;**
b) **professional standards and guidelines;**
c) **that it is necessary to preserve the life of the woman;**
d) **that it is necessary to protect the physical or mental health of the woman;**
e) **that it is necessary or appropriate having regard to the woman's social or economic circumstances;**
f) **that the pregnancy is the result of rape or another coerced or unlawful act;**

g) that there is a risk of serious or fatal foetal abnormality (drawing on the terminology from the present law).

(Questions 9 and 10)

ALHR submits that there should be no specific ground or grounds for a lawful termination of pregnancy at any stage of the pregnancy and supports the law reform model adopted in the *Medical Practitioners (Maternal Health) Amendment Bill 2002 (ACT).*

As noted elsewhere in this submission, the decision as to whether to terminate a pregnancy should be a private matter of consultation between a patient and their doctor, assessed in each case according to its circumstances, best practice and clinical guidelines. Specified grounds for the lawful termination of pregnancy are unnecessary where access to abortion is approached in this manner.

If a gestational limit is to be set with specific grounds applying to persons seeking abortion services after that time, then ALHR submits that specified grounds similar to the following clause recommended by the Queensland Law Reform Commission are appropriate (noting ALHR's preference for any gestational limit to be 24 weeks as opposed to 22 weeks as adopted in Queensland):

(1) A medical practitioner may perform a termination on a woman who is more than 22 weeks pregnant if—
   a) the medical practitioner considers that, in all the circumstances, the termination should be performed; and
   b) the medical practitioner has consulted with another medical practitioner who also considers that, in all the circumstances, the termination should be performed.

(2) In considering whether a termination should be performed on a woman, a medical practitioner must consider—
   a) all relevant medical circumstances; and
   b) the woman's current and future physical, psychological and social circumstances; and
   c) the professional standards and guidelines that apply to the medical practitioner in relation to the performance of the termination.

(3) In an emergency, a medical practitioner may perform a termination on a woman who is more than 22 weeks pregnant, without acting under subsections (1) and (2), if the medical practitioner considers it is necessary to perform the termination to save the woman's life or the life of another unborn child

In respect of the above clause, ALHR does however submit that:

- the requirement for two medical practitioners to approve the procedure is excessive and creates unnecessary barriers, as discussed below in relation to consultation by the medical practitioner.

We welcome the fact that the inclusion of 'social circumstances' is sufficiently broad to include situations where a pregnancy occurs in the context of rape, domestic violence, reproductive coercion, homelessness or substance abuse.

The Victorian *Abortion Law Reform Act 2008* establishes a similar regime. Allowing for terminations of pregnancy on request until 24 weeks gestation and after that point with greater medical oversight would be consistent with the laws in place in other Australian jurisdictions.[24]

Should different considerations apply at different stages of pregnancy? (Question 11)

ALHR submits that if a gestational limit is to be set, terminations should be available on request up until 24 weeks and after 24 weeks in accordance with the process outlined above.

As outlined above in 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.

The requirement for medical practitioners to consider psychosocial matters must be delivered carefully where there is a chance it will negatively impact women with disability. Completing 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

[24] See; *Termination of Pregnancy Act 2018* (Qld) s 5; *Abortion Law Reform Act 2008* (Vic), ss 4 and 6; *Health Act (Termination) Amendment Act 1998* (WA) s 7; *Criminal Law Consolidation Act 1935* (SA) s 82A; *Medical Services Act 1974* (NT) s 11(1)(a); *Reproductive Health (Access to Terminations) Act 2013* (Tas) s 4; *Medical Practitioners (Maternal Health) Amendment Act 2002* (ACT).

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 strongly supports application of the *Gillick* principle[25] so that the issue of whether girls under 18 years of age can provide 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.

Foetal abnormalities account for a small but important proportion of abortion requests. The South Australian Pregnancy Outcomes Report published in 2016 shows that most terminations which occurred later in the pregnancy were due to congenital anomalies. Ninety percent of terminations were performed before 14 weeks, and 2.8% were performed at or after 20 weeks gestation. Of the terminations performed at or after 20 weeks gestation, 43.3% were for congenital anomalies. Modern prenatal diagnosis is predicated on the availability of legal abortion should a serious abnormality be detected.

Further discussion on the appropriateness of legislation singling out serious physical or mental abnormalities as a ground for termination of pregnancies is provided below.

[25] 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 200.

The evidence suggests that many women will terminate a pregnancy before 20 weeks of gestation.[26] 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.[27] Given these statistics and factors, ALHR submits that setting an arbitrary gestational limit on termination fails to consider the individual circumstances of each case. The decision as to whether to terminate a pregnancy should be a private matter of consultation between a patient and their doctor, assessed in each case according to its circumstances, best practice and clinical guidelines. In addition to conferring rights on medical professionals, an approach to gestational limits developed from within a human rights framework must confer rights on pregnant patients. [28]

[26] Katherine Kerr '*Queensland Abortion laws: criminalising one in three women'* (2014) 14 QUT Law Review 1, 17; Women's Health Victoria *'Fact sheet: Abortion after 24 weeks'* <http://whv.org.au/static/files/assets/639c6f2c/Abortion_after_24_weeks_Q_A_.pdf>.
[27] Katherine Kerr *'*Queensland Abortion laws: criminalising one in three women' (2014) 14 QUT Law Review 1, 17.
[28] Jenny Morgan '*Abortion Law Reform: the importance of democratic channels*' (2012) 35 UNSW Law Journal 1, 149.

Consultation by the medical practitioner

Should a medical practitioner be required to consult with one or more others (such as another medical practitioner or health practitioner), before performing a termination of pregnancy? (Question 12)

If a consultation is required, should it include:

a) **another medical practitioner; or**
b) **a specialist obstetrician or gynaecologist; or**
c) **a health practitioner whose specialty is relevant to the circumstances of the case; or**
d) **referral to an appropriate counsellor; or**
e) **referral to a specialist committee? (Question 13)**

If there was a referral requirement should it apply:

a) **for all terminations, except in an emergency;**
b) **for terminations to be performed after a relevant gestational limit or on specific grounds? (Question 14)**

Regardless of gestation, 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 terminations before 24 weeks. ALHR recommends that termination of pregnancy be regulated in the same way as any other medical procedure, leaving consultation and referral in appropriate cases to clinical best practice.[29]

We believe this approach would accord greater respect for the autonomy, dignity and privacy of the pregnant person, and avoids the perceived need and difficulty for the woman to 'persuade' others of her need for termination.[30] 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.

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

Moreover, there is a serious question of equity for women across South Australia. 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 caseAs Professor Heather Douglas notes in relation to abortion access in Queensland:

> '*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 than their poorer sisters in the rural and remote parts of the state where access to numbers of doctors and specialists is more difficult.*'[31]

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. To impose such requirements undermines the function of a medical practitioner in exercising their duties and distinguishes the undertaking of a termination from other serious medical procedures without basis.

If it was determined that terminations after a certain gestational point should only be performed with the approval of two practitioners, we submit that the Queensland model as set out above should be adopted (noting that ALHR recommends 24 weeks is more appropriate than 22 weeks). Consistent with the model adopted in Queensland, the second medical practitioner should not be required to physically examine the patient. This would create an unnecessary burden for people living in rural and remote areas.

[31] https://law.uq.edu.au/files/9020/Douglas-final-submission.pdf

Conscientious objection

Should there be provision for health practitioners in South Australia to decline to provide an abortion related service for conscientious objection? (Question 15).

If a medical practitioner had a conscientious objection are there circumstances where this objection should be overridden, such as:

a) in an emergency;
b) the absence of another health practitioner or termination of pregnancy service within a reasonable geographic proximity. (Question 16)

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? (Question 17)

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 perform or assist in performing a termination of pregnancy. However, we are of the view that legislative and regulatory frameworks must specifically require that in such circumstances the objecting practitioner must inform the patient about their objection and provide an immediate referral to another practitioner who does not hold the same objection.

Laws should also ensure that in medical emergencies, for example where an abortion is required to save a person's life or prevent serious harm, doctors or nurses with a conscientious objection should be required to perform or assist with performing the procedure.

ALHR submits that section 8 of the *Termination of Pregnancy Act 2018* (Qld) 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 by stating the following:

> (1) This section applies if—
>
> (a) a person asks a registered health practitioner to—
>
> (i) perform a termination on a woman; or
>
> (ii) assist in the performance of a termination on a woman; or
>
> (iii) make a decision under section 6 whether a termination on a woman should be performed; or
>
> (iv) advise the person about the performance of a termination on a woman; and
>
> (b) the practitioner has a conscientious objection to the performance of the termination.

(2) The registered health practitioner must disclose the practitioner's conscientious objection to the person.

(3) If the request is by a woman for the registered health practitioner to perform a termination on the woman, or to advise the woman about the performance of a termination on the woman, the practitioner must refer the woman, or transfer her care, to—

(a) another registered health practitioner who, in the first practitioner's belief, can provide the requested service and does not have a conscientious objection to the performance of the termination; or

(b) a health service provider at which, in the practitioner's belief, the requested service can be provided by another registered health practitioner who does not have a conscientious objection to the performance of the termination.

(4) This section does not limit any duty owed by a registered health practitioner to provide a service in an emergency.

Circumstances may arise where a practitioner has a conscientious objection and there are no other practitioners or facilities within a geographically reasonable distance. ALHR submits that in such circumstances:

- it is particularly important that other health practitioners such as pharmacists are able to assist in performing terminations;
- consideration should be given to the establishment of programs such as telephone health services that are able to provide advice and send medications by mail to patients for medical terminations;
- geography and costs associated with a referral to another practitioner should not be a barrier to patients accessing services.

Counselling

Should there be any requirements in relation to offering counselling for the woman? (Question 18)

ALHR objects to legislative and regulatory frameworks that impose mandatory counselling, or mandatory offer of counselling on choices and contraceptive options for people accessing abortion services.

Medical practitioners have a duty to provide advice on options and risks as part of the requirement for informed consent for medical treatment. There are also situations where 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.

ALHR submits that mandatory counselling, or a mandatory offer of counselling fails to recognise that individuals do not make reproductive decisions lightly. Often, these decisions are the result of much consultation and discussion between partners, family and friends. Individuals should be entitled to seek and engage in as much or as little counselling as they wish, either with personal networks or qualified counsellors.

Accordingly, every provision should be made to facilitate and enable individuals who wish to access appropriate counselling to do so, in an accessible and timely manner.

Secondly, a mandatory requirement for counselling or an offer of counselling is an additional burden placed on providers. This is likely to result in delays for patients.

ALHR highlights the issues surrounding truth in advertising for pregnancy counselling. Not all providers offering pregnancy counselling are qualified or supportive of all options. Pregnancy counselling should be independent, all options counselling by qualified counsellors. If counselling, or an offer of counselling is required, not only would this result in delay for the patient accessing pregnancy termination services, it would be necessary to ensure any counselling services that patients are referred to provide independent, all options counselling by qualified counsellors and are adequately resourced to meet these demands.

Protection of women and service providers and safe access zones

Should South Australia provide for safe access zones in the area around premises where termination of pregnancy services are provided? (Question 19)

ALHR recommends that South Australia establish safe access zones around premises where terminations of pregnancy services are provided. Victoria[32], Tasmania[33], the Australian Capital Territory[34] the Northern Territory,[35] New South Wales[36] and Queensland[37] have all successfully introduced safe access zones around facilities where terminations are performed.

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 right to freedom of expression and assembly.

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.

The High Court of Australia recently confirmed in *Clubb v Edwards* [2019] HCA 11 ('***Clubb***') that safe access zone legislation in Victoria and Tasmania are constitutionally valid. Given that any questions regarding the constitutional validity of these laws have now been resolved ALHR submits that the South Australian Government should extend these important protections to patients seeking to access termination services as well as clinic staff.

The establishment of safe access zones seeks to support humans rights and uphold 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. Examples include 'sidewalk counsellors' engaging with patients as they enter clinics in an effort to dissuade patients from obtaining an abortion,[38] protests including the use of

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[32] *Public Health and Wellbeing Amendment (Safe Access Zones) Act 2015* (Vic).
[33] Rep*roductive Health (Access to Terminations) Act 2013* (Tas) s 9.
[34] *Health Act 1993* (ACT) ss 85-87.
[35] *Termination of Pregnancy Law Reform Act 2017* (NT) ss 14-16.
[36] *Public Health Amendment (Safe Access to Reproductive Health Clinics) Act (NSW) 2018.*
[37] *Termination of Pregnancy Act 2018* (Qld) ss 11 - 16.
[38] See, for example; footage captured in Queensland prior to the enactment of safe access zones which shows a protester engaging with a patient entering a clinic in Brisbane

graphic images,[39] and silent prayer. As stated by Justice Gageler in relation to the Melbourne clinic forming the basis of the facts in *Clubb,* 'pro-life protesters, typically in groups of between three and 12 but sometimes numbering up to 100, had stood outside the East Melbourne Fertility Control Clinic almost every morning for a quarter of a century' up until safe access zones came into effect. These types of behaviours clearly infringe women's right to privacy and dignity when accessing health services.

While some of these behaviours may already be captured by criminal law, incidents rarely result in criminal prosecution. This is likely due to privacy concerns, the controversial and sensitive nature of abortion, and the particular vulnerability of victims. This is clear from the evidence put before the Magistrate in *Clubb* where a doctor recounted her observations of the activities of protesters prior to the establishment of safe access zones, and attempts by the clinic to engage the assistance of police and the Melbourne City Council to prevent harassment of patients, which were ineffective.[40]

In the Second Reading Speech for the Bill for the Victorian safe access zones legislation, the Minister explained:

> 'It is unreasonable for anti-abortion groups to target women at the very time and place when they are seeking to access a health service, or to target health service staff. The impact of such actions on these women must be understood within the context of their personal circumstances. Many are already feeling distressed, anxious and fearful about an unplanned pregnancy, or a procedure that they are about to undergo. To be confronted by anti-abortion groups at this time is likely to exacerbate these feelings. It is intimidating and demeaning for women to have to run the gauntlet of anti-abortion groups outside health services.'[41]

ALHR submits that safe access zones are necessary in order to prevent harm to patients and clinic staff, not just to respond to incidents when they occur.

Implied freedom of political communication

Safe access zones do not deny groups or individuals the opportunity to express their views on abortion, nor do they impermissibly burden the implied freedom of political communication. In

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<https://www.news.com.au/lifestyle/real-life/news-life/woman-begs-christian-protester-to-leave-her-alone-outside-queensland-abortion-clinic/news-story/d209c09c11a5d8df9a66db6e44096f67>.

[39] See, for example; *Clubb v Edwards* [2019] HCA 11 at [106] where the appellant was charged under the Tasmanian safe access zones legislation after protesting with placards and leaflets.

[40] As discussed in the High Court's judgment in *Clubb* at [86].

[41] Victoria, Legislative Assembly, *Parliamentary Debates* (Hansard), 22 October 2015 at 3975.

Clubb each of the appellants were charged with offences under the Victorian and Tasmanian safe access zones provisions and argued that the provisions were invalid because they impermissibly burdened the implied freedom of political communication.

The High Court unanimously held that the Victorian and Tasmanian legislation did not impermissibly burden the implied freedom and dismissed the appeals. Kiefel CJ, Bell and Keane JJ delivered a joint judgment, Gageler, Gordon and Edelman JJ each delivered separate reasons but reached the same conclusion.

In summary, the High Court in *Clubb* found that:

- the implied freedom is not a personal right, it is a restriction upon legislative power;[42]
- conduct designed to persuade a person from accessing an abortion is not political communication, although some forms of anti-abortion activities may fall into this category, such as protests;[43] and
- the limited interference with the implied freedom is not manifestly disproportionate to the objects of the legislation establishing safe access zones in seeking to protect the dignity and privacy of people seeking to access terminations.[44]

The High Court rejected arguments from the appellants regarding different ways in which the extent of the burden on the implied freedom might have been reduced, including by:

- requiring that an offending communication actually be heard or seen by any person;[45]
- creating an exception for where the person consents to receiving an otherwise prohibited communication; or[46]
- providing for an exception to the prohibition during election campaigns.[47]

ALHR submits any safe access zones legislation should clearly state its objects to avoid any ambiguity in light of the High Court's comments in *Clubb* with respect to the Tasmanian legislation which did not include an express statement of its objects.[48]

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,

[42] *Clubb* at [35] per Kiefel CJ, Bell and Keane JJ and at [247] per Nettle J.
[43] *Clubb* at [31] per Kiefel CJ, Bell and Keane JJ and at [252] per Nettle J.
[44] *Clubb* at [102].
[45] *Clubb* at [92] per Kiefel CJ,, Bell and Keane JJ and at [287].
[46] *Clubb* at [93] per Kiefel CJ, Bell and Keane JJ and at [285]-[286] per Nettle J.
[47] *Clubb* at [94] per Kiefel CJ, Bell and Keane JJ and at [288] per Nettle J.
[48] See discussion of Tasmanian legislation at [117] per Kiefel CJ, Bell and Keane JJ and [187] per Gageler J.

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.

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 right to freedom of expression and assembly.[49]

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.

If a safe access zone was established should it:

a) **automatically establish an area around the premises as a safe access zone?; or**
b) **empower the responsible Minister to make a declaration establishing the area of each safe access zone? (Question 20)**

ALHR recommends that safe access zones of 150 metres be automatically established by legislation around any premises which provides for termination of pregnancy services, and to also empower the relevant Minister to amend the safe access zone around a particular premises.

Establishing an automatic radius of 150 metres would provide certainty for members of the public. To provide for flexibility where necessary (for example where it may be appropriate to reduce or to increase the size of the zone), the relevant Minister should be empowered to otherwise declare the size of the safe access zone. This may be appropriate in situations where, for example, accessibility issues may require the zone to be greater than 150m, or alternatively where the clinic is located near an appropriate place of protest (for example, Parliament House).

In relation to the size of the radius of the safe access zones in Victoria, the Minister explained in her Second Reading Speech:

[49] See, for example; Ward v Rock Against Racism (1989) 491 US 781 at 791, citing Clark v Community for Creative Non-Violence (1984) 468 US 288 at 293; R v Lewis (1996) 139 DLR (4th) 480; R v Spratt (2008) 298 DLR (4th) 317.

> 'The zone of 150m was chosen in Victoria after consultation with a range of stakeholders. Hospitals and clinics provided examples of the activities of anti-abortion groups and the places where they confronted patients and staff. This included waiting at places where patients parked their cars and at public transport stops. Some health services asked for a much larger zone, but after careful consideration it was determined that a zone of 150m would be sufficient to protect people accessing premises.'[50]

Similarly the Statement of Compatibility prepared in relation to the Victorian Safe Access Zones Bill provided that any reduction in the radius would be likely to compromise the effectiveness of the protections, stating that:

> 'A safe access zone of 150 metres has been determined to be appropriate because it provides a reasonable area to enable women and their support people to access premises at which abortions are provided without being subjected to such communication. As I have explained, the conduct has included following women and their support persons to and from their private vehicles and public transport. There have also been many instances of staff being followed to local shops and services, and subjected to verbal abuse. Such conduct has often occurred well beyond 150 metres. However, I consider that 150 metres is a reasonable area that is necessary to enable women and their support persons to access premises, safely and in a manner that respects their privacy and dignity. While such conduct has occurred beyond 150 metres of some abortion services, having a clear safe access zone of 150 metres will enable abortion services to advise women of how they can best access the premises without the risk of such conduct, such as where they can park their vehicles or use public transport'.[51]

In the decision of *Clubb* Justice Gageler commented that 'the 150m reach of the protest prohibition around premises at which abortion services are provided must be close to the maximum reach that could be justified as appropriate and adapted to achieve the protective purpose of facilitating access to those premises'.[52]

What types of behaviour or conduct should be prohibited in a safe access zone? (Question 21)

ALHR supports the adoption of a definition similar to that used in the Queensland safe access zones legislation reflected in the *Termination of Pregnancy Act 2018* (Qld)

ALHR submits that the Queensland safe access zones legislation most effectively and concisely captures the behaviours intended to be prohibited within safe access zones.[53] Section 15 of the *Termination of Pregnancy Act 2018* (Qld) provides:

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[50] Victoria, Legislative Assembly, *Parliamentary Debates* (Hansard), 22 October 2015 at 3976.
[51] Victoria, Legislative Assembly, *Parliamentary Debates* (Hansard), 22 October 2015 at 3973-3974. See also at 3976.
[52] *Clubb* at [213].
[53] *Termination of Pregnancy Act 2018* (Qld) Part 4.

15 Prohibited conduct in safe access zones

(1) A person's conduct in the safe access zone for termination services premises is prohibited conduct if the conduct—

(a) relates to terminations or could reasonably be perceived as relating to terminations; and

(b) would be visible or audible to another person in, or entering or leaving, the premises; and (c) would be reasonably likely to deter a person mentioned in paragraph (b) from—

(i) entering or leaving the premises; or

(ii) requesting or undergoing a termination; or

(iii) performing, or assisting in the performance of, a termination.

(2) A person's conduct may be prohibited conduct whether or not another person sees or hears the conduct or is deterred from taking an action mentioned in subsection (1)(c)(i) to (iii).

(3) A person must not engage in prohibited conduct in the safe access zone for termination services premises. Maximum penalty—20 penalty units or 1 year's imprisonment.

(4) Subsection (3) does not apply to a person employed to provide a service at the termination services premises.

The behaviours captured by the Queensland legislation are arguably broader than those captured by safe access zone legislation in other States. However, based on the High Court's recent decision in *Clubb*, it is likely that Queensland's legislation would also withstand any constitutional challenge.

ALHR submits that 'silent' protests, for example prayer outside abortion clinics are just as harmful to patients seeking termination services as other types of protests and it is important that any legislation captures this behaviour as well as more vocal types of behaviour. In *Clubb* the Kiefel CJ, Bell and Keane JJ found that 'silent but reproachful observance of persons accessing a clinic for the purpose of terminating pregnancy may be as effective, as a means of deterring them from doing so, as more boisterous demonstrations.'[54]

The plurality in *Clubb* went on to quote the statement of compatibility in relation to the Victorian Bill for safe access zones legislation tabled by the Minister for Health, which stated that:

Provisions that only prohibit intimidating, harassing or threatening conduct, or conduct which impedes access to premises are inadequate for a number of reasons, including:

(a) They can only be enforced after the harmful conduct has occurred and there are significant difficulties in enforcing such laws. This is particularly the case in relation to conduct directed toward women accessing legal abortion services. Although such conduct has often extended to criminal conduct, women and their support persons are

[54] *Clubb* at [89].

generally unwilling to report the conduct to police or assist in prosecution which would expose them to the stress and possible publicity of a criminal proceeding. The intensely private nature of the decision that the protesters seek to denounce, effectively operates to protect the protesters from prosecution for criminal conduct.

(b) *It will not fully protect staff members and others from the harmful effect of the otherwise peaceful protests given their sustained nature and the background of extreme conduct against which they occur. Staff and members of the public are entitled to be safe and to feel safe in undertaking their lawful work activities and accessing lawful health services.*[55]

Subsection 15(2) of the *Termination of Pregnancy Act 2018* (Qld) provides that a person's conduct may be prohibited conduct whether or not another person sees or hears the conduct or is deterred from taking an action mentioned in s 15(1)(c)(i)-(iii). ALHR submits a similar provision should be included in South Australia to ensure a contravention of the offence provision can be proved without the need to call a person protected by the legislation to give evidence. On this issue, the plurality in *Clubb* said that 'that can readily be understood as an aspect of the protection of the privacy of women seeking access to abortion services'.[56]

Summary of prohibited behaviour in other jurisdictions

Victoria

The Victorian *Public Health and Wellbeing Amendment (Safe Access Zones) Act 2015* (Vic) provides that 'prohibited behaviour' means:

(a) in relation to a person access, attempting to access, or leaving premises at which abortions are provided, besetting, harassing, intimidating, interfering with, threatening, hindering, obstructing or impeding that person by any means; or

(b) subject to subsection (2) [*which provides that the definition of prohibited behaviour does not apply to clinic staff*], communicating by any means in relation to abortions in a manner that is able to be seen or heard by a person accessing, attempting to access, or leaving premises at which abortions are provided and is reasonably likely to cause distress or anxiety; or

(c) interfering with or impeding a footpath, road or vehicle, without reasonable excuse, in relation to premises at which abortions are provided; or

(d) intentionally recording by any means, without reasonable excuse, another person accessing, attempting to access, or leaving premises at which abortions are provided, without that other person's consent; or

(e) any other prescribed behaviour.

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[55] *Clubb* at [90].
[56] Clubb at [92].

In relation to subparagraph (b) above, the Castan Centre for Human Rights Law in *Clubb* submitted that the following behaviours observed outside abortion clinics may fall within this category:

> (a) Protesters approaching, following or walking alongside people approaching clinic premises, distributing pamphlets, and distributing plastic models of foetuses.
>
> (b) Protesters equating foetuses with babies by imploring patients not to 'kill' their 'baby', and castigating patients as murderers.
>
> ...
>
> (e) Protesters displaying large and graphic posters depicting what purported to be foetuses post-abortion, foetuses in buckets, or skulls of foetuses.
>
> (f) Protesters distributing visually graphic literature containing medically inaccurate and misleading information warning that abortion results in infertility, failed relationships, mental illness and cancer.[57]

Tasmania

The *Reproductive Health (Access to Terminations) Act 2013* (Tas) provides the following definition of prohibited behaviour:

> ***prohibited behaviour*** means –
>
> > (a) in relation to a person, besetting, harassing, intimidating, interfering with, threatening, hindering, obstructing or impeding that person; or
> >
> > (b) a protest in relation to terminations that is able to be seen or heard by a person accessing, or attempting to access, premises at which terminations are provided; or
> >
> > (c) footpath interference in relation to terminations; or
> >
> > (d) intentionally recording, by any means, a person accessing or attempting to access premises at which terminations are provided without that person's consent; or
> >
> > (e) any other prescribed behaviour.

In *Clubb* the High Court said that while the expression 'footpath interference' was not defined in the legislation, it seems to have originated from a British Columbia Act which prohibits 'sidewalk interference'. Relevant case law explains that expression 'sidewalk interference' was said to correspond with 'sidewalk counselling'.[58]

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[57] *Clubb* at [281].
[58] *Clubb* at [114].

In a separate judgment delivered in *Clubb,* Justice Nettle said that while the Tasmanian legislation may arguably go further in its restrictive effect on the implied freedom of political communication because it does not contain an express limitation to communications which are reasonably likely to cause distress or anxiety, in terms of the practical reality, the two provisions have much the same effect.[59]

Northern Territory

'Prohibited conduct' is defined under the *Termination of Pregnancy Law Reform Act 2017* (NT) as:

(a) harassing, hindering, intimidating, interfering with, threatening or obstructing a person, including by recording the person by any means without the person's consent and without a reasonable excuse, that may result in deterring the person from:
    (i) entering or leaving premises for performing terminations; or
    (ii) performing, or receiving, a termination at premises for performing terminations; and
(b) an act that could be seen or heard by a person in the vicinity of premises for performing terminations, that may result in deterring the person or another person from:
    (i) entering or leaving the premises; or
    (ii) performing a termination, or receiving a termination at the premises.

Under the Northern Territory laws, a person commits an offence if the person intentionally engages in prohibited conduct and the prohibited conduct occurs in a safe access zone and the person is reckless in relation to that circumstance.

Australian Capital Territory

'Prohibited behaviour' is defined under the Australian Capital Territory's *Health Act 1993* as:

prohibited behaviour, in a protected area around an approved medical facility, means any of the following:

(a) the harassment, hindering, intimidation, interference with, threatening or obstruction of a person, including by the capturing of visual data of the person, in the protected period that is intended to stop the person from:
    (i) entering the approved medical facility; or
    (ii) having or providing an abortion in the approved medical facility;
(b) an act that:
    (i) can be seen or heard by anyone in the protected period; and
    (ii) is intended to stop a person from:
        (A) entering the approved medical facility; or
        (B) having or providing an abortion in the approved medical facility;

[59] *Clubb* at [303].

(c) a protest, by any means, in the protected period in relation to the provision of abortions in the approved medical facility.

Should the prohibition on behaviours in a safe access zone apply only during periods of operation? (Question 22)

ALHR supports safe access zones operating 24 hours a day, 7 days a week.

Other Australian jurisdictions have not found it necessary to limit the operation of safe access zones to particular periods of time. However, in the Australian Capital Territory, the definition of prohibited behaviour under the *Health Act 1993* (ACT) is limited to behaviours which take place during 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.

ALHR submits that limiting the operation of safe access zones to specific time periods is undesirable for a number of reasons, including that:

- clinics may have different operating hours or flexible staffing arrangements;
- the operating hours of clinics may be subject to change on an *ad hoc* basis;
- it creates uncertainty and is is potentially confusing for members of the public;
- the motivation of protesters participating in demonstrations outside clinics beyond the hours of operation is likely to be to dissuade patients from obtaining an abortion; and
- seeing protesters participating in demonstrations outside clinics is still likely to cause distress to and intimidate individuals seeking terminations.

Should it be an offence in South Australia 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? (Question 23)

ALHR notes that the *Surveillance Devices Act 2016* (SA) provides minimal restrictions on the taking of photos or film in a public place including that the photo must not be defamatory. As outlined above in relation to prohibited behaviour which may already be captured by other general criminal offence provisions, we submit the current legislation does not adequately protect individuals accessing pregnancy termination services.

ALHR submits that it should be separate offence in South Australia to make or publish a recording of another person entering or leaving, or trying to enter or leave a facility where terminations of pregnancy are performed.

ALHR submits the offence should be similar to the offence established by section 16 of the *Termination of Pregnancy Act 2018* (Qld) which provides:

> ***16 Recording persons in or near termination services premises***
>
> *(1) This section applies in relation to a recording (a **restricted recording**) that—*
>
> *(a) is an audio or visual recording of a person while the person is in, or entering or leaving, termination services premises; and*
> *(b) contains information that identifies, or is likely to lead to the identification of, the person.*
>
> *(2) A person must not, without reasonable excuse, make a restricted recording of another person without the other person's consent.*
>
> *Example—*
>
> *It may be a reasonable excuse for the occupier of premises to make a restricted recording of persons in or near the premises, without the persons' consent, for security purposes.*
>
> *Maximum penalty—20 penalty units or 1 year's imprisonment.*
>
> *(3) A person must not, without reasonable excuse, publish or distribute a restricted recording of another person without the other person's consent.*
>
> *Maximum penalty—20 penalty units or 1 year's imprisonment.*
>
> *(4) Subsections (2) and (3) do not apply to a police officer doing a thing in the course of performing the officer's duties.*
>
> *(5) In this section—*
>
> ***distribute** includes—*
>
> *(a) communicate, exhibit, send, supply or transmit (including by live streaming), whether or not to a particular person; and*
> *(b) make available for access, whether or not to a particular person; and*
>
> *(c) enter into an agreement or arrangement to do a thing mentioned in paragraph (a) or (b); and*

(d) attempt to distribute.

***publish** means publish to the public by television, radio, the internet, newspaper, periodical, notice, circular or other form of communication.*

***visual recording** includes a photograph.*

Should it be unlawful to harass, intimidate or obstruct:

a) a woman who is considering, or who has undergone, a termination of pregnancy;
b) a person who performs or assists, or who has performed or assisted in performing, a lawful termination of pregnancy? (Question 24)

See above in relation to question 22.

Rural and Regional Access

Given the difficulties of access to medical services in rural areas of South Australia should there be different laws to facilitate access in rural and regional areas? (Question 26)

Should women be permitted to use telehealth or other electronic services to consult with medical and/or health practitioners? (Question 27)

Where a woman would otherwise be able to have a termination but does not have local access to clinics able to do so (such as in rural South Australia), should another qualified health practitioner (such as a registered nurse or pharmacist) be permitted to undertake this procedure. (Question 28)

All abortion services must be accessible. As previously outlined, geographic accessibility is one component of this. ALHR recommends that any new legislative framework and guidelines must specifically consider the impact of the guidelines on all women who live in remote areas, and how to eliminate any barriers to them accessing abortion services.

ALHR notes that Aboriginal women are disproportionately affected in accessing health services given the number of Aboriginal women that live in remote and very remote communities vis-à-vis non-Aboriginal women. When developing any new legislative framework and guidelines, such as that 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.

The definition of a suitably qualified medical practitioner should require the practitioner to have appropriate knowledge of abortion services without being overly prescriptive. We recommend the that a definition similar to that used in the Northern Territory be adopted. Section 4 of the *Termination of Pregnancy Law Reform Act 2017* (NT) defines a 'health practitioner' as 'a person registered under one of the following health professions within the meaning of the *Health Practitioner Regulation National Law* (other than as a student):

(a) Aboriginal and Torres Strait Islander health practice;
(b) medical
(c) midwifery
(d) nursing
(e) pharmacy.

The government should consider referring to the *Therapeutic Goods Administration Act 1989* (Cth) and the Pharmaceutical Benefits Scheme in the regulations so that suitability can also be

established where existing legislation authorises a practitioner to administer abortion-inducing medication.

ALHR proposes that termination both within and outside clinics be specifically authorised. However, due to the remoteness of South Australia, 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 from 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.

We note the Australian Medical Association NT's advice that women be within two hours of a hospital when she takes medication to terminate a pregnancy. To manage this requirement in a jurisdiction as vast as South Australia, ALHR supports a requirement that practitioners performing terminations follow professional standards and guidelines. We support the development of these guidelines, because this would increase safe access to abortions by providing valid options for women in remote areas.

Incidental

Should there be a residency requirement to access a lawful abortion in South Australia? (Question 29)

ALHR submits there should be no residency requirement to access a lawful abortion in South Australia. No other Australian jurisdiction requires that a person be a resident of the relevant state to access termination services. Given that every other Australian state (except for New South Wales) has now decriminalised abortion, it is now much less likely that patients from other states would choose to travel to South Australia to access termination of pregnancy services.

Do you have any suggestions for incidental law changes to present law and/or practice in South Australia in relation to abortion? (Question 30) Are there any other comments you would like to make in relation to this reference? (Question 31)

The discriminatory nature of abortion law against people living with disabilities

There are two critical issues with the current operation of South Australian abortion laws facing people with disabilities. The first concerns the current legislative singling out of abortion on the basis of the unborn child having 'a physical or mental abnormality so as to be seriously handicapped' which by its very nature directly targets people with disability. The second issue is the use of abortions for women with disability who fall pregnant but are seen to be unable to parent a child.

Section 82A

This submission has made clear ALHR's view that people seeking an abortion should never be criminalised and that South Australia's current laws addressing the termination of pregnancy require reform.

With regard to the current law in place in South Australia we wish to stress that the operation of section 82A disproportionately targets disability. The condition of the section that 'the child would suffer from such physical or mental abnormalities as to be seriously handicapped' obviously describes people with disability, albeit in antiqued language which will be addressed below.

Section 82A violates the Convention on the Rights of People with Disabilities (CRPD). A key principle of the CRPD is 'respect for difference and acceptance of persons with disabilities as part of human diversity and humanity'[60]. It has the effect of sending the message that people living with disability, have no place in South Australian society. It also suggests that to live with physical or intellectual disability is not a life worth dignity or respect. ALHR strongly opposes these inferences.

In calling for the repeal of section 82A(1)(a)(ii), it is critical to note the offensive language in the section and the harm that does to people with disability. Use of language like 'abnormalities' and 'seriously handicapped' are outdated and reflect a medical model of disability. As the SALRI would be aware, the CRPD adopts a social model of disability where 'disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others'.[61] Language that is inconsistent with the social model must not be allowed continue.

Forced abortions for women with disability

While ALHR's strong position is for the decriminalisation of abortion in South Australia, it is recognised that women with disability experience forced abortions, a form of sexual violence.[62] In 2016, the United Nations Committee on the Rights of Persons with Disabilities (CRPD Committee) made General Comment No. 3 on women and girls with disabilities. Commenting on article 16 of the CRPD which provides the right for a person with disability to be free from exploitation, violence and abuse, the Committee identified that forced abortions forms of violence, exploitation and abuse that are considered as cruel, inhumane and degrading treatment.[63]

A woman with disability may be forced to have an abortion by having her legal capacity removed, or as a result of stigma associated with the perceived capacity of people with disability to be parents. Article 12 of the CRPD provides the right for 'persons with disabilities enjoy legal capacity on an equal basis with others'. Forcing a woman with disability to have an abortion on the basis that she does not have legal capacity, because she has a disability, is discriminatory.

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[60] *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008) art 3(d).
[61] Ibid at Preamble (e).
[62] Women With Disabilities Australia (WWDA) *Position Statement 4: Sexual and Reproductive Rights*. WWDA, September 2016, Hobart, Tasmania p 4.
[63] Committee on the Rights of Persons with Disabilities, *General Comment No. 3 (2016) on women and girls with disabilities* (CRPD/C/GC/3), para 32.

Currently, South Australian law does not discriminate against women with disabilities in this way, but ALHR questions if existing medical terminations are actually occurring on this basis. Unfortunately ALHR does not have access to state-based statistics on this and queries whether such statistics are able to be collected. However, General Comment 3 from the CRPD Committee which identifies forced abortions of women with disability is reason enough for SALRI to consider this issue in forming the recommendations to the South Australian Government.

ALHR respectfully submits that when abortion is decriminalised in South Australian law, consideration should be given to the safeguarding the right of women with disability to be free from violence, abuse and exploitation. These safeguarding mechanisms may look like the criminalisation of forced abortions against women with disability, replacing existing laws which criminalise a woman's choice to terminate her pregnancy.

Criminalising medical intervention by way of abortion where a woman does not choose to terminate the pregnancy and where the woman has a physical, intellectual or cognitive disability is a way to safeguard against continued rights violations for women with disability when forced to terminate their pregnancies. In other states and territories, there is not specific legislative safeguarding provisions by way of criminalising the acts of medical professionals who may be responsible for the forced abortion of a woman with disability.

In Victoria, Queensland and the Australian Capital Territory the respective Human Rights Acts provide a civil legal avenue to be pursued when basic human rights are violated. Sadly, South Australia does not have such protections. Accordingly, specific consideration needs to be given to safeguard the rights of women with disability to carry children and prevent any instances of forced abortion.

Similar to the lack of evidence on the number of women with disability who undergo forced abortions, ALHR is not aware of data on the stigmatisation of encouraging women with disability to have abortions on the basis that they cannot parent because they have a disability. Article 23 of the CRPD provides the right for people with disability to found a family. Specifically, article 23(b) provides that people with disability have the right to decide freely and responsibly the number and spacing of their children.

Further, article 23(2) requires State Parties to render appropriate assistance to persons with disabilities in the performance of their child-rearing responsibilities. The CRPD Committee affirmed in General Comment 3 that '[i]t is particularly important to reaffirm that the legal capacity of women with disabilities should be recognised on an equal basis with that of others and that women with disabilities have the right to found a family and be provided with appropriate assistance to raise their children."[64]

Any practice whereby women with disabilities face undue pressure to terminate their pregnancies on the basis of their parenting capacity because they have a disability violates this right. ALHR recognises that it can be difficult to properly capture attitude barriers like this in legislation, and there may not be an effective way to regulate such practices. ALHR strongly recommends that SALRI put forward an education program for medical professionals to better inform them on the right of women with disability to have a family. Education should make it clear that failing to acknowledge, protect and promote this right is a breach of the CRPD.

While the CRPD is ratified by Australia, it is not enforceable unless incorporated within domestic law. In the event a woman with disability complained that she was forced to have an abortion, it would likely be treatment contrary to the *Health and Community Services Act 2004(SA)*. A complaint could also be brought to the CRPD Committee. Any misunderstanding that there would not be state and international consequences for forced adoption should be quickly addressed.

Right to safe abortions

In criminalising abortions, ALHR is mindful that safe abortions must be available for women with disability. On this topic, the CRPD Committee have commented that:

> "*women with disabilities may also be denied access to information and communication, including comprehensive sexuality education, based on harmful stereotypes that assume that they are asexual and do not therefore require such information on an equal basis with others. Information may also not be available in accessible formats. …. including safe abortion and post-abortion care."*[65]

[64] Committee on the Rights of Persons with Disabilities, *General Comment No. 3 (2016) on women and girls with disabilities* (CRPD/C/GC/3), para 45.
[65] Ibid para 40.

ALHR respectfully submits that if abortions were decriminalised in South Australia, accessible information before and after abortion must be available to women with disability. Policy guidelines should be developed to dictate what accessibility features the information is required to be had. The development of these guidelines must be done in consultation with the South Australian disability community.

Ensuring Affordability and Adequate Funding

In order to adequately protect the women's right to access safe and legal abortion services, 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.

To enable reform of abortion legislation, adequate funding needs to be provided to the health portfolio.

Accessible Information

ALHR supports the development of plain English, accessible and culturally appropriate resources to inform women of available services. It is critical to ensure that women are not prevented from seeking abortions due to geographical location, unaffordable transport to a hospital, lack of services or long wait times. Implementation of the new legislation will need to be properly resourced.

Gender Neutral Language

ALHR submits that legislation should be inclusive and drafted in a gender neutral way. Legislation should be drafted in a way that recognises not all people who may need to access abortion services identify as women, for example, non-binary or transgender people.

Conclusion

The legislative framework for termination of pregnancy in South Australia has fallen behind other Australian jurisdictions. South Australia and NSW are the only Australian states yet to fully decriminalize abortion. This is not reflective of community value or of internationally recognised human rights principles.

The United Nations Committee on the Elimination of Discrimination Against Women, the Special Rapporteur on the right to health, the Committee on Economic, Social and Cultural Rights and the Committee on the Rights of the Child have all declared access to safe and legal abortion is a fundamental human right for women and girls.

The reality is that 81% of Australians believe individuals should have the right to choose whether or not to have an abortion and that between half and one quarter of Australian women will access an abortion service in their lifetime.[66] Those who seek abortions should not be treated as criminals or subjected to harassment and intimidation.

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.

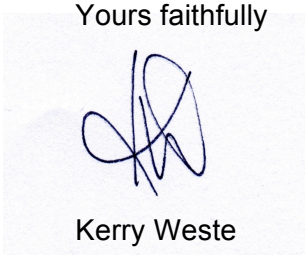
[66] The 2003 Australian Survey of Social Attitudes (AuSSA) found that 81% of those surveyed believed a woman should have the right to choose whether or not she has an abortion.K Betts "Attitudes to Abortion in Australia: 1972 to 2003" *People and Place* 22, 2004. Available online at http://tapri.org.au/wp-content/uploads/2016/02/v12n4_3betts.pdf

About 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.

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

Yours faithfully



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