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Office of the Chief Health Officer
Department of Health
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Dear Chief Health Officer

Safe access zones - Proposal for reform in Western Australia

Australian Lawyers for Human Rights (**ALHR**) is grateful for the opportunity to provide this submission in response to the discussion paper on safe access zones in Western Australia.

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

Australian Lawyers for Human Rights

Responses to consultation questions

Confidentiality and details of organisation (Questions 1-5)

ALHR is happy to provide its submission on an open basis.

Level of awareness of issue (Question 6)

ALHR has advocated widely over many years for access to safe and legal abortion services throughout Australia, including advocacy in support of the introduction of safe access zones. ALHR has previously made submissions in relation to a number of parliamentary inquiries and law reform commission consultations in Australia as part of its work more broadly advocating for legal, safe and accessible pregnancy termination services.

Do you support the introduction of safe access zones around premises that provide abortion services in Western Australia? (Question 7)

Recommendation: ALHR recommends that the Western Australian Government legislate to establish safe access zones around premises where terminations of pregnancy services are provided. Legislation should make it an offence 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

ALHR supports safe access zones around abortion clinics as a way of protecting and promoting human rights and women's safety. 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, inhuman or degrading treatment, and rights to privacy, personal autonomy and the highest attainable standard of physical and mental health.¹

¹ See UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171; UN General Assembly, Convention on the Elimination of All Forms of Discrimination Against Women, 18 December 1979, United Nations, Treaty Series, vol. 1249, p. 13; UN General Assembly, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85; and UN General Assembly, International Covenant on Economic, Social and Cultural Rights, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3 for example.

Victoria, Tasmania, the Australian Capital Territory the Northern Territory, New South Wales and Queensland have all successfully introduced safe access zones around facilities where terminations are performed. The High Court 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 Western Australia Government should extend these important protections to patients seeking to access termination services as well as clinic staff.

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, protests including the use of graphic images, and silent prayer. As stated by Gageler J in relation to the Melbourne clinic 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.

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.

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 *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 found that:

- the implied freedom is not a personal right, it is a restriction upon legislative power;
- 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;
- 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;

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;
- creating an exception for where the person consents to receiving an otherwise prohibited communication; or

- providing for an exception to the prohibition during election campaigns.

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.

Relevant International Human Rights Law

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.

(a) Freedom of expression and assembly

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.²

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.

(b) The right to access safe and legal abortion services

In the context of consideration of safe access zones ALHR takes the opportunity to note that reproductive rights are recognised in multiple of the human rights instruments to which Australia is a party.³ Further, the United Nations Human Rights Committee ('UNHRC') has stated that the

² 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.

³ 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

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').⁴ 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.'⁵ CEDAW also prohibits practices which harm women and girls, including women and girls' reproductive rights.⁶

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".⁷ 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.⁸ The Committee on the Rights of the Child has recommended that "States ensure access to safe abortion."⁹

During what times should safe access zones apply? (Question 9)

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.

Rights, International Regulation, Max Planck Encyclopedia of Public International Law (Oxford Public International Law Online, August 2013).

⁴ ICCPR, 16 December 1966, 999 U.N.T.S 171 (entered into force 23 March 1976).

⁵ Convention for the Elimination of Discrimination Against Women ('CEDAW') Art 16.

⁶ CEDAW Arts 2(f) and 5(a); see also Convention on the Rights of the Child, Art 24(3).

⁷ 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.

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

⁹ General Comment 15 (2013) on the right of the child to the enjoyment of the highest attainable standard of health, para. 70.

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 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.

Proposed prohibited behaviours (Question 10)

We note that it is proposed that prohibited behaviours will include:

- in relation to a person accessing, 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;
- 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;
- interfering with or impeding a footpath, road or vehicle, without reasonable excuse, in relation to premises at which abortions are provided;
- 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
- any other prescribed behaviour.

Recommendation: ALHR supports adopting a similar definition used in the Queensland safe access zones legislation.

In our submission, the Queensland safe access zones legislation most effectively and concisely captures the behaviours intended to be prohibited within safe access zones. Section 15 of the *Termination of Pregnancy Act 2018* (Qld) provides:

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 said 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.

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 explained:

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 access legal abortion services. Although such conduct has often extended to criminal conduct, women and their support persons are 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.

Subsection 15(2) provides The Queensland legislation 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 Western 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'.

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.

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 fetuses.
- (b) Protesters equating fetuses 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 fetuses post-abortion, fetuses in buckets, or skulls of fetuses.
- (f) Protesters distributing visually graphic literature containing medically inaccurate and misleading information warning that abortion results in infertility, failed relationships, mental illness and cancer.

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'.

In a separate judgment delivered in *Clubb*, Nettle J said that while the Tasmanian legislation may arguable 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.

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;

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

Making or publishing recordings of another person entering or leaving, or trying to enter or leave, premises where termination of pregnancy services are performed, without the recorded person's consent.

Recommendation: Legislation creating safe access zones in Western Australia should include a separate offence relating to the making or publishing of a recording of another person entering or leaving, or trying to enter or leave a facility where terminations of pregnancy are performed.

ALHR acknowledges relevant provisions of the Surveillance Devices Act 1998 (WA). However we also note that current legislation does not specifically protect individuals accessing pregnancy termination services. We submit that this is an issue that should relevantly be considered when legislating safe access zones .

ALHR submits that it should be a separate offence in Western 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.

Conclusion

ALHR supports safe access zones around abortion clinics as a way of protecting and promoting the fundamental human rights and safety of women accessing essential health services.

Women seeking abortions and staff working at clinics report routinely experiencing harassment and intimidation from anti-abortion protestors outside the clinics. Such behaviour infringes on women's right to privacy and dignity when accessing health services. Safe access zones are consistent with internationally recognised fundamental human rights of women and girls, including the right to be free from discrimination, the right not to be subjected to cruel, inhuman or degrading treatment, and rights to privacy, personal autonomy and the highest attainable standard of physical and mental health.

Safe access zones are also consistent with community attitudes – between half and one quarter of Australian women will access an abortion service in their lifetime, and 81% of Australians believe a woman should have the right to choose whether or not she has an abortion.

Safe access zones do not deny groups or individuals the opportunity to express their views. United Nations human rights bodies as well as courts in similar countries such as the United States of 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.

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.

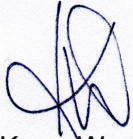
About ALHR

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:

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Yours faithfully



Kerry Weste

President

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