



AUSTRALIAN
LAWYERS
FOR
HUMAN RIGHTS™

Submission on the Inquiry into the *Human Rights (Children Born Alive Protection) Bill 2022*

Senate Community Affairs Legislation Committee
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Acknowledgements

Australian Lawyers for Human Rights (**ALHR**) acknowledges the traditional owners and custodians of the lands on which we work across Australia as the first people of this country. We recognise that the land belonging to these peoples was never ceded, given up, bought, or sold. We pay our deep respect to Elders past, present and emerging.

About Australian Lawyers for Human Rights

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.

ALHR seeks to utilise its extensive experience and expertise in the principles and practice of international law and human rights law in Australia to:

- Promote Federal and State laws across Australia that comply with the principles of international human rights law;
- Engage with the United Nations in relation to Australian human rights violations;
- Promote and support lawyers' practice of human rights law in Australia;
- Engage internationally to promote human rights and the rule of law.

Through advocacy, media engagement, education, networking, research and training, ALHR promotes, practices and protects universally accepted standards of human rights throughout Australia and overseas.

Executive summary

Australian Lawyers for Human Rights (**ALHR**) welcomes the opportunity to make a submission to the inquiry into the *Human Rights (Children Born Alive Protection) Bill 2022* (**the Bill**). ALHR submits that the Bill seeks to address a problem that does not exist. For the reasons that follow, the Bill should be rejected in its entirety.

The Bill stigmatises pregnant people, demonises healthcare providers and is founded on two fundamental misunderstandings. First, the Bill misunderstands the realities of healthcare provision in Australia. Second, the Bill misunderstands the normative content and scope of the international human rights law standards it purports to advance.

Furthermore, ALHR is concerned that the Bill seeks to politicise healthcare by replicating the language and methodologies of the United States (**US**) anti-abortion movement. The politicisation of abortion in the US has undermined healthcare access, generated vast inequity in healthcare provision and has seen the US become the nation with the highest maternal death rate among high income countries.¹

After outlining the medical misconceptions that underpin the Bill and the effect that the enactment of such legislation would have, ALHR will detail the human rights implications of the Bill. We will then consider the Bill in the context of the politicisation of healthcare access in Australia and the importance of guarding against such politicisation to ensure equitable access to evidence-based healthcare.

A problem that does not exist

A preponderance of abortions in Australia occur before the point of foetal viability. Providers of abortion care have observed that the Bill bears little resemblance to the reality of medical practice. Dr Catriona Melville, deputy medical director of MSI Australia has described the situation contemplated by the Bill as one that ‘by the nature of the procedure wouldn’t occur.’² Doctors have observed that in the rare cases where a live birth may occur, the foetus is not viable. Professor Caroline da Costa from the Cairns Institute at James Cook University has observed that ‘[t]hese foetuses have some serious abnormalities: some may have no kidneys, some may have no brain, or serious heart abnormalities -that is why the termination happens. They are not viable.’³

In its response to the earlier iteration of this Bill, the NHMRC Centre of Excellence in Sexual and Reproductive Health for Women in Primary Care (**SPHERE**) submitted that the measures in the Bill reflected a poor understanding of the realities of clinical decision making, subject to clear medical protocols in line with evidence-based standards for clinical care, and are essentially irreconcilable with patient autonomy and patient centred care.⁴

ALHR submits that mandating treatment in cases of lethal and serious foetal anomaly is incompatible with medical standards and evidence-based healthcare. The Bill is based on a

¹ Munira Z Gunja et al, ‘Health and Health Care for Women of Reproductive Age: How the United States Compares with Other High-Income Countries, The Commonwealth Fund (Blog Post, 5 April 2022) <https://www.commonwealthfund.org/publications/issue-briefs/2022/apr/health-and-health-care-women-reproductive-age>.

² Paul Karp, ‘George Christensen’s ‘nonsensical’ abortion proposal could penalise doctors up to \$440,000’, *Guardian Australia*, 23 February 2021.

³ Cate Swannell, Canavan’s ‘Nonsense’ Abortion Bill Slammed’, *The Medical Republic*, 13 February 2023, <https://medicalrepublic.com.au/canavans-nonsense-abortion-Bill-slammed/85662>

⁴ SPHERE response to Human Rights (Children Born Alive Protection) Bill 2021.

misunderstanding of these medical standards and the realities of healthcare provision in Australia.

Stigmatising healthcare and demonising those who seek and provide it

While the Bill makes it clear that the mother of a child born alive is not liable to criminal prosecution, ALHR submits that, if passed, the Bill would significantly heighten abortion stigma. It would demonise healthcare providers, create an unnecessary regulatory burden and consequently undermine abortion access. It would further stigmatise pregnant people and undermine their health and wellbeing. While late terminations are relatively rare, terminations arising in the circumstances contemplated by the Bill are extremely traumatic for the pregnant person. Mandating an interference with their reproductive autonomy in such difficult circumstances is profoundly stigmatising and, as expanded upon in the following part of this submission, would breach international human rights guarantees, including the right to protection from cruel, inhuman and degrading treatment and torture.

The human rights implications of the Bill

The Bill purports to give effect to Australia's international human rights obligations under the *Convention on the Rights of the Child (CRC)* and the *International Covenant on Civil and Political Rights (ICCPR)*. By invoking the external affairs power under Australia's Constitution, the Bill, if enacted, would override inconsistent state laws.

However, while the Bill co-opts the language of human rights and purports to implement Australia's human rights obligations under international law, **the Bill fundamentally misunderstands the normative content of the obligations it purports to give effect to, and ignores the jurisprudence with respect to these obligations.** The consequence of this misunderstanding is that if it were to be enacted, this Bill would have a deleterious effect on Australia's performance of its human rights obligations. It would operate to undermine abortion access, impede the implementation of Australia's human rights obligations and run counter to the recommendations of United Nations human rights organs, including the treaty bodies which supervise the implementation of the ICCPR and CRC.

Australia's obligations to respect, protect and fulfil its obligations under the human rights treaties it has ratified require the *advancement* of access to reproductive healthcare, including abortion services.⁵

⁵ ALHR uses the term women, noting that the submission is concerned with the National Women's Health Strategy, while acknowledging that sexual and reproductive healthcare may be accessed by a diverse range of people, including those who do not identify as women.

Access to abortion services falls within a number of human rights standards, including:

- the right to privacy and autonomy;⁶
- the right to security of person;⁷
- the right to equality and non-discrimination;⁸
- the equal right of women to decide freely and responsibly on the number and spacing of their children;⁹
- the right to protection from cruel, inhuman or degrading treatment and torture;¹⁰ and
- equality of access to health care services, including those related to family planning.¹¹
- the right to health:¹² access to abortion is a corollary of the right to health which includes access to safe abortion and post-abortion services, which are available, accessible, affordable, acceptable and of good quality.¹³

Access to reproductive healthcare has been recognised as being indivisible from and interdependent with other human rights¹⁴ and the realisation of gender equality has been found to require the removal of barriers to accessing sexual and reproductive health, services, goods and information, including the adoption of legal and policy measures to guarantee ‘to liberalise restrictive abortion laws; to guarantee women and girls’ access to safe abortion services and quality post-abortion care, including by training health-care providers; and to respect the right of women to make autonomous decisions about their sexual and reproductive health.’¹⁵

The ICCPR

The Bill purports to give effect to Australia’s obligations under the ICCPR, with specific reference made to articles 24 (protection from discrimination, birth registration and nationality) and 26 (equality before the law).

Restrictions on abortion are not and never have been a corollary of implementation of these rights. In fact, the United Nations Human Rights Committee (**UNHRC**) which supervises the

⁶ Article 17 of the International Covenant on Civil and Political Rights.

⁷ Article 9(1) of the International Covenant on Civil and Political Rights.

⁸ See for example article 3 of the International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights, article 1 of the Convention on the Elimination of All Forms of Discrimination against Women.

⁹ Article 16(1)(e) of the Convention on the Elimination of All Forms of Discrimination against Women.

¹⁰ Article 7 ICCPR and article 16 of the Convention on the Elimination of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.

¹¹ Art 12(1) of the Convention on the Elimination of All Forms of Discrimination against Women.

¹² See for example the work of the UN Special Rapporteur on the Right to Health at <https://www.ohchr.org/en/special-procedures/sr-health/sexual-and-reproductive-health-rights>

¹³ Ibid [11]-[21].

¹⁴ Ibid [10]

¹⁵ Ibid [28].

implementation of the ICCPR has found the denial of access to safe and lawful abortion to violate articles 24 and 26 and to furthermore violate other rights in the ICCPR, including freedom from cruel, inhuman and degrading treatment and the right to privacy.¹⁶

In *Llantoy Huamán v Peru*, the UNHRC found that the right to special measures of protection in article 24 was breached alongside the right to be free from torture and cruel, inhuman and degrading treatment (article 7) and the right to privacy (article 17).¹⁷ The case concerned a 17 year old girl who requested, and was refused, a termination after a scan revealed anencephaly, a foetal abnormality inconsistent with life outside the womb with concomitant risks to her life if the pregnancy continued. The young woman was refused an abortion, gave birth to an anencephalic child who died four days later, and experienced serious mental harm as a consequence.

A breach of article 26 was also found by the UNHRC in *Mellet v Ireland*¹⁸ and *Whelan v Ireland*,¹⁹ issued in 2016 and 2017 respectively. Both matters concerned women who were informed that due to congenital defects, the foetus each was carrying would die in utero or shortly after birth. Both were unable to obtain an abortion in their home country of Ireland due to the prohibition of abortion in Irish law at the time. Both chose to travel abroad to obtain an abortion and were required to incur financial, psychological and physical burdens and denied the protection of Ireland's public health care system. The UNHRC found that Ireland had violated article 26 of the ICCPR by failing to accommodate their medical and socio-economic circumstances and meet the requirements of reasonableness, objectivity and legitimacy of purpose. As in the case of *Llantoy Huamán v Peru*, the UNHRC also found that Ireland violated articles 7 and 17 of the ICCPR and called on Ireland to avoid future violations by decriminalising abortion and providing healthcare access.

ALHR submits that, if passed, the Bill would mandate an interference with the reproductive autonomy of pregnant people which, as in the above matters, would include interfering with the human rights that the Bill purports to protect, as well as the right to privacy and the right to be free from torture and cruel, inhuman and degrading treatment.

The CRC

¹⁶ See eg *Llantoy Huamán v Peru*, HRC, Communication No 1153/2003, UN Doc CCPR/C/85/D/1153/2003 (22 November 2005); *LMR v Argentina*, HRC, Communication No 1608/2007, UN Doc CCPR/C/101/D/1608/2007 (28 April 2011).

¹⁷ *Llantoy Huamán v Peru*, HRC, Communication No 1153/2003, UN Doc CCPR/C/85/D/1153/2003 (22 November 2005).

¹⁸ *Mellet v Ireland*, HRC, Communication No 2324/2013, UN Doc CCPR/C/116/D/2324/2013 (9 June 2016).

¹⁹ *Whelan v Ireland*, HRC, Communication No 2425/2014, UN Doc CCPR/C/119/D/2425/2014 (11 July 2017).

The Bill purports to give effect to Australia's obligations under the CRC, with specific reference made to articles 6 (the right of the child to life, survival and development) and 24 (the right of the child to health). As with articles 24 and 26 of the ICCPR, restrictions on abortion are not and never have been a corollary of implementation of articles 6 and 24 of the CRC. In fact, the United Nations Committee on the Rights of the Child (**UNCRC**), which supervises the implementation of the CRC, has recognised 'reproductive freedom to make responsible choices' and access reproductive health services as a corollary of the right to health in article 6.²⁰

The UNCRC has furthermore called on states to provide access to sexual and reproductive healthcare as part of its implementation of article 6 and 24 and emphasised the obligation on states to 'ensure the right to life, survival and development for all children by taking all necessary measures, including addressing the root causes of teenage pregnancies, strengthening support for pregnant adolescents and providing them with adequate sexual and reproductive health services.'²¹

Once again, ALHR submits that, if passed, the Bill would mandate breaches of the very rights it purports to implement. It would furthermore mandate breaches of other human rights obligations in treaties ratified by Australia, as outlined further below.

Other relevant human rights treaties ratified by Australia

The UN Committee on Economic, Social and Cultural Rights (**CESCR**) which oversees the International Covenant on Economic Social and Cultural Rights (**ICESCR**), has recognised that the right to sexual and reproductive health is an integral part of the right to health and includes a set of rights and entitlements, including the right to make autonomous decisions concerning one's body and entitlement to unhindered access to health facilities, goods, services and information.²²

The CESCR has established that the right to sexual and reproductive healthcare requires health facilities, goods, information and services related to the underlying determinants of sexual and reproductive health, including safe abortion and post-abortion services, which are available, accessible, affordable, acceptable and of good quality.²³ The CESCR has

²⁰ Committee on the Rights of the Child, General comment No. 15 (2013) on the right of the child to enjoyment of the highest attainable standard of health (art 24) UN Doc CRC/ C/JC/15, 17 April 2013,[24], [31].

²¹ Committee on the Rights of the Child, Concluding Observations: Namibia, U.N. Doc. CRC/C/NAM/CO/2-3 (2012), [35].

²² Committee on Economic, Social and Cultural Rights, *General Comment No. 22 on the Right to Sexual and Reproductive Health (Article 12 of the International Covenant on Economic, Social and Cultural Rights)*, UN Doc E/C.12/22 (2 May 2016) [1], [5].

²³ *Ibid* [11]-[21].

furthermore recognised the right to sexual and reproductive health as being indivisible from and interdependent with other human rights²⁴ and that the realisation of gender equality requires the removal of barriers to accessing sexual and reproductive health, services, goods and information, including the adoption of legal and policy measures to guarantee ‘access to affordable, safe and effective contraceptives and comprehensive sexuality education including for adolescents; to liberalise restrictive abortion laws; to guarantee women and girls’ access to safe abortion services and quality post-abortion care, including by training health-care providers; and to respect the right of women to make autonomous decisions about their sexual and reproductive health.’²⁵

This position has been echoed by the United Nations Committee on the Elimination of Discrimination Against Women (**CEDAW Committee**) which supervises the implementation of the Convention on the Elimination of All Forms of Discrimination against Women (**CEDAW**). The Committee has found that laws, policies and practices which serve to bar access to reproductive healthcare services are discriminatory and may cause or constitute gender-based violence²⁶ and in some circumstances amount to cruel, inhuman and degrading treatment or torture.²⁷

“Violations of women’s sexual and reproductive health and rights, such as criminalization of abortion, denial or delay of safe abortion and/or post-abortion care, and forced continuation of pregnancy, are forms of gender-based violence that, depending on the circumstances, may amount to torture or cruel, inhuman or degrading treatment.”²⁸

In its Concluding Observations on Australia’s implementation of the Convention on the Elimination of All Forms of Discrimination against Women, the Committee called on Australia to review state and territory laws, policies and practices:

‘to guarantee access to legal and prescribed abortion services and to raise awareness of sexual and reproductive health rights among women and girls, parents,

²⁴ Ibid [10]

²⁵ Ibid [28].

²⁶ Committee on the Elimination of Discrimination against Women, *General Recommendation 24: Women and Health*, A/54/38/Rev 1 (1999) [11]; Summary of the Inquiry into the Philippines under Article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, CEDAW/C/OP.8/PHL/1, 2015, [77], *L.C.v Peru*, Communication No. 22/2009, C/50/D/22/2009, 2011[8.15]-[8.19].

²⁷ CEDAW Committee, *General Recommendation 35 on Gender-Based Violence against Women, Updating General Recommendation No 19* (14 July 2017) [18].

²⁸ Committee on the Elimination of Discrimination against Women, *General Recommendation 35 (2017) on gender-based violence against women, updating general recommendation 19*, para. 18.

*teachers, medical professionals and the general public and create safe zones around abortion clinics.*²⁹

The UN Working Group on discrimination against women and girls, as specialist mandate of the UN Human Rights Council has emphasised that the:

*“..right of a woman or girl to make autonomous decisions about her own body and reproductive functions is at the very core of her fundamental right to equality and privacy, involving intimate matters of physical and psychological integrity, and is a precondition for the enjoyment of other rights.”*³⁰

Resisting politicisation

The politicisation of abortion in the US has had devastating consequences for the internationally recognised human right to access reproductive health care. Resulting abortion bans have compelled pregnant people to give birth against their will and irrespective of their life circumstances. There is little doubt such bans will threaten the lives and health of pregnant people. They have undermined access not just to abortion, but to healthcare more broadly, including access to medical treatment for autoimmune disorders, miscarriage and ectopic pregnancy. The politicisation of abortion has had an intersectional effect and has placed Black women at heightened risk of pregnancy related complications and death.³¹

The politicisation of healthcare polarises society and hampers evidence-based lawmaking and policy formulation. It marginalises members of already marginalised groups and undermines the realisation of human rights. A strong majority of Americans oppose abortion bans,³² yet the politicisation of abortion in the US over the past four decades has overridden public opinion and undermined human rights.

²⁹ Committee on the Elimination of Discrimination against Women, *Concluding observations on the eighth periodic report of Australia*, CEDAW/C/AUS/CO/8 (25 July 2018) [50(a)].

³⁰ Working Group on the issue of discrimination against women in law and in practice, A/HRC/38/46 (2018), para. 35.

³¹ See for example Mary Tuma, ‘At death’s door’: abortion bans endanger lives of high-risk patients, Texas study shows’, *The Guardian*, 13 July 2022, <https://www.theguardian.com/world/2022/jul/13/texas-abortion-ban-maternal-health-risk>

³² Alison Durke, ‘How Americans Really Feel About Abortion: The Sometimes Surprising Poll Results As Supreme Court Overturns Roe v Wade’, *Forbes* (online, 24 June 2022) <https://www.forbes.com/sites/alisondurkee/2022/06/24/how-americans-really-feel-about-abortion-the-sometimes-surprising-pollresults-as-supreme-court-reportedly-set-to-overturn-roe-v-wade/?sh=52ad48ab2f3a>; Hannah Hartig, ‘About six-in-ten Americans say abortion should be legal in all or most cases’, Pew Research Centre (online, 13 June 2022) <https://www.pewresearch.org/fact-tank/2022/06/13/about-six-in-ten-americans-say-abortion-should-be-legal-in-all-or-most-cases-2/>.

While the hyper-partisanship surrounding abortion in the US has not been replicated in Australia and abortion remains a conscience vote issue, there are signs of growing politicisation of abortion in Australia under the influence of the US anti-abortion movement.

The influence of the US anti-abortion movement in Australia is examined in a recent article by Associate Professor Tania Penovic, Senior co-chair of ALHR's Women's and Girls' Rights Committee and **attached with this submission as [Annexure A](#)**³³ As observed in the article, the discourses and tactics of the US anti-abortion movement have been increasingly replicated in Australia. A narrative favoured by the US anti-abortion movement and Republican politicians, who have become increasingly enmeshed within the anti-abortion movement, is the narrative of 'abortion up to birth'. ALHR is troubled that this medically misleading narrative has been replicated in the Bill which would appear to be modelled on initiatives pursued in the US.

Conclusion

Over the past two decades, Australia's states and territories have chosen to liberalise abortion laws with measures that better reflect international human rights law standards. In contrast, this Bill seeks to override these legislative reforms, generate outrage, polarise public opinion, undermine health care access and introduce measures that are at odds with international human rights law standards. Based on a misunderstanding of medical practice and human rights, the Bill has replicated discourses utilised by the US anti-abortion movement.


ALHR strongly recommends that the Bill be rejected in its entirety.

³³ Penovic, T, '*The Fall of Roe*', 2022, *Alternative Law Journal* 2022, Vol. 47(4) 253–260

If you would like to discuss any aspect of this submission, please email me at:

president@alhr.org.au.

Yours faithfully,

A handwritten signature in blue ink, appearing to be 'Kerry Weste', is centered within a light blue rectangular background.

Kerry Weste

President

Australian Lawyers for Human Rights

Any information provided in this submission is not intended to constitute legal advice, to be a comprehensive review of all developments in the law and practice, or to cover all aspects of the matters referred to. Readers should take their own legal advice before applying any information provided in this document to specific issues or situations.

