Human Rights Law Centre

Reforming Queensland's Outdated Abortion Laws

Submission to the Review of Termination of Pregnancy Laws by the Queensland Law Reform Commission

20 March 2018

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Freedom. Respect. Equality. Dignity. Action.

Contact

Adrianne Walters
Human Rights Law Centre Ltd
Level 17, 461 Bourke Street
Melbourne VIC 3000

T: + 61 3 8636 4451

E: adrianne.walters@hrlc.org.au

W: www.hrlc.org.au

About the Human Rights Law Centre

The Human Rights Law Centre uses a strategic combination of legal action, advocacy, research, education and UN engagement to protect and promote human rights in Australia and in Australian activities overseas.

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1. Introduction

1. This submission responds to the Queensland Law Reform Commission's review of termination of pregnancy laws. The Human Rights Law Centre (**HRLC**) made two submissions to a recent inquiry into abortion laws conducted by the Health, Communities, Disability Services and Domestic and Family Violence Prevention Committee of Queensland Parliament. Those submissions are repeated in this submission.

2. The HRLC is a national human rights organisations whose mandate includes the protection and promotion of women's reproductive rights. We have worked closely with Children by Choice in relation to the reform of Queensland's termination of pregnancy laws.

3. Across Australia, the HRLC has advocated for the decriminalisation of abortion and improved access to abortion, including safe access zones, in Tasmania, Victoria and the Northern Territory. In 2015, we acted for the East Melbourne Fertility Control Clinic in its legal bid to end decades-long harassment by anti-abortionists out the front of its premises.

2. Executive Summary

4. Queensland has a unique opportunity to demonstrate its commitment to women's health and equality by comprehensively reforming the state's outdated abortion laws, which are hopelessly out of step with community standards and clinical practice.

5. Although it is legal to access and provide abortion in Queensland in some circumstances, abortion nonetheless remains a criminal offence. Abortion is treated as a criminal justice issue rather than a health issue. Women's basic rights to non-discrimination, privacy and bodily autonomy are threatened by a system under which they risk criminal prosecution for making medical decisions concerning their own body. The threat is not merely theoretical. In 2009, a Cairns couple were charged with procuring a miscarriage.

6. The criminalisation or restriction of medical procedures only needed by women discriminates against women. Restrictive abortion laws or a failure to ensure reproductive health services are accessible do not stop women having abortions. Rather, they lead to worse health outcomes for women – women may be forced to carry an unwanted pregnancy to term, or delayed in obtaining the health services they need, or resort to unsafe clandestine options. These risks are heightened for women whose circumstances make accessing health services more difficult, including young women and girls, women living remotely, women with a disability, Aboriginal and Torres Strait Islander women, women of culturally or linguistically diverse backgrounds and women who cannot afford to travel to jurisdictions with more liberal abortion laws.

7. Queensland should reform its abortion laws to ensure safe and equitable access to abortion services for women for years to come and to respect women as competent decision-makers over their bodies and lives.

8. This requires abortion to be comprehensively removed from the *Criminal Code 1899* (Qld), thereby allowing it to be situated as a clinical health issue to be determined between a woman and her doctor without fear of prosecution. Women should have the right to choose whether they have an abortion without needing to justify their decision or seek third party authorisation, at least up to 24 weeks gestation. For those rare, and typically distressing and complex situations in which a woman needs an abortion after 24 weeks gestation, abortion must be accessible, which means not limiting access to abortion to a narrow set of circumstances. Further, the law should not subject women to arduous approval processes, such as referral to an ethics committee or a requirement to track down a particular medical specialist.

9. Queensland must ensure that abortion is practically accessible to all women, as well as legally available. This means introducing laws that require health professionals with a conscientious objection to abortion to refer women to a professional without such an objection. It also requires protection around abortion clinics (**safe access zones**) so that women are not harassed, intimidated or obstructed when trying to see their doctor.

10. In addition to reforming the law, it is critical that safe, impartial and confidential reproductive health services are actually available to women across Queensland, including to women in the state's vast regional and remote areas. Queensland should therefore ensure services are appropriately funded and supported.

3. Recommendations

Recommendation 1:

Amend the *Criminal Code 1899* (Qld) by:

(a) repealing sections 224-226;

(b) repealing section 313(1); and

(c) creating an offence making it unlawful for an unqualified person to perform an abortion, and which makes it clear that a woman will not be criminally responsible for consenting to, assisting in or terminating her own pregnancy.

Recommendation 2:

The regulation of abortion in Queensland law should replicate the ACT or Victorian model.

Recommendation 3:

There should be provision for conscientious objection to performing or assisting with an abortion, subject to the following obligations:

(d) medical practitioners and health professionals (including counsellors and pharmacists) with a conscientious objection must refer a woman to another medical practitioner or health professional who is known not have a conscientious objection; and

(e) medical practitioners and health professionals (including nurses and midwives) with a conscientious objection must perform, or assist in, the termination of a pregnancy in cases of medical emergency, where an abortion is necessary to save a woman's life or prevent serious physical harm.

Recommendation 4:

Queensland law should *not* include a requirement for a woman to undergo counselling or for a medical practitioner to refer a woman to counselling.

Recommendation 5:

Queensland law should provide for sensible and proportionate safe access zones around abortion clinics, which protect women trying to access abortion services from harm. Safe access zones should be set in law, apply at all times and prohibited behaviour should not include an intention element.

4. International human rights law and abortion

Women's reproductive rights

11. Queensland has a duty to guarantee all women and girls safe access to abortion services and post-abortion care.[1] The use of criminal law to regulate abortion places women in danger by denying them safe access and care.[2]

12. Laws that criminalise or restrict medical procedures only needed by women discriminate against women.[3] They threaten women's basic rights to life, health, equality and bodily autonomy. Without access to safe abortion, maternal mortality and illness increases as women are forced to turn to clandestine abortions in unsafe and unhygienic conditions. Women forced to carry their pregnancies to term against their will are also vulnerable to the physical and psychological consequences of that experience.[4] Such laws also perpetuate wrongful stereotypes of women as "reproductive instruments"[5] and as incapable of making decisions about their own bodies.

The limited rights of a foetus

13. The fundamental principles of equality and non-discrimination require that the rights of a pregnant woman to life, health and bodily autonomy be given priority over an interest in prenatal life.

14. Although a foetus has some rights as a potential person, it has not been found to have a right to life under international law.[6] This is because protecting a right to life before birth could conflict with human rights protections for women. Or as the European Court of Human Rights put it: "the unborn child is not regarded as a 'person' directly by Article 2 of the Convention

[1] Committee on Economic, Social and Cultural Rights, *General Comment No 22: Sexual and Reproductive Health* E/C.12/GC/22 (2016) [28].
[2] Ibid, [40]; Juan Mendez, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatmen*t, A/HRC/31/57, 5 January 2016, [44], (**Mendez 2016 Report**) See also Juan Mendez, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment*, A/HRC/22/53, 1 February 2013, from [45] (**Mendez 2013 Report**) and citations contained therein.
[3] Committee on the Elimination of Discrimination against Women, *General Recommendation 24: Women and Health*, A/54/38/Rev 1 (1999) [11]; United Nations Human Rights Committee, *Views adopted by the Committee under article 5(4) of the Optional Protocol, concerning communication no. 2324/2013*, CCPR/C/116/D/2324/2013 (9 June 2016) [7.9]-[7.11].
[4] Juan Méndez, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment*, A/HRC/31/57 (5 January 2016) [43]; Anand Grover, *Report of the Special Rapporteur on the right of everyone to the highest attainable standard of physical and mental health*, A/66/254 (3 August 2011) [21].
[5] Human Rights Committee, *Views adopted by the Committee under article 5(4) of the Optional Protocol, concerning communication no 2324/2013*, CCPR/C/116/D/2324/2013 (17 November 2016) [7.11]
[6] *Vo v France*, App No 53924/00, Eur. Ct HR, 80 (2004). The drafters of the *International Convenant on Civil and Political Rights* rejected a proposal to extent the right to life to prenatal life: United Nations General Assembly Official Records, Annex, 12 Session, Agenda Item 33 [96], [113] [119], UN Doc A/C.3/L.654.

[right to life] and that if the unborn do have a 'right' to 'life' it is implicitly limited by the mother's rights and interests", including her rights to life, health and privacy.[7]

15. The Australian Government has said that the right to life under the *International Covenant on Civil and Political Rights*[8] was "not intended to protect life from the point of conception but only from the point of birth."[9]

5. Responses to consultation paper questions

Questions 1 & 2: Application of the criminal law

16. The consultation paper asks who should be permitted to perform or assist with performing terminations of pregnancy, and whether a woman should be held criminally responsible for the termination of her own pregnancy.

17. The starting point must be to remove abortion from Queensland's criminal law by repealing sections 224-226 and 313(1) of the *Criminal Code 1899* (Qld). Sections 224-6 criminalise the provision of, assistance in and undergoing of an abortion, subject to an exception in section 282. Section 313(1) is discussed below.

18. The current law is unclear and creates unacceptable levels of clinical uncertainty over when a doctor can legally provide an abortion. Under the Queensland *Criminal Code* women and doctors risk jail terms for having or providing abortions "unlawfully", but the Code does not define "unlawful." This uncertainty led to the recent case in which a 12 year old girl required court orders in order for her to have a termination, in circumstances where the pregnancy was clearly unviable and causing emotional and physical distress to the girl.

19. Registered medical practitioners and health professionals with appropriate qualifications and training should not be put in a position of fearing criminal prosecution. The chilling effect of potential criminal prosecution is well known – it creates uncertainty and fear for the medical profession and for women. It makes it harder for women and girls to access an important reproductive health service, leading some to resort to unsafe options. It compounds the barriers to access experienced by young women and girls, and those who live regionally or remotely, who speak English as a second language or who lack the financial means to travel.[10]

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[7] *Vo v France*, App No 53924/00, Eur. Ct HR, 80 (2004); *A, B and C v Ireland*, App No 25579/05, Eur Ct HR 237-238 (2010).
[8] *International Covenant on Civil and Political Rights*, 16 December 1966, 999 U.N.T.S. 171 (entered into force 23 March 1976).
[9] Peter Arnaudo, Attorney–General's Department, Hansard - Joint Standing Committee on Treaties Reference: Treaties tabled 14 May and 4 June 2008 16 June 2008, 7, http://www.aph.gov.au/hansard/joint/commttee/J10940.pdf.
[10] Public Health Association of Australia, *Abortion in Australia: Public Health Perspectives* (2005) 12.

20. A woman seeking an abortion should never fear criminal prosecution. If safe and confidential reproductive health services, including abortion, are made available and accessible across Queensland, women will be far less likely to resort to unsafe abortion options.

21. The Public Health Association of Australia has observed that the legal status of abortion directly affects the planning, safety and quality of reproductive health services. It has called for state and territory governments to remove abortion from criminal laws.[11] The Royal Australian and New Zealand College of Obstetricians and Gynaecologists (**RANZCOG**) stated in 2016 that it "strongly supports legislation to decriminalise and regulate abortion in Queensland", noting that "criminalising abortion does not decrease abortion rates, rather it increases unsafe procedures."[12]

22. The 2016 Queensland Parliamentary inquiry noted that medical practitioners could "focus on practicing in accordance with evidence based clinical standards to address women's health care needs, free of the threat of criminal proceedings" following the decriminalisation and reform of abortion laws in Victoria in 2008.[13]

23. The HRLC considers the criminal law to be an inappropriate, harmful and archaic tool to regulate abortion, except to deter or punish in the following situations:

    (a) unqualified persons performing abortions on women; and

    (b) any person destroying or harming a woman's foetus without her consent.

24. The following action is required for the Queensland's laws to be consistent with its international human rights obligations towards women.[14]

Repeal sections 224-6

25. Queensland should ensure absolute clarity by completely decriminalising abortion where it is performed or directed by a registered and qualified practitioner with a woman's consent. Queensland law should ensure that other health practitioners who assist with a termination of pregnancy, or who could appropriately be authorised to administer or supply drugs to cause a medical abortion, such as registered nurses, midwives, Aboriginal and Torres Strait Islander health practitioners and pharmacists, are also authorised to do so.

[11] Ibid.
[12] Royal Australian and New Zealand College of Obstetricians and Gynaecologists (**RANZCOG**), 'Queensland Abortion Law Reform' (Media Statement, undated), https://www.ranzcog.edu.au/news/Queensland-abortion-law-reform.
[13] Health, Communities, Disability Services and Domestic Family Violence Prevention Committee, *Abortion Law Reform (Women's Right to Choose) Amendment Bill 2016 and Inquiry into Law Governing Termination of Pregnancy in Queensland* (Report No 24, August 2016) 63.
[14] Committee on Economic, Social and Cultural Rights, *General Comment No 22: Sexual and Reproductive Health* E/C.12/GC/22 (2016) [40].

26. To give women certainty after years of fear and uncertainty, Queensland's laws should expressly state that a woman cannot be held criminal responsible for consenting to, assisting with, or attempting to terminate her own pregnancy, similar to law reforms in Tasmania.[15]

27. Instead of making women feel like criminals, Queensland should prioritise funding and supporting women's reproductive healthcare services, including termination of pregnancy services.

Repeal of section 313(1) and punishing criminal acts against women that harm a foetus

28. Section 313(1) of the *Criminal Code* criminalises the "killing of an unborn child". This provision could apply to abortions where the foetus is capable of being born alive (often referred to as a "late-term abortion"). Section 313(1) is worded in such a way as to create uncertainty about the circumstances in which a late-term abortion performed with a woman's consent by a qualified practitioner could be the subject of a criminal prosecution.[16]

29. Section 313(2) already exists to criminalise unlawful assaults on a pregnant woman that destroy or seriously harm a foetus. The section attaches the harm to the foetus to an unlawful assault on a woman, and has been interpreted as addressing "the occasioning of harm via an assault on the pregnant female to the life forming within her", whilst not imputing "any requirement regarding the likely fate of that life without her."[17] The maximum penalty that can imposed is life imprisonment.

30. Any criminal provisions that seek to prevent the destruction of a foetus by an unqualified person or to ensure appropriate punishment where a criminal act against a woman destroys or harms her foetus, must be appropriately adapted to this purpose and not capable of extending to late-term consensual abortions performed by qualified practitioners. This necessitates the repeal of section 313(1).

31. It is critical that the criminal law appropriately punishes unlawful acts against women that harm them by destroying or injurying the foetus they are carrying. Queensland can do this either by retaining section 313(2) or by adopting the approach of Victoria (which is similar to New South Wales).

32. In 2008, following a recommendation by the Victorian Law Reform Commission, the Victorian Parliament, repealed the offence of "killing an unborn child". In addition, it amended the definition of "serious injury" in Victoria's criminal law to include the "the destruction, other than in the course of a medical procedure, of the foetus of a pregnant woman, whether or not the

[15] *Reproductive Health (Access to Terminations) Act 2013* (Tas) s 8.
[16] For discussion of this issue in relation to a similarly worded provision that used to exist in Victorian law see Victorian Law Reform Commission, *Law of Abortion* (Final Report, 2008), ch 7.
[17] *R v Waigana* [2012] QSC 202.

woman suffers any other harm".[18] This definition of serious harm applies to a range of offences, including situations in which serious harm is caused recklessly and negligently, as well as intentionally. It therefore appears to apply to a greater range of conduct than section 313(2) of the Queensland *Criminal Code*, which only applies to unlawful assaults, however the Queensland approach imposes a greater punishment.

33. The HRLC supports either the retention of section 313(2) or the approach taken in Victorian and NSW.[19]

Recommendation 1

Amend the *Criminal Code 1899* (Qld) by:

(a) repealing sections 224-226;

(b) repealing section 313(1); and

(c) creating an offence making it unlawful for an unqualified person to perform an abortion, and which makes it clear that a woman will not be criminally responsible for consenting to, assisting in or terminating her own pregnancy.

Questions 3 – 10: Gestational limits, grounds for abortion and consultation by medical practitioners

34. Queensland law should framed in a way that respects the health, autonomy and decision-making capacity of women.[20] In light of the uncertainties and fears that have surrounded abortion services in Queensland for so long, the reform of Queensland's abortion laws should be done in a way that ensures clarity and certainty for both women and medical professionals. As with other health matters, women should have the freedom to choose what happens to their bodies, in consultation with their doctor.

35. Abortion laws in the ACT and Victoria achieve these objectives, albeit in different ways.

36. Recently reformed laws in Tasmania and the Northern Territory share similarities with the Victorian approach, however they should not be followed, as they unreasonably and arbitrarily set gestational limits of 16 weeks and 14 weeks respectively.[21] The Northern Territory's laws

[18] *Crimes Act 1958* (Vic) s 15. For rationale, see Victorian Law Reform Commission, *Law of Abortion* (Final Report, 2008) [7.95]. See also *Crimes Act 1900* (NSW) s 4.
[19] This is similar to the approach in New South Wales where the *Crimes Act 1900* (NSW) includes the destruction of a foetus of a pregnant woman in the definition of "grievous bodily harm": s 4.
[20] Consistent with the requirements of the right to health in the *International Covenant on Economic, Social and Cultural Rights*: Committee on Economic, Social and Cultural Rights, *General Comment No 22: Sexual and Reproductive Health* E/C.12/GC/22 (2016) [28]. See also see Centre for Reproductive Rights, *Safe and Legal Abortion is a Woman's Human Right* (Briefing Paper, 2011).
[21] *Reproductive Health (Access to Terminations) Act 2013* (Tas) s 4; *Termination of Pregnancy Law Reform Act 2017* (NT), pt 2.

are deeply problematic because they have different rules for different stages of gestation, which cause confusion, and they deny access to safe abortion services after 23 weeks gestation except to save a woman's life.[22]

Option A: ACT model

37. In the ACT, abortion is regulated no differently in law to other medical procedures. No gestational limit is set in law, nor are women required by law to prove to one or two doctors that their situation makes them eligible for an abortion.[23] As with other medical procedures, practitioners are guided by strict professional standards and regulations, and women must provide informed consent. Such an approach allows doctors to focus on determining what is in their patient's clinical interests, consistent with modern medical practice.

38. The RANZCOG has stated that gestational limits discriminate against women in the most difficult or vulnerable circumstances. As the consultation paper notes, RANZCOG has also stated that "no specific clinical circumstances" should be imposed that dictate eligibility for abortion because each women's circumstance will be different.[24] It supports a multidisciplinary approach, without gestational limits, in which late-term abortion is available "for the rare situations where both managing clinicians and patient believe it to be the most suitable options in the circumstances".[25]

39. The law in the ACT is consistent with human rights and with the position of RANZCOG. The HRLC supports this approach to the regulation of abortion in law, noting that medical practitioners are already subject to high professional standards and guidelines in relation to abortion.

Option B: Victorian model

40. Victoria's laws allow a woman to seek an abortion without having to justify her decision or seek out third party approval up to 24 weeks gestation.[26] After 24 weeks, if a woman seeks an abortion, two doctors must determine that an abortion is appropriate, taking into account a woman's full circumstances, including medical, physical, psychological and social circumstances.[27] The Victorian approach may allay community concerns about late-term abortions.

[22] *Termination of Pregnancy Law Reform Act 2017* (NT) ss 7-10.
[23] *Health Act 1993* (ACT) pt 6. Note that medical facilities must be approved to provide abortion services. The ACT approach is similar in effect to that in Canada.
[24] Queensland Law Reform Commission, *Review of Termination of Pregnancy Laws* (Consultation Paper, December 2017) 48 [182].
[25] RANZCOG, 'Termination of Pregnancy' (C-Gyn 17, July 2016) [4.4]; RANZCOG, 'Queensland Abortion Law Reform' (Media Statement, 15 February 2017).
[26] *Abortion Law Reform Act 2008* (Vic) s 4.
[27] Ibid s 5.

41. It is important to note that abortions after 20 weeks make up approximately 1 per cent of all abortions performed in Australia and are typically required in complex and distressing circumstances for the women involved.[28]

42. Victorian law gives full respect to women's automony for 24 weeks, which is to some extent, reflective of the period at which a foetus is viable. After 24 weeks, it requires doctors to consider a woman's full circumstances, which are highly individual and often complex, in considering whether an abortion is appropriate, rather than narrowly prescribing those circumstances in law.

43. A legal requirement for two doctors to approve a woman's decision based on psycho-social grounds is inconsistent with adults' usual role as primary decision-maker about medical procedures to their own bodies. It situates women as incompetent decision-makers, in need of protection, and doctors as gatekeepers.[29] For this reason, if a requirement in law for third party authorisation is considered necessary, it should be strictly limited to pregnancies of more than 24 weeks and to consulting another registered medical practitioner. The law should not include a mandatory requirement for referral to an ethics committee or consultation with a specialist, both of which can cause distressing delays and deny access to essential care for women, particularly in regional and remote locations.

44. Regardless of whether the ACT or Victorian model is following, Queensland needs to ensure that reproductive health services, including abortion services, are practically available to women, including women in regional and remote locations. Queensland should therefore ensure services are appropriately funded and supported

Recommendation 2

The regulation of abortion in Queensland law should replicate the ACT or Victorian model.

Questions 11 & 12: Conscientious objection

45. Seeking assistance for an unwanted pregnancy can be practically or emotionally difficult for some women. Encountering a doctor with a conscientious objection to abortion can impede timely access to vital health services, particularly in regional and remote locations, which in turn can imperil a woman's physical and psychological health.

46. Health professionals have a right to freedom of thought, conscience and religion, however this must be balanced against the right of women to life, health, autonomy and non-discrimination.

[28] Women's Health Victoria, *Fact Sheet: Abortion After 24 Weeks* (May 2016), http://whv.org.au/static/files/assets/639c6f2c/Abortion_after_24_weeks_Q_A_.pdf
[29] Rebecca Cook and Simone Cusack, *Gender Stereotyping: Transnational Legal Perspectives* (University of Pennsylvania Press, 2010) 86-87.

We support an approach that respects the right of medical practitioners and other health professionals to conscientiously object but imposes:

(a) a duty to refer a woman to another medical practitioner or health professional who is known not have a conscientious objection; and

(b) a duty to perform, or assist in, the termination of a pregnancy in cases of medical emergency where an abortion is necessary to save a woman's life or prevent serious physical harm.[30]

47. Medical practitioners are in a position of power and authority when women seek their assistance. Referral provisions ensure that women receive the treatment and advice they need and that their rights are realised in practice. The HRLC considers it important that the duty to refer extend beyond medical practitioners and include all health practitioners, including pharmacists and counsellors. Counsellors may be the first service that a woman contacts for assistance. The religious or moral values of a counsellor, or any other health professional, should not impede a woman from accessing information about her treatment options.[31]

48. Such an approach strikes the appropriate balance between the right of the health professional to freedom of conscience and religion and women's rights to life, health, non-discrimination and bodily autonomy.[32]

[30] This is in line with the approach taken in Tasmania: *Reproductive Health (Access to Terminations) Act 2013* (Tas). A similar provision exists in Victoria but only compels a doctor or nurse to participate in an abortion where a woman's life is at risk (not where she is at risk of serious physical harm): *Abortion Law Reform Act 2008* (Vic) s 8(3)-(4).
[31] This is consistent with Committee on the Elimination of Discrimination against Women, *General Recommendation 24: Women and Health* A/54/38/Rev 1 (1999) [11].
[32] Note that the right to freedom of religion can be limited in certain circumstances, including to protect health and to protect the rights and freedoms of others: *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966 (entered into force 23 March 1976) art 18(3). See also Committee on the Elimination of Discrimination Against Women, *General Recommendation 24 on Women and Health,* 20th session, 1999; CEDAW Committee: Croatia, ¶ 109, U.N. Doc. A/53/38 (1998); Slovakia ¶ 43, U.N. Doc. A/63/38 (2008).

Recommendation 3

There should be provision for conscientious objection to performing or assisting with an abortion, subject to the following obligations:

(a) medical practitioners and health professionals (including counsellors and pharmacists) with a conscientious objection must refer a woman to another medical practitioner or health professional who is known not have a conscientious objection; and

(b) medical practitioners and health professionals (including nurses and midwives) with a conscientious objection must perform, or assist in, the termination of a pregnancy in cases of medical emergency, where an abortion is necessary to save a woman's life or prevent serious physical harm.

Question 13: Counselling

49. Counselling can be an important aspect of dealing with an unwanted pregnancy. Accurate, confidential and impartial counselling and information about options should be available to women. However, no woman should be compelled to receive counselling.

50. In its extensive review of abortion laws, the Victorian Law Reform Commission considered the question of whether counselling should be mandated. The Commission found that the provision of counselling is a "clinical matter best left to professional judgment based on a woman's circumstances".[33]

51. The Commission "did not find evidence that forcing women into counselling is necessary or advisable."[34] It recommended that abortion laws not include a requirement for counselling or a referral to counselling.[35]

Recommendation 4

Queensland law should *not* include a requirement for a woman to undergo counselling or for a medical practitioner to refer a woman to counselling.

[33] Victorian Law Reform Commission, *Law of Abortion* (Final Report, 2008) [8.139].
[34] Ibid [8.122].
[35] Ibid, recommendation 5.

Safe access zones

52. Experience in Victoria and other jurisdictions shows that women seeking abortions and staff at clinics providing abortion services can be severely affected by the intimidating and abusive behaviour of some anti-abortion protestors outside abortion clinics.[36]

53. Women should not have to run the gauntlet of intimidation and abuse to see their doctor. We therefore recommend that Queensland introduce safe access zones around clinics or hospitals that provide abortion services. This is consistent with legislative developments in Tasmania, Victoria, the ACT and Northern Territory, which prohibit harmful conduct, such as harassment, intimidation, distressing communications and obstruction, in limited zones around abortion clinics.[37]

Sensible and proportionate safe access zones

54. Safe access zones may engage the right to freedom of expression of anti-abortionists, including the implied freedom of political communication in the Australian Constitution. These rights are not absolute and may be limited.[38]

55. Sensible and proportionate safe access zones, enacted for a legitimate purpose of protecting women from violence, harassment, surveillance and obstruction when trying to access a health service, do not unreasonably restrict freedom of expression. Overseas courts have noted that free speech rights do not extend to entitling people to a captive audience.[39] When people cannot simply walk away, there is a greater imperative for protection of the rights of the audience. There is also a greater imperative in relation to abortion and other reproductive health care, given the intensely private and personal nature of the services for women.

56. The HRLC represented the East Melbourne Fertility Control Clinic in its Supreme Court bid to stop decades long harassment of women accessing its services which included abortions, pap tests, contraception and other vital healthcare. While the Supreme Court case was not successful, the evidence gathered during the case and the attention which the case

[36] See discussion in Victorian Parliament, 2 September 2015, referencing the evidence put before the Supreme Court by East Melbourne's Fertility Control Clinic: http://www.parliament.vic.gov.au/images/stories/daily-hansard/Council_2015/Council_AugDec_2015_Daily_2_September_2015.pdf.
[37] *Reproductive Health (Access to Terminations) Act 2013* (Tas); *Public Health and Wellbeing (Safe Access Zone) Amendment Act 2015* (Vic); *Health (Patient Privacy) Amendment Act 2015* (ACT); *Termination of Pregnancy Law Reform Act 2017* (NT) pt 3. A provision in Victorian law prohibits communications that are "reasonably likely to cause distress or anxiety" and was unsuccessfully challenged in the Magistrates' Court in 2017. The matter has been appealed to the Supreme Court of Victoria and in March 2018 an application made to have the High Court consider whether the provision impairs the constitutionally implied freedom of political communication.
[38] *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966 (entered into force 23 March 1976) art 19(3). For the implied constitutional freedom, see *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520; *Coleman v Power* (2004) 220 CLR 1.
[39] *R v Watson*, [84], agreeing with Stevens J in *Hill v Colorado* and Adams J in *Ontario (AG) v Dieleman* (1994) 117 DLR (4th) 449 (Ont. Gen. Div.)

generated, played an important role in prompting the Victorian Government to introduce safe access zone laws.

57. That evidence highlighted that for more than 20 years, opponents of abortion beset the clinic every day to coerce women not to have an abortion. Evidence included:

- women being followed after leaving trams or their cars;
- strangers getting in women's faces and calling them "child murderers" and threatening dire and ill-founded medical, spiritual and psychological consequences';
- women being subjected to displays of graphic and offensive material such as dismembered fetuses and comparisons to the Holocaust, lynching, slaughterhouse and sin;
- women and their companions being shoved with their entry to the clinic blocked; and
- a four-year-old child was once targeted with the anti-abortionist saying: "Your mummy is going to kill your baby brother or sister".

58. Women and their families were seriously affected. Women entered the clinic frightened, tearful or angry. Heightened emotional distress can cause additional, unnecessary physical pain with medical treatments. Some women suffered long-term distress. Some delayed urgent medical care or follow-up.

59. The threat of violence is also real. In 2001, an anti-abortionist murdered a security guard at the clinic.[40]

60. The Victorian Government ended this harassment and intimidation with its safe access zone laws.

61. Queensland women seeking health services and the health professionals providing those services should likewise be protected, within safe access zones, from harassment or interference, threatening or intimidating conduct, being hindered, beset, obstructed or subjected to communications reasonably likely to cause distress or anxiety, and being recorded or surveiled (including the publishing of recordings). Prohibited behaviour should be prohibited all of the time, rather than at specified times, to provide certainty for women, healthcare workers and anti-abortionists.

62. The consultation paper asks whether safe access zones around premises in Queensland should be established in law or by Ministerial declaration. Safe access zones should be established by law, similar to the approach in Tasmania, Victoria and the Northern Territory,

[40] See Jamie Berry & Ian Munro, '"Remorseless" recluse gets life' (The Age, 20 November 2002) https://www.theage.com.au/articles/2002/11/19/1037697662403.html. For a summary of history of violence outside US abortion clinics available at http://www.prochoice.org/about_abortion/violence/history_violence.html.

rather than being subject to the whim of the executive. Given the sensitive and highly politicised nature of abortion, there may be strong political and other factors weighing against creating a protected area by Ministerial declaration, which could undermine the intent of the law.

63. Finally, it is important that any offence provisions prohibiting certain conduct within safe access zones do *not* include an intention element (e.g. that conduct must be done with the intention of stopping a person from having abortion). The intention requirement creates an unnecessary element of the offence and a barrier to enforcement. Canadian courts have explained that a broad "white line prophylactic rule" that simply prohibits behaviours without needing to prove intention or an impact on the victim is necessary because it is too difficult to attempt to characterise each interaction between anti-abortionists and patients as harassing or not harassing.[41] The requirement of intent would make it difficult to successfully prosecute the offence, which might discourage law enforcement authorities from acting and undermine the intention of a safe access zone.

Recommendation 5

Queensland law should provide for sensible and proportionate safe access zones around abortion clinics, which protect women trying to access abortion services from harm. Safe access zones should be set in law, apply at all times and prohibited behaviour should not include an intention element.

[41] *R v Watson*, citing US Supreme Court in *Hill v Colorado.*