

A HUMAN RIGHTS ACT FOR QUEENSLAND

Children by Choice Submission to the
Legal Affairs and Community Safety Committee
March 2016



ABOUT CHILDREN BY CHOICE

Children by Choice provides counselling, information and education services on all options with an unplanned pregnancy, including abortion, adoption and parenting. We provide a Queensland-wide counselling, information and referral service to women experiencing unplanned pregnancy, deliver sexual and reproductive health education sessions in schools and youth centres, and offer training for GPs and other health and community professionals on unplanned pregnancy options.

We also advocate for improvements to law and policy that would increase women's access to reproductive health services and information. We are recognised nationally and internationally as a key advocacy group for the needs and rights of women in relation to reproductive and sexual health.

In 2014-15 we received a total of 3723 client contacts, ranging in age from under 14 to over 50. Our Annual Reports are available on our website at www.childrenbychoice.org.au.

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ABOUT THIS SUBMISSION

Children by Choice is strongly supportive of the introduction of a Human Rights Act for Queensland.

We believe economic, social and cultural rights should be included in a Human Rights Act as well as civil and political rights.

All the rights encapsulated in the Covenant on Civil and Political Rights, and the Covenant on Economic, Social and Cultural Rights, should be included in a Queensland Human Rights Act.

These rights should apply to all people in Queensland from birth onward, regardless of their race, cultural background, religion, age, residency status, gender identity, sexuality, level of ability, socio-economic status, or geographic location.

Children by Choice believes the Government should consider establishing a model similar to that of Canada, where courts have the power to 'strike down' legislation that is inconsistent with the Human Rights Act.

Failing this, we would support the introduction of the 'dialogue' model, which has been widely discussed during the Consultation. This model would allow parliament to retain ultimate decision-making power but would require any proposed legislation to be checked to ensure compatibility with the human rights act. It would also provide some avenues for individuals to pursue rights violations by public authorities.

SEXUAL AND REPRODUCTIVE HEALTH RIGHTS

This submission argues strongly in favour of a Human Rights Act for Queensland which would guarantee the right to health and healthcare, including sexual and reproductive health care.

All people have the right to health and health care. This has been acknowledged as a universal human right by countless treaties and agreements,¹ but it is still far from being a concrete reality even in a nation as wealthy as Australia. People may be prevented from accessing health care due to their geographic location or isolation, poverty, disability, a lack of culturally-appropriate health services and interpreters, or other life circumstances.

Barriers to accessing sexual and reproductive health care are higher still: specialist sexual and reproductive health services can incur high out-of-pocket costs, mainstreamed public sexual and reproductive health services are few and far between in most parts of the state, and the stigma still attached to asking for help in this area prevents many people from seeking health services or information. Legal uncertainty also impacts some areas of sexual and reproductive health, particularly in regard to abortion access and the provision of sexual health services to minors.

¹ See for example *The Right to Health*; Factsheet No 31 by the World Health Organisation and the Office of the United Nations High Commissioner for Human Rights. Available online at <http://www.ohchr.org/Documents/Publications/Factsheet31.pdf>.

The World Health Organisation recognises that

women are frequently denied access to sexual and reproductive health care and services in developing and developed countries. This is a human rights violation that is deeply engrained in societal values about women's sexuality.²

Sexual and reproductive health rights encompass many areas of basic human rights. The right to health and healthcare, the right to information, the right to life, the right to live free from discrimination and the right to privacy are all inherent in comprehensive access to sexual and reproductive health rights. There are many aspects to this broad area of health rights, including access to good maternity care, sexual health services, contraception and sexuality education. It also includes access to safe and legal abortion - arguably the most contested of sexual and reproductive health rights.

ABORTION AS A HUMAN RIGHT

Around the world, human rights acts, charters and instruments have done much to advance people's enjoyment of optimal sexual health and reproductive health and rights, including the right to abortion.

United Nations

The website of the Office of the United Nations High Commissioner for Human Rights includes the following information on sexual and reproductive health rights:

Women's sexual and reproductive health is related to multiple human rights, including the right to life, the right to be free from torture, the right to health, the right to privacy, the right to education, and the prohibition of discrimination. The Committee on Economic, Social and Cultural Rights and the Committee on the Elimination of Discrimination against Women (CEDAW) have both clearly indicated that women's right to health includes their sexual and reproductive health. This means that States have obligations to respect, protect and fulfil rights related to women's sexual and reproductive health. The Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health maintains that women are entitled to reproductive health care services, goods and facilities that are: (a) available in adequate numbers; (b) accessible physically and economically; (c) accessible without discrimination; and (d) of good quality.

CEDAW (article 16) guarantees women equal rights in deciding "freely and responsibly on the number and spacing of their children and to have access to the

² *Health and human rights*; Fact sheet No 323, by the World Health Organisation, December 2015. Available online at <http://www.who.int/mediacentre/factsheets/fs323/en/>.

information, education and means to enable them to exercise these rights.” CEDAW (article 10) also specifies that women’s right to education includes “access to specific educational information to help to ensure the health and well-being of families, including information and advice on family planning.”

The Beijing Platform for Action states that “the human rights of women include their right to have control over and decide freely and responsibly on matters related to their sexuality, including sexual and reproductive health, free of coercion, discrimination and violence.”³

A 2011 report by the United Nations’ Special Rapporteur on the Right to Health, Anand Grover, examined the ‘interaction between criminal laws and other legal restrictions relating to sexual and reproductive health and the right to health’, given that ‘The right to sexual and reproductive health is an integral component of the right to health.’ The report stated that:

Realization of the right to health requires the removal of barriers that interfere with individual decision-making on health-related issues and with access to health services, education and information, in particular on health conditions that only affect women and girls. In cases where a barrier is created by a criminal law or other legal restriction, it is the obligation of the State to remove it.⁴

And:

Criminal laws penalizing and restricting induced abortion are the paradigmatic examples of impermissible barriers to the realization of women’s right to health and must be eliminated. These laws infringe women’s dignity and autonomy by severely restricting decision-making by women in respect of their sexual and reproductive health.⁴

Furthermore, the principle of non-discrimination inherent in international human rights mechanisms (including the Convention on the Elimination of All Forms of Discrimination Against Women, to which Australia is a signatory),

characterises the refusal of medical procedures that only women require, such as abortion, as sex discrimination.⁵

³ *Sexual and reproductive health and rights* from the Office of the United Nations High Commissioner for Human Rights website at <http://www.ohchr.org/EN/Issues/Women/WRGS/Pages/HealthRights.aspx>.

⁴ *Right of everyone to the enjoyment of the highest attainable standard of physical and mental health*. United Nations General Assembly document A/66/254, tabled 3 August 2011. Available online at http://www.un.org/ga/search/view_doc.asp?symbol=A/66/254.

⁵ R Cook, B Dickens (2003) ‘Human Rights Dynamics of Abortion Law Reform’ *Human Rights Quarterly* 25 (2003) 1-59, John Hopkins University Press.

Human rights organisations

Human rights groups around the world continue to advocate for the removal of laws criminalising abortion: Amnesty International has urged all countries still holding these laws to repeal them;⁶ Human Rights Watch continues to document the result of criminalised abortion and lack of abortion access.⁷

According to Human Rights Watch, a global independent non-profit organisation established in 1978,

The denial of a pregnant woman's right to make an independent decision regarding abortion violates or poses a threat to a wide range of human rights.

International human rights legal instruments and authoritative interpretations of those instruments by U.N. expert bodies compel the conclusion that women have a right to decide independently in all matters related to reproduction, including the issue of abortion. Where women's access to safe and legal abortion services are restricted, a number of human rights may be at risk.⁸

Human Rights Watch goes on to list the following rights which may be violated or threatened by the restriction of safe and legal abortion services:

- Right to life;
- Rights to health and health care;
- Rights to non-discrimination and equality;
- Right to security of person;
- Right to liberty;
- Right to privacy;
- Right to information;
- Right to be free from cruel, inhuman or degrading treatment;
- Right to decide the number and spacing of children;
- Right to enjoy the benefits of scientific progress; and
- Right to freedom of conscience and religion.⁸

⁶ 'Protecting the rights of women: Kate Gilmore speaks' Human Rights Defender 9 August 2007. Available online at <http://www.amnesty.org.au/svaw/comments/2420/>.

⁷ See for example A State of Isolation: Access to Abortion for Women in Ireland Human Rights Watch 2010. Available online at <https://www.hrw.org/report/2010/01/28/state-isolation/access-abortion-women-ireland>.

⁸ Q&A: Human Rights Law and Access to Abortion Background Briefing by Human Rights Watch, 2006. Available online at <https://www.hrw.org/legacy/backgrounder/americas/argentina0605/>.

Rights recognised in other jurisdictions

South Africa's Bill of Rights has enshrined the 'right to bodily and psychological integrity, which includes the right... to make decisions concerning reproduction', which has protected abortion access from anti-choice attacks.⁹

In the United States, the decision in 1973's *Roe v Wade* Supreme Court case overrode state laws to legalise abortion up until viability to protect women's constitutionally-protected right to privacy.¹⁰

Resolution 1607 of the Parliamentary Assembly of the Council of Europe, 'Access to safe and legal abortion in Europe', encouraged member states to

decriminalise abortion within reasonable gestational limits, if they have not already done so; and

*guarantee women's effective exercise of their right of access to a safe and legal abortion.*¹¹

While Australia has no national human rights mechanism, Victoria and the Australian Capital Territory both have instruments designed to protect the human rights of those within their jurisdictions. In the ACT, this is the Human Rights Act 2004;¹² in Victoria, the Charter of Human Rights and Responsibilities 2006.¹³ Interestingly, these were the first two jurisdictions in Australia to decriminalise abortion.

Abortion and the right to life

Anti-abortion organisations and lobby groups sometimes claim the universally recognised right to life should prevent any access to legal abortion in order for legislation to meet our commitments to international human rights conventions.

Expert human rights bodies disagree.¹⁴

⁹ The South African Bill of Rights is accessible online at <http://www.justice.gov.za/legislation/constitution/SACConstitution-web-eng-02.pdf>.

¹⁰ See for example *Roe v Wade Fast Facts* CNN April 2015. Available online at <http://edition.cnn.com/2013/11/04/us/roe-v-wade-fast-facts/>.

¹¹ Parliamentary Assembly Resolution 1607 (2008), adopted by the Assembly on 16 April 2008. Available online at <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17638&lang=en>.

¹² Human Rights Act 2004 is available online at <http://www.legislation.act.gov.au/a/2004-5/current/pdf/2004-5.pdf>.

¹³ Victoria's Charter of Human Rights and Responsibilities is available online at <http://www.humanrightscommission.vic.gov.au/index.php/the-charter>.

¹⁴ See for example D Korff (2006) *The right to life: A guide to the implementation of Article 2 of the European Convention on Human Rights* Human rights handbook No 8. Published by the Directorate General of Human Rights Council of Europe, Belgium 2006. Available online at http://www.echr.coe.int/LibraryDocs/HR%20handbooks/handbook08_en.pdf

In relation to the right to life, the UK's Equality and Human Rights Commission website states that

*the European Court of Human Rights has ruled that a fetus does not have human rights until the moment it is born.*¹⁵

Human Rights Watch examines this issues in some detail, stating that

the negotiation history of core international human rights treaties and authoritative interpretations of these treaties suggest that the right to life as spelled out in international human rights instruments is not intended to apply from the moment of conception.

All but one of the international human rights treaties are silent on the issue of whether the right to life applies to a fetus. International legal experts who have followed and documented the development of the international bill of rights have indicated that certain interpretations of the right to life could apply to the fetus from the moment of viability—and not conception—but that in any case such right would have to be balanced against the rights of the pregnant women. The pregnant woman's rights are clearly established in international law, and include those indicated above.

Other international legal experts have asserted that the historical understanding is that the right to life, as protected by the international bill of rights, begins when a human being is born. This interpretation is supported by the negotiation history of international human rights treaties.

During the negotiation processes leading up to the adoption of several international and regional human rights documents, a small number of governments proposed adding language to the provisions on the right to life, that would have protected the right to life from the moment of conception. In the vast majority of cases, these proposals have been rejected.

*The American Convention on Human Rights is the only international human rights instrument that contemplates the application of the right to life from the moment of conception, though not in an unqualified manner. In 1981, the body that monitors the implementation of the human rights provisions in the American regional system—the Inter-American Commission on Human Rights—was asked to establish whether or not the right-to-life provisions in this convention and in the American Declaration on the Rights and Duties of Man are compatible with a woman's right to access safe and legal abortions. The commission concluded that they are.*⁸

¹⁵ *Right to Life* on the Equality and Human Rights Commission website at <http://www.equalityhumanrights.com/your-rights/human-rights/what-are-human-rights/human-rights-act/right-life>.

QUEENSLAND WOMEN'S ACCESS TO SAFE AND LEGAL ABORTION: A HUMAN RIGHTS ISSUE

Legal impediments

In Australia women's right to lawful abortion is determined by which state or territory she lives in. Abortion is covered by state-based criminal law or health regulations, and ranges between full lawful access and archaic-sounding legal restrictions accompanied by labyrinthine pathways to negotiate in order to have an abortion performed.

The Committee may be aware that in Queensland abortion is contained in the 1899 Criminal Code, sections 224-226, as follows:

Section 224. Any person who, with intent to procure the miscarriage of a woman, whether she is or is not with child, unlawfully administers to her or causes her to take any poison or other noxious thing, or uses any force of any kind, or uses any other means whatever, is guilty of a crime, and is liable to imprisonment for 14 years.

Section 225. Any woman who, with intent to procure her own miscarriage, whether she is or is not with child, unlawfully administers to herself any poison or other noxious thing, or uses any force of any kind, or uses any other means whatever, or permits any such thing or means to be administered or used to her, is guilty of a crime, and is liable to imprisonment for 7 years.

Section 226. Any person who unlawfully supplies to or procures for any person anything whatever, knowing that it is intended to be unlawfully used to procure the miscarriage of a woman, whether she is or is not with child, is guilty of a misdemeanour, and is liable to imprisonment for 3 years.¹⁶

However, due to the *R v Bayliss and Cullen* court case in 1986 and the resulting judgement, an abortion is considered lawful in Queensland if carried out to prevent serious harm to the woman's physical and mental health from the continuation of the pregnancy.¹⁷ Section 282 of the Criminal Code attempts to define a lawful abortion and is used as a defence to unlawful abortion. The wording was amended in September 2009 to include medication abortion:

A person is not criminally responsible for performing or providing, in good faith and with reasonable care and skill a surgical operation on or medical treatment of:

- a) a person or unborn child for the patient's benefit; or*
- b) a person or unborn child to preserve the mother's life;*

if performing the operation or providing the medical treatment is reasonable,

¹⁶ Queensland Criminal Code 1899. Available online at http://www.austlii.edu.au/au/legis/qld/consol_act/cc189994/.

¹⁷ N Cica, *Abortion Law in Australia* Parliament of Australia Library, Research Brief 1, 1998-1999.

*having regard to the patient's state at the time and to all circumstances of the case.*¹⁶

Professor Caroline de Costa, medication abortion provider and advocate, has stated in relation to this supposed defence for doctors:

*The existence of section 282 provides but little reassurance to doctors, who would have to appear in court to invoke the section.*¹⁸

In other words, it does not provide certainty for practitioners that they will not face criminal charges; it simply gives them a defence to rely upon should they be charged and prosecuted.

It should also be noted here that the defence provided by s282 is applicable to abortion providers only, not to their patients – that is, it provides a defence for doctors charged with providing abortion if they are able to make the case that they formed a reasonable judgement it was necessary, but women have no recourse to that same defence. Ethicist Dr Leslie Cannold explains

*It is not open to her [a woman charged with procuring her own abortion] to say “I formed a reasonable belief that the abortion was necessary to preserve my life, my physical, my mental health.” These excuses were constructed and appear only available for use by providers.*¹⁹

It seems clear from the above that the current legislation pertaining to abortion in Queensland creates a situation which violates or obstructs women’s human rights as laid out earlier in this submission.

Barriers to accessing safe abortion services

The combination of archaic Criminal Code statutes and District Court case law creates confusion for doctors and problems for women.

In Queensland, it’s estimated that only around 1% of abortions are provided in public hospitals.²⁰

Despite the release of a Queensland Health Clinical Guideline on the therapeutic termination of pregnancy for hospitals in 2013,²¹ there is still widespread confusion and misunderstanding about the implications of abortion law for service delivery throughout public hospitals in this state. While some hospitals have fully implemented the Guideline, others have varying degrees of support for

¹⁸ C de Costa (2009) ‘Abortion standoff continues – and Queenslanders pay’ *Crikey.com.au*, 18 September 2009. Online at http://www.crikey.com.au/2009/09/18/abortion-stand-off-continues-and-queenslanders-pay/?wmp_switcher=mobile.

¹⁹ From the 2011 Pamela Denoon Lecture, *Sleeping Dragon: The unfinished business of abortion law reform in Australia*. Transcript available online at <http://pameladenoonlecture.net/archives/pamela-denoon-lecture-2011/>.

²⁰ See ‘Abortion on Trial’, *ABC Radio Background Briefing*, 7 November 2010. Transcript available at <http://www.abc.net.au/radionational/programs/backgroundbriefing/abortion-on-trial-in-queensland/2982710>.

²¹ The Guideline is available online at <https://www.health.qld.gov.au/qcg/documents/g-ttop.pdf>.

women requesting abortion, and the conditions women must meet for accessing a publicly provided abortion differ widely between hospitals around the state.

This means that even women whose circumstances would seem to fit within the narrow definition of a lawful abortion are being denied public services, including women who are pregnant as a result of sexual violence or women whose pregnancies are a threat to their health.

This is in direct contravention with human rights instruments as well as community opinion and expectation.

Additionally, diagnostic screening throughout pregnancy is now routinely offered to women as a standard part of maternity care. Implicit in these practices is that if a negative or fatal fetal diagnosis were to be received, or if antenatal tests revealed a maternal health complication or condition, a pregnant woman may choose to terminate the pregnancy.

The following are all cases we have supported women through here in Queensland:

K was diagnosed at 20 weeks gestation with a fatal fetal anomaly – that is, her pregnancy had no chance in resulting in a live birth – and was not only refused abortion at her public hospital, but also refused referral to a private specialist and then sent to ante-natal care. She carried the pregnancy for a further 17 weeks before labour followed by stillbirth.

S, a woman with a severe and debilitating medical condition, pregnant after being raped by a carer, was refused an abortion in a public hospital, despite her sight being at risk if the pregnancy continued. She had to find hundreds of dollars herself to have an abortion in a private clinic.

M, receiving ante-natal care at a Catholic hospital, presented for a scan at 16 weeks only to be told there was no amniotic fluid present, nor a heartbeat. Her fetus had died in utero. Instead of providing her with medical care, the hospital sent her home to wait for certain miscarriage, not wanting to speed the process as they believed it to be tantamount to abortion.

C was 13 years old and pregnant after being violently raped by a friend of her brother. The first GP she saw advised her to ‘put it down to experience’ and to ‘try and use contraception next time’. The second GP she saw was only too ready to provide her with a referral to her local public hospital – which advised her she would have to get a court order to enable them to offer her a procedure as she was so young. Aside from the fact this would have taken some weeks (time they didn’t really have), the legal advice was incorrect: doctors are able to assess minors for competence and provide them with procedures if they believe the minor to be mature enough to provide consent.

It would make for an almost endlessly long submission were we to list all our clients denied service in a public hospital here: suffice to say the stories are numerous and include cases of women hospitalised by intimate partner violence, living in a car or tent with multiple children, some with life-threatening health conditions or previous birth complications, those with severe substance abuse or mental health problems, and women expressing suicidality and an intention to try and induce miscarriage themselves.

Sadly these are not isolated or rare cases.

In 2014-15:

- 30% of the work of our counselling team was with women reporting at least one form of violence;
- 7.5% of their work was with women reporting both sexual and domestic violence;
- 6% of calls were with or about women reporting suicidality because of their unplanned pregnancy;
- almost 7% had drug and alcohol related issues;
- over 5% were with or about homeless women; and
- 118 times, clients disclosed a plan to try and induce a miscarriage themselves at home, or a past attempt to have done so, because of the perceived impossibility of accessing a safe, professionally-provided service.

Very few were able to access a publicly provided abortion.

This is not to say that abortion services are entirely unavailable for women in Queensland. Private clinics and GP providers exist, although finding information about their location and services can be difficult and, although very safe and professionally-provided, these services have high out-of-pocket costs attached.

Depending on a woman's location, gestation, and the method of her procedure, an abortion in Queensland could cost her anywhere from \$250 to over \$4000. For women in regional and remote areas of the state, additional travel and accommodation costs may apply, depending on how far she has to travel to reach a provider. Many women also struggle to arrange care for existing children or other dependents if they need to travel to access a service, as well as take time away from paid employment.

The Parliamentary Assembly of the Council of Europe has stated their concern that, in European countries where some or all abortions are legally permitted:

numerous conditions are imposed and restrict the effective access to safe, affordable, acceptable and appropriate abortion services. These restrictions have discriminatory effects, since women who are well informed and possess adequate financial means can often obtain legal and safe abortions more easily.¹¹

Such is certainly the case in Queensland. Women in regional centres or the southeast corner, who are well resourced, have no language or ability barriers, and can confidently ask for the service they require, are usually able to access abortion with relative ease. Women experiencing poverty, disadvantage, social or geographic isolation, or a lack of support structures, are the ones who suffer with our two tiered system of abortion access.

For some women, the denial of their basic rights to health care results in having to continue with an unwanted or unviable pregnancy. In a first world country with what is generally considered a first class health system, this is unconscionable and a clear breach of human rights.

The introduction of a Human Rights Act provides a unique opportunity to begin addressing such drastic inequities. This debate cannot take place solely in a rights-based framework, but it is a great place to start. Essential components and areas to target include access to quality, safe, legal and affordable abortion services; national standards for quality sexuality education; and honest discussions about the rights of faith-based or anti-abortion health workers or facilities to withhold abortion care or information versus the rights of pregnant women.

If this Committee inquiry is a stepping stone on the way to a Human Rights Act for Queensland, it is vital that we include sexual and reproductive health rights, particularly in relation to abortion, from the beginning.

- *End*