

29 June 2023

Committee Secretariat  
Parliamentary Joint Committee on Human Rights

Dear Secretariat,

Thank you for reviewing my submission to the Inquiry into Australia's Human Rights Framework. I am a final year law student at the University of Newcastle undertaking a course in International Human Rights Law.

This submission addresses the improvements that should be made to the federal human rights framework and the effectiveness of state Acts in protecting rights.

### **Executive Summary**

1. This submission argues that a federal Human Rights Act should contain a right to maternal and reproductive healthcare.
2. Considering recent international movements away from reproductive healthcare, such as the overturning of *Roe v Wade*,<sup>1</sup> Australia must implement a federal right to maternal and reproductive healthcare.
3. Australia has obligations at international law to provide maternal and reproductive healthcare without discrimination, and such an obligation must be recognised in a specific provision in a federal Human Rights Act.

### **Introduction**

4. Australia has obligations pursuant to *Convention on the Elimination of All Forms of Discrimination Against Women* ('CEDAW')<sup>2</sup> Art 12(1) to ensure equality in the area of healthcare, including reproductive healthcare:

*States Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning.*

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<sup>1</sup> 410 US 113 (1973), 152-153. See *Dobbs v Jackson Women's Health Organization* 597 US \_\_\_\_ (2022).

<sup>2</sup> *Convention on the Elimination of All Forms of Discrimination Against Women*, GA Res 34/180, (18 December 1979, entered into force 3 September 1981) ('CEDAW').

5. Further, reproductive rights are integral to the maintenance of several other human rights<sup>3</sup> including the right to exercise legal capacity,<sup>4</sup> the right to decide the number and spacing of children,<sup>5</sup> and to be free from discrimination based on race, gender, or other status.<sup>6</sup>
6. Likewise, CEDAW protects the right to access maternal care under Art 12(2) which identifies that:

*Notwithstanding the provisions of paragraph 1 of this article, States Parties shall ensure to women appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation.*

7. A legislated right to access maternal and reproductive care would provide greater reinforcement of the governmental responsibilities to ensure healthcare is available to all. This is particularly important for individuals who experience discrimination in access to maternal and reproductive healthcare, including LGBTQI+ persons, First Nations people and people with disabilities.

### Definitions

8. Reproductive healthcare relates to the prevention and termination of pregnancy, sexual health, infertility services and maternal and newborn healthcare.<sup>7</sup>

### Legal framework

9. The only Australian human rights act containing an explicit right to healthcare is the *Human Rights Act 2019* (Qld) s 37.
10. However, it is insufficient to only have a recognised right to healthcare in one Australian state. The right to access maternal and reproductive healthcare must be protected across all Australian states and territories.
11. There is authority that a right to reproductive healthcare is secured under international law. In *KL v Peru*,<sup>8</sup> the minor complainant claimed Peru violated her rights under the *International Covenant on Civil and Political Rights* ('ICCPR')<sup>9</sup> when she was denied an abortion for an anencephalic foetus which

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<sup>3</sup> Lynne P Freedman and Stephen L Isaacs, 'Human Rights and Reproductive Choice' (1993) 24(1) *Studies in Family Planning* 18, 19.

<sup>4</sup> CEDAW (n 2) Art 15(2).

<sup>5</sup> *Ibid* Art 16(1)(e).

<sup>6</sup> *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, UN Doc A/810 (10 December 1948) Art 1; Jennifer Templeton Dunn, Katherine Leysna and Anna Zaret, 'The role of human rights litigation in improving access to reproductive health care and achieving reductions in maternal mortality' (2017) 17 (Suppl 2) *BMC Pregnancy and Childbirth* 71, 74.

<sup>7</sup> UNFPA, The Danish Institute for Human Rights and the United Nations Office of the High Commissioner, *Reproductive Rights are Human Rights: A Handbook for National Human Rights Institutions*, UN Doc HR/PUB/14/16 (2014) <

<https://www.ohchr.org/sites/default/files/Documents/Publications/NHRIHandbook.pdf> > , 23.

<sup>8</sup> *KL v Peru* UN Doc CCPR/C/85/D/1153/2003 (22 November 2005), 10 [7].

<sup>9</sup> GA Res 2200A (XXI), (16 December 1966, entered into force 23 March 1976) Arts 2, 7, 17 and 24.

threatened her life. It was held that the refusal to provide a termination contravened Peru's obligations under Arts 2, 7, 17, and 24 of the ICCPR.<sup>10</sup>

12. Likewise, the right to maternal care has been recognised by the CEDAW Committee in *Alyne da Silva Pimentel Teixeira (deceased) v Brazil*,<sup>11</sup> in which it was held that Brazil violated its obligations under CEDAW Arts 2, 12, as Teixeira was denied emergency obstetric care, leading to her death.

13. The inclusion of a specific right to access maternal reproductive healthcare where there is a threat to the life of the patient would therefore accord with Australia's human rights obligations.

14. However, the ambit of the right to access maternal and reproductive healthcare must go further than a mere right to healthcare where there is a threat to life.

14.1. The right to access contraception and elective termination must be included within a right to access reproductive care, as this is integral to the right to privacy and autonomy.<sup>12</sup>

14.2. The right to access maternal care must encompass a right to life on behalf of the pregnant patient, the right to health and the right to security of person.<sup>13</sup>

15. The right to maternal and reproductive healthcare may be encompassed in Australia by a right to be free from cruel and inhuman treatment.

15.1. In *RR v Poland*<sup>14</sup> it was held that a significant delay in the conduct of prenatal genetic testing breached the complainant's rights under the *Convention for the Protection of Human Rights and Fundamental Freedoms* ('ECHR')<sup>15</sup> to be free from cruel and inhuman treatment.<sup>16</sup>

16. Alternatively, maternal and reproductive rights may be encapsulated by a right to privacy or private life.<sup>17</sup>

16.1. Within the context of the right to private life under Art 8 of the ECHR, it has been held that pregnancy constitutes a sphere of private life, including

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<sup>10</sup> *KL v Peru* UN Doc CCPR/C/85/D/1153/2003 (22 November 2005), 10 [7].

<sup>11</sup> UN Doc CEDAW/C/49/D/17/2008 (10 August 2011), 20-21 [7.5]-[7.8].

<sup>12</sup> See Ronli Sifris and Suzanne Belton, 'Australia: Abortion and Human Rights' (2017) 19(1) *Health and Human Rights Journal* 209, 210.

<sup>13</sup> Mindy Jane Roseman, 'Bearing Human Rights: Maternal Rights and the Promise of ICPD' in Laura Reichenbach and Mindy Jane Roseman (eds), *Reproductive Health and Human Rights: The Way Forward* (University of Pennsylvania Press, 2011) 91, 96.

<sup>14</sup> (European Court of Human Rights, Section IV, Application No 27617/04, 28 November 2011).

<sup>15</sup> *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953) Art 3.

<sup>16</sup> *RR v Poland* (European Court of Human Rights, Section IV, Application No 27617/04, 28 November 2011), [153]-[162].

<sup>17</sup> See *KL v Peru* UN Doc CCPR/C/85/D/1153/2003 (22 November 2005), 10 [7].

the right to autonomy, personal development and the establishment of relationships.<sup>18</sup>

16.2. This could be influential in an Australian context if a right to privacy was included in a Human Rights Act.

17. Further, a right to freedom from discrimination may protect maternal healthcare rights and reinforce the right to emergency maternal care.<sup>19</sup>

18. Nonetheless, an explicit right to maternal and reproductive healthcare within a federal Human Rights Act is preferable, as interpretations of implied rights may change over time and consequently disintegrate reproductive rights. For example, an implied right to termination under the right to privacy was recently overturned in the United States in *Dobbs v Jackson Women's Health Organisation*.<sup>20</sup>

19. Having regard to the recent Senate inquiry into Universal Access to Reproductive Care, an explicit right to maternal and reproductive healthcare would assist in educating health practitioners and the broader public on the rights of women and pregnant people to access such healthcare.<sup>21</sup> The right would also accord with recommendations to improve access to abortion and contraception and strengthen culturally safe maternal healthcare.<sup>22</sup>

### Inconsistency between state and federal legislation

20. A right to reproductive and maternal healthcare would likely be inconsistent with some state legislation.<sup>23</sup> Relevant stakeholders should be consulted in these states to ensure that the state of the law is clarified before the enactment of a federal Human Rights Act.

20.1. In Western Australia, a right to maternal and reproductive healthcare would likely conflict with the *Health (Miscellaneous Provisions) Act 1911 (WA)* s334(2), which partially criminalises abortion.

20.2. Legislating a right to reproductive healthcare may conflict with conscientious objection provisions in state legislation.<sup>24</sup>

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<sup>18</sup> *Tysiac v Poland* (European Court of Human Rights, Section IV, Application No 5410/03, 20 March 2007), 22-23 [106]-[107].

<sup>19</sup> See *Alyne da Silva Pimentel Teixeira (deceased) v Brazil* UN Doc CEDAW/C/49/D/17/2008 (10 August 2011), 20-21 [7.6]-[7.7].

<sup>20</sup> 597 US \_\_\_\_ (2022), 48, 69.

<sup>21</sup> Senate Standing Committee on Community Affairs, Parliament of Australia, *Ending the postcode lottery: Addressing barriers to sexual, maternity and reproductive healthcare in Australia* (Final Report, May 2023), 87-88.

<sup>22</sup> *Ibid* xvii-xxii.

<sup>23</sup> *Australian Constitution* s 109.

<sup>24</sup> See *Abortion Law Reform Act 2008* (Vic) s 8; *Abortion Law Reform Act 2019* (NSW) s 9; *Termination of Pregnancy Act 2018* (Qld) s 8.

20.2.1. When considering the impact of a Human Rights Act on inconsistency with state legislation, the impact of this on the ability for minority groups, including First Nations people, LGBTQI+ people, people with disabilities and ethnic minorities to access maternal and reproductive healthcare must be considered.

20.2.2. Further consideration must also be afforded to the impact that conscientious objection has on patients in rural and regional areas, who may be unable to access any other form of reproductive healthcare if their local health practitioner is a conscientious objector.<sup>25</sup>

## Recommendations

### Proposed inclusion

21. The right to maternal and reproductive healthcare must include a specific provision protecting the rights to access termination and contraception.

21.1. As access to reproductive and maternal healthcare is often affected by the 'social determinants of health', it is paramount that the right does not unequally apply based on gender, ethnicity, disability, sexuality, age, or socioeconomic status.<sup>26</sup> Therefore, the provision must explicitly state that the right to access maternal and reproductive healthcare is non-discriminatory.

22. The right to access maternal care must encompass an obligation to reduce maternal mortality and morbidity.<sup>27</sup> This is particularly important for First Nations patients, as the maternal mortality rate amongst First Nations patients is drastically higher when compared to the wider population.<sup>28</sup>

22.1. This right to maternal care must centralise a pregnant patient's agency in determining their reproductive healthcare and reproduction.<sup>29</sup>

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<sup>25</sup> Sophie Black, 'It was very traumatic for her': how conscientious objection hinders women's access to abortion', *The Guardian* (Online, 16 July 2022) < <https://www.theguardian.com/australia-news/2022/jul/16/it-was-very-traumatic-for-her-how-conscientious-objection-hinders-womens-access-to-abortion> >.

<sup>26</sup> Economic and Social Council, *General comment No.22 (2016) on the right to sexual and reproductive health (article 12 of the International Covenant on Economic, Social and Cultural Rights)*, UN Doc E/C.12/GC/22 (2 May 2016) < <https://www.ohchr.org/en/women/human-rights-based-approach-maternal-health> >, 8.

<sup>27</sup> Tlaleng Mofokeng, Special Rapporteur, *Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Tlaleng Mofokeng – Sexual and reproductive health rights: challenges and opportunities during the COVID-19 pandemic*, UN Doc A/76/172 (16 July 2021) 11-12 [26].

<sup>28</sup> Australian Institute of Health and Welfare, 'Australia's mothers and babies: Maternal deaths' (29 November 2022) < <https://www.aihw.gov.au/reports/mothers-babies/maternal-deaths-australia> >.

<sup>29</sup> Mindy Jane Roseman, 'Bearing Human Rights: Maternal Rights and the Promise of ICPD' in Laura Reichenbach and Mindy Jane Roseman (eds), *Reproductive Health and Human Rights: The Way Forward* (University of Pennsylvania Press, 2011) 91, 97.

- 22.2. Access to maternal care must be non-discriminatory and must be accompanied by a guarantee of maternal healthcare in rural and regional communities.<sup>30</sup>

### Proposed wording

23. This submission proposes the following wording, based on CEDAW Art 12 and the *Human Rights Act 2019* (Qld) s 37:

*All appropriate measures must be taken to eliminate discrimination on the basis of gender in the field of reproductive and maternal healthcare. Everyone has the right to autonomy in reproductive and maternal healthcare.*

*Notwithstanding this, everyone has the right to access reproductive healthcare without discrimination, including termination and contraception. This includes granting free services where necessary.*

*Notwithstanding this, all measures shall be taken to ensure access to healthcare in relation to pregnancy, during pregnancy and in the postnatal period. This includes granting free services where necessary. All appropriate measures must be taken to reduce maternal mortality.*

*Notwithstanding this, a person must not be refused emergency reproductive or maternal healthcare or treatment that is immediately necessary to save the person's life or to prevent serious impairment to the person.*

### Conclusion

24. A right to reproductive and maternal healthcare must be included in a federal Human Rights Act, as this accords with Australia's obligations under international law.
25. This right would protect and reinforce the rights of women and pregnant people.

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<sup>30</sup> Tlaleng Mofokeng, Special Rapporteur, *Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health*, Tlaleng Mofokeng – Sexual and reproductive health rights: challenges and opportunities during the COVID-19 pandemic, UN Doc A/76/172 (16 July 2021) 11-12 [26].