LEGISLATIVE ASSEMBLY
FOR THE AUSTRALIAN CAPITAL TERRITORY

STANDING COMMITTEE ON HEALTH AND COMMUNITY WELLBEING
Mr Johnathan Davis (Chair), Mr James Milligan MLA (Deputy Chair),
Mr Michael Petterson MLA

Submission Cover Sheet

Inquiry into Abortion and reproductive choice in the ACT

Submission Number: 49

Date Authorised for Publication: 6 September 2022

ACT HUMAN RIGHTS COMMISSION
Australian Capital Territory

Standing Committee on Health and Community Wellbeing
ACT Legislative Assembly
GPO Box 1020
CANBERRA ACT 2601
Via LACommitteeHCW@parliament.act.gov.au

22 August 2022

Dear Committee Secretary

ACT Human Rights Commission submission to the ACT Legislative Assembly Standing Committee on Health and Community Wellbeing's *Inquiry into abortion and reproductive choice in the ACT*

The ACT Human Rights Commission welcomes the opportunity to provide a submission regarding access to reproductive services in the Territory. The enclosed submission primarily reflects the information provided by the President and Human Rights Commissioner, Dr Helen Watchirs OAM, and the Discrimination, Disability, Health and Community Services Commissioner, Karen Toohey.

Should you wish to discuss this matter further or provide feedback regarding our advice, the contacts in our office are Karen Toohey and Kevin Campbell, who may be reached on 6205 2222.

Yours sincerely

Dr Helen Watchirs OAM
President and Human Rights Commissioner

Karen Toohey
Discrimination, Health Services, and Disability and Community Services Commissioner

About the ACT Human Rights Commission

1. The ACT Human Rights Commission is an independent agency established by the *Human Rights Commission Act 2005* (HRC Act). Its main object is to promote the human rights and welfare of people in the ACT. The HRC Act became effective on 1 November 2006 and the Commission commenced operation on that date. Since 1 April 2016, a restructured Commission has included:

    - The President and Human Rights Commissioner
    - The Discrimination, Health Services, Disability and Community Services (DHSDCS) Commissioner
    - The Public Advocate and Children and Young People Commissioner (PACYPC); and
    - The Victims of Crime Commissioner (VOCC)

2. The ***DHSDCS Commissioner*** receives complaints from members of the ACT community in relation to the following:

    - discrimination, vilification & sexual harassment
    - health services & health records
    - services for people with a disability and their carers
    - services for children and young people
    - services for older people and their carers
    - vulnerable people complaints (ie complaints about abuse, neglect or exploitation of people with a disability or people over 60)
    - veterinary services
    - occupancy disputes
    - Victims of Crime Charter of Rights
    - sexuality & gender identity conversion practices

3. As this role has the function to receive and handle complaints, this submission is based on those sources of information and input from community members and health practitioners.

4. The ***President and Human Rights Commissioner*** also has an interest insofar as access to safe, effective and legal abortion engages several recognised human rights protected in the *Human Rights Act 2004* (HR Act). Her contribution outlines the human rights principles and jurisprudence relevant to the sexual and reproductive choice of women, girls and people able to be pregnant, including with respect to abortion.

5. The Commission has previously provided advice affirming the right of women, girls and pregnant persons to access lawful reproductive services without facing undue barriers or coercion. In August 2015, we provided a submission to the ACT Government about proposed legislation to define safe access zones around abortion clinics.[1] The proposed changes, which restricted forms of protest in defined spaces around clinics, aimed to ensure that everyone can access legally available reproductive services in the ACT in "relative privacy and free from the intimidating conduct of others."[2]

6. The HR Act recognises that few rights are absolute and that reasonable limits may be placed on most human rights as a means of balancing competing interests and/or rights.[3] Our submission

[1] Health (Patient Privacy) Amendment Bill 2015.
[2] Explanatory Statement, *Health (Patient Privacy) Amendment Bill 2015*.
[3] *Human Rights Act 2004* ('HR Act'), s 28.

accordingly affirmed that safe access zones seek to eliminate barriers to enjoyment of several rights in the HR Act, including equal access to health services without discrimination (s 8), the right to privacy (s 12) and the right to security of the person (s 18). Recognising, however, that the legislation may limit other rights, like freedom of expression (s 16) or peaceful assembly (s 15), our advice identified potential amendments to ensure any limits did not overreach their stated objectives.

Background

7. Abortion was decriminalised in the ACT in 2002,[4] with termination of pregnancy now regulated under Part 6 of the *Health Act 1993*. 'Abortion' is defined as 'causing a woman's miscarriage by administering a drug; or using an instrument; or any other means'.[5]

8. In the ACT, only a doctor may perform an abortion – which must be carried out in an approved medical facility (or part of one).[6] A person who unlawfully performs an abortion may be liable for child destruction, punishable by up to 15 years imprisonment.[7]

9. No person or institution is required to perform an abortion in the ACT. A doctor or a nurse may refuse to prescribe, supply or administer drugs or medicines that would prematurely end a pregnancy on religious or conscientious grounds.[8]

10. The *Health (Patient Privacy) Amendment Bill 2015*, referred to above, was passed in November 2015, and prohibits acts of protest directed toward people accessing legal abortion services, staff and other people in defined zones during declared times. The High Court of Australia has since upheld similar safe access zones under Victorian and Tasmanian laws as consistent with the implied freedom of political communication under the Australian Constitution.[9]

Relevant human rights principles

11. Several important human rights recognised in the HR Act are of direct relevance to the Committee's consideration of abortion and reproductive choice in the ACT. The HR Act expressly allows relevant international law and decisions of foreign and international courts to be considered in interpreting a relevant human right.[10] It is therefore open to the Committee to consider the expert commentary and case law of UN human rights treaty bodies (eg the UN Human Rights Committee ('HRC'), Committee on Economic, Social and Cultural Rights), which set out established human rights principles concerning regulation of abortion and reproductive services.

12. It is well settled that access to safe, legal and effective abortion supports a range of fundamental human rights. Expert human rights bodies routinely emphasise that equitable access to reproductive health services, including safe, legal and effective abortion, is an essential component of upholding the rights of all people who can become pregnant, most commonly women and girls. The UN Committee on the Elimination of Discrimination against Women (CEDAW), for example, recognises "the specific, distinctive health needs and interests of women",[11] and has repeatedly called on states

[4] *Crimes (Abolition of Offence of Abortion) Act 2002*.
[5] *Health Act 1993*, s 80.
[6] *Health Act 1993,* s 84.
[7] *Crimes Act 1900*, s 42.
[8] *Health Act 1993*, s 84A.
[9] *Clubb v Edwards* [2019] HCA 11.
[10] HR Act, s 31.
[11] UN Committee on the Elimination of All Forms of Discrimination Against Women ('CEDAW'), 'Communication No. 17/2008 (*Maria de Lourdes da Silva Pimental v Brazil*)', 49th sess, UN Doc. CEDAW/C/49/D/17/2008 (25 July 2011).

to ensure all health services are "consistent with the human rights of women, including rights to autonomy, privacy, confidentiality, informed consent and choice."[12]

13. Safeguarding reproductive choice has been repeatedly characterised as vital to the autonomy, security and freedom from discrimination of women, girls and all people who can become pregnant (henceforth 'pregnant persons'). The UN Human Rights committee (the HRC) and the Committee on the Elimination of Discrimination against Women (CEDAW), have found that measures denying or severely curtailing access to abortion violate the rights to health, security, privacy and, in certain individual matters, the freedom from cruel, inhumane and degrading treatment.[13]

14. Although States may adopt measures that regulate the voluntary termination of pregnancy, such restrictions must not jeopardise the life of any pregnant person, subject them to physical or mental pain or suffering, or arbitrarily interfere with their personal privacy.[14] To that end, the HRC has also recognised a positive duty for governments to provide safe, legal and effective access to abortion where carrying a pregnancy to term would risk the person's life and health or cause her substantial pain or suffering.[15] This includes in cases of sexual assault, incest or circumstances in which the pregnancy is not viable. In two notable cases, the HRC has held that refusal of abortion in such cases has been held to infringe the prohibition on torture or other cruel, inhuman or degrading treatment or punishment.[16]

15. Governments are accordingly required to take steps to eliminate any existing or new barriers to women, girls and pregnant persons accessing safe and legal abortion and quality prenatal and post-abortion health care.[17] Impermissible barriers have included criminalisation, requiring third party or judicial authorisation, mandatory waiting periods or prior counselling, and unacceptable delays due to lack of medicines or availability of qualified health professionals and facilities.[18] Unreasonable barriers may equally arise from the exercise of conscientious objection by medical practitioners and associated staff; that is, opting out of providing services related to abortion or post-abortion care.[19]

16. In this regard, the Commission acknowledges that certain groups within the community may hold strong views – whether cultural, religious or ethical – that premature termination of a pregnancy violates the right to life. The right to life has not been taken, in international and domestic human

---

[12] CEDAW, General Recommendation No. 24: Article 12 of the Convention (Women and Health), 20th sess, UN Doc. A/54/38/Rev.1, chap I (1999), [31(e)].

[13] See UN Human Rights Committee ('HRC'), 'Communication No. 2324/2013 (*Amanda Jane Mellet v Ireland*)', UN Doc. CCPR/C/116/D/2324/2013 (17 November 2016), 15-16 [7.4]-[7.6]; HRC, 'Communication No. 2425/2014 (*Siobhán Whelan v Ireland*)', 119th sess, UN Doc. CCPR/C/119/D/2425/2014 (17 March 2017), [7.6]; HRC, 'Communication No. 1153/2003 (*Karen Noelia Llantoy Huáman v Peru*)', UN Doc. CCPR/C/85/D/1153/2003 (22 November 2005) 10 [6.3]; HRC, 'Communication No. 1608/2007 (*V.D.A. v. Argentina*)', 101st sess, UN Doc. CCPR/C/101/D/1608/2007 (28 April 2011), 11 [9.2].

[14] HRC, 'General Comment No. 36: Article 6: right to life' ('General Comment 36'), 124th sess, UN Doc. CCPR/C/GC/36, [8].

[15] HRC, 'General Comment 28: Article 3 (The equality rights between men and women)' ('General Comment 28'), 68th sess, UN Doc. CCPR/C/21/Rev.1/Add.10 (29 March 2000), [21].

[16] HRC, 'Communication No. 1153/2003 (*Karen Noelia Llantoy Huáman v Peru*)', UN Doc. CCPR/C/85/D/1153/2003 (22 November 2005) 10 [6.3]; see also *Mellet v Ireland*.

[17] General Comment 36, [8].

[18] UN Office of the High Commissioner for Human Rights ('OHCHR'), 'Abortion (Information Series on Sexual and Reproductive Health and Rights" (2020), available at: https://www.ohchr.org/sites/default/files/Documents/Issues/Women/WRGS/SexualHealth/INFO_Abortion_WEB.pdf

[19] See for example, HRC, 'Concluding observations on the seventh periodic report of Colombia', 118th sess, 3330th mtg, UN Doc. CCPR/C/COL/CO/7 (17 November 2016), [21].

rights law, to include a right to life of unborn children.[20] This position is similarly true of the right to life, as framed in the HR Act which recognises that:

> [The right to life] applies to a person from the time of birth.[21]

17. To minimise unnecessary limitations of the right to freedom of thought, conscience, religion and belief, governments are obliged to develop and effectively regulate a framework for conscientious objection by individual health professionals.[22] Facility for conscientious objection provides for *individual* medical professionals to opt out of performing abortions or providing post-abortion care based on their cultural, religious or conscience-based objections. Freedom of thought, conscience, religion and belief, as recognised in s 14 of the HR Act, must not, however, be relied on to justify discrimination against women, girls or pregnant persons.[23] In this regard, the exercise of conscientious objection by individual medical providers, and associated staff, must not present a barrier to their enjoying effective access to safe and legal abortion.[24]

18. The right of everyone to the highest attainable standard of physical and mental health (henceforth 'the right to health') similarly incorporates a right to sexual and reproductive health as an integral component. Although not expressly recognised in the ACT, it is open to the Committee to draw on relevant standards under the right to health insofar as they supplement and reinforce the principles articulated above. We note, in this regard, express recognition in the HR Act that it does not reflect an exhaustive statement of the rights an individual may have under domestic or international law.[25]

19. The 'right to health' emphasises the equal freedom of all people, irrespective of sex or gender, to decide if, and when, to reproduce. This necessitates their ability to access and be informed about safe, effective, affordable and acceptable methods of family planning and available reproductive health care services, including abortion.[26] Access to contraception and the information, education and means to freely and responsibly decide on the number and spacing of their children is hence a key component of the rights to health and equality that governments must take steps to facilitate.[27]

20. Reproductive and sexual health services (including post-abortion care), contraceptives and related information must be available, accessible, affordable, acceptable and of good quality.

    - In terms of ***availability***, for example, clinics and post-abortion care must be within appropriate reach in terms of location, physical accessibility and cost; especially for people from disadvantaged or marginalised communities. Where providing these services locally is impracticable (eg in remote communities), equitable access to such services must still be promoted through positive measures, like facilitating transport or communication. Ensuring

[20] See for example, HRC, 'Concluding observations on the fourth periodic report of Ireland', 111th sess, 3091st mtg, UN Doc. CCPR/C/IRL/CO/4, [9].
[21] HR Act, s 9(2).
[22] UN Committee Against Torture, 'Concluding observations on the seventh periodic report of Poland', 67th sess, 1776th mtg, UN Doc. CAT/C/POL/CO/7 (5 August 2019), [34].
[23] General Comment 28, [21].
[24] HRC, 'Concluding observations on the seventh periodic report of Poland', 118th sess, 3306th and 3308th mtg, UN Doc. CCPR/C/POL/CO/7 (23 November 2016), [24].
[25] HR Act, s 7.
[26] UN Committee on Economic, Social and Cultural Rights, '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)' ('General Comment 22'), UN Doc. E/C.12/GC/22 (2 May 2016), [10].
[27] OHCHR, 'Contraception and Family Planning (Information Series on Sexual and Reproductive Health and Rights" (2020), available at: https://www.ohchr.org/sites/default/files/Documents/Issues/Women/WRGS/SexualHealth/INFO_Contra_FamPlan_WEB.pdf

the availability of trained medical and professional personnel trained to provide a full range of reproductive health care is a vital part of ensuring availability.[28]

- Sexual health and reproductive services, including legal abortion and aftercare, and related goods, like medicines, must be ***affordable*** for all. Consistent with the right to equality, essential goods, information and services must be provided at no cost or on a subsidised basis for those requiring support to cover their expense.[29]

- *Accessibility* also includes that all people can access accurate, evidence-based and balanced information about their sexual and reproductive health, available reproductive services and a range of affordable contraceptive methods.[30] Ensuring that quality education and information about these matters are available for all men and women, especially young people, plays a crucial role in preventing unwanted pregnancies and unsafe abortions. It also serves an essential function in de-stigmatising women, girls and pregnant persons who seek abortion and upholding the rights to life and equality and non-discrimination.[31] Both the right to life (s 9, HR Act) and right to receive information (s 16, HR Act) similarly mandate the provision of evidence-based and quality information about reproductive and sexual health.

- *Acceptability* requires that all facilities, goods, information and services are sensitive to their consumers' respective needs and personal characteristics (eg observing respect for culture, gender, age, disability, sexual diversity and other characteristics).

- Services, information, facilities and medicines of good *quality* in turn means that each must be evidence-based, scientifically and medically appropriate, and up to date. For example, this obliges governments to implement practices that ensure reproductive and sexual health professionals are trained and suitably skilled, that any relevant medicines and drugs are safe and unexpired, and that facilities adopt and employ safe and contemporary technologies, methods and equipment.

Commission's observations

21. The Commission welcomes the recent budget commitment by the ACT Government to remove out of pocket costs of abortion services, including for both medical and surgical abortions, which was announced following the commencement of this inquiry. We further welcome that this change is to be accompanied by a communications package directed to improving accessibility of abortion services.[32] These developments appear well placed to further realise the important human rights principles outlined above, especially with respect to affordability and accessibility.

22. It is essential, in our view, that the implementation of this program is designed in consultation with key community organisations, service providers and directly informed by the views of women and people able to be pregnant. Direct engagement with these audiences to ensure that sufficient capacity to deliver on the commitments is available in a timely manner to ensure the program achieves its objective and that community expectations following the announcement can be met.

[28] General Comment 22, [15].
[29] General Comment 22, [17].
[30] See General Comment 36, [8]; General Comment 22, [18]-[19], [41].
[31] For example, HRC, 'Concluding observations on the initial report of Pakistan' 120th sess, 3406th and 3407th mtgs, UN Doc. CCPR/C/PAK/CO/1 (23 August 2017), [16].
[32] ACT Government, 'Women's Budget Statement 2022-23', 6, available at: https://www.treasury.act.gov.au/__data/assets/pdf_file/0003/2051328/Womens-Budget-Statement.pdf)

23. Accessing abortion in the ACT presently demands a high level of health literacy, internet literacy and persistence, which is required to navigate an opaque information network. It is important to recall that a pregnant person can be experiencing high levels of distress at the point of seeking relevant information about available abortion services. Requiring a person in such circumstances to navigate a secret network of providers and prescribers, stigma and discrimination, financial and cultural barriers to access a universally available health procedure reflects an additional undue burden.

24. We note, in this regard, that there are other issues in accessing reproductive health care in the ACT that present barriers for people, which have been brought to our attention or have arisen through enquiries and complaints we have received. These include workforce capability, conscientious objection, lack of transparent and accurate public information about accessing services, and gestational limitations in the ACT; each of which we consider must be addressed as a priority.

Workforce capability

25. We understand there are a limited number of General Practitioners (GPs) who prescribe medical termination of pregnancy treatment in the ACT. While we are able to review the number of GPs and pharmacists *authorised* to prescribe and dispense medication, we understand that the actual number who actively do so is much lower. We also understand that this information is not generally available, which itself constitutes a barrier to accessing safe, legal and effective abortion services. In addition, the purported secrecy of this information suggests professional judgement or stigma that practitioners who provide these services may experience. Such stigma affecting practitioners can, in our experience, impact timely, accessible and supported access to abortion and reproductive health services by leading to a lack of public information about available services. Limited publication of clear and readily accessible information can, in turn, delay access to such information and treatment, and erode confidence in the health services provided in the ACT.

26. As part of the announced communications strategy, key stakeholders, like the Capital Health Network and the relevant Colleges, should be included as essential partners. We would suggest, in this regard, that such stakeholders play a role in educating providers about the importance of access to reproductive health services without stigma or discrimination for both clients and providers.

27. The Commission would also support the ACT Government's consideration of broadening the range of authorised prescribers in the ACT. Affording nurses and midwives an accessible opportunity for an expanded scope of practice given their expertise in reproductive health and their greater accessibility relative to GPs would, in our view, better realise consistency with the human rights principles outlined above. Nurse-led care would improve accessibility and aftercare and evidence shows appropriately trained nurse and midwife led abortion care is clinically safe.[33] Although this would require systemic change and support, greater scope of prescribing authorisation would provide a practical way to better promote the accessibility and availability of these services in future.

28. The Commission also suggests that a review of the availability of surgical abortion in ACT public hospitals be undertaken to ensure that current availability is not contributing to people travelling interstate for such services. A review of this kind is vital to ensuring there is meaningful local availability of surgical abortion services or, otherwise, that appropriate supports are in place to ensure equitable and safe access (e.g. transport) interstate, as outlined above.

Conscientious objection

[33] World Health Organisation, *Safe abortion: technical and policy guidance for health systems* (2nd ed, 2012), available at: http://apps.who.int/iris/bitstream/handle/10665/70914/9789241548434_eng.pdf?sequence=1

29. The Commission supports other stakeholders' submissions to the extent they call for reform of legislation governing conscientious objection in the ACT. Specifically, we support the Committee considering a recommendation that such provisions require providers who conscientiously object to refer the pregnant person to a practitioner (or practice) who they know, or believe, does not also object. This would harmonise ACT legislation with that which operates in other Australian states and territories.[34] An amendment of this kind would also address identified barriers that impede both access to reliable information about a practitioner's position and timely and informed referrals.

30. We understand that in some practices, even where they have practitioners authorised to prescribe medical abortion treatments, they do not do so because of stigma or pressure from within the practice. The inquiry should consider whether registered or authorised practitioners and health services in the ACT should be required to have information available on their website or through their booking systems and reception staff that makes clear whether the practice has a practitioner that provides these services, or whether the services are not available at the practice as this may inform both choice of practitioner and practice, but also assist in the timeframes in which reproductive services of this nature are available.

Post abortion and partial miscarriage care

31. The Commission has dealt with several complaints expressing concern about a lack of clarity regarding the facilities in which a woman or pregnant person can access services for incomplete medical abortion, partial termination or miscarriage. The ACT community expect that services provided at our public hospitals will be equivalent and, for a range of reasons, this is not always the case. In a number of matters the Commission has handled, women who have sought to access surgical intervention for a partial or incomplete abortion or miscarriage have been provided 'conservative treatment' which has resulted in hours or days of discomfort and distress as their wish to have a surgical resolution has been denied or deferred.

32. Where there is a conscientious objection to the provision of a particular service, the practitioner or institution should be required to make that information publicly available so women and pregnant people can freely decide which health service they seek to access for treatment. With the increased access to medical abortion as its availability has increased, complications in medical terminations are likely to also increase. It is therefore important that the pathways for treatment and support are made clear to ACT practitioners and community members.

33. We note with concern we have heard reports of delays in accessing Dilation and Curettage (D&C) procedures in public hospitals. This procedure should be readily available, given the circumstances in which a D&C is sought or is required has a profound impact on the physical, mental and emotional wellbeing of the patient. Where it is sought because of an incomplete miscarriage or abortion we have been told these factors are exacerbated by the pregnant person's experience of carrying a fetus that is no longer viable. A review of the availability, frequency and average time from request to the procedure being carried out would be valuable to ensure the timely availability of this procedure.

Availability of abortion after 16 weeks

34. While there is no legal gestational limit on abortion in the ACT, in practice it is only available until 16 weeks gestation. After this time, women and pregnant people are required to travel interstate to obtain surgical abortion due to a lack of available infrastructure within the ACT to deliver surgical abortion after 16 weeks. This is inconsistent with practice in other states which make abortion

[34] See, for example, *Abortion Law Reform Act 2008* (Vic), s 8(1)(b).

available up to 22 weeks or 24 weeks, or later in some circumstances. Consistent with the fundamental human rights principles we have outlined above, we support further consultation with a view to remedying this practical limitation on access to services in the ACT.

Exclusion zones

35. As outlined above, the Commission provided advice to support the introduction of safe access zones, noting these uphold rights to privacy and reputation of women and pregnant people who are accessing reproductive health services. The Commission has dealt with number of complaints that arise from the small number of facilities in the ACT that provide abortion services. Notwithstanding the need to consider freedom of expression and related rights of those who oppose legal abortion, the small size of the Canberra community means that it can be difficult in practice for people attending and providing abortion services to remain anonymous. The Commission notes that the statutory size of safe access zones in the ACT is less than that which applies in other states and territories – including other human rights jurisdictions, Victoria and Queensland.[35] Although we believe the current arrangements have been effective, we also note that some community support for harmonisation with states that apply a 150 metre safe access zone has been expressed to us. The Committee may wish to consider this issue in the course of the present inquiry.

[35] *Public Health and Wellbeing Act 2008* (Vic), s 185B(1); *Termination of Pregnancy Act 2018* (Qld), s 14.