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5 April 2013

Department of Health and Human Services
Draft Reproductive Health (Access to Terminations) Bill
GPO Box 125
Hobart TAS 7001

By email: public.health@dhhs.tas.gov.au

Dear Michelle O'Byrne MP,

Re: Consultation into Pregnancy Termination Law Reform

Community Legal Centres Tasmania (CLC Tas) appreciates the opportunity to respond to the consultation into pregnancy termination law reform.

CLC Tas is the peak body representing the interests of eight community legal centres located throughout Tasmania. We are a member based, independent, not-for-profit incorporated organisation that advocates for law reform on a range of public interest matters aimed at improving access to justice, reducing discrimination and protecting and promoting human rights.

CLC Tas strongly supports the right of women to decide on pregnancy termination. The decision to terminate a pregnancy is a complex and momentous decision, demanding consideration of physical, mental, social and economic consequences. However, as the law in Tasmania currently stands, women's views are discounted, instead having to rely on the opinion of two medical practitioners.

CLC Tas supports the recommendations proposed in the *Reproductive Health (Access to Terminations) Bill 2013* on the grounds that the reforms will provide a legislative framework that provides legal certainty as to the circumstances in which pregnancy termination can lawfully occur and strengthen the right of women to make an informed decision.

The Uncertainty surrounding Tasmania's Pregnancy Termination Laws

Currently, women in Tasmania are only able to access pregnancy termination services where the procedure is considered 'legally justified'.¹ This means that two doctors must

¹ Section 134 of the *Criminal Code Act 1924* (Tas).

determine that the continuation of the pregnancy would pose a greater risk to the women's physical or mental health than terminating the pregnancy:

164. Medical termination of pregnancy

(1) Notwithstanding anything contained in section 134, 135 or 165, but subject to this section, a person is not guilty of a crime in relation to the termination of a pregnancy which is legally justified.

(2) The termination of a pregnancy is legally justified if –

(a) two medical practitioners have certified, in writing, that the continuation of the pregnancy would involve greater risk of injury to the physical or mental health of the pregnant woman than if the pregnancy were terminated; and

(b) the woman has given informed consent unless it is impracticable for her to do so.

(3) In assessing the risk referred to in subsection (2), the medical practitioners may take account of any matter which they consider to be relevant.

(4) If it is impracticable for the woman to give informed consent, the two medical practitioners referred to in subsection (2)(a) are to make a declaration in writing detailing the reasons why it was impracticable for the woman to give informed consent.

(5) At least one of the medical practitioners referred to in subsection (2)(a) is to specialise in obstetrics or gynaecology.

(6) A legally justified termination can only be performed by a medical practitioner.

(7) Subject to subsection (8), no person is under a duty, whether by contract or by any statutory or other legal requirement, to participate in any treatment, including any counselling authorised by this section, to which the person has a conscientious objection.

(8) Nothing in subsection (7) affects any duty to participate in treatment which is necessary to save the life of a pregnant woman or to prevent her immediate serious physical injury.

...

Tasmania's pregnancy termination laws were clarified following the Victorian case of *R v Davidson*.² Nevertheless, uncertainty remains particularly as in the later New South Wales district court decision of *R v Wald*³ Levine DCJ seemed to broaden the circumstances in which pregnancy termination would be allowed, commenting:⁴

² [1969] VR 667.

³ (1971) 3 DCR (NSW) 25.

⁴ (1971) 3 DCR (NSW) 25 at 29.

In my view it would be for the jury to decide whether there existed in the case of each woman any economic, social or medical ground or reason which in their view could constitute reasonable grounds upon which an accused could honestly and reasonably believe there would result a serious danger to her mental or physical health. It may be that an honest belief be held that the woman's mental health, although not then in serious danger, could reasonably be expected to be seriously endangered at some time during the currency of the pregnancy.

The current law in Tasmania is unsatisfactory as it is unclear what circumstances amount to 'greater risk of injury to physical or mental health of the pregnant woman' than the pregnancy termination. It is arguable that a medical practitioner may provide a certificate allowing a termination to be lawfully carried out based on economic, social or medical grounds. However, because the law does not provide any guidance, many Tasmanian doctors refuse to carry out pregnancy terminations in the absence of a clear physical risk to the women. The burden of seeking out two practitioners willing to take a broader perspective and certify that a risk exists can impose increased difficulty, cost and worry before a pregnancy termination can take place.

A recently released study into the views of doctors in New South Wales and Queensland who do undertake pregnancy terminations demonstrates the difficulties of the current law. The study entitled *Manufacturing mental illness (and lawful abortion): Doctors' attitudes to abortion law and practice in New South Wales and Queensland*⁵ found that many doctors who provide pregnancy terminations are discouraged by the legal impediments required of them concluding that:⁶

doctors providing abortions in New South Wales and Queensland routinely feel compelled to behave, at best, misleadingly but often dishonestly and unethically in order to behave 'legally'... [c]ommonly doctors expressed frustration at having to invent diagnoses of mental health issues for women requesting a termination in order to bring the abortion within the law. Often this required doctors to ignore or reframe the women's view of her circumstances.

In Tasmania there has been no empirical research carried out so it is difficult to know doctors' views. Nevertheless, it is likely, given the experience in New South Wales and Queensland, that in some instances terminations are being approved in circumstances requiring a broad reading of 'risk of physical or mental injury'. The uncertainty of the current law however, means that doctors are reluctant to talk about their experiences for fear of criminal sanction. In other cases, some doctors may be reluctant to provide

⁵ Heather Douglas, Kirsten Black and Caroline de Costa, *Manufacturing mental illness (and lawful abortion): Doctors' attitudes to abortion law and practice in New South Wales and Queensland* (2012) 20(3) *Journal of Law and Medicine* 560-576.

⁶ Heather Douglas, Kirsten Black and Caroline de Costa, *Manufacturing mental illness (and lawful abortion): Doctors' attitudes to abortion law and practice in New South Wales and Queensland* (2012) 20(3) *Journal of Law and Medicine* 560 at 574.

pregnancy terminations for fear of prosecution. Finally, based on anecdotal evidence and experiences reported by CLC clients some women are being told to travel interstate for a termination, resulting in increased financial cost and lack of support.

Current Practice in Tasmania

Pregnancy termination in Tasmania remains limited, not only due to medical practitioner's interpretation of the law, but also because the availability of two medical practitioners for women living in rural, remote or regional areas is more difficult.

Significant financial burdens are also placed on women wanting to access pregnancy termination with the procedure only performed in the public health system where necessary to save a woman's life or due to severe fetal illness. This means that women have to be referred to private clinics resulting in inevitable delays and fees of anywhere between \$200-\$320. In some instances these costs rise to \$1000 in circumstances where the procedure is required to be carried out interstate. Some financially disadvantaged women are often unable to pay the financial gap for private termination services and are forced to rely on loans or financial assistance from a limited number of charities.

Additionally, the unavailability of publicly funded termination services in Tasmania means that some women have to travel interstate for a termination. It is unsatisfactory that women are forced to be far away from their support networks for pregnancy termination. As the authors of a report into the practices of doctors in NSW and Queensland observed "...doctors generally accepted that having an abortion far from home and without the usual supports could make the termination a particularly traumatic experience".⁷

Proposed reforms

CLC Tas strongly supports the introduction of a *Reproductive Health (Access to Terminations) Act*. Pregnancy termination is a medical procedure and has no place in Tasmania's *Criminal Code Act 1924*. The ability of women to access pregnancy termination on request at or before 24 weeks into the pregnancy will provide peace of mind and legal certainty.

CLC Tas has no issue with the ability of doctors, nurses and counselors to refuse to perform or assist in a termination on the basis of a conscientious belief unless it is an emergency situation. However, we support the proposed provisions requiring that, in such circumstances, the pregnant woman must be referred to a service provider who does not have such objections. Such a requirement will mean that a woman understands the reasons for the refusal to perform the service, and that delays in securing the assistance of an alternative provider are minimized. At the same time the proposed penalty provisions must be retained to ensure that the law is complied with.

⁷ Heather Douglas, Kirsten Black and Caroline de Costa, Manufacturing mental illness (and lawful abortion): Doctors' attitudes to abortion law and practice in New South Wales and Queensland (2012) 20(3) *Journal of Law and Medicine* 560 at 574.

There is no point in obliging doctors, nurses and counselors to refer to other service providers if there is no penalty attached to non-compliance. Penalties will reinforce that compliance is mandatory, ensuring that education programs are put in place and allowing for a smoother transition. We believe that the obligation to refer provisions of the current Bill balance the rights of those who hold a strong conscientious belief with the equally important right of acting in the best interest of the pregnant woman.

CLC Tas does not support the introduction of different legislative frameworks for pregnancy terminations up to and after 24 weeks. We believe that, in all cases, women should be recognized as capable of making an informed decision. Pregnancy termination should be treated like any other medical procedure, with consultation being offered and the ultimate decision being respected. We support a doctor being able to make a determination about a proposed termination on the basis of the health of the woman, and other relevant circumstances. While the gestation period will be relevant to this assessment, it should not be determinative. It should also be acknowledged that the overwhelming majority of terminations take place before the 24 weeks. In the alternative, we recommend that following 24 weeks gestation, the woman require approval from two doctors.

CLC Tas supports the introduction of a 150 meter buffer zone so that women and their support persons are not harassed, intimidated or impeded from accessing the premises. In our view, the 150 meter buffer zone will protect women and their supporters from picketing and unwanted harassment whilst at the same time allowing others to express their opinion. Whilst it is recognized that no other medical procedure has buffer zones legislatively prescribed, CLC Tas believes that termination patients are particularly vulnerable and the experience of the two private clinics in Tasmania as well as that of interstate provides ample evidence of the need for such measures in respect of terminations.

In summary CLC Tas believes strongly in the right of a woman to decide on pregnancy termination. We endorse the reforms proposed in the *Reproductive Health (Access to Terminations) Act* and believe that they strike the right balance between the needs of pregnant women, the responsibilities of doctors and community expectations.

We thank you for your time in considering this submission.

Please do not hesitate to contact us if you have any queries or would like to discuss our submission further.

Yours Faithfully,

Benedict Bartl
Policy Officer
Community Legal Centres Tasmania
