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Human Rights Commission
Te Kāhui Tika Tangata

Submission of the Equal Employment Opportunities Commissioner on Abortion Law Reform

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Contents

Introduction

1. The Human Rights Commission is New Zealand's National Human Rights Institution (NHRI). NHRI's form part of the United Nation's human rights system by promoting and monitoring the domestic implementation of international human rights standards. The Commission is accredited as an A Status NHRI, meaning that it meets the highest standard of practice and independence set by the Global Alliance of NHRIs and the United Nations (UN) High Commissioner for Human Rights.

2. As the Equal Employment Opportunities (EEO) Commissioner, I have specific responsibilities in relation to human rights issues relevant to women. I welcome the opportunity to make to make this submission to the Law Commission on abortion law reform.

3. The aim of this submission is to provide the Law Commission with information on the international human rights laws, principles and standards that apply to abortion. The submission refers to international human rights treaties to which New Zealand is a party and to guidance from UN treaty monitoring bodies and other UN experts.

4. The first section of the submission sets out the current laws and regulations that apply to abortion in New Zealand. Section two outlines the domestic and international human rights that are relevant to abortion, including the right to life, right to equality and non-discrimination, right to health, right to privacy and the right to freedom from cruel treatment. The third section addresses international human rights law in the context of decriminalisation, access, consent, antenatal testing and conscientious objection.

5. As EEO Commissioner, I strongly recommend that the Law Commission gives paramount consideration to human rights principles when assessing the role of the criminal law with regard to abortion, the grounds for abortion and the process for receiving abortion services.

6. In my view, abortion should be treated as a health issue, rather than a criminal offence in New Zealand. This approach would be consistent with international human rights obligations, and the recommendations made to New Zealand by the United Nations Committee on the Elimination of Discrimination Against Women (CEDAW Committee). Sections 182-187A of the Crimes Act 1961 should be repealed. Decriminalising abortion does not mean that abortion should not be subject to certain requirements, such as temporal restrictions. However, breaches of such temporal requirements should not carry the risk of criminal sanction. Medical practitioners who do not perform abortions within the law should be subject to professional sanction under the Health Practitioners Competence Assurance Act 2003, rather than the criminal law. Furthermore, a pregnant woman who has an unlawful abortion should not be liable for any offence, and therefore section 44 of the Contraception, Sterilisation and Abortion Act 1977 (CSA Act) should be repealed.

7. Should the Law Commission wish to discuss the issues raised in this submission in more depth, or any other aspects of international human rights law that would support its review, the Commission is happy to assist in any way it can.

I. Current Law

What makes abortion a crime?

8. Women in New Zealand do not have the right to an abortion on request. The ultimate decision as to whether women can access abortion services lies with medical consultants. Abortion will only be lawful if it is carried out in accordance with the Crimes Act 1961.

9. Killing an unborn child is a crime under section 182 of the Act.[1] Sections 183 and 186 provide that procuring an abortion or supplying the means of procuring an abortion are crimes if carried out unlawfully. The term "unlawfully" is defined in section 187A of the Act, which stipulates that an abortion will not be unlawful if performed earlier than 20 weeks into the pregnancy and if it is believed that:

    - the continuance of the pregnancy would result in serious danger to the life, physical or mental health[2] of the woman[3]
    - there is a substantial risk that the child would be so physically or mentally abnormal as to be seriously handicapped[4]
    - the pregnancy is the result of incestuous sexual intercourse[5]
    - the woman or girl is severely subnormal within the meaning of section 138(2) of the Act[6]

10. An abortion is only lawful after 20 weeks' gestation if the person performing it believes that it is necessary to save the life of the woman or to prevent serious permanent injury to her physical or mental health.[7]

11. The Contraception, Sterilisation and Abortion Act 1977 (CSA Act) sets out the procedural elements of obtaining and performing an abortion. A medical practitioner can carry out an abortion lawfully if he or she acts under a certificate issued by two consultants,[8] and one of the certifying consultants must be an obstetrician or gynaecologist.[9] The certifying consultants may issue a certificate in the prescribed form if they decide in the particular case that one of the grounds in Section 187A of the Crimes Act applies.[10] Once the certifying consultants have decided they must advise the woman on her right to seek counselling.[11]

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[1] See section III. Killing of Unborn Child.
[2] Crimes Act 1961, Section 187A (2): In determining whether the continuance of the pregnancy would result in serious danger to a woman's physical or mental health, the age of the women and whether the pregnancy was a result of a sexual violation may be taken into account.
[3] Crimes Act 1961, Section 187A (1)(a).
[4] Ibid. Section 187A (1)(aa).
[5] Ibid. Section 187A (1)(b)-(c).
[6] Ibid. Section 187A (1)(d).
[7] Ibid. Section 187A (3).
[8] Contraception, Sterilisation and Abortion Act 1977, Section 33.
[9] Ibid. Section 32(2)(2)(b)(ii).
[10] Ibid. Section 33.
[11] Ibid. Section 35.

12. Unless an abortion is necessary to save the life of the patient or prevent serious mental or physical injury, non-compliance with the procedural elements carries a maximum penalty of six months imprisonment or a fine not exceeding $1,000.[12] It is also an offence for a female to procure her own miscarriage.[13]

Regulation of abortions

13. Abortion is also subject to the following bodies, regulations and standards:

- *Abortion Supervisory Committee*: Established under the Contraception, Sterilisation and Abortion Act 1977. Responsibilities include considering and reviewing hospital or clinic licence applications to perform abortions; ensuring hospitals and clinics with abortion licences have adequate facilities; appointing certifying consultants to consider cases where a woman is seeking to have an abortion; and reporting to Parliament annually on abortion law.

- *Code of Health and Disability Services Consumer's Rights*: Sets out the rights of health and disability service consumers, including the right to have services provided in a non-discriminatory manner, the right to respect, dignity and independence and to receive services of an appropriate professional standard. It also contains provisions relating to effective communication, the right to be fully informed and to make informed choices before receiving health care services.

- *Standards of Care for Women Requesting Induced Abortion in New Zealand*: Sets out standards for those involved in abortion care to guide access to abortion services.

- *Pre-natal Screening for Down Syndrome and Other Conditions Guidelines for health practitioners:* Guidelines to support health practitioners advising about the availability of services for antenatal screening for Down syndrome and other conditions. Among other things, they cover, provision of information, supporting women to make an informed decision, communicating results, and ensuring compliance with relevant laws.

- *Health Practitioners Competence Assurance Act 2003*: Provides for mechanisms to ensure that health practitioners are competent and fit to practise their professions and sets out duties of health practitioners in respect of reproductive health services.

[12] Ibid. Section 37 (1) and (2).
[13] Ibid. Section 44.

II. Human Rights Law and Abortion

New Zealand Bill of Rights Act 1990

14. The New Zealand Bill of Rights Act 1990 (BORA) affirms New Zealand's commitment to the International Covenant on Civil and Political Rights 1966 (ICCPR).[14] Abortion engages several rights under the BORA, including the right not to be deprived of life,[15] the right not to be subjected to cruel treatment,[16] and the right to refuse to undergo medical treatment.[17]

15. The BORA would have a direct effect on any new abortion law in New Zealand. Under Section 7 of the BORA, the Attorney-General must report to Parliament on any provision of a Bill introduced to parliament that appears to be inconsistent with the BORA. Furthermore, the current Government has indicated that the BORA will be amended to give the Courts the power to issue a declaration of inconsistency if legislation is inconsistent with rights affirmed in the BORA.

International Human Rights Framework

16. As a matter of international law, New Zealand is required to bring its law into line with the international human rights treaties that it has signed and ratified.[18] Accordingly, the Cabinet Office Manual and ancillary Legislation Design and Advisory Committee Guidelines direct the Government and public servants to ensure that proposed legislation and policy confirms with international obligations.[19]

17. These international obligations include a number of human rights treaties that are relevant to abortion, including the ICCPR, the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention on the Rights of the Child (CRC), the Convention on the Rights of Persons with Disabilities (CRPD) and the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW).

18. Over the past decade, the UN human rights mechanisms, including treaty monitoring bodies and Special Rapporteurs, have given increasing attention to the issue of abortion. They have called on States to decriminalise abortion; to remove regulatory and administrative barriers that impede women's access to safe abortion services; and to provide comprehensive sexual and reproductive health information and services to women.

[14] Preamble.
[15] Section 8.
[16] Section 9.
[17] Section 11.
[18] The Vienna Convention on the Law of Treaties, Articles 26, 27 & 29, ratified by New Zealand in 1971, provides that treaty obligations are binding on a State and domestic law may not be used as a justification for its failure to perform a treaty obligation.
[19] Cabinet Office, Cabinet Manual 2017, [7.65 (d)-7.66].

19. The Rule of Law, Equality and Non-Discrimination Branch of the UN Office of the High Commissioner for Human Rights (OHCHR) recently made the following comment regarding the impact abortion law has on human rights:

> *Human rights mechanisms, including this Committee, have consistently raised concerns about the impact of restrictive abortion laws, including criminal laws, on women's enjoyment of their human rights, including their rights to life, health, freedom from gender-based violence, freedom from torture and other forms of cruel, inhuman and degrading treatment, and freedom from discrimination based on sex. They have regularly called on States to amend restrictive laws, and urged States to remove barriers to accessing safe abortion services. They have also insisted that post-abortion care should always be available, regardless of whether abortion is legal or not.*[20]

20. The UN Human Rights Committee, which monitors the implementation of the ICCPR, has also highlighted that regulation of abortion implicates pregnant women's right to life, the right to privacy, and freedom from cruel, inhuman and degrading treatment.[21] In terms of social rights, access to abortion services stem directly from the right to health,[22] including sexual and reproductive health.[23] Moreover, the human rights principles of autonomy, dignity and bodily integrity are also central to abortion law. I set out in more detail below the substance of some of the rights that are relevant to abortion law and policy.

Right to life

21. The right to life is protected by Article 6(1) of the ICCPR: "Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life." This right has generally been seen to apply from birth. The UN Human Rights Committee *Draft General Comment on Article 6 – Right to Life* does not affirm the right to life of the unborn. Rather it expressly supports the right to life of pregnant women and access to abortion services. As will be set out below, treaty monitoring bodies, through general comments, concluding observations, and decisions in individual cases, consistently emphasise the importance of protecting women's rights.

22. This is consistent with the approach New Zealand law takes on whether a foetus can exercise the right to life under Section 8 of the BORA. In *Right to Life New Zealand v Abortion Supervisory Committee,* Miller J noted that very few of the rights in the BORA could be exercised by or on behalf of an unborn child.[24] Miller J also noted that, based on the White Paper to the BORA, if it

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[20] Rule of Law, Equality and Non-Discrimination Branch, OHCHR, Comments to draft General Comment on Article 6 of the ICCPR pg.3.

[21] UN Human Rights Committee, General Comment no. 28 on the Equality of Rights Between Men and Women, UN Doc. CCPR/C/21/Rev. 1/Add. 10, para. 20.

[22] Article 12 of the ICESCR. See also CEDAW, Article 12; CRC, Articles. 17, 23-25 and 27; and CRPD, Articles 23 and 25.

[23] 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 UN Doc. E/C.12/GC/22 (2 May 2016).

[24] *Right to Life New Zealand v Abortion Supervisory Committee* [2008] 2 NZLR 825 (HC) at para. 99.

was intended that the BORA extend the right to life to the foetus then it would have,[25] concluding that the BORA does not extend to the unborn child.[26] On appeal, the Court of Appeal did not see any need to conclusively decide the question of whether an unborn child could exercise the right not to be deprived of life under Section 8 of the BORA. However, it noted with approval the comments of Miller J in the High Court.[27] The Supreme Court declined leave to appeal in relation to Section 8 of the NZBORA, stating that it was plain that the legislation was based on the premise of the "born alive" rule and therefore the arguments were untenable.[28]

23. This is also in line with the position in the United Kingdom, Canada, South Africa and Australia where foetuses are not protected by the right to life.

Freedom from discrimination and right to equality before the law

24. The rights to equality and non-discrimination are a central tenet of international[29] and domestic[30] human rights law and require that any action or omission by the State must not discriminate, either directly or indirectly, against any individual or group, including on the grounds of sex.

25. Article 1 of CEDAW defines sex discrimination as "any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women … of human rights and fundamental freedoms."

26. The jurisprudence of the Committee on the Elimination of Discrimination Against Women (CEDAW Committee) makes clear that the fundamental principles of non-discrimination and equality require that the rights of a pregnant woman be given priority over an interest in prenatal life. For example, in the case of *L.C. v Peru*, the CEDAW Committee found that the government had violated a pregnant girl's rights by prioritising the foetus over her health by postponing essential surgery until the girl was no longer pregnant. The girl's continued pregnancy posed a substantial risk to her physical and mental health, and the CEDAW Committee held that the denial of a therapeutic abortion and the delay in providing the surgery constituted gender-based discrimination and violated her rights to health and freedom from discrimination.[31]

[25] Ibid. paras. 100-101.
[26] Ibid. para. 101.
[27] *Right to Life New Zealand Inc v Abortion Supervisory Committee v* [2011] NZCA 246 at para. 64.
[28] *Right to Life New Zealand Inc v Abortion Supervisory Committee* [2011] NZSC 97.

[29] ICCPR and ICESCR Article 3 set out the right to equality before the law; ICESCR, Article 2.2 ("The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."); ICCPR, Article 26 ("All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.").
[30] Section 19, BORA provides that "Everyone has the right to freedom from discrimination on the grounds of discrimination in the Human Rights Act 1993." Section 21, Human Rights Act 1993 sets out the prohibited grounds of discrimination, which among other things includes sex.
[31] UN CEDAW Committee, *L.C v Peru*, Communication No. 22/2009., UN Doc. CEDAW/C/50/D/22/2009 (2011), para. 8.15.

Right to Health

27. The World Health Organisation (WHO) has recommended that "laws and policies on abortion should protect women's health and their human rights" and that "regulatory, policy and programmatic barriers that hinder access to, and timely provision of, safe abortion care should be removed.[32]

28. Article 12 of the ICESCR sets out the key provision on the right to health and provides for "the right of everyone to the enjoyment of the highest attainable standard of physical and mental health." Abortion is a core element of the right to health. In General Comment 14, the UN Committee on Economic, Social and Cultural Rights explicitly states that "The right to sexual and reproductive health is an integral part of the right to health" enshrined in article 12 of the ICESCR.[33] The Committee outlines key government obligations in achieving full realisation of the right to health, and the four essential and interrelated elements of the right: availability, accessibility, acceptability and quality.

29. The right to health is also outlined in Article 12 of the CEDAW which commits States 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.[34] The CEDAW Committee's General Recommendation 24 on Article 12 of the Convention (Women and Health) clarifies that "access to health care, including reproductive health, is a basic right under the Convention."[35]

Right to privacy

30. Article 17 of the ICCPR protects the right to privacy. The UN Human Rights Committee has confirmed that privacy includes autonomy over one's body[36] and has found that the Irish ban on abortion violated several articles of the ICCPR, including the right to privacy.[37]

31. The right to privacy formed the basis of the landmark United States Supreme Court decision in *Roe v Wade* which recognised for the first time that the constitutional right to privacy "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."[38]

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[32] World Health Organisation, Safe abortion: technical and policy guidance for health systems Second Edition (2012) Geneva, pg. 9.
[33] UN Committee on Economic, Social and Cultural Rights, General Comment No. 14 (2000) The right to the highest attainable standard of health, UN Doc. E/C.12/2000/4, para. 1.

[34] Other treaties provide the right to health including Article 5(e)(iv) CERD; Article 24 CRC; Article 25 CRPD.
[35] UN Committee on the Elimination of Discrimination against Women, General recommendation no. 24: Women and health (article 12) para. 1.
[36] UN Human Rights Committee, *K.L v Peru* Views Communication No. 1153/2003, UN Doc. CCPR/C/85/D/1153/2003.
[37] UN Human Rights Committee, *Wheelan v Ireland*, Views Adopted concerning communication No. 2425/2014 (12 June 2017) UN Doc. CCPR/C/119/D/2425/2014.
[38] *Roe v Wade*, 410 U.S. 113 (1973), para. 153.

32. In a number of cases, the European Court of Human Rights has found a violation of the right to privacy under Article 8 of the European Convention on human rights.[39]

Freedom from cruel and degrading treatment

33. Article 7 of the ICCPR guarantees that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. This right is also protected under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).

34. The UN Human Rights Committee in the case of *K.L. v. Peru* established that the denial of a therapeutic abortion, where continued pregnancy posed a significant risk to the life and mental health of the pregnant woman, violated the woman's right to be free from cruel, inhuman, or degrading treatment.[40] Furthermore, the Committee's Draft General Comment on the right to life provides that regulation of abortion should not result in violation of the right to life of the pregnant women, or other rights under the Covenant including the prohibition against cruel, inhuman and degrading treatment.[41]

35. The Committee Against Torture has further stated that punitive abortion laws should be reassessed since they lead to violations of a woman's right to be free from inhuman and cruel treatment.[42]

CEDAW Committee Comments to New Zealand

36. In 2012, the CEDAW Committee reviewed New Zealand's compliance with the CEDAW. In its Concluding Observations, it noted with concern:

> *. . . the convoluted abortion laws which require women to get certificates from two certified consultants before an abortion can be performed, thus making women dependent on the benevolent interpretation of a rule which nullifies their autonomy. The Committee is also concerned that abortion remains criminalized in the State party, which leads women to seek illegal abortions, which are often unsafe.*[43].

37. Accordingly, the Committee urged New Zealand:

> *(a) To review the abortion law and practice with a view to simplifying it and to ensure women's autonomy to choose;*
> *(b) To prevent women from having to resort to unsafe abortions and remove punitive provisions imposed on women who undergo an abortion*.[44]

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[39] See *Tysiac v Poland* (application no. 5410/03); *A, B and C v Ireland* (application no. 25579/05); P and S v Poland (application no. 57375/08).
[40] UN Human Rights Committee, *K.L v Peru* Views Communication No. 1153/2003, UN Doc. CCPR/C/85/D/1153/2003.
[41] UN Human Rights Committee, General comment No. 36 on article 6 of the International Covenant on Civil and Political Rights, on the right to life, Revised draft prepared by the Rapporteur.
[42] UN Committee against Torture, Concluding observations on the second periodic report of Ireland para. 31: The Committee expressed concern at the "severe physical and mental anguish and distress experienced by women and girls regarding termination of pregnancy due to the State policies."
[43] UN Committee on the Elimination of Discrimination Against Women, Concluding observations of the Committee on the Elimination of Discrimination against Women, New Zealand UN Doc. CEDAW/C/NZL/CO/7 (6 August 2012). para. 34.
[44] Ibid. para. 35(a)-(b).

38. The previous Government's response to these recommendations was that it had no plans to review the law on abortion but that the Ministry of Health was currently developing a new sexual and reproductive health action plan that will review the availability of abortion services.[45]

39. In July 2018, the CEDAW Committee will undertake its eighth periodic review of New Zealand. New Zealand's report for this review was submitted by the previous Government in June 2016. The report noted that between March 2012 and March 2016 staff from the Ministry for Women conducted public and private meetings throughout New Zealand on issues that concern women. Among the issues raised at the meetings was the need for "a review of abortion law and practice to reflect abortion as an essential reproductive health care and ensure equitable access to abortions."[46]

40. In the list of issues and questions prepared by the CEDAW Committee in preparation for the review, it has asked the Government to provide them with further information:

    - The incidence of unsafe abortion and its impact on women's health, including maternal mortality
    - Measures being taken to amend the Crimes Act in order to expand the grounds for legal abortion to include rape
    - Measures taken to revise the Contraception, Sterilisation and Abortion Act, 1977 in order to alleviate the onerous procedure for procuring an abortion, which requires women to obtain certificates from two certified medical consultants and reportedly creates long waiting lists for women and girls
    - Steps being taken to shift oversight over abortion laws, policies and services from the Ministry of Justice to the Ministry of Health
    - The status of the National Sexual and Reproductive Health Action Plan being developed by the Ministry of Health, and the extent to which relevant stakeholders have been involved in its elaboration.[47]

III. Specific Issues

Decriminalisation

International Human Rights Law

41. UN treaty bodies have repeatedly called for States to remove abortion from their criminal laws:

    - *UN Committee on the Elimination of Discrimination Against Women*

[45] Eight periodic report of States parties due in 2016, New Zealand UN Doc. CEDAW C/NZL/8 (15 July 2016) pg. 48.
[46] Ibid. pg. 54.
[47] UN Committee on Discrimination Against Women, List of issues in relation to the either periodic report of New Zealand UN Doc. CEDAW/C/NZL/Q/8 (24 November 2017) para. 16.

- Violations of women's sexual and reproductive health and rights, such as criminalisation of abortion is a form of gender-based violence that may amount to torture or cruel, inhuman or degrading treatment.[48]
- Recommended that States repeal laws that criminalise abortion.[49]
- As noted earlier, following its review of New Zealand, the CEDAW Committee raised concern that abortion is still criminalised and urged New Zealand to remove punitive provisions imposed on women who undergo an abortion.

- *UN Committee on Economic, Social and Cultural Rights*

  - States have an obligation to reform laws that impede the exercise of the right to sexual and reproductive health, including laws criminalising abortion.[50]
  - Violations of the obligation to respect the right to sexual and reproductive health include the establishment of legal barriers impeding access by individuals to sexual and reproductive health services, such as the criminalization of women undergoing abortions.[51]

- *UN Committee for the Rights of the Child*

  - Urged States to decriminalise abortion to ensure that girls have access to safe abortion and post-abortion services, and to review legislation with a view to guaranteeing the best interests of pregnant adolescents and ensure that their views are always heard and respected in abortion-related decisions.[52]

- *UN Committee against Torture*

  - Punitive abortion laws should be reassessed since they lead to violations of a woman's right to be free from inhuman and cruel treatment.[53]

- *UN Human Rights Committee*

  - Recognised in the case of *Mellet v Ireland* that the prohibition and criminalisation of abortion contravene international human rights law.[54]

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[48] UN Committee on the Elimination of Discrimination Against Women, General recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19 UN Doc. CEDAW/C/GC/35 (26 July 2017) para. 18.
[49] Ibid. para. 29 (c) (i).
[50] 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) UN Doc. E/C.12/GC/22 (2 May 2016), paras. 40, 49.
[51] Ibid. para. 57.
[52] UN Committee on the Rights of the Child, General comment No. 20 (2016) on the implementation of the rights of the child during adolescence UN. Doc CRC/C/GC/20 (6 December 2016) para. 60.
[53] UN Committee against Torture, Concluding observations on the second periodic report of Ireland para. 31. See also Committee against Torture CAT/C/PER/CO/4, para. 23; CAT/C/NIC/CO/1, para. 16; and CAT/C/CR/32/5, para. 7.
[54] UN Human Rights Committee, Ireland abortion ban subjected women to suffering and discrimination

42. Independent UN experts have also raised concerns about the treatment of abortion as a criminal issue. The Special Rapporteur on torture has urged States to abolish laws that criminalise abortion.[55] Moreover, the former and current Special Rapporteurs on the right to health have recommended that Sates decriminalise abortion in line with international human rights norms, and have made the following observations:

- Criminal laws penalising and restricting induced abortion are the paradigmatic examples of impermissible barriers to the realisation of women's right to health and must be eliminated.[56]
- These laws infringe women's dignity and autonomy by severely restricting decision-making by women in respect of their sexual and reproductive health; and consistently generate poor physical health outcomes, resulting in deaths that could have been prevented, morbidity and ill-health, as well as negative mental health outcomes, not least because affected women risk being thrust into the criminal justice system.[57]
- Creation or maintenance of criminal laws with respect to abortion may amount to violations of the obligations of States to respect, protect and fulfil the right to health.[58]
- Criminalisation of abortion infringes on dignity and amount to violations of the obligations of States to guarantee the right to health.[59]

43. The UN Working Group on discrimination against women in law and practice has also highlighted the grave harm criminalisation of abortion does to women's health and human rights by stigmatising a safe and needed medical procedure.[60] The Group has noted that "criminalization of termination of pregnancy is one of the most damaging ways of instrumentalizing and politicizing women's bodies and lives, subjecting them to risks to their lives or health and depriving them of autonomy in decision-making about their own bodies."[61]

Comparative jurisdictions

44. The Law Commission may wish to consider the following two models of decriminalisation, which are applied in some of the Australian territories.

Model One

[55] Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment UN Doc. A/HRC/31/57 (5 January 2016) para. 72.
[56] Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health UN Doc. A/HRC/32/32 (4 April 2016) para. 92.
[57] Ibid. para. 113 (b).
[58] Right to everyone to the enjoyment of the highest attainable standard of physical and mental health UN Doc. 66/254 (3 August 2011) para. 21.
[59] Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health UN Doc. A/HRC/32/32 (4 April 2016) para. 92.
[60] Working Group on discrimination against women in law and practice report on health and safety UN Doc. A/HRC/32/44 (8 April 2016) para. 80.
[61] Ibid. para. 79.

45. The State of Victoria's Abortion Law Reform Act 2008 adopted a two-stage approach to abortion. Under the law, a line determined by the gestational age of 24 weeks separates the early and late stage of pregnancy. This is similar to one of the models recommended by the Victorian Law Commission in its 2008 report on abortion law.[62] Under this model, decriminalisation does not necessarily mean that abortion is not subject to certain requirements, such as temporal restrictions, but breaches of such temporal requirements would not carry the risk of criminal sanction. They key provisions of the law in Victoria include:

    - Removal of all provisions relating to abortion under the Crimes Act and any Common Law offences.[63]
    - For pregnancies of less than 24 weeks, a registered medical practitioner may perform an abortion.[64] For these "early stages" abortion, like all other medical procedures is a private decision for a woman in consultation with her doctor. Women are the ones with the final say about whether to have an abortion or not.
    - For pregnancies of greater gestation than 24 weeks, a medical professional can only perform an abortion if he or she "reasonably believes that the abortion is appropriate in all the circumstances" and has "consulted at least one other registered medical practitioner who also reasonably believes that the abortion is appropriate in all the circumstances."[65] When considering "all the circumstances" the practitioner "must" have regard to "all relevant medical circumstances and the woman's current and future physical, psychological and social circumstances."[66] If an abortion is performed unlawfully, the medical practitioner is deemed to have engaged in professional misconduct, not a criminal offence.
    - Allows a registered pharmacist or registered nurse to supply a drug or combination of drugs to a woman who is not more than 24 weeks pregnant.[67]
    - For pregnancies over 24 weeks, such a person may still provide the drug or drugs, but only on written direction from a registered medical practitioner who has consulted one other medical practitioner who both believe such an abortion is appropriate in all the circumstances. After 24 weeks, the nurse or pharmacist administering or providing the drugs to the woman must be employed at a hospital.[68]
    - The Act allows for conscientious objection, but the practitioner who is objecting must inform the woman and refer the woman to another registered health practitioner who the objector knows does not object to abortion.[69] Despite this allowance, the Act follows that despite any such objection, where the situation is an emergency and an abortion is required to preserve the life of the pregnant woman, a registered medical practitioner is under a duty to do so, and a registered nurse is under a duty to assist.[70]

[62] Victoria Law Commission, Law of Abortion, Final Report (2008). See Model C, pg 93.
[63] State of Victoria, Abortion Law Reform Act 2008, Section 1.
[64] Ibid. Section 4.
[65] Ibid. Sections 5(1)(a) and (b).
[66] Ibid. Section 5(2).
[67] Ibid. Section 6.
[68] Ibid. Section 7.
[69] Ibid. Section 8.
[70] Ibid. Sections 8(3) and (4).

46. In Tasmania, the Northern Territory and Western Australia, a similar approach is applied where abortion is available up to a certain stage of gestation without the need for specific justification.

Model Two

47. The Victorian Law Commission 2008 report proposed another model that the Law Commission may wish to consider. Under this model, abortion would be governed by the same legal rules which regulate all other medical procedures. Like any other medical procedure, it would be a private decision for a woman in consultation with her doctor and the final decision making lies with the pregnant women. An abortion performed by a medical practitioner would be lawful at any stage of a pregnancy if the women gives her consent.

48. This is the model that is effectively used in Canada. In 1988, the Supreme Court struck down the sections of the Criminal Code that made abortion a criminal offence because they conflicted with the "right to life, liberty and security of the person" enshrined in the Canadian Charter of Rights and Freedoms.[71] Since this decision, no legislation has been passed to regulate abortion. Consequently, abortion has been regulated in Canada by the body of law that governs all other medical procedures.

49. The Australian Capital Territory (ACT) also applies this approach. The ACT is the only Australian jurisdiction to remove abortion from the realm of criminal law and does not prescribe a temporal limitation on the legal availability of abortion services. The Crimes (Abolition of Offence of Abortion) Act was passed in 2002 repealing the abortion provisions of the Crimes Act 1900. Abortion is now treated in the same way as other medical procedures and is subject to the Health Act 1993. The performing of abortions in non-approved facilities and the performance of an abortion by anyone other than a registered medical practitioner are still offences. They have the penalties of six months and five years' imprisonment respectively.

Access to Services

50. International human rights mechanisms have repeatedly called on States to ensure that abortion is available and accessible to all women. For this to happen, considerable investment into abortion services may be required in New Zealand.

51. The right of women to access sexual and reproductive health information and services (including with regard to abortion) is firmly grounded in international human rights law. International human rights mechanisms have regularly called on States to remove barriers to accessing abortion services. For example, the UN Committee on Economic, Social and Cultural Rights has said that:

> *States must not limit or deny anyone access to sexual and reproductive health, including through laws criminalizing sexual and reproductive health services and information, . . .*

[71] *R v Morgentalier* [1988] 1 SCR 30, 1988 CanLII 90 (SCC).

States must reform laws that impede the exercise of the right to sexual and reproductive health.[72] [40]

52. Furthermore, a number of UN experts speaking ahead of the International Safe Abortion Day in 2016 called on States across the world to repeal restrictive abortion laws and policies and all punitive measures and discriminatory barriers to access safe reproductive services. They recommended women's access to safe abortion services, on request during the first trimester of pregnancy.[73]

53. The *Standards of Care for Women Requesting Induced Abortion in New Zealand* set out standards in relation to access and referral to abortion services. Some of the relevant standards, which are based on the Royal College of Obstetricians and Gynaecologists standards and guidelines, include:

- Standard 1: DHBs must ensure all women have access to abortion services
- Standard 2: Where possible women should have access to services within their own DHB or area of domicile but if this is not practicable, the DHB of domicile must make and fund appropriate arrangements with another abortion provider as close as possible to the domicile of the women. This funding must include transport and accommodation.
- Standard 5: DHBs must ensure access to both medical and surgical abortions.

54. It is also recommended under the standards that women should not have to travel more than two hours to access first trimester abortion services.

55. In New Zealand there are issues surrounding access, including difficulty, inconvenience and cost of travel to obtain an abortion, especially for women who live in rural areas. For example, in the South Island, only five providers can provide medical abortion.[74] There is no option for medical abortion for women living on the West Coast, between Dunedin and Timaru, or between Christchurch in Nelson. For surgical abortions after 14 weeks, women must travel to Christchurch.

56. The Abortion Supervisory Committee has raised access issues for women who live in South Auckland and recommended in its 2017 report that healthcare providers should consider setting up a local first trimester service in South Auckland.

[72] 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 UN Doc. E/C.12/GC/22 (2 May 2016) para. 40.

[73] "Unsafe abortion is still killing tens of thousands women around the world" – UN rights experts warn (27 September 2016). Chair-Rapporteur of the Working Group on the issue of discrimination against women in law and in practice; Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health; Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment and Special Rapporteur on violence against women.

[74] Invercargill Hospital up to 9 weeks; Dunedin up to 9 weeks; Christchurch Gynecology Procedure Unit up to 8 weeks; Christchurch women's hospital; Nelson Hospital up to 13 weeks.

Consent

Children

57. The World Health Organisation's technical and policy guidance for health systems in relation to safe abortion recommends that:

> *Third-party authorization should not be required for women to obtain abortion services. To protect the best interests and welfare of minors, and taking into consideration their evolving capacities, policies and practices should encourage, but not require, parents' engagement through support, information and education*.[75]

58. Furthermore, UN treaty bodies have explicitly stated that parental notification or authorisation should not be required in order for a child to access an abortion. In its General Comment No. 20 on the rights of the child during adolescence, the UN Committee on the Rights of the Child stated that:[76]

> *The voluntary and informed consent of the adolescent should be obtained whether or not the consent of a parent or guardian is required for any medical treatment or procedure. Consideration should also be given to the introduction of a legal presumption that adolescents are competent to seek and have access to preventive or time-sensitive sexual and reproductive health commodities and services*.[77]

59. The CEDAW Committee has also called on States to eliminate barriers that impede women's access to health services, such as preliminary authorisation from parents.[78] The CEDAW Committee has observed that the requirement that a young person seek authorisation of a parent for an abortion may violate the right to privacy and women's access to health care on the basis of equality of men and women.[79]

60. New Zealand law aligns with the international guidance set out above. Section 38 of the Care of Children Act 2004 provides that a female child of any age can consent to or refuse to consent to an abortion. This is consistent with the presumption under the Code of Health and Disability Services Consumers' Rights that every person has the competence to consent to a medical procedure, unless there are reasonable grounds for believing they are not competent.[80] Therefore, a certifying consultant considering whether to issue a certificate for an abortion will consider a young person's capacity to give consent, rather than their age. In accordance with the *Gillick* test, the young person will be considered competent if they are mature enough to fully understand the treatment that is proposed, including the purpose, risks, and benefits of

[75] World Health Organisation, Department of Reproductive Health and Research, Safe abortion: technical and policy guidance for health systems (2012), p. 68, 95.
[76] See also, UN Committee on the Elimination of Discrimination against Women, General recommendation no. 24: Women and health (article 12) para. 31 (e).
[77] UN Committee on the Rights of the Child, General comment No. 20 (2016) on the implementation of the rights of the child during adolescence UN. Doc CRC/C/GC/20 (6 December 2016) para. 39.
[78] UN Committee on the Elimination of Discrimination against Women, General recommendation no. 24: Women and health (article 12) para. 14.
[79] Ibid. para. 31 (e).
[80] Right 7(2).

treatment, and to choose whether to accept the treatment.[81] This test is outlined in detail in a Ministry of Health publication on *Consent in Child and Youth Health: Information for Practitioners.*[82]

61. In 2014 the Justice and Electoral Committee's report on Petition 2014/11 of Hilary Kieft considered whether parental notification or consent should be required for access to abortion for children under 16. The Committee found that, although it is best practice for a young person to tell her parents that she is pregnancy, this should not be mandatory. The Committee sets out a number of recommendations, including that the Abortion Supervisory Committee should:

    - Collect data on the uptake of post-procedure care by young persons, such as counselling services
    - Strengthen post-procedure care and oversight
    - Emphasis a consultant's responsibilities around post-procedure care and the protection of children under 16 who have an abortion, when renewing or certifying a consultant
    - Ensure ongoing training is provided to consultants on the risk and safety issues around parental notification
    - Confirm best practice guidelines for pre- and post-procedure care, and mandatory follow up for children under 16 years old, especially those who opt not to inform a parent of caregiver.

Women with disabilities

62. The CRPD, ratified by New Zealand in 2008, recognises that despite States international human rights obligations, persons with disabilities continue to face barriers in their participation as equal members of society.[83] The CRPD therefore provides a legally binding disability specific human rights framework for civil, political, economic, social and cultural rights. The CRPD recognises the importance of the inherent dignity, individual autonomy and independence, including the freedom people with disabilities to make their own choices.[84]

63. The practice of forced or coerced abortions of women with disabilities undermines the principles and standards set out in the CRPD. UN treaty bodies have raised concern about this practice, finding that it violates the right to non-discrimination,[85] integrity of the person,[86] can amount to

[81] House of Lords decision *Gilleck v West Norfolk and Wisbech Area Health Authority* [1986] sets out the common law test for competence of a child under 16 years.
[82] Consent in Child and Youth Health: Information for Practitioners

[83] Preamble (k)
[84] See CRPD Preamble.

[85] Committee on the Rights of Persons with Disabilities, General comment No. 6 (2018) on equality and non-discrimination UN. Doc CRPD/G/GC/6 (26 April 2018) para. 7; Committee on the Rights of Persons with Disabilities, General comment No. 3 on women and girls with disabilities UN Doc. CRPD/C/GC/3 (25 November 2016)
[86] Committee on the Rights of Persons with Disabilities, General comment No. 3 on women and girls with disabilities UN Doc. CRPD/C/GC/3 (25 November 2016) para. 54.

cruel, inhuman or degrading treatment or punishment,[87] and may constitute a form of gender-based violence against women.[88]

64. The CRPD sets out the primary human rights considerations when it comes to the legal capacity of people with disabilities. Article 12 provides: "Persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life." Article 12(4) elaborates further on States obligations:

> *States Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person's rights and interests.*

65. The UN Committee on the Rights of Persons with Disabilities (CRPD Committee), the body responsible for monitoring implementation of the CRPD, has interpreted Article 12(4) to require that States create appropriate and effective safeguards for the exercise of legal capacity:[89]

- The primary purpose of the safeguards must be to ensure respect of the person's rights, will and preferences, and order to do this the safeguards must provide protection from abuse on an equal basis with others.
- Where, after significant efforts have been made, it is not practicable to determine the will and preferences of an individual, the "best interpretation of will and preferences" must replace the "best interests" determinations.
- The "best interests" principle is not a safeguard which complies with article 12 in relation to adults. The "will and preferences" paradigm must replace the "best interests" paradigm to ensure that persons with disabilities enjoy the right to legal capacity on an equal basis with others.
- Safeguards for the exercise of legal capacity must include protection against undue influence; however, the protection must respect the rights, will and preferences of the person, including the right to take risks and make mistakes.

66. Specifically, the CRPD Committee in its General Comment No. 3 on women and girls with disabilities has observed that:

> *In practice, the choices of women with disabilities, especially women with psychosocial or intellectual disabilities, are often ignored and their decisions are often substituted by those of third parties, including legal representatives, service providers, guardians and family*

[87] General comment No. 3 on women and girls with disabilities UN Doc. CRPD/C/GC/3 (25 November 2016) para. 32. Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health UN Doc. A/HRC/32/32 (4 April 2016) paras. 39, 45, 86, 94.
[88] Committee on the Elimination of Discrimination Against Women, General recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19 UN Doc. CEDAW/C/GC/35 (26 July 2017) para. 18.
[89] Committee on the Rights of Persons with Disabilities, General comment No. 1 (2014) Article 12: Equal recognition before the law UN Doc. CRPD/C/GC/1 (19 May 2014) paras. 20-22.

members, in violation of their rights under article 12 of the Convention. All women with disabilities must be able to exercise their legal capacity by taking their own decisions, with support when desired, with regard to medical and/or therapeutic treatment, including by taking their own decisions on retaining their fertility and reproductive autonomy, exercising their right to choose the number and spacing of children, consenting and accepting a statement of fatherhood and exercising their right to establish relationships. Restricting or removing legal capacity can facilitate forced interventions, such as sterilization, abortion, contraception, female genital mutilation, surgery or treatment performed on intersex children without their informed consent and forced detention in institutions.[90]

67. Accordingly, the CRPD Committee recommended that States combat multiple discrimination by prohibiting all forms of forced abortion and non-consensual birth control.[91]

68. In New Zealand, capacity to consent to abortion in is assessed under the Code of Health and Disability Services Consumers' Rights. Under the CSA Act, where a woman or girl lacks mental capacity to consent to an abortion, the certifying consultants must consult with a medical practitioner or other appropriately qualified person to assess the patient's condition and the likely effects of an abortion and continued pregnancy.[92]

69. The PPPR Act provides protection of the personal and property rights of persons who are not fully able to manage their own affairs. If a person is found to lack capacity under Section 6 of the PPPR Act, the Court may make an order under Section 10(1)(f) "that the person be provided with medical advice or treatment of a kind specified in the order." In *Re H,* Judge Inglis held that abortion falls within the definition of medical care if it is in the person's best interest.[93]

70. In *Re H*, Judge Inglis addressed the relationship between the CSA Act and PPPR Act. Judge Inglis held that the Court first must authorise an abortion under Section 18(2) of the PPPR Act, allowing the welfare guardian or applicant to apply on the woman's behalf for an abortion under the CSA Act. Under s 19(1) of the PPPR Act, the welfare guardian's decision is treated as if it is the decision of the person for whom the guardian is acting and that person had full capacity to make the decision. However, the final decision to authorise the abortion is that of the appropriate medical professionals under the CSA Act.[94] The Court's role in an application for a personal order under Section 10 is confined to authorising an application for an abortion.[95] An exception to consent to abortion without the Court's approval would only arise in emergency cases where an abortion is required to save the mothers' life or prevent serious harm to her health.[96]

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[90] Committee on the Rights of Persons with Disabilities, General comment No. 3 on women and girls with disabilities UN Doc. CRPD/C/GC/3 (25 November 2016) para. 44.
[91] Ibid. para. 63 (a).

[92] Section 34, CSA Act.
[93] *Re H* [1993] NZFLR 225 (FC).
[94] *X v Y* [Mental Health: Sterilisation] 23 FRNZ 475 (HC), pg 492.
[95] *X v Y,* pg 492.
[96] CSA Act, section 18(1)(c); *X v Y* at [56].

71. In *X v Y*, Miller J agreed with Judge Inglis in *Re H* that the first and paramount consideration shall be the promotion and protection of the welfare and best interests of the person in respect of whom the application is made under Section 10.[97]

Antenatal screening

72. The New Zealand Independent Monitoring Mechanism (IMM) under the CPRD, which is made up of the Human Rights Commission, the Office of the Ombudsman and the Disabled People's Organisations Coalition, recently raised some of these issues around antenatal screening in its submission to the CRPD Committee to inform the list of issues prior to its review of New Zealand that will take place in 2019. The IMM submission noted the following:

> *A disability-selective antenatal screening policy that has the purpose or effect of birth prevention of a protected minority group could be considered as raising issues of discrimination insofar as it impacts the social (and other rights) of the protected group. Practically, birth prevention of a specific group impacts on that group and the wider disability community in that it increases stigma in society, means there are fewer people with lived experience to advocate for protections and services, and adds to the notion that disability is a negative experience rather than a facet of human diversity.* [98]

73. Accordingly, the IMM recommended that the CRPD Committee require New Zealand to provide information on the legal and policy requirements that are in place to ensure that doctors and other medical professionals provide full information to people who receive positive prenatal test results for Down syndrome and other conditions.

74. This issue was reflected in the CRPD Committee's final list of issues in which it is asked to provide information on:

> *Measures taken and any legal and policy requirements placed to ensure that doctors and other medical professionals provide full information to people who receive positive prenatal test results for disabilities, particularly Down's syndrome.*[99]

75. From an international human rights perspective, there is some disagreement between UN bodies regarding the practice of prenatal screening and the ability for women to terminate a pregnancy based on "fatal impairment." The UN Human Rights Committee recently released its Draft General Comment that provides guidance for State parties on Article 6 of the International Covenant for Civil and Political Rights– the right to life. Among the issues the Committee addresses is access to abortion services. Among other things, the Draft General Comment states that:

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[97] *X v Y,* at [59], [61].

[98] Submission from New Zealand's Independent Monitoring Mechanism to Inform the Development of the List of Issues Priori to Reporting for New Zealand's 2nd Periodic Review under the Convention on the Rights of Persons with Disabilities (30 November 2017).

[99] Committee on the Rights of Persons with Disabilities, List of issues prior to submission of the combined second and third periodic reports of New Zealand (23 March 2018) UN Doc. CRPD/C/NZL/QPR/2-3, para. 21.

States parties must provide safe access to abortion to protect the life and health of pregnant women, and in situations in which carrying a pregnancy to term would cause the woman substantial pain or suffering, most notably where the pregnancy is the result of rape or incest or when the foetus suffers from fatal impairment.[100]

76. The CRPD Committee submission on the Draft General Comment called for the deletion of the sentence "most notably where the pregnancy is the result of rape or incest or when the foetus suffers from fatal impairment," stating that:

> *Laws which explicitly allow for abortion on grounds of impairment violate the Convention on the Rights of Persons with Disabilities (Art,. 4,5,8). Even if the condition is considered fatal, there is still a decision made on the basis of impairment. Often it cannot be said if an impairment is fatal. Experience shows that assessments on impairment conditions are often false. Even if it is not false, the assessment perpetuates notions of stereotyping disability as incompatible with a good life.*

77. On the other hand, the UN Rule of Law, Equality and Non-Discrimination Branch of the UN Office of the High Commissioner for Human Rights welcomed the aspects of the Comment that relate to abortion. The Working Group on the issue of discrimination against women in law and in practice did not think the Draft General Comment went far enough. The Working Group thought that the current formulation could lead to a regressive interpretation of Article 6 setting back the considerable progress made by UN human rights mechanisms in recognising women's human rights to dignity, autonomy, highest attainable standard of health and respect for private life on a basis of equality with men, without discrimination.[101]

78. In one case, the UN Human Rights Committee recommended that a Spanish law that distinguished in the period allowed within which a pregnancy can be terminated based solely on disability be abolished.[102]

79. In New Zealand, all women who are less than 20 weeks pregnant must be advised about the availability of antenatal screening for Downs syndrome and other conditions. The screening is optional for all women and the Guidelines for health practitioners on Antenatal Screening for Down Syndrome and Other Conditions guide the process for such screening.[103] In 2016, the Abortion Supervisory Committee recorded 12,823 abortions. Of those, 231 cited the grounds of

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[100] Human Rights Committee, General comment No. 36 on article 6 of the International Covenant on Civil and Political Rights, on the right to life, Revised draft prepared by the Rapporteur para. 9.

[101] Mandate of the Working Group on the issue of discrimination against women in law and in practice, Inputs on the Human Rights Committee draft general comment No. 36 on article 6 of the International Covenant on Civil and Political Rights, on the right to life (October 2017)

[102] The law allowed pregnancy to be terminated up to 14 weeks and included two specific cases in which the time limits for abortion are extended if the foetus has a disability: until 22 weeks of gestation, provided there is "a risk of serious anomalies in the foetus", and beyond week 22 when, inter alia, "an extremely serious and incurable illness is detected in the foetus". See Committee on the Rights of Persons with Disabilities, Concluding observations of the Committee on the Rights of Persons with Disabilities UN Doc. CRPD/C/ESR/CO/1 (19 October 2011) paras. 17, 18 http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD/C/ESP/CO/1&Lang=En

[103] Antenatal Screening for Down Syndrome and Other Conditions

"handicapped child," along with other factors, making up approximately 1.8% of the total abortions in 2016.[104]

80. The Guidelines for health practitioners on Antenatal Screening for Down Syndrome and Other Conditions guide the process for such screening:

> *If screening shows an increased risk of a genetic condition, women may require more information to enable them to make an informed decision about the ongoing management of their pregnancy; one which they feel is best for themselves and their families.*[105]

81. I note that it is important that parents, who have received a positive result for Down syndrome or other conditions, are provided with balanced information on the implications of having a child with a disability. This should include options and information about raising a child with a disability, not just the option of termination. As the Committee on the Rights of the Child has stated: "We must celebrate diversity and learn to celebrate the birth of every child, with or without disability."[106]

82. I also note that the terminology used in the Crimes Act and by the Abortion Supervisory Committee with regard to abortion are antiquated. Under section 187A the Crimes Act one of the lawful grounds for abortion is that "there is a substantial risk that the child would be so physically or mentally abnormal as to be seriously handicapped." Furthermore, the Abortion Supervisory Committee's statistics include a category of "handicapped child". This type of terminology is antiquated and could be offensive to many people with disabilities. Terminology that is consistent with international human rights law, and particularly the CRPD, should be used when discussing disabilities.

Conscientious Objection

83. Section 46(1)(a) of the CSA Act provides that a medical practitioner, nurse or other person that has a conscientious objection to abortion is not required to perform or assist in the performance of an abortion. Under the procedure for women seeking an abortion, Section 32(2)(a) provides that where a woman's doctor does not propose to perform the abortion, she shall be referred to another medical practitioner who will be willing to perform the abortion.

84. Section 174(2) of the Health Practitioners Competence Assurance Act also provides that when a health practitioner objects to providing reproductive health services on the ground of conscience, they must inform the person who requests the service that he or she can obtain the service from another health practitioner.

85. The WHO guidelines on abortion provide that:

> *Health-care professionals who claim conscientious objection must refer the woman to another willing and trained provider in the same, or another easily accessible health-care facility, in*

[104] Table 8.1, pg. 21.
[105] Pg. 23.
[106] Committee on the Rights of the Child, Children with Disabilities, para. 329.

accordance with national law. Where referral is not possible, the health-care professional who objects must provide abortion to save the woman's life or to prevent damage to her health. Health services should be organized in such a way as to ensure that an effective exercise of the freedom of conscience of health professionals in the professional context does not prevent patients from obtaining access to services to which they are entitled under the applicable legislation.[107]

86. The Law Commission may wish to consider the Victoria Abortion Law Reform Act 2008 model for conscientious objection, referred to above. Under this model, a medical practitioner who has a conscientious objection to inform the woman of that objection and refer them to another health practitioner "who the practitioner knows does not have a conscientious objection to abortion."[108] Despite any conscientious objection to abortion, a registered medical practitioner is under a duty to perform an abortion in an emergency where the abortion is necessary to preserve the life of the pregnant woman" and a registered nurse is under a duty to assist in such circumstances.[109]

[107] Para. 4.2.2.5, pg. 96 Conscientious Objection
[108] Section 8 (1)(b).
[109] Section 8(3)-(4).