



Queensland Advocacy Incorporated

Our mission is to promote, protect and defend, through advocacy, the fundamental needs and rights and lives of the most vulnerable people with disability in Queensland.

Systems and Legal Advocacy for vulnerable people with Disability

Review of Termination of Pregnancy Laws in Queensland

**Submission by Queensland Advocacy
Incorporated**

Queensland Law Reform Commission

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QAI endorses the objectives, and promotes the principles, of the Convention on the Rights of Persons with Disabilities.

Patron: His Excellency The Honorable Paul de Jersey AC

About Queensland Advocacy Incorporated

Queensland Advocacy Incorporated (QAI) is an independent, community-based systems and individual advocacy organisation and a community legal service for people with disability. Our mission is to promote, protect and defend, through systems and individual advocacy, the fundamental needs and rights and lives of the most vulnerable people with disability in Queensland.

QAI has an exemplary track record of effective systems advocacy, with thirty years' experience advocating for systems change, through campaigns directed to attitudinal, law and policy reform and by supporting the development of a range of advocacy initiatives in this state. We have provided, for almost a decade, highly in-demand individual advocacy through our three individual advocacy services – the Human Rights Legal Service, the Mental Health Legal Service and the Justice Support Program.

QAI deems that all humans are equally important, unique and of intrinsic value and that all people should be seen and valued, first and foremost, as a whole person. Further, QAI believes that all communities should embrace difference and diversity, rather than aspiring to an ideal of uniformity of appearance and behaviour. Central to this, and consistent with our core values and beliefs, QAI will not perpetuate use of language that stereotypes or makes projections based on a particular feature or attribute of a person or detracts from the worth and status of a person with disability. We consider that the use of appropriate language and discourse is fundamental to protecting the rights and dignity, and elevating the status, of people with disability.

Summary of QAI's recommendations:

1. QAI supports the removal of terminations of pregnancy performed by a duly registered medical practitioner from sections 224, 225 and 226 of the Queensland Criminal Code.
2. QAI calls for legislative amendments to ensure all laws impacting upon terminations of pregnancy in Queensland involving a person with disability adopt a supported decision-making approach.
3. QAI calls for the introduction of procedures and mandatory training for all Queensland practitioners who provide information, advice and/or medical treatment or assistance to women who are or are attempting to become pregnant, on:
 - (a) supported decision-making and what is required to ensure a person is properly supported to make informed decisions about their body, their reproductive rights and their family, where the person concerned is a person with disability;
 - (b) the relevant laws and articles of international human rights conventions pertaining to the rights to equality and non-discrimination, including for people with disability;
 - (c) the elective nature of genetic testing, with information presented in a neutral and non-biased way; and
 - (d) the benefits of diversity.

These procedures and training programs should be drafted following consultation that includes specific consultation with people with disability, their family and advocacy organisations.
4. QAI does not support legislation that makes an exception to legalise termination of pregnancy on the basis of fetal abnormality and potential disability in circumstances where termination of pregnancy is otherwise unlawful.
5. Legal safeguards should be introduced to protect people with disability from sterilisation, with the following tests required to be satisfied before sterilisation is permitted:
 - (a) the 'but for' test (to guard against discrimination on the basis of disability);
 - (b) the 'best interests of the person with disability' test, to reflect the wishes and needs of the person with disability, rather than other stakeholders; and
 - (c) the 'least restrictive alternative' test and the test of 'last resort', to ensure that there are no other possible options.
6. Sterilisation of children should always be unlawful, except in circumstances where this is necessary to preserve the life of the child. Any application to authorise sterilisation of a child should involve extremely rigorous examination of all evidence by an independent court or tribunal to ensure that all available alternatives have been trialled.
7. There should be serious penalties for contravention of these proposed laws that reflect the serious, invasive and permanent nature of sterilisation.
8. People with disability and their families must be offered adequate supports chosen by the person and specialist information and resources.
9. Where families seek court/tribunal authorisation of sterilisation, approval should be an option of last resort. Processes used must be respectful of family relationships.

Background

The Queensland Law Reform Commission (QLRC) has received terms of reference from the Queensland Attorney-General and Minister for Justice and Minister for Training and Skills to conduct a review into modernising Queensland's laws relating to termination of pregnancy.

The terms of reference require the QLRC to recommend how Queensland laws should be amended to:

1. Remove termination of pregnancy performed by a duly registered medical practitioner(s) from sections 224, 225 and 226 of the Criminal Code; and
2. Provide clarity in the law in relation to terminations of pregnancy in Queensland.

Below, we provide further detail regarding QAI's recommendations on these issues, summarised above. We note that as an organisation which focuses on people with disability and mental illness, our submissions will be confined to a consideration of the impact of current laws and potential reforms on people with disability and mental illness.

Key concerns

1. The laws must reflect a supported decision-making approach

The Convention on the Rights of Persons with Disabilities (CRPD) recognises that people with disabilities have legal capacity on an equal basis with others and also that, where a person with disability requires assistance to exercise legal capacity, the State must do what it can to support the person and to introduce safeguards against abuse of that support.¹

QAI submits that the laws, as amended, should impose penalties on a medical practitioner or any person who acts to procure a termination of pregnancy without taking all reasonable steps to gain the informed consent of the person. We support the second and third recommendations of the Senate Community Affairs References Committee report² on its inquiry into involuntary or coerced sterilisation of people with disabilities in Australia that:

- medical workforce training with respect to sexual and reproductive health should include content on supporting sexual relationships and sexual and reproductive health needs for people with a disability; and
- medical workforce training should include training with respect to the ethical and legal aspects of informed consent, substitute and supported decision making and fertility control.

QAI has previously documented our concerns that in many situations people with disability are coerced into having abortions as a direct consequence of their disability, in circumstances where they do not wish to terminate the pregnancy, including in our submission to the Senate Standing Committee on Community Affairs inquiry into the involuntary or coerced sterilisation

¹ Article 12 of the CRPD.

² Involuntary or coerced sterilisation of people with disabilities in Australia. July 2013.

of people with disabilities in Australia.³ In our joint submission to that inquiry with Queensland Centre for Intellectual and Developmental Disability and Queenslanders with Disabilities Network, we quoted the following reflection:⁴

While few studies have investigated the views and wellbeing of those with intellectual disability to determine these potential implications; a recent article regarding forced sterilisations for girls and women with intellectual disability included an interview with a young woman with mild intellectual disability who had undergone a hysterectomy when she was 12 while being told she was having her appendix removed. Years later during a pap smear, the young woman was informed by her General Practitioner that her uterus had been removed. She reported continued feelings of anger, sadness and violation that “they had stolen something from my body”.

2. The laws must not perpetuate, and must take proactive steps to challenge, discriminatory stereotypes against people with disability

QAI submits that all reasonable steps must be taken to safeguard the rights of people with disability and to not coerce or persuade a person to terminate a pregnancy on the grounds that the foetus has a disability.

Neither the Abortion Law Reform (Woman’s Right to Choose) Amendment Bill 2016 nor the Health (Abortion Law Reform) Amendment Bill 2016 makes references to the specific rights or needs of people with disability in the context of the proposed omission of sections 224, 225 and 226 of the Criminal Code.

The QLRC’s Consultation Paper⁵ expressly recognises the contention that surrounds termination where the pregnancy involves a diagnosis of fetal abnormality.⁶ In particular, it is noted that only two of the Australian jurisdictions expressly include fetal abnormality as a ground for lawful termination of pregnancy, and then only subject to specific conditions.⁷ It is noted that the World Health organisation recognises that mental health under the health ground for lawful termination includes psychological distress or mental suffering caused to the woman by a diagnosis of fetal abnormality.⁸

QAI notes that extreme care must be taken with drafting, and with the explanations attendant to the introduction of law reform, to ensure that discriminatory stereotypes are not further entrenched. We emphasise the importance of drawing a distinction between a right to

³ Available at:

https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/Involuntary_Sterilisation/Submissions

⁴ Available at:

https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/Involuntary_Sterilisation/Submissions

⁵ Queensland Law Reform Commission. *Consultation Paper: Review of termination of pregnancy laws*. WP No 76. December 2017.

⁶ *Ibid*, at [174].

⁷ *Ibid*, at [175].

⁸ *Ibid*, at [176].

terminate based upon a fetal abnormality and a right to terminate based upon the mental health of the woman (which may include a diagnosis of fetal abnormality).

All law and policy reform must be grounded in an explicit acknowledgement of the human rights of all people with disability to equality and non-discrimination.⁹ Reforms must also be consistent with other fundamental human rights of people with disability expressly protected by the CRPD including, relevantly, the right to have a family,¹⁰ the right to health, including sexual and reproductive health,¹¹ and the inherent right to life.¹²

As discussed in the Consultation Paper, issues surrounding the human rights of unborn fetuses are not settled. QAI recognizes the complexities around disability-selective abortion and notes the importance of respecting the right of women to make choices with respect to their bodies and their families. However, our concern is that women are not being provided with the right to choose in an informed, non-discriminatory environment. The laws must help to neutralize the environment in which these choices are made, so that discriminatory stereotypes do not impact upon the decision-making of each individual person. In light of the negative stereotypes and myths that have historically shaped the decision-making landscape, it is important that proactive steps are taken to neutralise the environment.

QAI does not support legislation that makes an exception to legalise termination of pregnancy on the basis of fetal abnormality and potential disability in circumstances where termination of pregnancy is otherwise unlawful. We note that our position in this regard is consistent with the United Nations Committee on the Rights of Persons with Disabilities, which has emphasised the need to ensure that termination of pregnancy laws do not draw distinctions based solely on disability.

As Peterson aptly recognises:¹³

[M]any disability rights scholars and activists would argue that society does not simply allow pregnant women to make their own decisions. Instead, the medical profession and other powerful institutions actively encourage disability-selective abortion by recommending genetic screening and prenatal testing and then counselling prospective parents in a manner that discourages them from continuing a pregnancy if the tests reveal fetal impairment.

QAI strongly endorses these sentiments and points to the need for a change in policy, training and culture in this regard.

⁹ This is expressly recognised by the CRPD, in particular Articles 4 and 5 of the CRPD. However, it is not presently reflected in the laws of Queensland.

¹⁰ Article 23 of the CRPD.

¹¹ Article 25 of the CRPD.

¹² Article 10 of the CRPD.

¹³ CJ Petersen, 'Reproductive Justice, Public Policy, and Abortion on the Basis of Fetal Impairment: Lessons from International Human Rights Law and the Potential Impact of the Convention on the Rights of Persons with Disabilities' (2015) 28(1) *Journal of Law and Health* 121, 137.

Further, we note the need for stringent safeguards to ensure that, where a person with disability does provide informed consent to an abortion, no further procedures (such as sterilisation) are carried out at the same time without the person's consent.

3. The treatment of people with disability in terms of their reproductive rights

QAI holds significant concerns about the ways in which the reproductive rights of people with disability, which are core human rights, are often disregarded. Our concerns are heightened given that the human rights of people with disability to health, including sexual and reproductive health and autonomy and associated freedoms, are not reflected into Queensland law and practice, despite that these rights are expressly recognised in international humanitarian law.¹⁴

QAI made a submission to the inquiry and supports the recommendation of the Senate Community Affairs References Committee that, for a person with a disability who has the capacity to consent, or to consent where provided with appropriate decision-making support, sterilisation should be banned unless undertaken with that consent.¹⁵

QAI has issued a position paper on sterilisation of people with disabilities, in which core human rights concerns associated with sterilisation of people with disabilities are noted, and important safeguards proposed. Relevantly, we note that sterilisation should never be performed for eugenic reasons, for purely contraceptive reasons, to conceal sexual abuse, for control of menstruation or control of masturbation, sexual expression or 'challenging behaviour', or on the basis of disability alone. Sterilisation is a permanent, invasive and risky medical procedure – with lifelong consequences. Due to the serious consequences of this procedure, it is important that legal safeguards are in place in order to protect the fundamental right to bodily integrity for people with disability.

Sterilisation should never be performed on a discriminatory basis and should only be considered as a "last resort". Therefore, we suggest that a combination of tests should be satisfied, before a sterilisation can be authorised. These include a 'but for' test (i.e. not discriminate on the basis of disability), a test that the procedure is 'in the best interests of the person with disability' (rather than other stakeholders), and a test that decision-making is also guided by a principle of 'least restrictive alternative' and is the 'last resort'.

The sterilisation of children raises particular alarm. It is unlikely to ever be an appropriate procedure to be performed on a child (except to preserve life) and most particularly on a child prior to puberty – in anticipation of difficulties. Any application to authorise sterilisation of a child should involve extremely rigorous examination of all evidence to ensure that all available alternatives have been trialled.

¹⁴ Article 23 of the CRPD sets out the rights of persons with disabilities to decide freely and responsibly on the number and spacing of their children and to have access to age-appropriate information, reproductive and family planning education are recognized, and the means necessary to enable them to exercise these rights are provided.

¹⁵ Involuntary or Coerced Sterilisation of People with Disabilities in Australia. July 2013.

People with disability and their families have the right to adequate supports and to specialist information and resources. Where families seek court/tribunal authorisation of sterilisation, extreme caution must be exercised to ensure that all other options have been exhausted and that this is truly the option of last resort. Where this is the case, the processes used must be respectful of family relationships.

Historically, the forced sterilisation of people with disability for eugenic reasons has constituted an unacceptable abuse of the human rights of people with disability. While sterilisation may in very rare circumstances be justified as an act of last resort, the potential for this to be abused and the fact that sterilisation overrides the human right to bodily integrity demands stringent safeguards.

Government and others must act to ensure that the rights of people with disability are adequately protected.

Conclusion

QAI congratulates the Queensland Law Reform Commission for reviewing the laws in this area. We would welcome the opportunity to be involved in forthcoming stages of law and policy reform in this area.